

18 February 2022

Ms Autumn Field
Assistant Secretary
Transparency and Criminal Law Branch
Attorney-General's Department

By email: CriminalLaw@ag.gov.au

Dear Ms Field

Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022

Legal Aid NSW welcomes the opportunity to provide a submission to the Attorney General's Department on the proposed reforms in the Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022 (Cth) (**Bill**).

[About Legal Aid NSW](#)

Legal Aid NSW is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients. We also work in close

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partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services.

Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and allied health services with a range of Health Justice Partnerships. Our Civil and Family Law Divisions work closely with victims¹ of domestic and sexual violence through Legal Aid NSW's Women's Domestic Violence Court Advocacy Service and Domestic Violence Unit. Our Sexual Assault Communications Privilege Unit also represents witnesses in sexual offence proceedings.

Lawyers in Legal Aid NSW's Criminal Law Division regularly appear in State and Commonwealth jurisdictions. Legal Aid NSW has a specialised Children's Legal Service which represents children. Legal Aid NSW also has a specialised Commonwealth Crimes Unit. This unit represents people charged with Commonwealth offences in the Sydney area and provides advice and assistance in proceedings for matter elsewhere in NSW. It also represents Federal Offenders who are at risk of parole refusal or are facing parole revocation.

Legal Aid NSW is currently a member of the Child Sexual Offence Evidence Program (**CSOEP**) Reference Group, and was previously a member of its predecessor, the CSOEP Implementation and Monitoring Group. Our lawyers continue to represent defendants in CSOEP proceedings.

Given Legal Aid NSW's experience representing victims, witnesses and defendants, and our particular experience in NSW and Commonwealth child sexual offence proceedings, we are able to provide valuable insights about the proposals in the Bill.

[Proposed amendments to the Crimes Act 1914 \(Cth\) \(Crimes Act\)](#)

Legal Aid NSW acknowledges the proposed amendments aim to strengthen protections and criminal justice outcomes for vulnerable witnesses and victims of sexual violence.

We recognise the importance of amendments to the Crimes Act that would better categorise and accommodate the needs of vulnerable victims and witnesses. We strongly support efforts to reduce the re-traumatisation of victims through the justice process, while maintaining procedural fairness for the accused.

In its Criminal Justice Report, the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) noted that the introduction and expansion

¹ Some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the terms 'victim' and 'survivor' are used interchangeably. This submission acknowledges every person's experience is unique and individual to their circumstances.

of special measures for vulnerable witnesses may have resource implications for states and territories.² Measures which are not properly resourced may result in delayed proceedings and unjust outcomes.

Of further concern, each state and territory has its own different provisions providing protections for vulnerable witnesses. The Bill introduces provisions which are inconsistent with existing provisions in NSW. Clarity is needed on how the Commonwealth provisions interact with existing state/territory provisions, especially in proceedings involving both Commonwealth and state/territory offences.

We provide further comments on the Bill below.

Expanding vulnerable witness classification

The Bill will amend section 15Y of the Crimes Act to:

1. extend existing and proposed protections for child witnesses to a larger range of criminal proceedings, including those involving crimes against humanity, war crimes, additional child sex offences, and drug offences involving children,³ and
2. automatically deem adult complainants of these offences to be vulnerable adult complainants and entitled to the same protections as child witnesses.⁴

Legal Aid NSW supports the proposal to extend vulnerable witness protections to all children involved in proceedings for the prescribed offences. We acknowledge the vulnerability of children and support the expansion of protections for child witnesses beyond child sex offences.

However, we do not support the proposal to automatically deem adult complainants of these offences to be vulnerable adult complainants.

Firstly, the amendment is not necessary. Section 15YB of the Crimes Act already allows a court to declare that an adult complainant is a special witness who is entitled to protections. An adult complainant may be a special witness regardless of whether they have a disability. The court may, on its own motion or upon an application, declare that a witness is a special witness because of intimidation, distress or emotional trauma arising from:

- (i) the person's age, cultural background or relationship to a party to the proceeding

² *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) Pt III – IV.

³ Bill cl 1-5.

⁴ *Ibid* cl 6-9.

- (ii) the nature of the evidence, or
- (iii) some other relevant factor.⁵

There is therefore adequate scope for an adult complainant to be declared a special witness because of the traumatic nature of the evidence in child sexual offence proceedings or otherwise.

Secondly, the amendment is not reflective of the findings of the Royal Commission. The Royal Commission stated:

We particularly consider the needs of young victims and victims with disability, but we also recognise that many complainants of child sexual abuse, including adult survivors without disability, are likely to be vulnerable witnesses.⁶

The Royal Commission noted that adult survivors are *likely* to be vulnerable witnesses but did not state that *all* adult survivors are necessarily vulnerable, nor did it make any recommendations suggesting that they be treated as such. Those who are *likely* to be vulnerable witnesses can be declared special witnesses under the existing section 15YB.

Further, while the Royal Commission noted the possible vulnerability of adult survivors of child sexual offences, there is no evidence that adult complainants of other offences (for example, drug offences involving children or war crimes) are necessarily vulnerable.

[Restricting the admissibility of sexual reputation/experience in certain vulnerable adult proceedings](#)

Under the Crimes Act, evidence of a child's sexual experience or reputation is inadmissible. The Bill extends this provision to include the sexual reputation or experience of adult survivors in vulnerable adult proceedings.⁷

This proposed amendment is largely consistent with NSW provisions.⁸ We acknowledge that the admission of sexual experience or reputation evidence can re-traumatise witnesses through humiliation and 'victim blaming' and can further 'rape myths'. We therefore support this amendment to restrict its admissibility in all cases, including for adults.

⁵ *Crimes Act 1914* (Cth) s 15YB.

⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) Pt VII, 3.

⁷ Bill cl 15-16.

⁸ *Criminal Procedure Act 1986* (NSW) s 293.

Allowing pre-recording of evidence

The Bill amends the Crimes Act to allow for ‘pre-trial hearings’ for the recording of evidence, prior to a trial. This amendment applies to child witnesses, vulnerable adult complainants, and special witnesses.⁹

We support the conduct of pre-trial hearings for eligible child witnesses and special witnesses, with appropriate procedural fairness safeguards and supported by resourcing of agencies to ensure that the provisions do not delay proceedings.

Inconsistency between Commonwealth and NSW

We note that the Bill would extend the eligibility for pre-trial hearings beyond the scope provided for by similar provisions in NSW.

In NSW, ‘pre-recorded evidence hearings’ are provided only for certain children involved in child sexual offence proceedings¹⁰ and for adults in trials affected by COVID-19.¹¹ The explicit purpose of the provisions permitting pre-recorded evidence hearings for adults is to allow for the conduct of criminal trials in a way that is appropriate, given the COVID-19 pandemic. They do not provide a policy justification for the extension of pre-recording to adults more generally. No evidence has been provided as to how pre-recording evidence in full is required during the pandemic.

With regard to pre-recorded evidence hearings for children, the CSOEP only applies:

- in certain locations
- to children under 16 at the time of committal, or over 16 if the court so orders
- to child complainants or child prosecution witnesses, and
- to prescribed sexual offences.¹²

The proposed Bill would broaden the application of pre-trial hearings to:

- all locations
- all children under 18
- all child witnesses (not just complainants and prosecution witnesses)
- other offences which are not child sexual offences, and
- vulnerable adult complainants and special witnesses.¹³

⁹ Bill cl 18.

¹⁰ *Criminal Procedure Act 1986* (NSW), Sch 2, Pt 29.

¹¹ *Ibid* Ch 7, Pt 5.

¹² *Ibid* Sch 2, Pt 29.

¹³ Bill cl 18.

This inconsistency between Commonwealth and NSW provisions creates legal uncertainty and may result in extensive legal arguments, delays and potential appeals.

The inconsistency also raises practical difficulties. In NSW, Commonwealth trials frequently involve a mix of State and Commonwealth charges. Situations may arise where different procedures apply for different charges involving the same vulnerable witness. For example, the witness may be eligible to give evidence in a pre-trial hearing for the Commonwealth charges but not for the State charges. Hence, a vulnerable witness might have to provide a mixture of pre-recorded evidence and evidence which is not pre-recorded. The witness at the pre-trial hearing would need to be told that they cannot talk about certain charges.

Safeguards

We submit that the Commonwealth legislation would be strengthened by the inclusion of additional provisions reflecting the NSW provisions for pre-recorded evidence hearings under the CSOEP.

The Bill contains insufficient guidance to the court and practitioners as to how a pre-trial hearing to take evidence is intended to operate, including necessary procedural fairness safeguards.

We strongly urge that the Bill reflect the following safeguards within the CSOEP:

- The court may order the pre-recorded evidence hearing only if it is appropriate to do so in the interests of justice, taking into account the wishes and circumstances of the witness and the availability of a court and other facilities required.¹⁴
- The pre-recorded evidence hearing is to be held only after full prosecutorial pre-trial disclosure.¹⁵
- Pre-recorded evidence is heard in the absence of the jury but is later played in the presence of the jury.¹⁶
- There needs to be access to recordings and transcripts by the accused, their lawyer and those assisting them.¹⁷
- The court may grant leave for a witness to give further evidence after giving pre-recorded evidence.¹⁸
- The pre-recording of the complainant's evidence is the commencement of the trial. This has important consequences for subsequent prosecution disclosure,

¹⁴ *Criminal Procedure Act 1986* (NSW), Sch 2, s 84.

¹⁵ *Ibid* s 85(1).

¹⁶ *Ibid* s 85.

¹⁷ *Ibid* s 86.

¹⁸ *Ibid* s 87.

changes in the prosecution case and other factors, including costs. Although the Bill uses the term ‘*pre-trial* hearing’, it is vital that the Bill stipulates that the pre-trial hearing is taken to be the commencement of the trial.

Resource implications

Pre-recording schemes have significant resource implications for legally aided defendants. In Legal Aid NSW’s experience with the CSEOP, pre-recorded evidence hearings result in the following additional steps and associated costs:

- Additional pre-trial mentions.
- Funding of additional trial days to cover the days spent in the pre-recording (as there is a doubling up of trial days between the days conducting the pre-recording, and the days spent in trial playing the pre-recording).
- Additional preparation in order to fund counsel (and a solicitor) to attend the Director of Public Prosecutions’ office or remotely access the recording on at least two occasions to check the recording, suggest edits to the recording and transcript, then check the final recording and transcript as is proposed to be shown to the jury. In our experience, a rigorous checking process is vital as it often results in errors being identified, which can have a significant impact on the proceedings.
- Payment of refresher fees to counsel where there is a substantial delay between the pre-recorded hearing and the balance of the trial.
- Additional conferences with the accused to cover matters already raised in conferences before, but which need to be repeated due to the lapse in time.
- Payment of new counsel where counsel who appeared in the pre-recorded evidence hearing is not available on the dates set for the trial.

Delays

In our experience, the use of pre-recorded hearings also involves extensive delays, extends the length of the trial, and fragments the trial.

The delay between pre-recorded evidence hearing and the balance of the trial is significant. The 2018 Final Outcome Evaluation Report of the CSEOP (**Final Report**) noted:

Court delay data suggests this maybe a significant problem, particularly in Sydney, where the average time between the pre recorded hearing and the trial is currently 36 weeks in the Pilot trials compared with 16 weeks in Newcastle.¹⁹

¹⁹ Judy Cashmore and Rita Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report* (August 2018) 67 (**Final Report**).

The Final Report commented on the impact of such delay:

The impact of long delays between the prerecording hearing and the balance of the trial have more adverse consequence for the defence particularly where the accused is in custody. The pre recorded hearing starts the trial process, but then further progress and finalisation may be delayed for many months. This causes disjointedness in the trial and may cause difficulties for the defence in terms of recalling details of the evidence presented during the pre recorded evidence hearing...

The Final Report also noted that the delays can lead to difficulties with continuity of representation and judicial officer between the ground rules hearing, the pre-recorded evidence hearing, and the balance of the trial.²⁰

In addition, other concerns that flow from delay include the following:

- There is a significant risk that pre-recorded witnesses will communicate with other Crown witnesses during a fragmented trial.
- The rule in *Brown v Dunn*²¹ requires that the accused reveal their case through cross-examination. In a pre-recorded evidence hearing the accused is forced to reveal their case long before the balance of the trial and the Crown's opening address. The delay between the pre-recorded hearing and the balance of the trial enables the prosecution to undertake further investigations and serve new evidence to deal with any deficiencies in the Crown case revealed through cross examination.

As such, we suggest consideration be given to additional safeguards to address these concerns. We refer you to the Final Report and attach it for your consideration (**Attachment 1**).

[Introducing ground rules hearings](#)

We are concerned that the Bill provides that both holding a pre-trial hearing, and the use of a witness intermediary, are contingent on the holding of a ground rules hearing, noting the delays that will be caused.

Although NSW has no legislation relating to ground rules hearings, they can nevertheless occur at the discretion of the court.²² The NSW practice note for the Child Sexual Offence Evidence Program Scheme contains guidance for ground rules hearings in the Downing Centre District Court (**Attachment 2**).

²⁰ Ibid 54.

²¹ *Brown v Dunn* (1893) 6 R 67.

²² *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) Pt VII, 68.

We support ground rules hearings but are concerned that the Bill proposes that, at a ground rules hearing, certain directions may be made which may adversely impact on the right of an accused to a fair trial.

We share the concerns outlined by Victoria Legal Aid during the Royal Commission:

Legal Aid Victoria submitted that any ground rules should only relate to how questions are asked rather than whether specific questions could be asked [...] Legal Aid Victoria also suggested that certain practical issues relating to the operation of ground rules would need to be addressed before they could be adopted, including consideration of how defence could depart from agreed ground rules where the evidence leads to further lines of inquiry relevant to the accused's defence or the facts in issue. They also recommended that ground rules hearings be available in relation to the questioning of a vulnerable accused.²³

We are concerned that the Bill provides for directions which may be given at a ground rules hearing that may unduly fetter parties' right to a fair trial, and may in fact work against the interests of the vulnerable witness for whom they are designed to protect. In particular, proposed section 15YDD(2)(b) allows for a court to make a direction about the duration of questioning. While we acknowledge that it may be appropriate to make a direction that allows a vulnerable witness sufficient breaks, we are concerned this provision might be used to put a time limit on the evidence given by the witness.

The Bill also allows for a direction about the allocation amongst co-defendants of matters about which the vulnerable witness may be questioned.²⁴ This has great potential to unduly interfere with an accused's fundamental right to a fair trial. The case against each accused is inherently different, and each accused should be entitled to question the witness themselves or through their own lawyer, without relying upon questioning by a co-accused or a co-accused's lawyer who is not representing their interests. This provision is likely to lead to contested ground rules hearings and appeals.

Legal Aid NSW is also concerned that the direction under proposed section 15YDD(2)(f) dilutes the rule in *Brown v Dunn* and may lead to procedural unfairness, including unfairness to the vulnerable witness.

While the Bill allows for the court at a ground rules hearing to make or vary any direction, there are no provisions allowing for variations of directions *after* a ground

²³ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) Pt VII, 76-77.

²⁴ Bill cl 18.

rules hearing, such as at trial or the pre-trial hearing.²⁵ For example, a court at a ground rules hearing may direct that a witness's cross-examination and re-examination be restricted to one hour. However, answers provided during questioning at a pre-trial hearing may require additional time for clarification. As currently drafted, the Bill does not provide power to extend the timeframe set at the ground rules hearing.

Pre-trial hearings for Commonwealth child sexual offences may require significantly longer time if dealing with vulnerable child witnesses and interpreters. We note that a large proportion of Commonwealth charges involves interpreters. Either the accused, the complainant or other witnesses may need interpreters, and there may need to be interpreters for multiple languages. Ground rules hearings may need to consider how to appropriately deal with interpreters. For example, if a diagram or other material is to be used in giving evidence, it may be helpful for the interpreter to have seen it in advance so they can provide better interpretation about evidence in relation to it. The material must also be very clearly visible to an accused's interpreter while questioning proceeds. Questioning must proceed more slowly as interpreters need time to translate.

[Witness intermediaries](#)

While we support in principle the use of witness intermediaries for witnesses with communication difficulties in Commonwealth proceedings, we are concerned that the Bill does not provide any clear framework for their role and appointment, their regulation, or procedural fairness safeguards. Without a clear legislative framework and resourcing to support it, the amendments risk delays and appeals in Commonwealth criminal proceedings.

Moreover, because the Commonwealth matters in which a witness intermediary may be appointed and used are much broader than those in which NSW witness intermediaries may be appointed and used, it is especially important that the Bill explicitly clarify the framework for witness intermediaries in relevant Commonwealth matters.

[Commonwealth or state-appointed witness intermediary](#)

The Bill proposes that a witness intermediary can be appointed under a law of the Commonwealth or a law of a state or territory.²⁶ We are concerned that some states and territories do not have witness intermediary schemes, which may result in inconsistent application across the country. Although NSW does have a witness intermediary scheme, there are only limited numbers of such intermediaries.

²⁵ Bill s 15YDD(1).

²⁶ Ibid cl 10.

Prior to the introduction of witness intermediaries in Commonwealth matters, careful consideration should be given to the resource implications for the states/territories. We encourage dialogue between the Commonwealth and states/territories about the implementation of any Commonwealth witness intermediary scheme, and how those intermediaries would be allocated and regulated.

In NSW, Victims Services administer the panel of witness intermediaries (otherwise named ‘children’s champions’), and should be consulted if it is proposed that witness intermediaries on the panel are to be used in Commonwealth matters.

The Bill’s definition of ‘witness intermediary’ to include a witness intermediary ‘appointed under a law of a State’ may be problematic in relation to witness intermediaries proposed to be used in eligible Commonwealth proceedings heard in NSW. In NSW, witness intermediaries are only ‘appointed’ by a court for a particular witness in a particular (NSW) proceeding.²⁷ Although not expressly stated, an appointee is taken from the panel of witness intermediaries established by Victims Services.²⁸ There is however no formal ‘appointment’ process, by a court or the NSW Department of Communities and Justice, of a witness intermediary onto the panel. Hence, as currently drafted, if a witness intermediary is to be used in a Commonwealth matter, it may not be one who is ‘appointed’ under NSW law.

In our view, for clarity, the various state/territory schemes under which witness intermediaries are appointed or empanelled should be more clearly prescribed in the Bill.

[Role and appointment of witness intermediaries](#)

There are no provisions in the Bill outlining the role of witness intermediaries or procedures for the appointment of witness intermediaries.

We suggest that the Bill should reflect NSW provisions. In NSW, the intended purpose of provision for witness intermediaries is to “reduce the re-traumatisation of child victims in court... without compromising the fundamental elements of a fair trial.”²⁹ The legislation clearly outlines that the role of a witness intermediary is to communicate:

- (a) to the witness, questions put to the witness, and
- (b) to any person asking such a question, the answers given by the witness in replying to them,

²⁷ *Criminal Procedure Act 1986* (NSW), Sch 2, s 89(3)(a) and (b).

²⁸ *Ibid* s 89(1).

²⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, 5 (The Hon Gabrielle Upton).

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.³⁰

We note that not all vulnerable witnesses will require a witness intermediary because they may not have a communication difficulty. The Final Report raised a concern that witness intermediaries were being appointed in circumstances where they were not necessary.³¹ Hence, we suggest that the Bill clarify the circumstances in which a witness intermediary may be ordered for a vulnerable witness.

A witness intermediary must also be suitably qualified. The NSW legislation sets out the types of qualifications necessary for inclusion on the panel of witness intermediaries.³² Similarly, the Bill should provide that witness intermediaries are suitably qualified so as to maintain the integrity of the scheme. We note that in NSW, the majority of witness intermediaries on the panel are female and speech pathologists. At the time of the Final Report, there were no First Nations witness intermediaries.³³ The Commonwealth witness intermediary scheme should ensure there is appropriate gender and cultural representation amongst witness intermediaries.

A witness intermediary must be impartial. The NSW legislation specifies that the witness intermediary is “an officer of the Court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness’s best evidence”.³⁴ As such, the witness intermediary must not be a relative or friend of the witness, have previously assisted the witness in a professional capacity (other than as a witness intermediary), or be themselves a party or potential witness in the proceedings concerned.³⁵ The case of *SC v R*³⁶ illustrates the importance of the impartiality of a witness intermediary. The Bill should contain explicit provisions explaining the impartial role of the witness intermediary and providing similar measures to ensure impartiality.

[The use of witness intermediaries](#)

To ensure the fair trial of an accused in Commonwealth proceedings, we also recommend that the Bill include express safeguards not only about the role and appointment of witness intermediaries but also about their use during proceedings. These safeguards should reflect those which exist within NSW, including:

³⁰ *Criminal Procedure Act 1986* (NSW), Sch 2, s 88(1).

³¹ Final Report 46.

³² *Criminal Procedure Act 1986* (NSW), Sch 2, s 89(2).

³³ Final Report 44.

³⁴ *Criminal Procedure Act 1986* (NSW), Sch 2, s 88(2).

³⁵ *Ibid* s 89(5).

³⁶ [2020] NSWCCA 314 (2 December 2020).

- the ability of court participants to see and hear the evidence and communicate with the witness intermediary,³⁷ and
- that a witness intermediary is required to take an oath/affirmation in the same way that an interpreter is required to take an oath/affirmation prior to interpreting.³⁸

Final Report

Other valuable lessons can be learnt from the longstanding use of witness intermediaries in the United Kingdom Witness Intermediary Scheme, and the use of witness intermediaries in NSW under the CSOEP. We refer to the Final Report, which raised a number of issues concerning the use of witness intermediaries in NSW. Some of those issues are outlined below.

In NSW, witness intermediaries are asked to participate in police interviews, perform witness assessments and write witness assessment reports for police interviews and for court. There is no legislative guidance for these practices, and there are some concerns that their involvement in the police investigatory process can increase timeframes and increase the number of people involved in a stressful process.³⁹ Clarity is needed about whether Commonwealth witness intermediaries would be involved in police interviews or witness assessments.

Requiring recording of evidence and allowing recorded evidence to be tendered in subsequent trials and retrials

The Bill allows audio visual recording of all evidence given in proceedings by all vulnerable witnesses – i.e., child witnesses, vulnerable adult complainants, or special witnesses.⁴⁰

We support such recording of evidence for all of these witnesses in relevant Commonwealth proceedings. We acknowledge that audio visual recording is beneficial for all parties as it shows the demeanour of witnesses and physical actions which would not otherwise be captured on audio recordings or transcripts. It is important for juries to both see and hear the evidence, and audio visual recordings may more readily resolve any disputes about what was said or transcribed, thereby reducing delays.

Allowing victims to publish identifying material

³⁷ *Criminal Procedure Act 1986* (NSW), Sch 2, s 90(2).

³⁸ *Ibid* s 90(4). See also *Evidence Act 1995* (NSW) s 22.

³⁹ Final Report 44-46.

⁴⁰ Bill cl 22.

The Bill proposes to allow vulnerable witnesses to give consent for publication of their identity.⁴¹ We support empowering victims to choose whether to share their experiences if they so wish.

The proposed amendment to section 15YR of the Crimes Act may also allow family members to apply to the court to seek leave to publish identifying information about a vulnerable person, where that person is deceased. We note that family members may not always act in the best interests of the deceased, and that it is necessary for judicial discretion to conduct a balancing exercise that takes into account the best interests of the deceased.

Warnings

The Crimes Act currently prescribes that warnings are not to be given to a jury suggesting that greater or lesser weight is given to vulnerable witness's recorded evidence which is admitted in later trials.⁴² The court is also not to warn the jury that the law requires greater or lesser weight to be given to a vulnerable witness's evidence given by CCTV, video recording, or with a support person.⁴³

This diverges from established practice in NSW where warnings are given to juries to the effect that:

- it is standard procedure to give evidence by CCTV, and that they are not to draw any inference or give the evidence greater or lesser weight,⁴⁴ and
- they are not to give greater or lesser weight to evidence given by out of court recording.⁴⁵

The Royal Commission's Criminal Justice Report notes:

It is common in trials of child sexual offences for some directions and warnings to be given over and above the directions commonly given in trials for other offences. The law with respect to judicial directions and warnings in sexual offence – including child sexual abuse – trials is complex and controversial, and it has been the subject of considerable review and research in Australia over the last decade.⁴⁶

⁴¹ Ibid cl 31.

⁴² *Crimes Act 1914* (Cth) s 15YNE.

⁴³ Ibid s 15YQ.

⁴⁴ *Criminal Procedure Act 1986* (NSW) s 306ZI.

⁴⁵ Ibid s 306X.

⁴⁶ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, August 2017) Pt I, 86.

Whilst the report goes on to make recommendations about certain judicial directions, it does not make any recommendations about whether warnings should be given about vulnerable witness protections.

Nevertheless, Legal Aid NSW suggests that the Commonwealth provisions are amended to provide that warnings *are* given to juries whenever any protective measures under Pt IAD of the Crimes Act are used. Rather than remain silent about the use of the protective measures, it is preferable to provide juries with a warning so that they can understand their task in assessing the evidence. Such warnings are necessary because the jury will notice the difference between evidence given by vulnerable witnesses versus other witnesses, and there is a risk that they will attach greater or lesser weight to that evidence unless they are warned.

Thank you for the opportunity to provide feedback on the Bill. If you have any questions or would like to discuss this matter further, please contact Meagan Lee, Manager Strategic Law Reform Unit, on (02) 9219 5629 or at Meagan.Lee@legalaid.nsw.gov.au.

Yours sincerely



Monique Hitter
Acting Chief Executive Officer

Enclosed:

1. Judy Cashmore and Rita Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report* (August 2018).
2. *NSW District Court Criminal Practice Note 11: Child Sexual Offence Evidence Program Scheme – Downing Centre* (August 2019).



Evaluation of the Child Sexual Offence Evidence Pilot

Final Outcome Evaluation Report

Prepared for:

Victims Services, NSW Department of Justice

August 2018

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Abbreviations

ABE	Achieving Best Evidence
CALD	Culturally and linguistically diverse
CA & SCS	Child Abuse & Sex Crimes Squad (NSW Police Force)
CAU	Child Abuse Unit (NSW Police Force)
CCTV	Closed-circuit television
COPS	Computerised Operating Policing System (NSW Police Force IT database)
CPS	Crown Prosecution Service (UK)
CSA	Child Sexual Assault
EAGP	Early Appropriate Guilty Plea
FACS	Family & Community Services
GRH	Ground Rules Hearing
HREC	Human Research Ethics Committee
IMG	Implementation and Monitoring Group
JIRT	Joint Investigative Response Team
NSWPF	NSW Police Force
ODPP	Office of the Director of Public Prosecutions
PGM	Children Champion's (Witness Intermediary) <i>Procedural Guidance Manual</i> (2016)
PRH	Pre-recorded evidence hearing
RI	Registered Intermediary (UK)
SACPS	Sexual Assault Communications Privilege Service
SPRC	Social Policy Research Centre, UNSW
WI	Witness Intermediary
WICC	Code of Conduct (Witness Intermediaries) (NSW)

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1. Executive Summary

This is the final report of the evaluation of the Child Sexual Offence Evidence Pilot (the Pilot) in NSW. It outlines the findings of the outcome evaluation and presents an assessment of the impact and effectiveness of the special measures introduced by the Pilot and recommendations for possible improvements to, and future development of those measures, related processes, and implications for a wider and sustainable roll out. Some key challenges and risks for expansion of the Pilot are identified.

1.1 Introduction and background to the Pilot

The Pilot represents a key initiative by the NSW Government to strengthen the criminal justice response to child sexual abuse. An extensive body of research dating from the 1980s has consistently pointed to the difficulties child complainants/victims experience as witnesses in criminal justice processes and the negative impact on both their capacity to give evidence and their wellbeing (NSW Ombudsman's Report *Responding to Child Sexual Assault in Aboriginal Communities* and the 2014 *Report of the Joint Select Committee into Sentencing of Child Sexual Assault Offenders*).

The Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 ('the amending legislation') and its relevant regulations guide implementation of the reforms. The Pilot commenced in Newcastle and Sydney on 31 March 2016 and is due to run for three years under the administration of Victims Services (Department of Justice) until March 2019.

The aim of the Pilot is to reduce the difficulties and stress for child witnesses in matters involving alleged child sexual offences and to improve the accuracy and quality of their evidence without impinging upon the defendant's right to a fair trial. The Pilot was based on recommendations of the Child Sexual Assault Taskforce.

The Pilot introduces three special measures:

- Witness intermediaries to assess children's needs and communication capacities both at the police interview and at court, broadly based on the UK Witness Intermediary Scheme;
- The use of pre-recorded evidence hearings for child complainants and witnesses giving their evidence prior to the balance of the trial; and
- The appointment of two specialist District Court judges to manage the pre-recorded evidence hearings in prescribed child sexual offence matters.

Pilot evaluation scope and methodology

The research team was commissioned to undertake a rigorous research-based evaluation of the implementation, impact and efficacy of the Pilot. The earlier report on the process evaluation outlined the barriers and facilitating factors to successful implementation of the Pilot, and the implementation of different aspects including referral processes, legislative and regulatory

instruments, procedural guidance, training and recruitment, and technology and facilities. This report reconsiders process issues as relevant to evaluation of the Pilot's outcomes.

The outcome evaluation draws on a range of quantitative and qualitative data to assess the effectiveness of the Pilot in reducing the difficulties experienced by child complainants and witnesses in criminal proceedings (see Appendix 4 for a full list of the outcome evaluation measures the evaluation team was asked to address).

The findings for this report are based on the following sources of data:

- Interviews and focus groups, and written feedback including separate online surveys for Pilot stakeholders, including the District Court, NSW Police Force (NSWPF), the Office of the Director of Public Prosecutions (ODPP), witness intermediaries, Family and Community Services (FACS), Legal Aid NSW, NSW Health, the NSW Bar Association, and the NSW Law Society, and importantly children and their families who have participated in the Pilot (see Appendix 8 for further examples of key qualitative data not cited elsewhere in this report).
- Administrative data provided by Victims Services on referrals for witness intermediaries for police interviews and court assessments
- Data provided by the New South Wales Bureau of Crime Statistics and Research (BOCSAR) on the Computerised Operational Policing System (COPS) and District Court data
- Redacted witness intermediary assessment reports
- Court observations.

The main sites for the Pilot and the evaluation are Sydney and Newcastle. Three Child Abuse Units (CAU) – Central Metropolitan (Strawberry Hills) Child Abuse Unit, South West Metropolitan (Liverpool) Child Abuse Unit and Hunter (Newcastle) Child Abuse Unit – include witness intermediaries in their police investigative interviews with children.

Matters involving child complainants committed to the Sydney Downing Centre or Newcastle District Courts were eligible for the Pilot and may not have progressed through the Child Abuse Unit sites in the Pilot. Other police areas and other District Courts in Sydney and in NSW provide comparison groups for the police and court data, as outlined in the findings.

Evaluation participants

The collective insights of all the participants involved in the Pilot evaluation draws on rich experience across hundreds of Pilot matters. In total, 133 legal and non-legal professionals responded to the online survey, and 71 professionals participated via individual interviews (either face to face or by telephone) and small group discussions.

Twenty parents responded to the online survey and five to a telephone interview. Their children ranged in age from 3 to 16 years. The very low response rate from parents and children, despite considerable effort within the ethical constraints, is disappointing but understandable given that

the aim of the Pilot is to reduce the stress for child complainants and witnesses and allow them to put the events and experience of the prosecution process behind them.

1.2 Key findings of the evaluation

The Pilot has involved considerable effort in implementation and in appointing witness intermediaries for 1,268 children involved in police interviews and 222 for court assessments. There have been 206 pre-recorded hearings (104 in Sydney Downing Centre and 102 in Newcastle District Courts).

Key findings from qualitative data

The evaluation has found strong widespread support for the special measures in the Pilot – the use of witness intermediaries in the police investigative process and in the trial process and the role of pre-recorded hearings presided over by judges, as currently, with expertise, experience and disposition to manage matters involving child witnesses in sexual offence matters.

The reasons for this support are that the measures have been seen to go some way to level the ‘playing field’ in communicative capacities for child witnesses, helping to reduce the stress of the investigatory and prosecution process for them and helping child witnesses to give better quality evidence.

There is general agreement, though not unanimous agreement, that implementation of the Pilot does not unduly undermine fairness in the criminal process. While some defence lawyers have indicated some concerns about possible intrusion into their trial preparation and cross-examination, there have been no appeals related to Pilot matters. There is a feeling that these concerns will likely alleviate with further training of relevant professionals and as the special measures introduced by the Pilot become more familiar and streamlined.

Use of witness intermediaries

There is strong consensus that witness intermediaries make a unique contribution in facilitating questioning and communication with child witnesses by police and at court. Professionals involved in child sexual assault cases recognised the skills that witness intermediaries offer them for working with children.

There is some evidence from police and legal professionals that witness intermediaries have been able to play an educative role in developmentally appropriate and effective questioning and the use of aids by police and prosecution lawyers.

Perceived fairness: overall legal and non-legal professionals rated the use of a witness intermediary at court as ‘very fair’ to the complainant and the accused, with the exception of several defence lawyers who indicated some concerns about the fairness to the accused.

Perceived effectiveness: legal and non-professional stakeholders generally indicated that child complainant/witnesses with intermediaries at court are more confident and at ease in answering questions than those without:

- Both prosecution and defence lawyers and witness intermediaries indicated that a child with a witness intermediary in court was more likely to feel less stressed and to give better evidence.
- Parents' and children's reports (direct or via their parent) indicated that the witness intermediary did help to reduce the child's stress at court and to improve their confidence in answering the questions (9.8 on a 10-point scale where 10 = 'a lot of help').
- The parents of children who gave evidence at a pre-recorded hearing were generally very positive about the help the witness intermediary provided to their children. They were much more aware of the witness intermediary's role and their presence than at the police interview.

The role of the ground rules hearing

Lawyers and senior legal professionals agreed that the ground rules hearing constitutes an important step in circumventing difficulties in questioning the witness and reducing the potential for the trial to be aborted.

Judges and lawyers appreciated the time to consider the witness intermediary's court assessment report prior to the ground rules hearing and discussion of the report and more collaborative decisions at the ground rules hearings. However, stakeholders recognised that holding a ground rules hearing well in advance of a pre-recorded evidence hearing may also translate into increased workloads for judges and practitioners resulting from having to hold multiple hearings in a case and undertaking related preparation. On the other hand, another view was that, as lawyers become more familiar with the special measures and its processes, they will adjust and become more efficient.

Some lawyers and senior legal professionals indicated that witness intermediary assessment reports are now more useful with recommendations that are less repetitive and 'template-like' and relate to the particular child.

The perceived impact, value and fairness of pre-recorded evidence

Both legal and non-legal professionals were generally very positive about pre-recorded hearings and emphasised their value in allowing children to exit the criminal trial early, providing more certainty about the timing of their testimony, and allowing them to avoid potential encounters with hostile witnesses and other trial related stressors.

Prosecutors indicated the value of pre-recordings in providing clarity as to the main evidence and the relevant issues (both factual and legal) much earlier in the trial process.

Perceived fairness: the pre-recording of the whole of the child's evidence was generally viewed as very fair for the child complainant though some defence lawyers raised some concerns about the potential impact on fairness to the accused person. Defence lawyers' concerns included being required to cross-examine the main prosecution witness before the balance of the trial, not having sufficient time to prepare their cross-examination before the pre-recording and being

disadvantaged by new evidence potentially emerging between the pre-recording and the balance of the trial. Feedback from the ODPP highlighted that some of these concerns would likely be ameliorated as lawyers become more familiar with pre-recorded evidence hearings and the special measures introduced by the Pilot. In particular it was felt that if ground rules hearings are increasingly conducted in a timely way prior to the pre-recording hearings that defence lawyers will have more time to prepare for the pre-recording hearing.

Legal Aid NSW Sexual Assault Communications Privilege Service (SACPS) lawyers also raised concerns about the delay between the pre-recorded evidence hearing and the balance of the trial noting the potential risk that counselling information, concerning the complainant, may be sought/obtained between the pre-recording and the balance of the trial, resulting in the child being recalled to give further evidence. SACPS lawyers also raised concerns about inadequate compliance by practitioners and court registry staff with the leave requirement to produce or adduce protected counselling communications. Legal Aid and the ODPP emphasised the importance of increased training for practitioners particularly defence lawyers in relation to sexual assault communications privilege and related legal issues.

Parents' views: parents were generally very positive about their child's evidence being pre-recorded, confirming the dual benefits of reducing the child's stress and allowing them, with the assistance of a witness intermediary, to give better evidence, and to 'move on'. They reported delays from the time children talked with police to the pre-recorded hearing ranging from 16 weeks to 84 weeks, still long times in the life and experience of a child. Waiting times at court were, however, quite short, mostly around 30 minutes to an hour, with some exceptions (eg where equipment failed).

Technology related issues: judges and lawyers also raised concerns about the quality of the technology in court, and the impact on a jury of viewing several recordings where the quality of the child's image and sound is inadequate on a screen across the courtroom. Quality pre-recorded evidence is reliant on functioning high quality technology and appropriate facilities.

Key findings from the quantitative data

Finalised Pilot matters and court outcomes

To 31 May 2018, 69 Pilot matters have been finalised in Sydney Downing Centre and Newcastle District Courts – 36 in Sydney and 33 in Newcastle; 28 are still to be determined in Sydney and 18 in Newcastle.

While the aim of the Pilot is not to increase the conviction rate, an increase in the plea rate is possible as well as an associated increase in the conviction rate though it is too early to tell; data on finalised matters over a longer time period is necessary. A possible effect of the special measures in the Pilot is that child witnesses may be able to provide clearer evidence and that this might encourage the accused to plead guilty; a judge or jury is also likely to find clearer, better quality evidence more convincing. If child witnesses are less stressed, they may also be more likely to be willing to proceed and to give evidence.

The court outcomes data for finalised Pilot matters indicate that there has been no overall increase in the conviction rate but there is a higher guilty plea rate and a somewhat higher conviction rate in the Newcastle District Court than in Sydney Downing Centre and other comparison courts, particularly when this is counted in relation to the overall numbers of *complainants* involved. This may or may not be associated with the special measures. There were also fewer cases discontinued (no further proceedings) or withdrawn in Newcastle than in Sydney.

Impact on delays for child

The time between the pre-record evidence hearing (PRH) and the trial in both Sydney and Newcastle (ranging from less than one week to 72 weeks) indicates that children's evidence is being heard in an expedited manner as intended, allowing children to give their evidence on average 6 months or more before the balance of the trial. This measure is important as it supports the intended reduction in stress for the child.

Baseline police and court data

De-identified police and court data from the NSW Bureau of Crime Statistics and Research (BOCSAR) provide a state-wide baseline for the number of reports to police of child sexual offences against children and the number proceeding to court, the number of guilty pleas, and the court outcomes. This is important to show the trends and possible overall 'demand' for witness intermediaries and pre-recorded hearings if the Pilot is to be expanded beyond the current sites. It also provides a comparison of the key outcomes related to the criminal justice and court processes to benchmark the effects of the pilot compared with other sites in NSW which have not implemented these changes – within the constraints of the available data. The limitations of the data are that COPS data do not include the location of the CAU which dealt with the report and the court data do not include any information on the complainant, importantly the child's age at the time of the alleged offence, when it was reported to police or dealt with at court.

The Police COPS data indicate:

- an increase in the numbers of child reports of sexual offences against children from 4,265 in 2010 to 5,833 in 2016, a 36% increase over 8 years.
- about 80.8% in 2014 to 88.0% in 2011 of reports to police of sexual offences against children were child reports (reported in childhood), similar to earlier analyses for the Royal Commission (Cashmore et al., 2016).
- a fairly stable likelihood of incidents involving child reports 'proceeding to court', fluctuating between 0.14 (or 14%) and 0.19 (19%). The number of arrests by CAUs between 2010 and 2016 have, however, doubled from 399 in 2010 to 770 in 2016.

The court data from BOCSAR indicate:

- an increase in the numbers of finalised appearances over the period 2010 to 2016;

- that there are no significant differences between the Pilot courts and the non-Pilot courts and no significant changes from the pre-Pilot to post-Pilot period in the two Pilot courts on the available measures.
- some clear non-significant trends from the pre- to post-Pilot period in the Newcastle District Court, which indicate:
 - An increase in the guilty plea rate – consistent with the court referral administrative data.
 - A drop in the proportion of matters that are withdrawn or do not proceed.
 - An increase in the conviction rate – and the highest conviction rate across the court areas (80.3%).

This indicative increase in the guilty plea and conviction rate in the Newcastle District Court is consistent with the same trends in the court referral administrative data in which it is clear that a witness intermediary and a pre-recorded hearing were involved.

Changes in the processes to make it less stressful for child witnesses to give evidence and more able to provide better quality evidence may take some time to take full effect, in terms of culture change and increasing experience with the measures as well as the availability of more data as evidence of any effects. While the Pilot has been operational for two years, only 23 cases that have proceeded to court have involved a witness intermediary at the police interview and then at court, in a pre-recorded hearing, and 14 of these have not yet been determined. It is therefore too early to draw any conclusions so it is important to continue to monitor the special measures and their effects.

1.3 Conclusions and recommendations

Overall there is very strong support for the Pilot special measures, including the use of witness intermediaries at the police interview and at court, and pre-recorded evidence hearings conducted by two specialist District Court judges. There is also very strong support for expanding the special measures in the Pilot to other geographical areas and extending it to other groups, including vulnerable adults and child defendants. There is also support for a more targeted use of witness intermediaries rather than a general presumption that it should be available to every child complainant and witness under 16 in prescribed offences; the recommended priorities are young children, children with a disability, cognitive impairment or with trauma or a mental health problem that compromises their capacity to communicate clearly with police or legal professionals and children who may need support to communicate more effectively due to cultural barriers. The evaluation has identified some key challenges to implementation, which will be important to consider in decisions about any future roll-out of the scheme. These include:

- *Resourcing:* many stakeholders highlighted the need for adequate resourcing for the courts, for quality reliable technology, and for witness intermediary remuneration, and that the future success of any expansion of the Pilot would be contingent on adequate resourcing for all components of Pilot and the strong cooperation of all.

- Recruitment, retention and training of witness intermediaries:* it will be important to recruit Aboriginal and Torres Strait Islander (ATSI), Culturally and Linguistically Diverse (CALD) and male witness intermediaries to serve the diverse needs of vulnerable children. Recruitment of more diverse witness intermediaries may be facilitated by engaging with ATSI and CALD communities directly and expanding appointment criteria to overcome the existing barriers to broader recruiting and appointment of suitable professionals as witness intermediaries. Strategies for developing a broader future witness intermediary workforce should be explored including developing work placement programs and partnering with Universities to target and reach suitable students and graduates and perhaps create pathways from University to witness intermediary appointment and training. Remuneration and reimbursement for witness intermediaries should be reviewed to ensure that rates of pay are consistent with professional qualifications and expectations and the demands of the position including reimbursement for travel and other expenses. Witness intermediaries also require ongoing high quality training and support, including peer support from other witness intermediaries and support and training from Victim Services. There is need to develop a professionally informed quality assurance process that extends beyond that currently undertaken by Victims Services, to include external assessment, similar to the process undertaken for Children’s Court Clinician reports.
- Involvement of other stakeholders (Judiciary, Police, WAS, Defence and Crown lawyers, FACS and Health):* The success of the Pilot was not only due to the contribution of the witness intermediaries. A range of stakeholders were affected by the Pilot and their contribution was important to its success. These included the judiciary, police, ODPP and defence lawyers, WAS, FACS and Health workers. After two years of the Pilot, stakeholders who were involved in the Pilot were generally strongly supportive of it and recommended its expansion across NSW. While the evaluation found that most of the participants were strongly supportive of the Pilot and its potential to be rolled-out, there was initially a great deal of resistance to the Pilot from some stakeholder groups. In considering future expansion of the Pilot, it is important to recognise that any significant change in a system is bound to disrupt to some extent and will inevitably result in some ‘push back’ from elements within the system.
- The quality of the recordings and their impact on juries:* Concern about the impact on a jury of watching two recorded tapes was expressed by both prosecution and defence lawyers and some non-legal professionals. It is critical that the recording and playback equipment is reliable and able to produce and project clear properly visible properly sized images with good quality sound in the court environment. Monitoring and research are needed on the impact of pre-recorded evidence on witnesses and juries.
- The role of Victim Services:* The evaluation found that Victim Services was invaluable in the implementation of the Pilot. Their role was crucial not only for the recruitment and support of the witness intermediaries but also in facilitating other stakeholders’ engagement with the Pilot and addressing their concerns.

Key recommendations of this evaluation

It is recommended that all of the special measures introduced by the Pilot are continued and expanded to other geographical areas and cohorts. A number of changes are also recommended to improve the implementation of two of the measures (pre-recorded hearings and witness intermediaries), as outlined below.

1. Witness intermediaries

1.1 'Children's champions' name and role

- The legislation should be amended to replace all references to 'children's champions' with 'witness intermediaries'. This amendment is seen as urgent in order not to prejudice acceptance and further implementation of the special measures.
- The term 'children's champions' should be discontinued in all guidance and other material.
- The legislation should be amended to make more explicit that a witness intermediary, as an officer of the court, is impartial, neutral and owes a paramount duty to the Court.
- The role of a witness intermediary is to support and facilitate witness communication. The legislation explicitly provides that a witness intermediary "is to communicate:
 - (a) to the witness, questions put to the witness, and
 - (b) to any person asking such a question, the answers given by the witness in replying to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question."

Accordingly, the legislation clearly envisages that the role of a witness intermediary in 'explaining' questions and answers put to and provided by children, extends to the relay of questions and answers as interlocutor. The legislation should retain this wording and include explicit clarification that the role of a witness intermediary extends to relaying questions and answers as interlocutor when necessary for effective communication with a witness. Given that this aspect of the witness intermediary's role has not yet developed in NSW and is not generally viewed as constituting part of the role of a witness intermediary, steps should be taken to ensure that all stakeholders and practitioners understand when and how this interlocutor role would be triggered and are well trained in relation to this aspect of a witness intermediary's function.

- The Procedural Guidance Manual for witness intermediaries should be revised to provide clearer, more extensive guidance on what the witness intermediary role

entails, different facets of the role, its limits, and the role and function of the witness intermediary within the broader context of an adversarial system of criminal justice and all its various processes.

1.2 Eligibility

- The current requirement that a Court must appoint a witness intermediary for a witness who is less than 16 years of age, should be retained; however, the legislation should be amended to provide the court with broad discretion not to appoint in the prescribed circumstances. The legislation should explicitly provide that this presumption to appoint is rebuttable on the basis that a witness intermediary is not likely to facilitate the witness providing more ‘complete, coherent or accurate’ evidence or otherwise facilitate the provision of better quality evidence.
- The legislation should be amended to explicitly provide for the appointment of a witness intermediary by Victims Services at the police investigative interview.
- Eligibility for appointment at the police investigative stage should not be mandatory or rest on a rebuttable presumption but should rest on whether a witness intermediary is necessary to facilitate the witness providing more ‘complete, coherent or accurate’ evidence or otherwise facilitate the provision of better quality evidence. Guidelines should be developed that provide a set of criteria for Victims Services to consider and consult upon with Police, FACS and Health workers and any other relevant professionals in making a decision regarding whether or not a witness intermediary should be appointed in a case at the investigative stage.
- The legislation should accord priority in appointment of a witness intermediary during the police interview and at court to young children, children with a disability, cognitive impairment or with trauma or a mental health problem that compromises their capacity to communicate clearly with police or legal professionals, as well as children who may need support to communicate more effectively due to cultural barriers. The legislation should state that the decision to appoint a witness intermediary either at police interview or at court should include consideration of:
 - all available information in relation to the witness including from other agencies or departments that are involved in the case or have had prior contact with the witness;
 - the witness’s views;
 - the interests of justice; and
 - any other relevant matter in the case.
- Clear procedures and guidelines should be developed to ascertain a complainant/witness’ view as to whether they wish to have a witness intermediary.

1.3 Expansion of witness intermediaries

- Possible staged expansion of witness intermediaries to other vulnerable witnesses and young accused in child sexual offence matters is recommended.
- Over time the feasibility of further expansion to other criminal matters should be considered with careful appreciation of resourcing implications and constraints. The basis for appointment of a witness intermediary in expanded cases should be expressed explicitly in the legislation to ensure equity in opportunity and access to this special measure, always weighing up the interests of justice and the possible practical and resource limitations.
- It is recommended that in any expansion of the program, the two-fold test used in the UK for appointment of witness intermediaries is adopted in NSW i.e. a witness intermediary may be appointed, on the Court's own motion or on application by a party to proceedings, if the witness is deemed to be 'vulnerable' or their evidence would likely be 'diminished' without a witness intermediary. This approach is working well in the UK and has been evaluated as delivering more just outcomes for witnesses in need.

1.4 Witness intermediaries in the investigative process and police interview

1.4.1 Witness intermediary preliminary witness assessments

- Current processes should be reviewed to provide more notice to witness intermediaries in the appointment process and allow witness intermediaries, as far as practicable, to have more time to meet and assess the child's needs prior to police interview.
- Benchmarking should be undertaken to identify best practices in the conduct of preliminary assessments. Further guidelines should be published to direct witness intermediary and police in best practice in conduct of the preliminary assessment.
- The matching and appointment process should, as practicable, be based on broad consultation with all relevant stakeholders and on careful consideration of all relevant available information concerning the witness.
- Children and parents are often unable to remember who they speak with and who is present at the police interview so it is recommended that, as far as possible, no more than 2–3 adults should be present during a preliminary assessment or at any conference with a child/vulnerable witness throughout the criminal process.

A brief written record (even in dot point) of the witness intermediary preliminary assessment should be made by the witness intermediary and shared with the police interviewer. Use of a standard template form to facilitate this record and information exchange between witness intermediaries and police interviewers, as is used in the UK, should be considered.

1.4.2 Joint planning between witness intermediary and police prior to police interview

- Where possible, the timing of the witness intermediary’s preliminary assessment of a witness should allow adequate time for discussion and joint planning between the witness intermediary and police interviewer prior to the police interview.
- A brief summary of the agreed interview strategy, adjustments and witness intermediary recommendations should be recorded, including agreement about how the witness intermediary will communicate with the police interviewer during the interview.
- Where possible, even a rapid debrief between the witness intermediary and police, should follow the police interview. This provides an opportunity for ongoing training and improvement of interviewer skills with children, particularly given the range of demands associated with children’s varying cognitive capacity, disability, and exposure to trauma. It may also promote shared understandings between witness intermediaries and police and strengthen the witness intermediary-police working relationship.
- More detailed guidelines for police and witness intermediary processes, exchange of information and planning should be developed prior to any expansion of the Pilot.

1.5 Witness matching and appointment process

- Victims Services should continue to co-ordinate and manage all aspects of the witness intermediary appointment process. The current practice of consultation with Police and Witness Assistance Service officers and any other relevant professionals, as deemed necessary and appropriate in a case regarding a child’s needs, should continue and should, to the extent possible, always occur prior to matching and appointment of a witness intermediary.

1.6 Witness intermediaries in the court process

1.5.1 Witness intermediary court assessments

- It is essential that witness intermediaries be provided sufficient time to conduct their court assessment of a witness. Most court assessments would be expected to take between 1–1.5 hours.
- Witness intermediary assessment reports should be provided to the Court, prosecution and defence to allow the prosecution and defence adequate opportunity to discuss the assessment report with the witness intermediary prior to the ground rules hearing (consistent with recently revised practice, the report should be provided concurrently to all parties directly by the witness intermediary). This recent change in practice

should be included in an updated version of the Procedural Guidance Manual for witness intermediaries.

1.5.2 The ground rules hearings

- The ground rules hearing should be understood as constituting a key venue for joint discussion by the Court and all parties concerning the witness intermediary's assessment report and the recommendations.
- The ground rules hearing should be held at least a week before the pre-recorded hearing as far as possible. Ground rule hearings should be scheduled to allow sufficient time for parties to prepare for the pre-recorded evidence hearing.
- The ground rules agreed upon at the ground rules hearing and set for the pre-recorded evidence hearing should include clear rules about how a witness intermediary will intervene during the pre-recording of the child's evidence.
- Ground rules should be understood by the parties as enforceable, not merely discretionary. Consideration would be useful regarding how best to develop practice notes and/or use of (written) trial directions to ensure that the ground rules are complied with.
- Provisions relating to the ground rules hearing and its conduct should be legislated in NSW to give this process a clear status and facilitate compliance; this is the approach that Victoria has adopted. Ground rules hearings are also entrenched in legislation in the UK.

2. Pre-recorded Evidence Hearings

- The pre-recorded evidence hearing (PRH) should be held after all the parties have had a reasonable opportunity to make any necessary adjustments and take any necessary actions or steps towards implementation of the ground rules set and agreed upon at the ground rules hearing e.g. modify questions or seek further advice from the witness intermediary.
- Delay between pre-recording of a witness's evidence-in-chief and cross-examination should be minimised to the extent possible.
- If there is a lapse in time between pre-recorded examination-in-chief and cross-examination, the child witness should be shown their pre-recorded examination-in-chief prior to pre-recording their cross-examination. This should occur as close as possible to examination-in-chief taking into account the child's needs and potential upset to the child.
- As far as possible, the pre-recorded evidence hearing should be presided over by the judge who presided over the ground rules hearing.

- Where possible, the judge hearing the pre-recorded evidence hearing should continue to preside over the balance of the trial.
- Opportunities for a diverse group of judges to regularly be involved in pre-recorded evidence hearings should be encouraged.
- To the extent possible, continuity should be maintained for all the professionals involved across all stages of a case. The increased consistency and ongoing involvement of professionals across all stages of a case requires appropriate complementary support strategies to minimise professional burn-out and vicarious trauma.
- The pre-recording of a witness's evidence should not take place until all legal issues relevant to the witness's evidence have been decided upon. Any necessary *voir dire* should be held prior to the pre-recording. This may also assist to reduce the need to edit the pre-recorded evidence. More training of all practitioners is recommended to ensure that all potential legal issues and the need for a *voir dire* are considered as early as possible prior to the pre-recorded evidence hearing including consideration of sexual assault communications privilege.
- In cases where a parent will also be a witness, consideration should be given to pre-recording their evidence as well at the pre-recorded evidence hearing. This is to avoid the child and parent being restricted from talking with each other and to assist the child being able to 'move on' with support from that parent. Necessary legislative amendments should be introduced to this effect.

3. Witness intermediary training, support and professionalisation

- As appropriate, some joint training for witness intermediaries and police, prosecutors, defence counsel, judges and other professionals should be considered including:
 - Working with witness intermediaries;
 - Specialist training for interviewing witnesses with particular needs such as traumatised witnesses and witnesses with a mental disorder, learning disability or physical disability that affects communication;
 - More focused training for witness intermediaries related to criminal justice processes, the criminal trial and the rules and admissibility of evidence.
- A library/bank of relevant resources/materials should be developed that is accessible to witness intermediaries, judges, lawyers and other professionals.
- More opportunities for structured and informal skill sharing, learning and debriefing mechanisms for witness intermediaries should be developed/implemented – including further mechanisms for intermediaries to share assessment methods, tools and communication aids, and innovative practice about what's 'worked' in interviews or at court or to pose questions to one another.

- Consideration should be given to evaluating the content and appropriateness of witness intermediary counselling support to deal with possible vicarious trauma associated with the witness intermediary role.
- Appropriate quality assurance processes with professional and external input should be developed including feedback loops to improve and sustain the quality and consistency of witness intermediary assessment reports. Setting up an interagency quality assurance monitoring group for the use of witness intermediaries in NSW is recommended.

4. Other training and professional issues

- Judges should be provided with judicial education related to practice and procedure in ground rules hearings and pre-recordings, and the role of witness intermediaries. A specialist accreditation/training program should be offered by the NSW Law Society and Bar Association on trial advocacy including advocacy in child sexual assault cases and cases involving special measures. The *Procedural Guidance Manual* for witness intermediaries should be revised and updated to reflect recent legislative changes and current practice and processes.

5. Availability and sustainability of witness intermediaries

- More diverse witness intermediaries need to be recruited targeting male, ATSI and CALD witness intermediaries. Direct engagement with ATSI and CALD communities and expansion of witness intermediary appointment criteria is encouraged to overcome existing barriers to broader recruiting and appointment of suitable professionals to the panel of eligible witness intermediaries.
- Strategies for developing a broader and sustainable future witness intermediary workforce should be explored including developing work placement programs and partnering with Universities to target and reach students and graduates with appropriate training/qualifications suitable for witness intermediary appointment. The development of possible pathways from University to witness intermediary appointment should be explored.
- The number of witness intermediaries across the relevant professional groups should be expanded, with more witness intermediaries with skills in mental health and complex trauma.
- Employment conditions and remuneration for witness intermediaries should be reviewed to ensure reimbursement for their time and any travel related expenses are consistent with professional expectations, standards and practice. This is critical to ensure the diversity, quality and retention of witness intermediaries.
- To the extent possible, expenses related to witness intermediary attendance at mandatory training including their time should be reimbursed.

- Arrangements for appointment of witness intermediaries should be reviewed to ensure that witness intermediaries are utilised in ways that are sufficiently flexible and attractive to a range of professionals engaged in varied professional activities. Where possible, reasonable notice of appointment to a matter should be prioritised for witness intermediaries to ensure that professionals can make suitable arrangements to act as a witness intermediary without unduly disrupting their other professional activities or suffering unreasonable loss of other professional income.
- Victim Services should regularly review the appointment of witness intermediaries to ensure equity in opportunity for engagement as a witness intermediary among those listed on the panel of witness intermediaries. Processes should be implemented to ensure that witness intermediaries who are not regularly appointed are able to keep abreast of relevant information, developing practices, and provided with ongoing opportunities for professional development and training.

6. Future data collection, monitoring measures and further research

- Monitoring the processes and outcomes for matters involving witness intermediaries and pre-recordings requires particular data collection. The administrative data collected by Victims Services should continue, with advice as to the format for analysis.
- Police data should be collected to allow some mapping of the event number to the case details and the information on the FACS database so that it is possible to analyse the effectiveness of special measures.
- Court data do not include any information about child complainants and witnesses, including their age at the time of prosecution and trial or the relationship of the accused to the child. This has been an ongoing issue since the 1980s, obstructing proper analysis and research about the prosecution of matters involving child complainants and witnesses. Consideration should be given to adding these fields to court data to allow monitoring and research concerning child complainants, and the role of pre-recorded evidence hearings and witness intermediaries.
- Additional court data on the timing of any plea in relation to the pre-hearing recording are needed to indicate whether there is any change in the numbers and proportion of pleas being entered after the pre-recorded hearing.
- Pre-recording has been operational in most states for some time without research or evaluation of its use or effectiveness or other implications for the criminal justice process. Further systematic research of the efficacy of pre-recording evidence should be undertaken, including some jurisdictional comparisons.
- The low response rate from parents and children in this evaluation is unfortunate but also not unexpected. Their feedback and input are invaluable so means of obtaining feedback on a regular basis in non-intrusive ways should be adopted and the data available for follow-up research with appropriate ethical approval.

2. Introduction

The Child Sexual Offence Evidence Pilot (the Pilot) represents a key initiative by the NSW Government to strengthen the criminal justice response to child sexual abuse. An extensive body of research dating from the 1980s has consistently pointed to the difficulties child complainants/victims experience as witnesses in criminal justice processes and the adverse impact on both their capacity to give evidence and their wellbeing (see Appendix 1 for a review of the main literature and relevant research).

The aim of the Pilot is to reduce the difficulties and stress for children following the report to police of alleged child sexual offences and to improve the quality of their evidence without impinging upon the defendant's right to a fair trial. The scheme was based on recommendations of the Child Sexual Assault Taskforce.¹ The reforms in NSW include the introduction of Witness Intermediaries, adapted from the UK Witness Registered Intermediary Scheme,² both in the investigative interview and at trial; the appointment of specialist District Court judges trained in the management of child sexual assault matters; and the expansion of the pre-recording of evidence given by child complainants to include cross-examination as well as the child's evidence-in-chief.³

The Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 and its relevant regulations guide the implementation of the reforms. The Pilot commenced in Newcastle and Sydney on 31 March 2016 and is due to run for three years under the administration of Victims Services (Department of Justice) until March 2019.

The evaluation of the Pilot has two components:

- A process evaluation to assess the barriers and facilitating factors to successful implementation of the Pilot (Report July 2017)
- An outcome evaluation to assess the effectiveness of the Pilot in reducing the difficulties experienced by child complainants and witnesses in criminal proceedings. In particular, the evaluation seeks to assess the Pilot's effectiveness in:
 - (i) minimising the duration of children's engagement with the court process; and
 - (ii) facilitating the communication with child victims and ensuring that the language used by police officers during interviews and during examination-in-chief, cross-examination and re-examination processes at court is appropriate to the child's developmental stage and communication needs.

The aim of reducing the stress for child witnesses and facilitating communication with them is to ensure the provision of the child's best evidence and to minimise the potential re-victimisation of the child and minimise rates of attrition in child sexual assault proceedings.⁴

2.1 The Legislative Framework of the NSW Pilot

The NSW Child Sexual Offence Evidence Pilot (‘the Pilot’) was enacted under the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) (the ‘amending legislation’) which received assent on 5 November 2015.⁵ The Pilot commenced on 31 March 2016 and will continue until 31 March 2019 (or such later date as may be prescribed by the regulations).⁶

The purpose of the Pilot is to introduce further special measures for children giving evidence in criminal proceedings concerning certain prescribed sexual offences.⁷ The *Criminal Procedure Act 1986* (NSW) has historically made provision for certain vulnerable persons to give evidence in criminal proceedings in the form of recordings and via closed-circuit television (CCTV).⁸ In introducing the legislation, the Attorney General stated that “Although legislative reforms over the past decade have gone a considerable way to helping children through the court process, including allowing them to give their evidence from remote witness rooms, more needs to be done”.⁹

The Pilot applies to proceedings before the District Court (including re-hearings and appeals) sitting at Newcastle, the Sydney Downing Centre, or any other place prescribed by the regulations in relation to a prescribed sexual offence (whenever committed) commenced on or after 31 March 2016 or prior to this date, if the matter has not previously been listed for trial.¹⁰

In summary, the main legislative provisions introduced by the Pilot include:¹¹

- A presumption in favour of pre-recorded evidence hearings for complainants under 16 years of age at the time at which the evidence is given; if a complainant turns 18 before the conclusion of proceedings, they may continue to give evidence in accordance with the order. This legislative presumption may be rebutted and orders for a pre-recording may also be made, on the court’s own motion or on application by a party to proceedings, for children aged 16–17 years if the Court is satisfied that to do so is in the interests of justice.¹²
- Eligible child complainants are able to have all of their evidence pre-recorded as early as practicable once a criminal charge has been committed to the District Court and before a jury is empanelled¹³ (expanding upon the prior existing provision which allows a child’s police investigative interview to be used as their evidence-in-chief).¹⁴ This measure was later made available to child *witnesses* for the prosecution in Pilot matters.
- The accused person must be given reasonable access to a recording of evidence made at a pre-recorded evidence hearing but is not entitled to be given possession of a recording made under the legislation.¹⁵
- A witness who gives evidence at a pre-recorded evidence hearing may not give further evidence except with leave of the Court.¹⁶
- Pre-recorded evidence is subsequently to be viewed or heard (or both) by the Court in the presence of the jury (if any).

- A witness intermediary with specified qualifications, training, experience or skills can be appointed, as an officer of the Court, to facilitate the communication of and with child witnesses so that they can provide their best evidence.¹⁷
- The witness intermediary must, if requested, by the Court, provide a written report, on the communication needs of the witness; a copy of any such report is to be provided to the parties to the proceedings concerned before the witness gives evidence in the proceedings.¹⁸
- A warning must be given to the jury where evidence is given by way of a pre-recording or where a witness intermediary is used, to inform the jury that it is standard procedure and that they should not draw any adverse inference about the accused person or give the evidence any greater or lesser weight because evidence was given in that way.¹⁹

The legislation does not explicitly provide for the use of witness intermediaries in the criminal investigative process or police interview. However, the appointment of witness intermediaries in the investigative process is consistent with the intent of the legislation.

The NSW Pilot is not unique in purpose or structure. Similar programs involving the use of pre-recorded evidence and witness intermediaries have been implemented in other Australian jurisdictions²⁰ and elsewhere overseas. In particular, the witness intermediary scheme in NSW has been adapted from the UK Witness Registered Intermediary Scheme, where it is well established, both in the investigative interview and at trial. Intermediaries in the UK play a fundamental role in relaying questions and/or answers between a witness and any persons asking such questions in order to facilitate communication and understanding on the part of the witness.²¹ They assess and report (orally or in writing) to the court the needs of the vulnerable person, and set out steps to be taken.²² During a hearing, intermediaries prevent miscommunication from arising, and 'actively intervene when miscommunication may or is likely to have occurred or to be occurring'.²³ However, in performing their role, intermediaries in the UK cannot interfere with the process of cross-examination and, as is the case in NSW, they are not supporters of the witness. Rather, they are neutral and independent officers of the court, responsible only to the court.²⁴ Further details about the UK intermediary scheme are outlined in Appendix 2 and the lessons learned from the UK experience are discussed as relevant in relation to this evaluation of the NSW scheme.

What is notable about the Pilot in NSW is the concurrent introduction of pre-recording of child witnesses' evidence and the use of witness intermediaries. These legislative developments also coincided with the inaugural appointment of two specialist child sexual assault judges in the NSW District Court. The Pilot therefore encompasses several changes that represent a major reform in the procedure and practice related to child complainants/witnesses and their evidence in the prosecution of child sexual assault offences in NSW.

3. Methodology

The purpose of the Pilot is to reduce the stress experienced by child complainants and child witnesses in child sexual offence criminal proceedings and to increase the quality of their evidence by:

- (i) facilitating communication with child complainants, using developmentally appropriate language by police during investigative interviews and by lawyers during examination-in-chief, cross-examination and re-examination processes at court;
- (ii) minimising children's engagement with the court process.

3.1 Aims of the Evaluation

The aim of the evaluation was to assess the effectiveness of the Pilot, using a mixed method design outlined below, and addressing as far as possible, using the available data, the qualitative and quantitative measures outlined in Appendix 4.

The main sites for the Pilot and the evaluation are Sydney and Newcastle. Three Child Abuse Units (CAU) – Central Metropolitan CAU, South West Metropolitan CAU and Hunter CAU – include witness intermediaries in their police investigative interviews with children.²⁵ Matters involving child complainants committed to the Sydney Downing Centre or Newcastle District Courts were eligible for the Pilot and may not have progressed through the Child Abuse Unit sites in the Pilot. Other police areas and other District Courts in Sydney and in NSW provide comparison groups for the police and court data, as outlined in the findings.

The evaluation is based on data from multiple sources:

1. De-identified administrative data from Victims Services on police and court referrals for the appointment of witness intermediaries
2. De-identified data from the NSW Bureau of Crime Statistics and Research (BOCSAR) for reports to police (COPS) and finalised court matters
3. Online surveys for parents and children, witness intermediaries, police, prosecution and defence lawyers, other professionals including Witness Assistances Service staff, Health and FACS workers, with specific links using RedCap
4. Focus group discussions and individual face-to-face or telephone interviews with key stakeholders
5. Court observations of the pre-recorded hearings
6. Other materials: case studies and redacted assessment reports.

3.2 Administrative data

Victims Services provided administrative data, redacted to remove identifying information, in relation to police referrals for the appointment of witness intermediaries as well as referrals from the court or from the ODPP for court assessments and the appointment of witness intermediaries.

The NSW Bureau of Crime Statistics and Research (BOCSAR) provided large datasets of state-wide unit record de-identified police and court data for child sexual offences from 2003 to the end of 2017. These data provide information on the reported incidents of such offences to police as well as the prosecution and finalisation of cases at court, comparing the Pilot sites (where possible) with other sites in NSW which have not implemented these changes.

3.3 Feedback from participants in the Pilot

Parents and children and those involved in the Pilot in a professional capacity were offered three ways of participating in the Evaluation by means of:

- Anonymous online surveys using RedCap²⁶
- Face to face or phone interviews
- Professionals were also offered the opportunity to participate in a group discussion
- Anonymously sending any feedback or comments or a drawing via email or mail.

Online surveys were specifically designed for each of the following groups of participants:²⁷

- Parents
- Child complainants and witnesses
- Witness intermediaries
- Police
- Prosecution and defence lawyers
- Non-legal professionals including Witness Assistances Service officers, Health and FACS workers.

The details of how the different groups of participants were invited to participate are outlined in Appendix 5. In summary, the members of the Implementation and Monitoring Group (IMG) sent an email with information about the evaluation to the staff in their organisation who have been involved in the Pilot. Professionals were also recruited by colleagues sharing information about the evaluation through appropriate professional channels. Victim Services sent information packs to parents whose children had been involved with either a witness intermediary in their police interview or in a pre-recorded hearing.

Focus groups and interviews were audio-recorded with the consent of participants. The audio files were either transcribed verbatim or summarised. The evaluation data (interview transcripts and written feedback) were analysed using a coding frame based on the focus group topics and

emergent themes that included the main objectives of the Pilot. All transcripts were de-identified. Some verbatim quotes from the transcripts, online surveys, and written feedback are included in the discussion of the findings.

Table 3.1. Pilot participants in online surveys, interview or discussions

Participants	Online survey	Interviews and discussion groups
Parents and children	20 parents 1 child	5 parents and one child
Witness intermediaries	22	16
NSW Police Force - Child Abuse Units	42	2
Judicial officers	–	5
Lawyers		
Crown Prosecutors	7	14 in total
ODPP Instructing solicitors	10	
Defence lawyers	7	
Legal Aid including Sexual Assault Communications Privilege Service (SACPS) lawyers		
Other Professionals		
Witness Assistance Service (ODPP)	7	16
FaCS	16	
Health	10	
Social workers	12	
Members of the Implementation Monitoring Group and Victims Services		12
TOTAL	154	71

Evaluation Respondents

The collective insights of all the participants involved in the Pilot evaluation draws on rich experience across hundreds of Pilot matters. In total, 132 legal and non-legal professionals responded to the online survey, and 64 professionals participated via individual interviews (either face to face or by telephone) and small group discussions (Table 3.1). The modest response rate from parents and children, despite considerable effort within the time and ethical constraints, is understandable given that the aim of the Pilot is to reduce the stress for child complainants and witnesses and allow them to put the events and experience of the prosecution process behind them.

- *Parents and Children*

Twenty parents responded to the online survey and five to a telephone interview. Their children involved in the Pilot, 26 in total, ranged in age from 3 to 16 years. Seven were 10 or younger, including two under 5 years of age at the time of the alleged incident. Most police interviews were conducted fairly soon after the alleged offence or incident in that the children were the same age or a year older than at the time of the incident. In three cases, the first time the child spoke with the police was 3 or more years after the alleged offence. Police spoke with the children involved in 18 of the 25 cases at least twice, and with eight children, 5 to 6 times, according to their parent.

Only 12 parents recalled there being a witness intermediary at the Police interview but 12 of the 13 parents whose children gave evidence at court indicated there was a witness intermediary at court with their child; 11 parents indicated that their child gave evidence at a pre-recorded hearing.

In 19 of these 25 cases, the matter proceeded to court and children gave evidence in 13 cases. In 6 cases, the defendant pleaded guilty – in two cases, the plea was entered ‘on the morning of the pre-recorded hearing. In the 13 matters that proceeded to court and in which children gave evidence at a pre-recorded hearing:

- In 3 cases, the accused was convicted on all or some of the charges at trial.
- In 3 cases, the accused was found not guilty – by direction in two matters and by jury verdict on the third.
- Seven cases were not finalised at the time the parent completed the survey or participated in the interview.

- *Lawyers*

In total, 37 lawyers participated in the Pilot evaluation. Of the 23 lawyers who completed the lawyers’ online survey, almost all Crowns, and two-thirds of Defence counsel, had worked in the field of child sexual assault for 10 or more years; only one prosecuting instructing solicitor had worked in the field for over 5 years.

Together, the Crown Prosecutors, prosecuting instructing solicitors, and defence lawyers surveyed had been involved in 61 cases involving a witness intermediary.

- *Police*

Twenty police officers from the Metropolitan Sydney area, 18 from the Newcastle/Hunter region, and 4 from a region unspecified, responded to the online survey. Of these, a majority had worked in the field of child sexual assault for 5 years or less; only five Metropolitan respondents and two Newcastle/Hunter respondents had worked in this field for 8 or more years. Over half of the Metropolitan respondents and two-thirds of the Newcastle/Hunter respondents were female, consistent with their representation in CAUs.

- *Witness intermediaries*

Twenty-two witness intermediaries responded to the online survey and focus groups and individual interviews were conducted with 16 witness intermediaries in Newcastle, Sydney or by phone. All except one were female and most had more than 10 years' experience in their field of work, mostly as speech pathologists.

- *Other professionals (Health, FACS and Witness Assistance Service workers)*

In total, 45 non-legal professionals involved in either the JIRT process (FACS and Health workers) or in assisting and supporting child complainants and their families at court (WAS workers) participated in one of the three online surveys that were specifically designed for them or in a focus group (WAS workers).

- *Ethics approval*

The evaluation has ethics approval from the UNSW Human Research Ethics Committee [HC16990] and the University of Sydney Human Research Ethics Committee [2017/791 and 2017/888]. Police and court data were provided by the NSW Bureau of Crime Statistics and Research in line with an approved deed of access to Professor Judy Cashmore and Dr Alan Taylor.

4. Scope of Pilot

4.1 Referrals for police interviews

There were 1,388 referrals for a witness intermediary for children involved in a police interview as part of the Pilot from 4 April 2016 to the end of March 2018. Of these referrals, 1,268 (91.4%) resulted in the appointment of a witness intermediary.²⁸

The highest number of referrals and appointments of witness intermediaries was in Newcastle/Hunter (95.1%), a significantly higher rate than in Sydney (88.1%).²⁹

Table 4.1: Police referrals by location of Child Abuse Unit (CAU)

Location	N	% of total	% matched
Central Metropolitan *	260	18.7	91.2
Chatswood	126	9.1	94.4
Kogarah	165	11.9	88.5
Bankstown	192	13.7	78.7
South West Metropolitan *	1	11	91.7
Newcastle	550	40.0	94.6
Hunter	92	6.6	97.8
Total CAU Referrals	1,388		
Total Matched	1,268		91.4
Total Unmatched	120		8.6

Source: Victims Services de-identified administrative data

* The amalgamation of a number of metropolitan CAU sites in June 2017 meant that the CAUs included in the Pilot became:

- Child Abuse Unit Central Metropolitan (formerly Child Abuse Squads – Chatswood and Kogarah)
- Child Abuse Unit South West Metropolitan (formerly Child Abuse Squad – Bankstown and Liverpool).
- Child Abuse Unit Hunter (formerly Child Abuse Squad – Newcastle).

Three in four children referred for the appointment of a witness intermediary were female (1,052, 75.8%); there was no gender difference between Sydney and Newcastle. One in eight were Aboriginal (174, 12%) with double the proportion in Newcastle (114, 17.6%) than in Sydney (60, 8.1%). The pattern was reversed, however, in relation to children with a culturally and linguistically diverse (CALD) background: 83 (11.2%) in Sydney but only 5 (0.7%) in Newcastle.

The ages of the children referred to Victims Services for the appointment of a witness intermediary ranged from 2 to 18 years at the time of the police interview (Figure 4.1), with an average age of 10.4 years (SD = 4.04) and a median age of 11 years. There was no significant difference in the age of children referred or matched with a witness intermediary in Sydney compared with Newcastle.

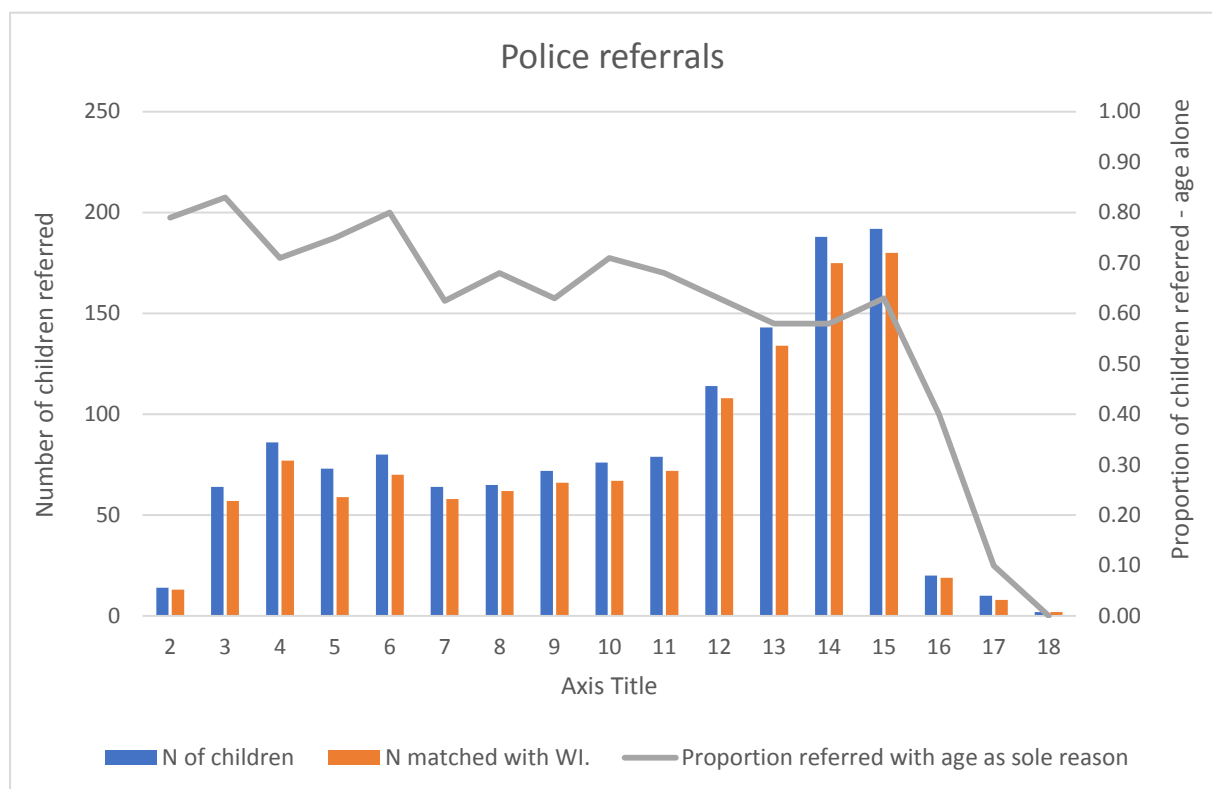


Figure 4.1. Number of police referrals and appointments of witness intermediaries by age of child and age as sole reason for appointment

Overall, nearly two-thirds of the referrals (65.1%) and appointments (65.2%) of a witness intermediary for Police interviews in the Pilot areas were on the basis of age alone; the proportion ranged from a low of 10% of 17 year-olds receiving a referral to a high of 83% for 3-year-olds.

There were a number of reasons apart from age for the other third of the referrals, related to:

- PTSD and trauma (192 children, 13.8%)
- Mental health concerns including anxiety and depression, self-harm and suicidal ideation (146, 10.5%)
- Learning delay and disability (ranging from mild to severe) (145, 10.4%)
- Autism spectrum disorder, ADHD and OCD (127, 8.6%)
- Language disorders and delay and speech problems (101, 7.2%)
- Hearing impairments and deafness (18, 0.1%)
- Physical disabilities (blind, cerebral palsy) (4)

For most of these children, there were multiple reasons for the referral, with some overlap between learning delays and disability and language delays and disorders; there was also an overlap between mental health concerns and trauma though for only about one in four children referred for trauma.

Three in four of the referrals and appointments (75%) of witness intermediaries were for speech pathologists in both Sydney and Newcastle. Psychologists were twice as likely to be appointed in Sydney (18.7%) than in Newcastle (8.6%), and occupational therapists more likely to be appointed in Newcastle (14.7%) than in Sydney (2.0%). Overall, 47 different witness intermediaries have been appointed across all Pilot police sites in Sydney and Newcastle. The number of referrals and appointments have ranged between 1 and 126, with about one in four (11, 23.4%) having been appointed in at least 40 police interviews, and five of these in 90 or more.

4.2 Referral for appointment of a witness intermediary for court

In total, there have been court orders for the appointment of a witness intermediary for 242 child complainants or witnesses in 115 matters across both courts in the two-year period from 11 April 2016 to 30 April 2018; 46 cases are yet to be determined.³⁰ The 242 children include 167 complainants (69%) and 75 witnesses (31%): 93 complainants in Sydney and 74 in Newcastle.

A witness intermediary was appointed and an assessment conducted for 222 children to date, with 6 yet to be confirmed. These children included 170 females and 52 males; 152 were complainants and 70 were witnesses. Their average age was very similar in Sydney (12.95 years) and in Newcastle (12.9 years) but there were more children under 10 years in Newcastle (21, 18%) than in Sydney (12, 11%) referred and matched with a witness intermediary at court. The youngest complainants were three years old (one child) and four years old (3 children). The youngest witnesses in Newcastle were two 8 year-olds and in Sydney, four 10 year-olds.

Just over 10% of the child complainants (18, 10.8%) were Aboriginal or Torres Strait Islander, and so also were five child witnesses. Ten child complainants (6%) and two child witnesses were from a CALD background.

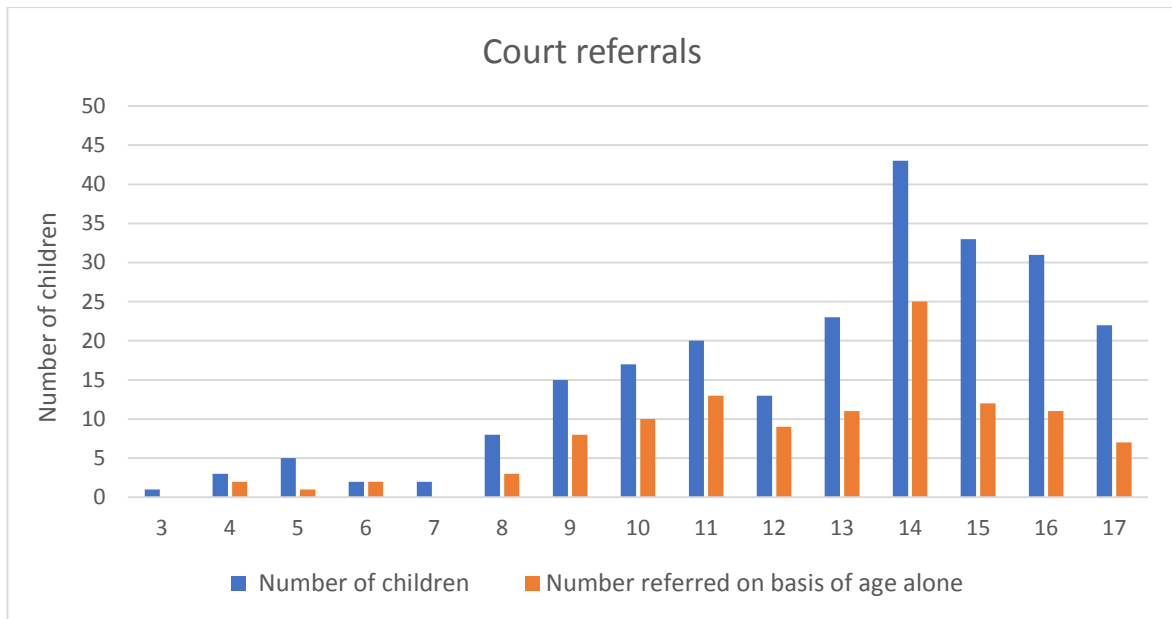


Figure 4.2. Number of children and number of court referrals on basis of age alone, by age

Just under half the referrals for a witness intermediary at court were for children on the basis of age alone (114 children, 47.5%). Child complainants and witnesses aged 14 were the most numerous by age ($n = 43$) and also the most numerous ($n = 25$) to be referred for a witness intermediary assessment for court. Just over one in four referrals (64, 26.4%) included reference to trauma, including 7 children with PTSD. As with the police interviews, there was frequently more than one reason for referral. There were:

- 40 children (16.5%) with mental health concerns (anxiety, depression, self-harm and bipolar), mostly adolescents aged 13–15 years)
- 35 (14.5%) with some form of disability: learning delay, mild intellectual disability, neurological disorder, epilepsy, physical disability, or hearing impairment, across all age groups;
- 26 (10.7%) with language delays or expressive disorders, across all age groups;
- 9 (3.7%) with ADHD or OCD or self-regulation problems
- 5 (2.1%) with autism.

Most court assessments (159, 65.7%) were conducted by speech pathologists, who dealt with the range of reasons for referral. The next most common were, in order, a social worker (12.8%), an occupational therapist (9.9%), and a psychologist (9.1%). The number of court assessments conducted by the witness intermediaries ranged from 1 to 27, with 7 of the 31 (mostly speech pathologists) conducting 15 or more assessments for court. Those who were more experienced in police interviews were also more likely to have greater experience in court assessments.

4.3 Out-of-Pilot referrals

There were an additional 39 police referrals and 62 referrals received from the ODPP in relation to court matters for witness intermediaries which were ‘out-of-Pilot’ – either they were outside the Pilot areas or the child complainant or witness was beyond the age criterion. Police, lawyers and judges provided case examples of complainants who were seen as particularly vulnerable and would have benefitted from a witness intermediary report being provided to the court. Witness intermediaries involved in out-of-Pilot matters do not provide support in court: they provide an assessment report to either assist the police with the interview process or to assist the ODPP (and Defence if appropriate orders can be obtained) with eliciting evidence in court. The complaints or witnesses involved also do not have the option of a pre-recorded hearing.

The police referrals were mostly out-of-area and included those from some Local Area Commands as well as Child Abuse Units from the Mid and Far-North Coast, Broken Hill, and the Central Coast and Wollongong areas, as well as 14 from the Sydney metropolitan areas not included in the Pilot.

The ODPP referrals included matters in District, Local and Children’s Courts in Sydney metropolitan and Newcastle Courts, as well as regional and rural District and Local Courts.

Most commonly the police referrals were for children aged 5 to 9 years, followed by 10 to 14 year-olds (Figure 4.3). There was a higher proportion of out-of-Pilot referrals for older (aged 15–17) adolescent and for adult complainants with learning disabilities, deafness or hearing impairments, voice disorders, and trauma and mental health problems, including one 87-year-old. Where age was the sole criterion for referral, children were young (under 10), including some preschool-age children. The majority of both police (66.7%) and ODPP (75.8%) referrals were for female complainants. A very high proportion of the police out-of-Pilot referrals involved an Aboriginal complainant (17/39, 43.6%), a higher proportion than in the Pilot areas (13/49, 21%). The numbers involving children with a CALD background were small: three police referrals and two ODPP referrals.

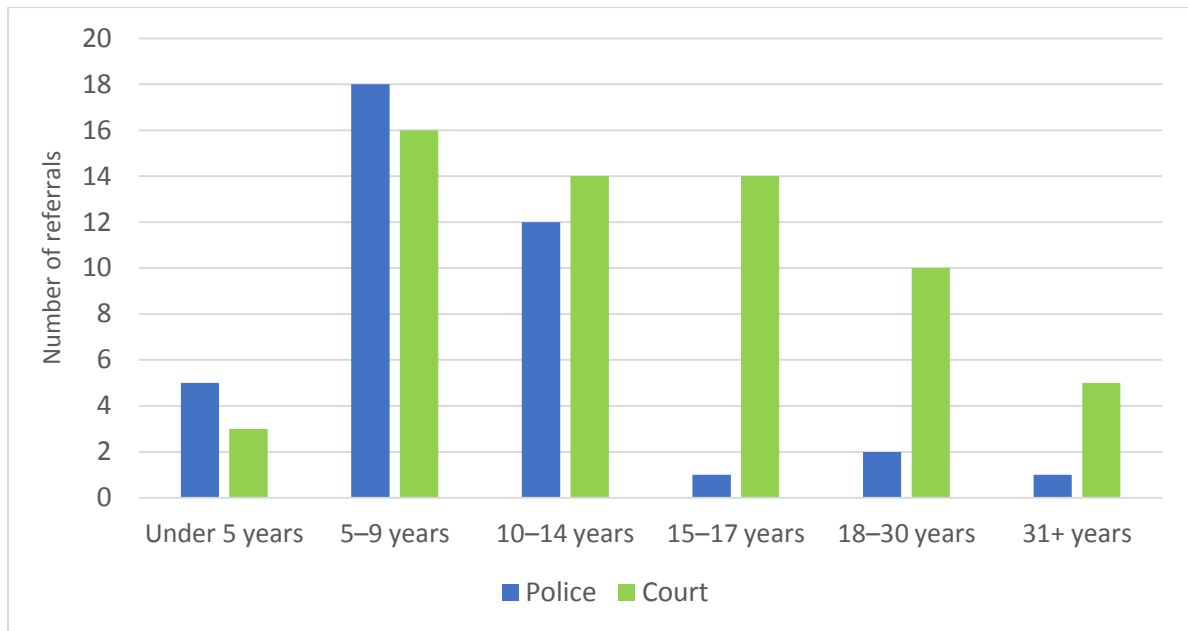


Figure 4.3: Age group of complainant or witness for police or ODPPI out-of-pilot referrals

4.4 Pre-recorded hearings

A total of 206 pre-recorded hearings were conducted in the two years from 25 May 2016 to 28 May 2018: 104 in Sydney and 102 in Newcastle (Table 3.2). The majority of these pre-recorded hearings involved child complainants (rather than witnesses) but to a greater extent in Sydney (80.7%) than in Newcastle (62.7%). A further 20 pre-recorded hearing dates were vacated in Sydney and 11 in Newcastle when the accused pleaded guilty or the matter did not proceed.

Table 4.2: Number of pre-recorded hearings in District Court matters, by location (25 May 2016 to 28 May 2018)

District Courts	Sydney Downing Centre	Newcastle
Complainants	84	64
Witnesses	20	38
PRH completed (per complainant/witness)	104	102

Source: Victims Services administrative court referral database

4.5 Sydney and Newcastle court outcomes

Table 4.3 shows the outcomes for Pilot matters dealt with to 31 May 2018 for both the Sydney Downing Centre and Newcastle District Courts. The numbers of finalised matters are very similar – 36 in Sydney and 33 in Newcastle – but with a larger number of matters still to be determined in Sydney. The conviction rate is higher in Newcastle (66.7%) than Sydney (50.0%) but that difference is largely accounted for by the difference in the number and proportion of guilty pleas: 13 (39%) in Newcastle and 6 (16.7%) in Sydney. The number of acquittals was the same but the number and proportion of matters that were dismissed or where there were no further proceedings was lower in Newcastle though these differences are not statistically significant.

Table 4.3. Court outcomes for Pilot matters to 31 May 2018 by Court

Court		N	% of all matters	% of finalised matters
Sydney Downing Centre District Court	No further proceedings /withdrawn/ dismissed	6	9.7	16.7
	Acquitted on all charges	10	16.1	27.8
	Hung/aborted trial	2	3.2	5.5
	G plea	6	9.7	16.7
	G on some charges	10	16.1	27.8
	G on all charges	2	3.2	5.5
	To be determined	28	41.9	
	Total (36 finalised)	64	100.0	100.0
Newcastle District Court	No further proceedings / withdrawn / dismissed	1	2.0	3.0
	Acquitted on all charges	10	20.0	30.3
	G plea	13	26.0	39.4
	G on some charges	6	12.0	18.2
	G on all charges	3	6.0	9.1
	To be determined	18	34.0	
	Total (33 finalised)	51	100.0	100.0

Source: Victims Services' administrative data

When convictions are counted in relation to the overall numbers of complainants involved (taking account of matters in which there was more than one complainant for whom the outcomes may not be the same), the conviction rate is significantly related to the age of the complainant in Sydney³¹ but not in Newcastle (Table 4.4).

A guilty plea was entered in Sydney for 9 complainants aged 15 and older, and for only one younger complainant. In Newcastle, guilty pleas were more likely for the youngest complainants (7/11 of under 10 year-olds) than for older complainants (11/37).

For child complainants aged 10 to 14 years, only 7 of 32 accused-complainant pairs resulted in a conviction in Sydney compared with 12 of 15 accused-complainant pairs in Newcastle. The conviction rate by complainant (rather than case) was also significantly higher in Newcastle (36/48 = 75%) than in Sydney (28/63 = 44.4%), and for all but the oldest age group (15 years and older).

Table 4.4. Number of complainants by age and outcome by Court

District Court		Age group of complainants			Total
		Under 10	10-14 years	15+ years	
Sydney	Acquitted or not proceed	5	25	5	35
	G plea	0	1	9	10
	G on some/all charges	1	6	11	18
	Total	6	32	25	63
Newcastle	Acquitted or not proceed	3	3	6	12
	G plea	7	4	7	18
	G on some/all charges	1	8	9	18
	Total	11	15	22	48
Total	Acquitted or not proceed	8	28	11	47
	G plea	7	5	16	28
	G on some/all charges	2	14	20	36
	TOTAL	17	47	47	111

Source: Victims Services' court referral administrative database

There was no significant difference between male and female complainants in relation to convictions but the number of male complainants was much smaller (8/15 male complainants compared with 56/96 female complainants).

4.6 Impact on delays for child

One of the aims of the evaluation was to assess whether the Pilot was associated with any reduction in the time that child complainants and witnesses are engaged in the prosecution and court process because a shorter court process would be less stressful for the child. One measure is the time between complaint to police and giving evidence at court. The data available from any of the administrative or statistical databases are, however, very limited in this regard. There was some indication though that children involved in pre-recorded hearings are able to exit the court process earlier.

From CAU interview to pre-record

To date there have been only 23 matters (involving 25 child complainants and 4 witnesses) in which the Child Abuse Unit interviewed children with a witness intermediary and there was also a witness intermediary involved at court, in a pre-recorded hearing. In all except two of these, the same witness intermediary was involved in both the CAS interview and the pre-recorded hearing.³²

In these cases, it was possible to calculate the time from the police interview to the pre-recorded hearing and then to commencement of the balance of the trial. At this stage, 14 of these cases have not yet been finalised but have a set date for trial. The average time from the police interview to the pre-recorded hearing in both court locations was nearly a year – 47 weeks in Newcastle and 51 weeks in Sydney. In relation to preserving the quality of the evidence, pre-recording the investigative interview and playing it as the evidence-in-chief is therefore clearly important. In these matters, the time from the pre-recorded hearing to commencement of the balance of the trial was considerably shorter, at around 19 weeks but this may change if the trial does not proceed as scheduled. It is therefore difficult to draw any conclusions as to the reduction of time of children's involvement in the court process.

From pre-recorded hearing to trial

The time between the pre-record hearing (PRH) and the trial ranged from less than one week to 68 weeks in Newcastle and from two weeks to 115 weeks in Sydney. The delays were significantly longer in Sydney (mean of 36.2 weeks) than in Newcastle (25.7 weeks).³³ This indicates that children's evidence is being heard in an expedited manner as intended, allowing children to give their evidence on average 6 months or more before the balance of the trial. This is a considerable benefit for child complainants and witnesses.

5. Police and Court baseline data (BOCSAR data)

Analysis of de-identified unit record police and court data from the NSW Bureau of Crime Statistics and Research (BOCSAR) provides a state-wide baseline for the number of reports to police of child sexual offences against children and the number proceeding to court, the number of guilty pleas and the court outcomes. This is important to show the trends and possible overall ‘demand’ for witness intermediaries and pre-recorded hearings if the Pilot is to be expanded beyond the current sites. It also provides a comparison of the key outcomes related to the criminal justice and court processes to benchmark the effects of the pilot compared with other sites in NSW which have not implemented these changes – within the constraints of the available data. The purpose of the analyses using these data sources is to examine whether the Pilot has resulted in:

- Any change in the attrition rates between reporting the complaint to the police and prosecution;
- Any increase in the number and proportion of young children providing evidence to police and proceeding to court;
- Reduced time between complaint to police and the child giving evidence;
- Reduced delays to hearing or trial;
- Any difference in the plea and conviction rates in the courts involved in the Pilot compared with those not involved in the Pilot.

5.1 Reports of child sexual offences to police

Police data extracted from the Computerised Operational Policing System (COPS) and BOCSAR provide information on the number of reported incidents of sexual offences against children, the persons of interest, and victims across NSW.³⁴

No data were available to provide any breakdown by location – other than the location of the incident and the location of the Local Area Command which was assigned to the incident. This does not indicate which Child Abuse Unit dealt with the matter. A series of discussions with BOCSAR and NSW Police Force indicates that there is no straightforward way to map the event number to the case details and the information on the FACS database. In the absence of that information, the BOCSAR data are used to show overall trends rather than location specific trends and comparisons.

Figure 5.1 shows the number of incidents since 2010 reported to police related to a sexual offence against a child for complainants under 18 at the time of the report, together with the number for whom the report was delayed until the complainant was an adult. The focus of these analyses is on reports that are made to police for children under 18 who could potentially come within the scope of the Pilot measures for witness intermediaries if the Pilot is to be expanded beyond the current sites. Figure 5.1 indicates an increase in the numbers of child reports from 4,265 in 2010 to 5,833 in 2017, a 36% increase over 8 years. Figure 5.1 also shows the percentage of child reports (reported in childhood) of the total number of reports to NSW Police Force per year, ranging from

lows of 80.8% and 80.9% from 2014 to 2017 through to a high of 88.0% in 2011.³⁵ These percentages are similar to those reported for the period back to 2003 and in the report on delayed prosecutions for the Royal Commission.³⁶

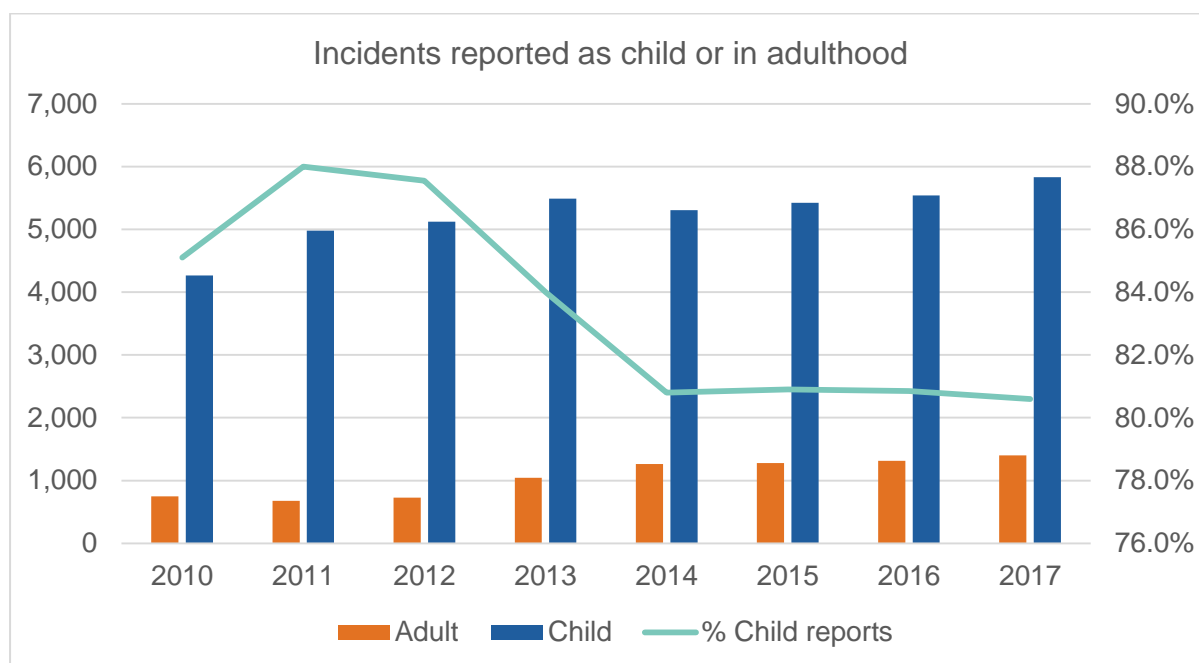


Figure 5.1 Numbers of incidents of sexual offences against a child reported in childhood and adulthood and percentage reported in childhood

Figure 5.2 shows the proportion of child sexual offence incidents in which legal action was initiated against the person of interest for incidents where all the complainants were under 18, together with those where the complainant was an adult at the time of reporting. This indicates a fairly stable likelihood of incidents involving child reports ‘proceeding to court’, fluctuating between a low of 0.14 (or 14%) in 2011 and 2012 and a high of 0.19 (19%) in 2014. At the same time, the number of arrests by CAUs between 2010 and 2016 has nearly doubled from 399 in 2010 to 770 in 2016.³⁷

The interpretation of these trends needs to take into account several factors. First, the increased awareness of child sexual abuse due to extensive media attention and the activity of the Royal Commission from 2012 is likely to have contributed to the increase in reports to police evident in Figure 5.1; this is the experience with other inquiries.³⁸ Second, police note that “a significant number of reported matters are captured through the mandatory care and protection reporting process and that there is often no intention by the complainant to report or engage with Police to institute criminal proceedings. Through the tri-agency arrangement, however, a criminal report is made on COPS”.³⁹ Third, not all these reports may constitute a criminal offence or provide sufficient evidence to support a criminal offence. The role of the police investigation is to make appropriate and differentiated decisions about which cases should result in legal action and which should not. Comments from several parents whose young children were interviewed by police indicated that they were satisfied after the police investigatory interview, where a witness intermediary had been present, that nothing untoward or criminal had occurred child.

Appropriately deciding when *not* to proceed is as important as deciding when a matter should proceed. Better quality evidence from child complainants and witnesses is vital to this process.

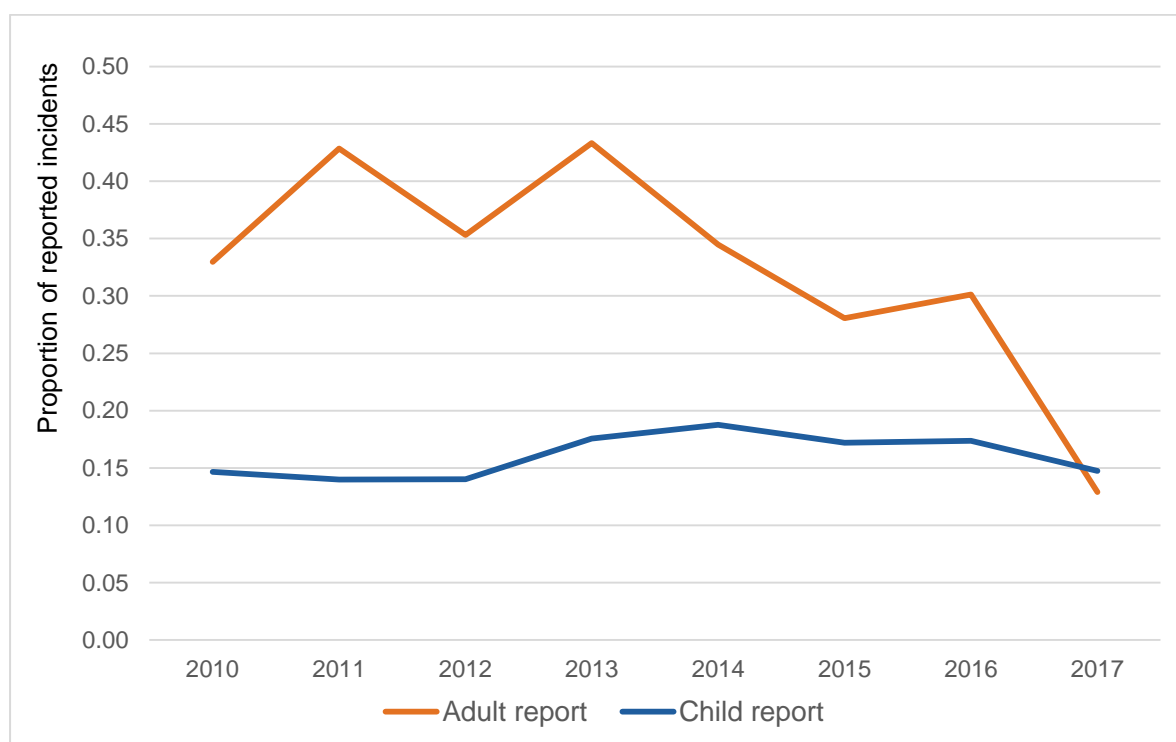


Figure 5.2. Proportion of incidents in which legal action was initiated against the person of interest proceeded to court by timing of report (child or adult report)

Fourth, it is important to take into account the age of the children involved in these incidents, and any change over time in the proportion of incidents involving younger children. NSW Police Force have advised that “the Child Abuse Units now conduct a larger number of recorded interviews with younger and younger complainants, where there is sometimes insufficient evidence to proceed to criminal proceedings”.⁴⁰ Further, a possible effect of involving witness intermediaries and pre-recording children’s evidence is that younger children might be able to provide better evidence so that the police and the ODPP may be encouraged to proceed with such matters. Overall, there has been a slight upward trend since 2010 in the proportion of reports involving children under 5 years of age from 7.8% to a high of 12.97% in 2014. There has been a similar small upward trend with fluctuations for 6–9 year-olds from a low of 16.5% in 2010 to a high of 24.2% in 2014. These small changes are prior to the Pilot and across the board, not specific to the Pilot locations, and may reflect the influence of the activity and media associated with the Royal Commission. It is possible that location specific data analysis could indicate some clear effects of the Pilot but these data are not available to the evaluation. Impacts of the special measures may also take some time to be evident so it is important to collect and analysis data that would allow such analyses and monitoring of the effect of the special measures.

5.2 Comparing Pilot and non-Pilot Courts

The Court data were not hampered by the problems in determining location and comparing pilot with non-pilot courts that frustrated the police data analyses. The Sydney Downing Centre was compared with the other District Courts in Sydney that include the large volume District Courts, such as Parramatta, Campbelltown and Penrith. Sydney Downing Centre deals with the largest number of child sexual offence matters in NSW, and the Newcastle District Court has the largest number outside the Sydney area. The other courts used for comparison purposes were the Wollongong District Court and other regional and small courts combined.

Figure 5.3 presents the overall trends in the number of matters involving sexual offences against children finalised in the Pilot and non-Pilot District Courts to provide a baseline comparison for all types of sexual offences against children and an indication of the increasing number of finalised appearances over the period 2003 to 2016 in the District Court.⁴¹

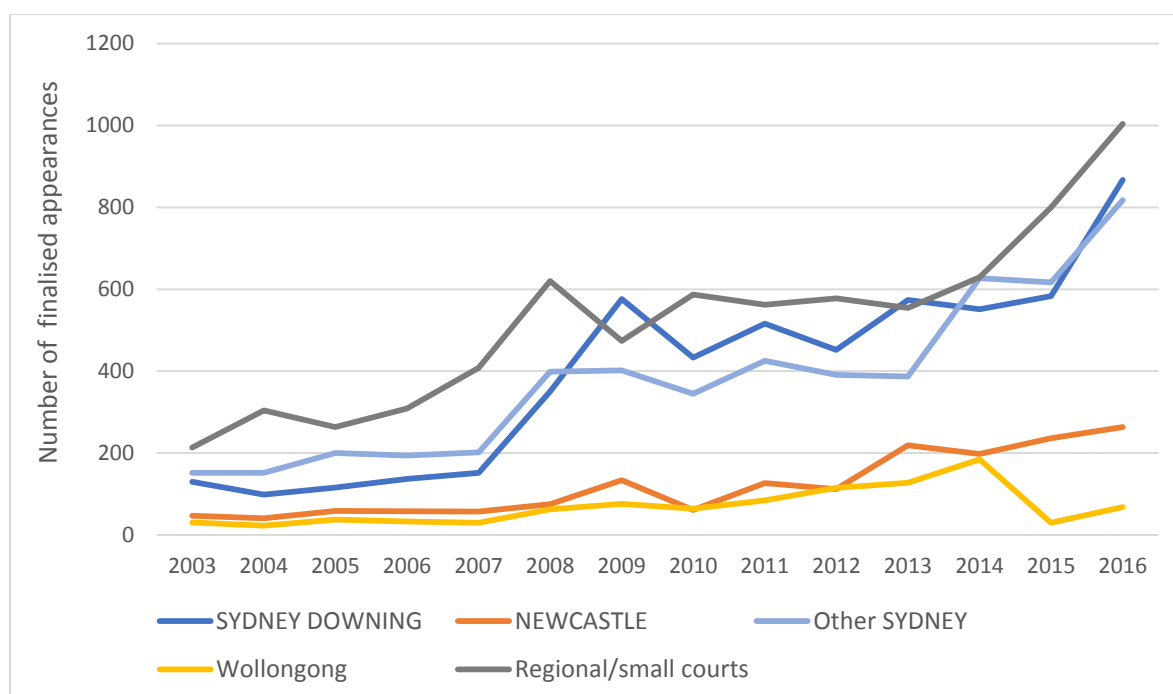


Figure 5.3 Number of finalised appearances for child sexual offences in Pilot and non-Pilot courts 2010–2017

Finalised matters since 2010 were used to compare the two Pilot District Courts with the three categories of comparison District Courts, and to compare the Pilot courts before and after the beginning of the Pilot.⁴² The data were selected:

- To include only the three main types of offence that are most relevant for the inclusion of children in the Pilot – in broad terms, sexual assault or persistent abuse of a child, indecent assault and act of indecency.⁴³
- To exclude matters with more than a 5-year delay from the offence to the date of arrest; since the court data do not include information on the age of the child complainant (either

at the time of the offence or at prosecution), this provides a proxy for excluding ‘historical matters’ reported when the complainant was an adult.⁴⁴ For example, 22 of the 25 parents who responded to the online survey and the interview indicated that the incidents occurred within 3 years before they were reported.

Guilty pleas

Figure 5.4 shows the likelihood of a guilty plea in the Pilot and non-Pilot courts before and after the Pilot began. There were no significant differences in the proportion of guilty pleas in the Pilot courts beforehand though there is a small increase in the guilty plea rate in the Newcastle Pilot court (from 53% to 58%). Nor is there a significant difference between the Pilot and non-Pilot courts.

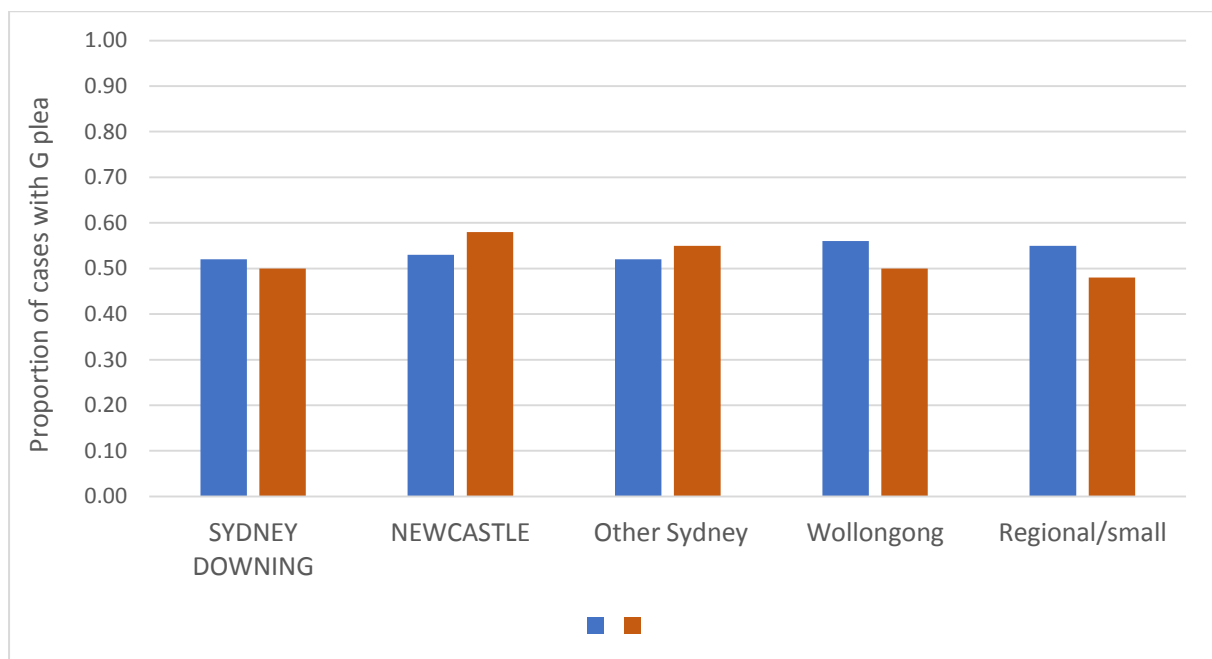


Figure 5.4. Guilty plea rate for Pilot and non-Pilot courts in the pre-and post-Pilot periods

The plea rate across these courts, ranging between .48 or 48% and 58%, is in line with the overall proportion of persons with at least one guilty plea in finalised appearances in the District Courts which has generally fluctuated between 0.5 and 0.6 or between 50% and 60% since 2006 (Cashmore et al 2016).

A possible effect of the special measures in the Pilot is that the accused might be more inclined to plead guilty once the substance of the child’s testimony is evident at the pre-recorded hearing. Ideally it would be helpful to know whether there was any change in the numbers and proportion of pleas being entered after the pre-recorded hearing. However, the court data indicate the timing of a guilty plea only in relation to whether it occurred at committal (**early plea**) or after the committal process and before or at trial (**late plea**). While there was some variation in the proportion of matters with an early vs late guilty plea between the Pilot and non-Pilot courts and

in the Pilot courts before and after the Pilot began for the most serious offence, these differences were not consistent across offences nor significant (see Appendix 7).

Cases withdrawn/not proceeding

A second possible effect of the special measures in the Pilot is that the proportion of cases that are withdrawn – because the child complainant does not wish to proceed or their evidence does not come up to proof – may be reduced. Figure 5.5 shows the proportion of finalised appearances in which all charges were withdrawn or where the matter did not proceed. The one comparison that is close to being significant is that of the Pilot versus other courts, with a lower proportion of cases not proceeding in the Pilot than in the non-Pilot courts.⁴⁵ This is likely to be associated with the drop in the proportion of cases being withdrawn or not proceeding in Newcastle in the post pilot period from 14.2% to 10.0%.

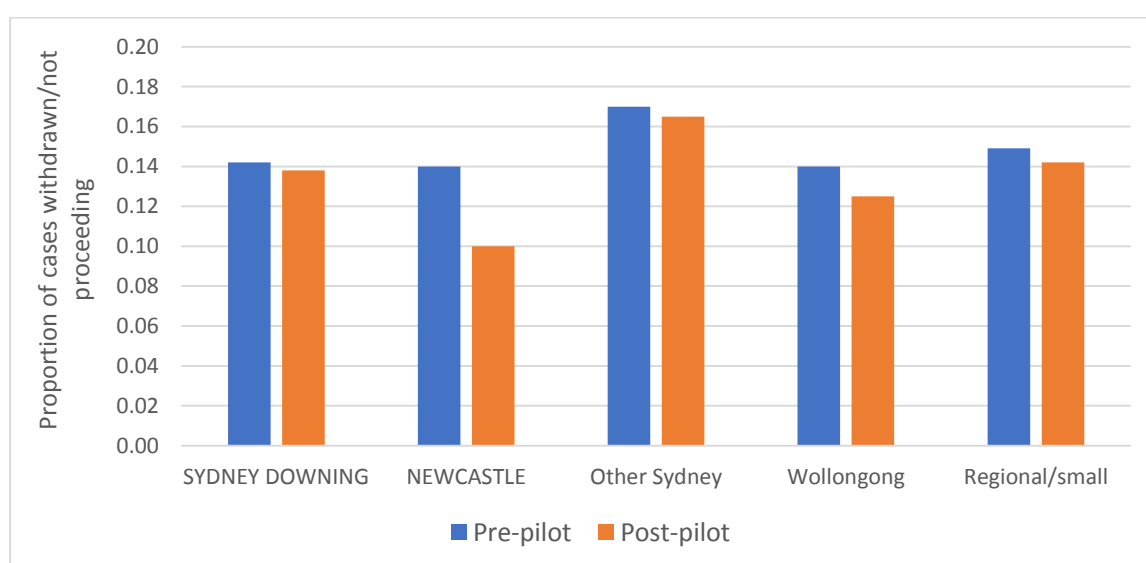


Figure 5.5: Proportion of cases withdrawn/not proceeding for pilot and non-pilot courts for the pre-and post-pilot periods

Conviction rates

A third possible effect of the special measures in the Pilot is that child witnesses are less stressed and provide stronger clearer evidence with a witness intermediary to assist their communication and that they are less stressed in the pre-recorded hearing than they might otherwise be in the full trial. If child witnesses are able to provide better quality evidence, a judge or jury may find their evidence more convincing, resulting in an increase in the conviction rate. Figure 5.6 shows the conviction rate for the pilot and non-pilot courts for the pre-and post-Pilot periods. Again there were no significant differences although there was a clear increase in the conviction rate in the Newcastle District Court in the post-pilot period (from 61.6% to 80.3%). This is consistent with the analysis of Victims Services administrative data on court referrals.

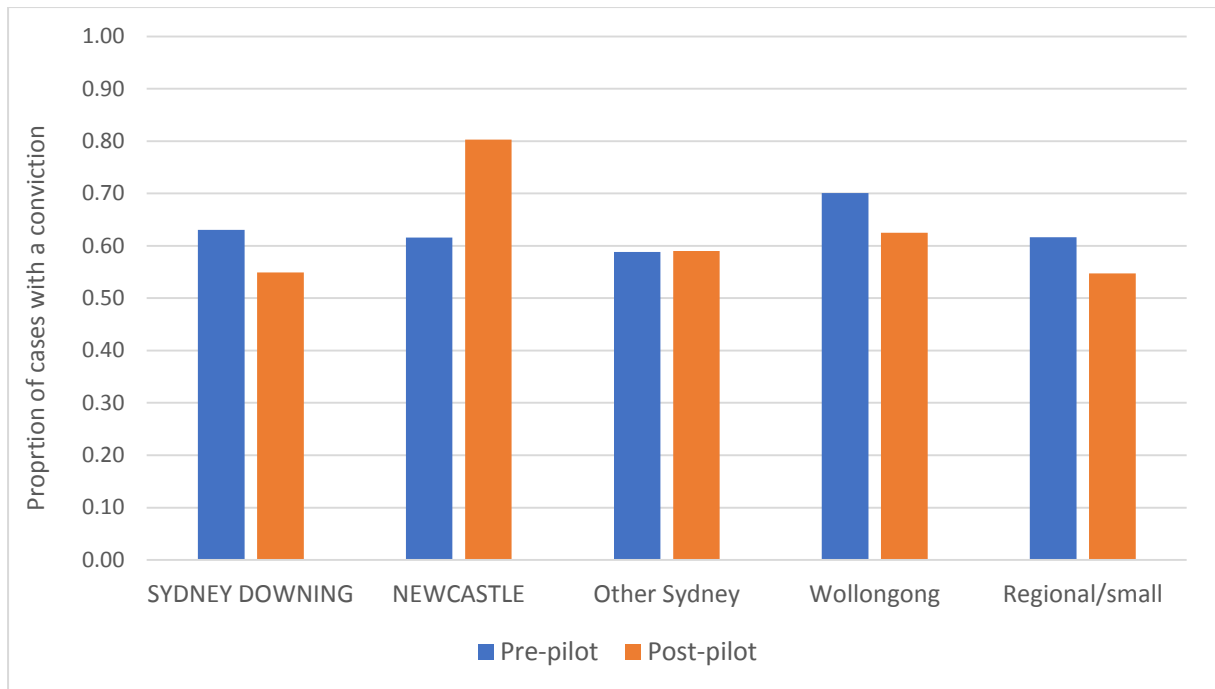


Figure 5.6 Conviction rate for the pilot and non-pilot courts for the pre-and post-pilot periods

In summary, there are no significant changes in the Pilot courts compared with the non-Pilot courts, and no significant changes from the pre-Pilot to post-Pilot period on any of the measures. There are, however, some clear non-significant *trends* in the Newcastle District Court, which indicate:

- An increase in the guilty plea rate – consistent with the court referral administrative data
- A drop in the proportion of matters that are withdrawn or do not proceed
- An increase in the conviction rate – and the highest conviction rate across the court areas (80.3%) consistent with the court referral administrative data outcomes.

6. Role of the witness intermediary

Overall the feedback from the legal and non-legal professionals and parents who participated in the evaluation strongly supports the use of witness intermediaries in child sexual assault matters. Witness intermediaries are seen to be making an important and unique contribution in facilitating questioning and communication with child witnesses by police and at court.

6.1 Legislative basis for use of witness intermediaries

Division 3 (clauses 88-90) of the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) (the ‘amending legislation’) provides the legislative basis for use of witness intermediaries in NSW. Under the legislation witness intermediaries are called ‘Children’s Champions’ (cl 88). Witness intermediaries are officers of the court, and as highlighted in the Code of Conduct for witness intermediaries, their duty to the court is paramount.⁴⁶ Witness intermediaries provide impartial advice and their function in the Pilot is to facilitate communication with child witnesses in police interviews with children and with child witnesses at court in the prosecution of prescribed child sexual assault offences.

The Department of Justice Information Sheet (Appendix 6) describes the role of the Witness Intermediary (Children’s Champions) as that of:

an accredited professional with specialist training who will assess the child victim’s communication needs and will tell the judge, the ODPP and the Defence the best ways to communicate with the child victim when they are giving evidence at the pre-recorded hearing.

The Witness Intermediary is not a support person. They are independent and impartial participants in the process. Victims Services, within the Department of Justice, are responsible for the Witness Intermediary scheme.”

The Pilot evaluation found unanimous support for removing the term ‘Children’s Champions’ from the legislation and discontinuing its use. Concerns were raised that the term ‘Children’s Champions’ is misleading and confusing, and misconstrues the role of the witness intermediary which is to be an impartial officer of the court. This amendment is seen as urgent to ensure that acceptance of the special measures is not prejudiced particularly among defence lawyers. Witness intermediaries are not advocates for the child nor are they child witness supporters:

‘[N]obody on either side of the profession has seen fit to use those words [Children’s Champion] ... Children’s champion suggests that you’re championing a child’s cause or interests when that’s fundamentally incompatible with an independent role.’

Clause 89 of the amending legislation details who may establish a panel of children’s intermediaries, witness intermediaries’ qualifications and appointment. There is a presumption under the legislation that a witness intermediary will be appointed in prescribed child sexual assault matters where a child witness is under 16 years of age. A witness intermediary may also be appointed on the court’s own motion or on application by a party to proceedings for a child witness who is 16 or more years of age if the court is satisfied that the witness has difficulty

communicating (cl 89(3b)). A court is not required to appoint a witness intermediary (cl 89(4)) if the court considers:

- (a) there is no suitable person available to meet the needs of the witness, or
- (b) it is not practical to make an appointment, or
- (c) it is unnecessary or inappropriate to appoint a witness intermediary, or
- (d) it is not otherwise in the interests of justice to appoint a witness intermediary.

Witness intermediaries may be asked to assess a child witness either before the police interview or before a pre-recording hearing or at trial. The purpose of this assessment is to determine the witness' communication needs and capacities in the context of a criminal investigative interview and questioning at trial. A witness intermediary must, if requested by the court, produce a written assessment report of the witness' communication needs (cl 89(6)) which must be provided to all parties to the proceedings prior to the witness giving evidence (cl 89(7)). All evidence provided by a child witness must, if a witness intermediary is appointed for them, be provided in the presence of the witness intermediary (cl 90).

The legislation does not explicitly provide for the use of witness intermediaries in the police investigative process. The legislation also more generally provides relatively little detail regarding the nature, form and use of a witness intermediary's assessment of a witness. The *Children Champion's (Witness Intermediary) Procedural Guidance Manual (2016)* (Procedural Guidance Manual) describes the steps in the process of a witness intermediary's involvement before a witness is interviewed by police or gives evidence. The Procedural Guidance Manual notes that a preliminary report to police may be written or oral; it is not the same as the report that may be prepared later for the Court, and is in comparison, relatively brief in nature. Witness intermediaries are provided detailed training in assessment of witnesses during a five-day compulsory training course including a written exam, a mock written assessment report and mock oral assessment.

Qualifications, skills and criteria for appointment

Under clause 89 (2) of the amending legislation witness intermediaries are required to have "a tertiary qualification in Psychology, Social Work, Speech Pathology, Teaching or Occupational Therapy or such other qualifications, training, experience or skills as may be prescribed by the regulations (or both)".⁴⁷

Currently there are 41 witness intermediaries on the eligibility panel of suitable witness intermediaries for the Pilot, 30 of whom are active. Almost half are speech pathologists (48.7%). The vast majority of witness intermediaries are female (92.7%) (Table 6.1).

There are currently no eligible ATSI-identified witness intermediaries although Victims Services reports that some have specialised training in working with the ATSI community.⁴⁸ The CALD profile of witness intermediaries in NSW is not known. Victims Services also reports that witness intermediaries are asked to indicate their experience and training in working with CALD

communities. This experience and training are considered in matching witness intermediaries to witnesses.

Table 6.1: Numbers of witness intermediaries by qualification and gender

		Sydney	Newcastle	Total
Qualifications	Speech Pathologist	12	8	20
	Psychologist	5	5	10
	Occupational Therapist	1	2	3
	Social Worker	6	2	8
	Total	24	17	41
Gender	Female	24	14	38
	Male	0	3	3
	Total	24	17	41

Source: Victims Services administrative data

Overall feedback regarding witness intermediaries' qualifications and expertise is very positive. However, there seems to be difficulty in recruiting males and particularly Aboriginal and Torres Strait Islander and CALD witness intermediaries.

'I think we really need to get indigenous people. We really need to get men. I haven't come across any blokes. I'm told there are some in Newcastle, but I haven't met them.' [Defence lawyer]

As the Ombudsman's Report on the JIRT Review points out, Aboriginal children, who are at "significantly increased risk of sexual abuse, may face particular difficulties interacting with the criminal justice system, especially in relation to communication" (p. 3017). Although the *Criminal Procedure Act* was amended in October 2016 to allow teachers to be appointed as witness intermediaries to provide another pathway for Aboriginal witness intermediaries, Aboriginal witness intermediaries are yet to be recruited. The JIRT review report supports the recommendation of Aboriginal experts in the child health and well-being field that another "suitable qualification pathway" be developed and recognised 'specifically for Aboriginal people who apply to become witness intermediaries' (p. 308). A targeted approach may also be needed to encourage the appointment of people from a CALD background to become witness intermediaries.⁴⁹

The matching process

Stakeholders were asked about their experiences of the child's needs being matched with the skills of the witness intermediary.⁵⁰ A number of FACS and Health workers suggested that there could be better communication between FACS, NSW Police, and Health staff involved in the tri-agency arrangement, and that information they had about the children could be useful in helping to match intermediaries to children's needs. Some police, judges, and defence lawyers were concerned that witness intermediaries were not needed in all interviews or cases:

'The witness intermediary program is great; however, they are only needed on some occasions, as in when a child has a mental health or intellectual problem, not with every interview, especially with adolescents.' [Police]

'In reality, the older a child is, unless they have some cognitive impairment or a language difficulty, or a learning difficulty, or something along those lines, in reality, probably the value of the witness intermediary is questionable.' [Legal Aid Defence lawyer]

On the other hand, some stakeholders indicated that witness intermediaries could be very useful even in cases where a complainant presented as being quite articulate and/or of a requisite level of maturity where prima facie they seemed not to need or warrant the assistance of an intermediary:

'I know there are certainly cases of 13 and 14 year-old girls, who on the surface, appear to have no communication needs though after an assessment there are identified needs.'

As highlighted by the ODPP, "it should not be forgotten that it is likely [that child complainants/witnesses were] younger at the time of the offending and that they have been engaged with the justice system for what is a very long time for a child by the time the matter gets to the District Court and that this itself would have taken a toll on the child, on their memory, on their health and on their welfare."

Overall the matching process is seen to be functioning satisfactorily though there is some concern that speech pathologists may not be the best fit for a child with significant trauma or mental health problem. There is also some concern about the lack of Aboriginal witness intermediaries and those with different cultural backgrounds. A senior legal professional said, for example:

*There are quite a few Aboriginal children in Newcastle and we found that we really need Aboriginal intermediaries and we haven't got any, and that's an issue... Aboriginal females won't talk about sex with men around ... but for this particular intermediary, we wouldn't have got the evidence.'*⁵¹

6.2 Overall response to the introduction and use of witness intermediaries

Overall professionals involved in child sexual assault cases recognised the skills that witness intermediaries offer them in working with children, and acknowledged that witness intermediaries have enabled them to gain new insights into children's behaviour and children's cognitive processes:

'They bring a skill set which is almost entirely absent within the police force.' [Police]

'[They] help break the ice and assist the interviewer to build rapport.' [Police]

'Children with complex needs are highly disadvantaged in the criminal justice system and the intermediary program assists in minimising this disadvantage.' [NSW Health worker]

Some police commented on what they have learnt from watching the assessments and the way witness intermediaries interact with children:

'I had no previous experience but watching the complainant be easily confused by the little 'tests' she underwent, whilst under no stress, showed me how easy it is to confuse a child in general. The report assisted in ensuring the evidence obtained from our victim was fair in relation to what should be expected due to her age, intellectual capacity, stress level etc.' [Police]

'[The best thing is] their ability to support the child to communicate and understand questioning. The intermediary conducted a preliminary assessment of the child's social and intellectual skills and was able to provide feedback to investigators as to how to broach questioning and the child's tendencies in her answers such as in multiple choice questioning which was then avoided.' [Police]

A number of prosecutors and defence counsel also noted that witness intermediaries have influenced them to fundamentally rethink how they question and examine child witnesses:

'Through the WI intervention process, it means lawyers have to consider and rephrase. Also, through the consequential education effect, the lawyers read the WI reports and may learn things they didn't know about children and how they may communicate better.' [Prosecuting instructing solicitor]

'[There has been] a significant reduction in the number of confusing questions being put to child witnesses. The use of such questions is both a deliberate tactic and the result of incompetence. Either way, there are less of them now than before. Related to the above, is a significant reduction in the use of pompous lawyers' jargon when asking questions. Although some barristers can't stop themselves, one hears terminology such as 'I put it to you that ' much less than before.' [Crown Prosecutor]

'[The best thing about working with witness intermediaries is] the insights into how questions can be asked in a more effective way.' [Defence lawyer]

A number of witness intermediaries also reported that the use of play and other techniques they commonly use in interviews has led to more disclosures from children, and that police officers have sometimes then adopted similar techniques in their interviews.

The use of witness intermediaries therefore clearly serves an educative role with the potential for wide-ranging impact in changing cultural attitudes and the way that criminal justice professionals work with child witnesses.

6.3 Role of witness intermediary at police investigatory interview

As outlined earlier, the legislation does not specifically provide for the use of witness intermediaries in police interviews with children so there is no legislative direction on how witness intermediaries fit into the police interview. The *Children Champion's (Witness Intermediary) Procedural Guidance Manual (2016)* provides some guidance in relation to conducting and sharing witness intermediary assessments, but the process for engaging with assessments and planning the process, particularly in the case of police, is fluid and changing with experience.

Witness intermediary assessments for police interviews

The Code of Conduct for Witness Intermediaries and the Procedural Guidance Manual (2016) state that the preliminary assessment serves the purpose of preparing the police interviewer for the best way of communicating with the child "to promote complete, accurate and coherent communication with the witness".

Witness intermediaries indicate that these assessment reports are usually verbal and very short, generally lasting for a few minutes only:

'The conversation with the police officer? The detective? Yeah, that's a quick minute or two.' [Sydney witness intermediary]

The Pilot administrative data suggest that witness intermediaries are often conducting their assessments for police interviews with minimal notice and opportunity for preparation and/or under very tight time pressures. In the case of preliminary assessments for police interviews, the average time from referral to the police interview was 2.05 days (SD = 2.9); 31.5% of interviews were conducted on the same day and another 31.6% were on the next day. The consistent feedback from police and witness intermediaries is that witness intermediaries are routinely undertaking preliminary assessments for police interviews in about 20 minutes.

A number of police and some Health and FACS workers, however, were concerned about the timing and time taken in the witness intermediary's preliminary assessment before the interview because children, particularly in stressful situations, often have a short attention span.

'Sometimes the intermediary assessments take too long, causing the child to lose focus/concentration and willingness to participate in the interview afterwards. This

can be noted for children 6 years and under. I would be interested in seeing the intermediary assessment take place on a day prior to the police interview. [Police]

Some police were also concerned that the assessment could be intimidating because of the number of adults in the room.⁵² In return, witness intermediaries consistently expressed concern about such time-pressures on their assessments with the child before the police interview and are aware of the concerns:

I'm finding it very frustrating at the moment in that, I've got a pretty thorough assessment, that takes under ten minutes. [Witness intermediary]

Experience in England and Wales indicates that most witness assessments can adequately be completed within an hour, though the duration of the assessment in the UK typically ranges from 40 to 120 minutes.⁵³ Depending on the witness and their needs, multiple sessions may be required to build rapport and Registered Intermediaries may also be required to make inquiries with contacts such as the child's teachers and health workers.⁵⁴ Plotnikoff and Woolfson (2015) described one witness intermediary who "has seen some children three times, including a young child with trauma-related fear and anxiety who took 40 minutes to come through the door at the first session".⁵⁵

Ideally the assessment, especially if more complex, would involve consultation between FACS and Health caseworkers and others with information about the child's needs and be followed by a break or conducted at another time prior to the police interview.

Obviously, there are sometimes some cases where there are immediate care and protection issues, but we would prefer to conduct the interviews with as much information as we can about the complainant and doing it at a time when the child is well rested, well fed and there has been assessment of the communication needs. [Police]

...Often FACS has substantial information regarding children that NSW Police may not immediately have available. Additionally, the ability of FACS to inform the interview process will ensure that all relevant information is gathered which reduces the need for additional interviews or follow up. [FACS]

FACS caseworkers also indicated that they would benefit from being able to 'speak with the witness intermediary post-interview' and receive a copy of the assessment report to help them plan their interview with the child, and their support for the child and the family.

FaCS staff would greatly value the expertise of a WI in supporting their own communication with the victim child. FaCS caseworkers are often required to undertake specific child protection interviews of the child subsequent to the police interview when the child has not disclosed or the police have not addressed the child protection issues. [FACS manager]

We do not currently receive any written assessment from the WI. By receiving the assessment, this would assist future case planning with the family and / or other

supports that FACS can engage to work with the family i.e. health, speech. [FACS manager]

This is consistent with comments in the Ombudsman's JIRT Review Report, particularly in relation to children and young people with disabilities.⁵⁶

Using the assessment to plan the police interview

The Procedural Guidance Manual makes it clear that police and witness intermediaries should plan the interview strategy together and "have a planning meeting to review the children's champion preliminary assessment and to discuss how best the interviewer can communicate with the witness in the police interview" (p. 15).⁵⁷ However, this collaborative approach for shared witness intermediary and police decision-making in planning the interview seems as yet to be aspirational rather than the general practice in NSW.

Unfortunate not to get enough time with the Intermediary prior to interview but was good throughout for prompting for breaks and how not to question. Didn't however give examples of possible questions or best words for questions which I felt would have been beneficial. [Police]

It is good that witness intermediary and police build rapport together ... and that the witness intermediary explains their role to the child before the interview, so the child doesn't think that the intermediary will answer the questions for them. [Police]

Both police and witness intermediaries indicated some uncertainty about the role of the witness intermediary in the police interview and the need to be clear about how and when the witness intermediary should intervene in the interview. From both perspectives:

How best to interject at appropriate times in an appropriate form to assist police in their investigations. If I'm struggling, I prefer to ask the WI... I have WIs suggest to stop the recording for a break when a child cries – unfortunately children do cry and it is ok particularly when they are in the middle of disclosing a crucial point. It's difficult for police who are used to conducting interviews and being mindful of a child's welfare during the interview and reaching a crucial part of the interview to lose the rhythm when a WI interrupts. [Police]

Sometimes I feel that the question could be asked in a different way or that the Detective could approach the questioning in a different way; however, it is difficult to intervene as the Detectives know which direction they are going in with the questioning and my suggestion may not be beneficial in that circumstance. ... Knowing a bit about the case and the direction the Detective is planning to go with their line of questioning would help in the pre-interview assessment and in the interview'. [Witness intermediary]

Witness intermediaries in the UK had similar experiences but the key to maximising the effectiveness of the intermediary there was "collaborative advance planning with the police interviewer".⁵⁸ Although the UK experience is different, it can offer NSW some useful lessons

about how to structure the processes for police-witness intermediary planning and collaboration. Intermediary strategies in the UK that led to more effective interviews included:

- familiarising witnesses with the layout of the interview room and adjusting this layout to accommodate their needs,
- setting rules in relation to truth and guessing,
- thorough and cooperative planning over the wording of questions appropriate to the child's developmental level, and
- recommending breaks to help interviewees ready themselves for questioning.⁵⁹

Perceived impact and fairness of witness intermediaries in police interviews

Overall, police participants in the evaluation view the use of witness intermediaries as a positive initiative, and as fair to both the child and the alleged offender. A recurring comment was that witness intermediaries 'level the playing field', because they help children understand the questions, so obtaining the most accurate evidence possible in 'fairness' to both parties. Police were also generally of the view that child complainant/witnesses with intermediaries are more confident in answering questions than those without one:

'I find that child complainants with witness intermediaries tend to feel more relaxed when being interviewed and are more open to answering questions than without. It also helps to get a child to go into the interview room if they are hesitant because they realise that they won't be in there by themselves.' [Police]

'The WI was extremely important in developing rapport and understanding of the child's intellectual capabilities and tendencies. She was very knowledgeable and supportive. She was able to assist in focusing the child who was easily distracted on the interview and utilised sensory and tactile tools such as sand and aids as the child was blind. The intermediary was crucial in obtaining a truthful version from the child.' [Police]

Overall, police appreciated the professionalism of witness intermediaries, though one in four commented on some witness intermediaries unnecessarily interrupting, interjecting, using inappropriate questions and misunderstanding their role. The most challenging aspect of police working with witness intermediaries that emerged in the evaluation related to the working relationship between police and intermediaries during the police interview process and some uncertainty about when and how the witness intermediary should intervene. There were a number of comments, however, that indicate that some initial reluctance in some quarters was giving way to real appreciation of the witness intermediary role and the value of preliminary witness intermediary assessments, consistent with the UK evaluation.⁶⁰

Case study: The importance of understanding the particular reactions of some children was evident in the example of a young complainant police had tried to interview on two occasions with little response. When the witness intermediary was involved, she said that the child really did

not like eye contact and advised the interviewer to talk with her without direct eye contact. He did so and she gave a full and complete disclosure.

6.4 Role of witness intermediary at court

Overall police, legal professionals, and non-legal professionals were very positive about the use of witness intermediaries at court. It is widely recognised, in line with the research literature, that children frequently misunderstand the questions they are asked at court but are often reluctant to ask for clarification. They can become confused by multiple or multi-part and leading questions, particularly when they involve complex grammatical structures and the use of double negatives.⁶¹

'I believe that the best thing about witness intermediaries is the confidence they provide to children during court proceedings. I believe they are an important part of court proceedings and stop the child from being attacked by defence solicitors.'
[Police]

The *Witness Intermediary Procedural Guidance Manual* (2016) states in relation to their Code of Conduct that:

*1. A person appointed as a children's champion for a witness must communicate and explain to the witness, questions put to the witness, and to any person asking such a question, **the answers given by the witness in replying to them and explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.***" [page 5]

There is confusion, however, about whether or not a witness intermediary should or is able to 'explain' the answers given by a witness or whether their role should be restricted to facilitating the giving of those answers. This is consistent with the current wording of the legislation (cl 88). This is not consistent, however, with current practice or with the training for witness intermediaries provided by Victims Services. The role of a witness intermediary in relaying questions and answers as interlocutor needs to be clarified in the legislation and guidelines.

Witness Intermediary Court Assessments and Ground Rules Hearings

Core to the witness intermediary's role is the impartiality and independence that the witness intermediary brings. The Procedural Guidance Manual instructs intermediaries that they are not to comment, advise or give evidence on the competence of a witness. Intermediaries are not expert witnesses and thus they cannot, for instance, give an opinion on the accuracy of a witness's recall of the facts or whether a witness is competent to give evidence.

The witness intermediary's assessment report may cover a broad range of issues. The Procedural Guidance Manual provides that this report should contain details of the child's attention and listening skills, auditory comprehension and understanding of spoken language, spoken expression, speech sound intelligibility, reading and writing ability, it should also advise the advocates on the most effective way of communicating questions to the witness. Clause 89(7) of

the amending legislation requires that this report is made available to all the parties to the proceedings before the witness gives evidence in the proceedings.

Witness intermediaries were generally under less time pressure to complete the court assessment than they were in the preliminary assessment for the police interviews. They were able to take longer for the actual assessment and the median time from the assessment to the due date for the assessment report for court was 13 days (mean = 15.6, SD = 12.2). The average time to report was significantly longer in Sydney (18 days) than in Newcastle (13.3 days).⁶² The median time between the witness intermediary's assessment and the pre-record hearing was significantly shorter in Sydney (28 days) than in Newcastle (42.5 days).⁶³

The witness intermediary assessment report directly informs decisions made at the ground rules hearing (GRH). Some concerns were raised, however, about witness intermediary assessment reports that are repetitive and 'template-like' with recommendations that were not tailored to the particular child before the court.⁶⁴ Although feedback from some lawyers and senior legal professionals indicated considerable improvement with experience, there is no review or quality assurance process to monitor for training and mentoring.

The GRH is seen as constituting an important step in overcoming some of the difficulties in questioning child witnesses⁶⁵ and reducing the potential for the trial to be aborted. Both judges, and prosecution and defence lawyers were positive about the GRH.

'What makes the most difference is the requirement on defence counsel to ask questions that are appropriate to the age, intellect and emotional maturity of the child. The ground rules conference causes counsel (Crown & defence) to turn their mind to those issues.' [Crown Prosecutor]

There were some concerns, however, that the ground rules hearings initially were generally a wholesale endorsement of a witness intermediary's report, and that was seen as more problematic when the report was 'template-like'. Such concerns are also more likely when the parties have not had sufficient time or the opportunity to discuss the report and the recommendations with the witness intermediary prior to the GRH. More discussion of the witness intermediary's report and more collaborative decisions at the GRH were seen as a positive development. This was also seen as helping to foster a culture within the legal profession that witness intermediaries are a resource for the court and to be shared by all parties to the proceedings.

Time to consider the witness intermediary's assessment report after the GRH and before the pre-recorded hearing is also important to allow the parties some time to 'digest' the recommendations and adjust their questioning. More recently, the specialist judges are, as far as possible, holding the GRH held a week or so before the pre-recorded hearing but the downside is the additional court time and workload.

Experience has demonstrated that ground rules hearings are essential, but to be effective they must be heard well in advance to the pre-recording, so a matter is triple handled, by the legal practitioners, the judges and the Courts. [Judge]

A senior prosecution lawyer commented on the way this is working:

The importance of the ground rules hearing cannot be underestimated and the recently introduced practice (in Sydney) of having the GRH a week before the PRH has improved the whole process. It has meant another court date but the trade-off in terms of greater understanding of the WI's recommendations, of how to implement them and greater co-operation in relation to this aspect of the Pilot – which all translates as a better outcome for the child and the justice system - is worth it.

In the UK it is now quite common and indeed expected practice for counsel to be directed to disclose their proposed questions in writing to the judge in advance of the ground rules hearing. At the ground rules hearing there is then discussion about the questions which are approved or amended.⁶⁶ In the UK there is strong judicial recognition and authority that:

*'There is nothing inherently unfair in restricting the scope, structure and nature of cross examination and or in requiring questions to be submitted in advance, in any case involving a child witness or a witness who suffers from a mental disability or disorder. The practice has been approved by this court on many occasions; it is the judge's duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant. Far from prejudicing the defence, it is the experience of many trial judges that the practice ensures that defence advocates ask focussed and often more effective questions of a vulnerable child witness.'*⁶⁷

In NSW, the evaluation has highlighted the need to consider how the decisions made at a GRH should best be formulated and what steps might be needed to ensure they are complied with by all parties and throughout the entire trial process. This is particularly important given that the trial judge will often not be the GRH judge.

Indeed some stakeholders noted that, for the sake of consistency and efficiency, the judge conducting the GRH should ideally conduct the pre-recording evidence hearing and the trial.

'[F]rom an evidentiary point of view, if they've ruled on matters of evidence, it's desirable to have the same judge do [the pre-recording].' [SACPS and defence lawyer]

'I think it's the pre-record judge that probably should be doing those ground rules hearings...as the ground rules hearing is going on, you can sometimes change your view about it...There might be an application, they might say 'well, we don't think this is admissible'. You might say 'well, I think it is at this stage', but then that's usually based on what people say the evidence will be. ... So I think the judges who are running the pre-record should do the ground rules hearings.' [Judge]

However, stakeholders noted that currently logistical and resource constraints make continuity between the GRH, the PRH, and the balance of the trial very difficult, particularly given the delays in the District Court.⁶⁸ Currently there are two specialist judges managing the GRH and the pre-recorded hearings in the two Pilot courts in the Sydney Downing Centre and Newcastle District Courts. They have conducted over 200 such hearings in two years so it is clearly not possible for them to follow through to sit on the rest of these trials.

Perceived impact on the child complainants' evidence

Overall, legal and non-professional stakeholders generally believe that child complainant/witnesses with intermediaries at court are more confident in answering questions than those without. Both the prosecution and defence lawyers and witness intermediaries indicated that a child with a witness intermediary in court was more likely to feel less stressed and to give better evidence.

'They are better prepared for what is about to happen so they're not as nervous, and they feel comfortable asking the person sitting in the room with them for a break or to clarify a question, where otherwise they might plough on and their exhaustion manifests in lots of 'don't remembers' or non-verbal answers, or they guess at an answer.' [20] [Defence lawyer]

Stakeholders also generally believed that child complainants/witnesses with an intermediary appeared to give better evidence.

'The language and understanding of the child's age are better accounted for, so there is far less confusion in the child answering the questions. It results in evidence which is more accurate.' [5] [Crown Prosecutor]

A significant number of respondents emphasised the efficacy of intermediaries in the court process and several specifically said that it prevents badgering of the child by defence.

'The best thing about working with witness intermediaries is] preventing the Defence from asking inappropriate and/or confusing questions' [Crown Prosecutor]

This points to the larger impact of witness intermediaries on the way that lawyers, both prosecution or defence, ask questions. It was obvious in court observations that some lawyers struggle with formulating simple direct questions starting with a question word (Did ..., when, where, what, how?). Some fell back on tag questions (a statement with a tag ending such as "Didn't you?) and excused their tag questions by saying they were going to ask "some of those difficult questions". In some cases, they admitted their difficulty in constructing a question and sought assistance from the witness intermediary in breaking down a complex multi-part question into several simple short questions. The ground rules and the assistance of the witness intermediary may help in preparing simpler questions.

Lawyers and support workers also commented that the presence of a witness intermediary also had an impact on the judge's willingness to intervene:

'The lawyers adapt their questioning in order to avoid objections and interruptions. The PRH is centred around the communication needs of the child witness.' [Crown Prosecutor]

From the judicial perspective, having a witness intermediary has also simplified the judicial task in child sexual assault trials:

'... as a trial judge you no longer have the concern of trying to ensure that the complainant or the child witness is fairly treated. In other words, you're trying to pass, to perform the function of a witness intermediary in a sense. So the benefit now is that that's already happened and you don't have to supervise it. So that's a good thing.' [Judge]

Some prosecution lawyers also saw the benefit of “having someone whose job it is to keep an eye on the wording of the questions – this means there is less pressure on me as the Crown to be constantly objecting to wording while also considering other aspects of the questioning”.

However, defence lawyers have raised concerns that this shift may be disrupting court processes and procedures which protect the rights of the accused:

'I think the whole system is very much slanted towards...I just think it's over-corrected, like a lot of other things in our community, there's an overcorrection, I think, and a real risk that there's going to be prejudice to an accused person.'
[Defence lawyer]

Overall though there was general consensus among stakeholders that the witness intermediary at court does not undermine fairness and is fair to the complainant and the accused. This is because witness intermediaries were seen as facilitating children's capacity to provide their best evidence, thereby bolstering the integrity of a justice system designed to protect the rights of both parties:

'The result is far more structured, focused, and understandable evidence. This is fair to both sides.' [Crown Prosecutor]

Some respondents noted that witness intermediaries bring a skill almost entirely absent in other professional groups working with child witnesses. This has been particularly on display in the way that witness intermediaries have deployed aids (including timelines or diagrams) to assist child witnesses with time sequencing, helping them to focus, and allowing them to communicate other issues or emotions under the stress of questioning.⁶⁹

'[Aids] help the child witness focus their attention on what is being asked of them and allow them to express themselves appropriately.' [Crown Prosecutor]

'The assessments are great because I can sit in and see what level the child is at... their aids that they use... dolls, houses, post it notes, happy/sad signs etc.... help for the child to explain what they mean and to bring a child back to a particular... incident. [The] [a]ids we used were things that facilitated the child indicating that they were tired and needed a break, that they didn't understand the question, or couldn't hear what was being said. They were pictures the child could point to if they didn't feel confident saying it. It was a comfort, I think for the child to have that as a back-up if they couldn't say it. One of my witnesses did ask the judge out loud if she could have a break. Another pointed to the break card and the WI told the judge. So it worked well.' [Prosecuting instructing solicitor]

Perceived fairness of witness intermediaries at court

Overall the legal and non-legal professionals, with the exception of some defence lawyers, rated the use of a witness intermediary at court as ‘very fair’ to both the complainant and the accused. The mean rating for fairness to the complainant ranged from 9.3 to 9.6 on a 10-point scale (where 1 = ‘not fair at all’ to 10 = ‘very fair’) for the police, prosecution lawyers and other professionals including WAS Officers (84 respondents in total). The mean rating for fairness to the accused ranged from 8.65 for prosecution lawyers and police (8.8) to 9.87 for other non-legal professionals. Only 3 to 5 defence lawyers responded to these rating questions and they rated the fairness to the complainant highly (mean of 8.5) but fairness to the accused as low (mean of 3.9).⁷⁰ The interviews with defence lawyers also indicated some concerns but more often a recognition that it is fair that children understand the questions they are asked.

One defence lawyer was frank about the advantage to the accused in an adversarial system of a child witness being confused and their evidence unclear. For example:

‘... some of the time, the problem about this adversarial system is that the defendant doesn't necessarily have an interest in ensuring that the child gives the best, reliable evidence, and they want to press on because the evidence that they're getting is of assistance to them. That's an evaluative judgement around, ‘Well, do you want the best evidence, or do you want the evidence that the accusatorial system produces?’

The specialist judges involved in the Pilot were positive about the way defence counsel on the whole have responded to the Pilot including the use of witness intermediaries, taking on board the changes in what is still an adversarial system where obfuscating and confusing the witness is one way to gain an advantage.

Parents’ and children’s views

The parents of children who gave evidence at a pre-recorded hearing were generally very positive about the help the witness intermediary provided to their children. They were much more aware of the witness intermediary’s role and their presence than at the police interview. All except one parent whose matter proceeded to court recalled the witness intermediary assessing their child’s communication capacities or being with the child in the remote room but only 12 of the 25 parents recalled there being a witness intermediary at the police interview.

Parents’ and children’s reports (direct or via their parent) indicated that the witness intermediary did help to reduce the child’s stress at court and to improve their confidence in answering the questions; the mean rating for both questions was 9.8 on a 10-point scale where 10 = ‘a lot of help’). In one case, a parent indicated that the child had the same witness intermediary in the police interview and at court and that provided an ‘element of familiarity’, and in her case this was helpful because the ‘police team’ and the ‘prosecution team’ and even the expected judge changed.

The mother of a young child who gave evidence at a pre-recorded hearing was positive about the help the witness intermediary gave her daughter at court, according to her report.

'I wasn't in there but from what she said, the lady kept saying, 'Can you please rephrase that [say it in a different way]?' And she was really good with having the right toys for her and the right objects and those kinds of things. She was really, really engaging. It was excellent.'

When interviewed, the child said that she was able to say everything she wanted to say in court, though they could have made it easier by 'just making the questions easier'. Her positive answer to this question is in contrast to the negative responses of child witnesses in the 2006 study (Cashmore and Trimboli, 2006). Nearly half the parents in this study, however, also said their children did not get a chance to tell 'their story' because they struggled to remember the details, could not understand their 'gobbledygook jargon' and were interrupted or intimidated by the defence lawyer. Their response is understandable in that the accused was found not guilty in most of these matters.

6.5 Training, support and professional development

While the legislation is clear about the function served by witness intermediaries, the feedback from other stakeholders suggests that their role may at times be unclear and that this understanding in the criminal justice sector is still developing:

"They need to remember they are there purely to help with communication and not to be the child's friend. This boundary often gets crossed. More training needed to ensure they respect their boundaries."

A number of police and lawyers suggested that a lack of understanding of criminal court processes on the part of witness intermediaries sometimes leads them to intervene inappropriately and hinder rather than facilitate the process:

'The witness intermediary can be a disruptive presence – this can be unintentional or intentional. The witness intermediary in my experience tended to disrupt cross-examination (sometimes necessarily and sometimes unnecessarily) and this disrupts the flow of the proceedings.' [Defence lawyer]

Some witness intermediaries themselves indicated that at times they are unsure about their role, and that this sometimes causes them perhaps, to err towards being unnecessarily passive rather than more interventionist. Some intermediaries indicated that they found it difficult to intervene in court proceedings and police interviews, sometimes uncertain about when and how to intervene:

'We have to be very careful with when and how we intervene in case the matter goes to court and the Detectives are always very conscious of ensuring that the Defence does not find cause to bring up issues with the case. For this reason, it can sometimes be difficult to intervene even if we can see that an intervention is needed or that we may think may help.'

'It's not our environment so initially it was just nerve-wracking, but now I've slowed down my pace I guess. I used to rush through it all but now I'm like 'No, I'll just put up my hand and if it's wrong, it's what I think, I have to believe in it. It's really – I

find it an extremely hard process to listen to the question, say to yourself, 'Is it right, will the kid understand it, is that okay, should I let it go?', because you've only got a moment's notice between each question to be able to raise your hand.'

Another witness intermediary commented that it was difficult to remain impartial or removed from child witnesses when the witness was under aggressive cross-examination from defence counsel:

"It is hard because, especially, at interviews as well, but especially at court. Because we can only pick on the structure, we can't pick on the content. So if the barrister's like, you know, harassing the child with something about a body image issue, and it's obviously embarrassing, and she's feeling very traumatised. But the questions very clear, there's not much we can do."

Numerous other respondents also indicated that there may be some role confusion for intermediaries, which is to some extent part of the process of 'negotiating their professional space' in a new and 'foreign' professional environment.⁷¹ This confusion can extend to concerns about others' perceptions of their relationships with the different actors involved, as well as understanding their function in the broader criminal justice process. Being clear and comfortable in their role, which also comes with experience, is important for witness intermediaries to be optimally effective.

There is general consensus that witness intermediaries should be provided with more specific training on criminal justice processes and especially on court procedures and practices, including further training on the role of courtroom advocates and the rules and admissibility of evidence:

'[Witness Intermediaries] need to have a better understanding of the Court process. This would allow them to be able to decide whether they need to intervene or not. In my experience, where the WI and the defence barrister have a good open dialogue, there is much to be gained in the ultimate questioning of the witness.' [Defence lawyer]

Conversely, it is equally important for other professional players to understand the witness intermediary's role. Numerous stakeholders suggested that more training generally, and especially joint police and/or lawyer–witness intermediary training would be very welcome, and would help to clarify some of the blurrier boundaries in the witness intermediary role:

'I believe there should be joint training, particularly for new staff. Many new staff do not know what the WI's role is and what they should and shouldn't do.' [Police]

'[It] would be good to sit down together and talk about experience and qualifications. As investigator[s] we are trained to interview children, in a non-leading way. Maybe witness intermediaries need to sit in on the JIRT course so they are aware of the investigation process.' [Police]

Witness intermediaries indicated that they would not only welcome more joint training with other professionals, but also more opportunities to engage with other witness intermediaries. This was

seen as being critical for their professional development and to provide opportunities for debriefing. Intermediaries have access to psychologists and support staff from Victims Services for debriefing purposes but they do not have an established system where they can informally debrief or communicate with each other.

To date witness intermediaries in the Pilot have had the opportunity to participate in the following training and professional development:

- Monthly mentoring/clinical debriefing sessions run by a Psychologist in both Sydney and Newcastle and access to one-on-one clinical debriefing whenever required via phone or face to face
- Annual conferences – with presentation and training provided to witness intermediaries by NSW Police from the Child Abuse Units, defence counsel from NSW Bar Association, training on the impact of CSA trauma by the Education Centre Against Violence, Vicarious Trauma Training by an external psychologist, and training on communication equality in the criminal justice system
- Court observations
 - Judicial training sessions with Judges offered in both Sydney and Newcastle
 - A specialist seminar with UK Witness Intermediary experts Joyce Plotnikoff and Richard Woolfson.

Victim Services also release a Practice Alert bi-monthly that outlines practice issues/changes, international updates and encourages witness intermediaries to provide case studies. Victim Services also have presented at stakeholder conferences with Legal Aid and the ODPP and at the National Victims of Crime Conference, as well as regularly presenting at the JIRT training course and CAU training.

Training was viewed by stakeholders as a way to strengthen the collaboration between witness intermediaries and other criminal justice actors and professionals, and to pave the way for witness intermediaries to be a key resource for all parties to access and benefit from. Defence lawyers, in particular, expressed a need for greater training in working with witness intermediaries. Other professionals agreed that more opportunities for defence lawyers and witness intermediaries to work together outside of court would assist in building greater shared understanding and co-operation between them.

‘I think that defence practitioners need training in particular as to how they can effectively cross-examine children without offending the intermediaries’ recommendations’. [Crown Prosecutor]

Some stakeholders also cautioned that joint training could risk witness intermediary independence and so would need to be carefully considered:

‘What we have actually done though, we’ve now looked at introducing a component of the witness intermediaries in [the police] child interviewing course, so police undertaking the course will understand the roles and responsibility of witness

intermediaries....What becomes problematic is if we keep telling witness intermediaries about what police are interviewing, what effects of offences are, they may get distracted from their role and consider whether they need to become more investigatively involved and we don't want that'.

7. Pre-recorded hearings

The second special measure in the Pilot involved pre-recorded hearings so that children's cross-examination (and re-examination if there is any) can be recorded in advance of the full trial. This pre-recording is played to the court at the full trial together with the child's police investigative interview, so constituting the whole of the child's evidence. This allows children to exit the criminal trial early, provides more certainty about the timing of their testimony, and allows them to give evidence in the absence of a jury and to reduce other trial related stressors. Both legal and non-legal professionals involved in the evaluation were generally very positive about these benefits but there were some concerns among some defence lawyers and about the impact of the recordings with inadequate technology.

7.1 Legislative basis for pre-recorded evidence hearings

Under clause 84(1) of the amending legislation evidence from a witness under the age of 16 in certain prescribed sexual offence matters must (unless the court orders otherwise) be given in a pre-recorded evidence hearing. If the witness becomes an adult (turns 18) before the conclusion of the proceedings, they remain entitled to give pre-recorded evidence in accordance with cl 84(7)). An order may also be made by the court, on its own motion or on the application of a party to proceedings, for pre-recording the evidence of a witness aged 16 years or older, if the court is satisfied that to do so is in the interests of justice (cl 84(2)). The court in making orders under this provision must consider two primary factors:

- (i) the circumstances of the witness and the availability of court; and
- (ii) other facilities necessary for a pre-recorded evidence hearing to take place.

The court may also take any other relevant factor into consideration in making an order under clause 84(6) including (a) sufficiency of preparation time for both parties, and (b) continuity and availability of counsel at both the pre-recorded evidence hearing and the trial.

A pre-recorded evidence hearing takes place at commencement of the trial in the absence of the jury. The ground rules hearing (GRH) is held prior to the pre-recording hearing. Legal argument regarding the child witness' evidence may also be heard prior to pre-recording. The pre-recording evidence hearing constitutes part of the trial proper. Prior to the pre-recorded hearing, the child witness will typically have been shown their pre-recorded police interview. In the pre-recorded hearing (PRH), as is the case in any criminal trial in Australia, the child witness is first questioned in examination-in-chief by the prosecution then cross-examined by the defence, and re-examined if necessary.

7.2 Impact of pre-recorded hearings on child witnesses

The pre-recording of children's evidence is directed towards two main objectives:

- (i) facilitating the collection of evidence from the child complainant at a point closer in time to the complaint, hence facilitating memory recall and minimising potential memory decay; and

- (ii) enabling a child's involvement with the criminal justice process to be concluded at an earlier stage in proceedings thus allowing child witnesses to 'move on' with their life.

Pre-recorded examination also alleviates the stress and potential trauma for a child of going to court and the uncertainty this brings, including the long delays and repeated adjournments which are commonly associated with waiting for a trial to commence and being called to give evidence.⁷² Pre-recorded evidence hearings together with use of witness intermediaries are directed towards facilitating the giving of the best quality evidence possible by a child complainant/witness with as little stress as possible. In NSW, the median time from arrest to finalisation in the District Court is 716 days for matters that are finalised after trial and 678 where the offender is sentenced after a guilty plea after committal and 420 where the plea is entered at committal.⁷³ Reducing the time that child witnesses need to wait before they give evidence is therefore very important.

Perceived benefit in reducing the stress for child witnesses

Both the legal and non-legal professionals involved in the evaluation were generally very positive about the value of pre-recorded hearings in allowing children to exit the criminal trial early, providing more certainty about the timing of their testimony, and allowing children to avoid potential encounters with hostile witnesses and other trial related stressors.⁷⁴

'More certainty for the child about when they will be giving evidence, so they're not waiting to be allocated a court and the jury being empanelled etc. Not having to watch their recorded interview again while the court sees it.' [Witness Assistance Service officer]

We have had some Crown Prosecutors trying to implement principles and processes of the Pilot outside the Pilot area and they've been very positive but because we don't have pre-recorded evidence, it is subjecting child complainants to lengthy delays and lengthy cross examinations in court, tag questions, multiple questions; that is still occurring, and will continue to occur till we get the Pilot state-wide, it's so significant, that part of the pilot as well. [Senior Police]

All the lawyers surveyed and interviewed in the evaluation had previous experience with pre-recorded evidence; their collective cumulative experience covered 66 cases involving a pre-hearing recording of the child's evidence, and 54 cases that proceeded to trial with the pre-hearing recording played at court. Prosecuting lawyers were particularly positive about the benefits for children being able to give evidence earlier and earlier in the day with less waiting and less stress. They also noted the increased efficiency in the trial process:

'It is far better for the complainant – to have a set time/date to give evidence sooner - and then they can get on with their life. They are not being asked to relive the matter years afterwards, and in circumstances where they have been likely trying to forget it. In my opinion, I want them to be able to not have it at the forefront of their mind all the time, I want them to be able to recover from it. A constant request for them to

remember the minutiae of it cannot be good for them psychologically. This system at least tries to mitigate that. [Crown Prosecutor]

Perceived benefit in improving the quality of evidence

The benefits of pre-recording children's evidence on children's memory and their recall, and consequently in facilitating more accurate testimony, were widely recognised by those involved with the Pilot:

'The children are able to provide evidence when it is still relatively fresh in their mind and this reduces the anxiety of making them wait months sometimes years before the case gets to court. It also reduces their anxiety about having to see the accused in a court room.' [Police]

On the issue of the accuracy of children's testimony, several respondents noted that pre-recording the child's evidence helped everyone in the courtroom by allowing them to witness the child giving evidence, so enabling the witness to be better assessed:

'I guess it's also good for the defence as they can hear the victim's evidence and ascertain direction on further trial and/or any pleas. This is also positive for the DPP as again they get to hear the evidence. It is good it's done in the pre-recorded setting.' [Police]

'[It] gives a first-hand view of the trauma and demeanour of the child. Better than tendering a typed statement which doesn't convey emotion.' [Police]

Parents' views

Parents were generally very positive about their child's evidence being pre-recorded, confirming the dual benefits of reducing the child's stress and allowing them, with the assistance of a witness intermediary, to give better evidence, and to 'move on'.

'The pre-recorded hearing felt very difficult at the time, but in hindsight it was much easier than attending court itself as there was no confrontational element, it was professional and over quickly and now my daughter can move on.' [Parent of 8 year-old]

The other benefits of the pre-recorded hearing relate to delays until the full trial and waiting around at court. Parents reported that the delay from the time children talked with police to the pre-recorded hearing ranged from 16 weeks to 84 weeks, with one much longer delay of 3 years. These are still long times to wait in the life and experience of a child.

The waiting times at court were, however, quite short, mostly around 30 minutes to an hour, with some exceptions where the recording equipment failed or the accused had not viewed the recording of the child's police interview prior to the hearing (court observations).

7.3 Perceived impact and fairness of pre-recording evidence

The pre-recording of the whole of the child's evidence was generally viewed as very fair for the child complainant but defence lawyers had concerns about the fairness to the accused person. Prosecution lawyers rated the pre-recording as being very fair to the child (mean rating of 9.4 on a 10- point scale) and fair to the accused (mean rating of 8.3).

'The use of witness intermediaries and pre-recording makes for a fairer and more efficient trial process.' [Crown Prosecutor]

While generally viewing pre-recording as fair to the child (mean rating of 7.2), defence counsel more often raised concerns about pre-recording on fairness to the accused (mean rating of 3.9 but rated by only three defence lawyers). Their concerns include the defence being required to cross-examine the main prosecution witness before the balance of the trial, and not always having sufficient time to prepare their cross-examination before the pre-recording:

'[The biggest challenge is] pre-recording occurring before all of the evidence is served. Subsequent evidence can change the way that one would have liked to cross examine the child witness.' [Defence lawyer]

Some defence lawyers also noted that pre-recorded evidence may disadvantage the accused when new evidence emerges between the pre-recording and the balance of the trial which might necessitate further police investigation and perhaps also further cross-examination of the child witness. For this reason, the Child Sexual Assault Taskforce report recommended that "pre-recording [the whole of the child's evidence] will not be undertaken until full disclosure of prosecution evidence has occurred in accordance with Part 3 of the Criminal Procedure Act 1986 (NSW)."⁷⁵

Legal Aid NSW Sexual Assault Communication Privilege Service (SACPS) lawyers also raised concerns about the delay between the pre-recorded evidence hearing and the balance of the trial noting the potential risk that counselling information, concerning the complainant, may be sought/obtained between the pre-recording and the balance of the trial, resulting in the child being recalled to give further evidence. SACPS lawyers also raised concerns about inadequate compliance by practitioners and court registry staff with the leave requirement to produce or adduce protected counselling communications. The evaluation heard that greater training is needed to ensure that all parties are alert to Sexual Assault Communications Privilege being explored prior to the pre-recorded evidence hearing.

The need to recall a child witness would also undermine a key objective of pre-recorded evidence. This has occurred at least once in the Pilot based on accounts heard in the evaluation.⁷⁶

Despite some lawyers raising some concerns about the potential disadvantages that pre-recording of evidence may introduce for the accused, these concerns have not translated to any appeals in NSW.⁷⁷

A number of respondents noted the importance of ensuring an appropriate timing and sequence for child witnesses to watch their prior interviews and examination. Other lawyers, however,

stated that children need to view their police interview just prior to their cross-examination. The challenge is to strike the balance between the opportunity for children to view their prior recording to enhance their memory and recall and the need to minimise the child's repeat exposure to such evidence.

Impact of pre-recording on court outcome

Lawyers were equivocal as to whether a defendant would be more likely to plead guilty as a result of the child's evidence being pre-recorded. The overall mean rating was 5.6 on a 10-point scale, with a range of ratings for both prosecution and defence lawyers from less likely (3.6) to more likely (8.5) but most in the mid-range.

'The point is that there is opportunity for reflection after that cross-examination is completed whereas in a normal trial, once the cross-examination is completed, you tend to just bat on because there's really no opportunity to properly have a think about what your case looks like. I can imagine that it might have a slight impact on the increased rates of pleas of guilty.' [Defence lawyer]

Both prosecution and defence lawyers as well as other professionals expressed some concern about the potential for lengthy pre-recorded evidence to be more tedious for jurors and lawyers to engage with compared with in-court witness evidence. Some, however, saw the benefits of clearer evidence balancing that possible disadvantage.

I worry that juries will always be slightly less engaged when something isn't happening live in front of them, but given that pre-records allow the evidence to be edited in some ways it might make things easier rather than a jury suffering through five minutes of poorly expressed question they are later asked to disregard. [Prosecuting instructing solicitor]

'I think there is a risk of a disconnect, as the jury is not hearing the evidence live. Certainly when relying upon evidence at re-trials, there is a very artificial nature of the replaying of evidence, and I expect it is the same here.' [Crown prosecutor]

On the other hand, some defence counsel noted the potential for pre-recorded evidence to vitalise juror engagement with complainant evidence rather than subdue it:

'[A] consequence of the pre-recording of both the evidence in chief and in the cross-examination is that if the jury then wants it played back, it can be played back with video and audio. Whereas for instance, if the jury wants to be reminded of the accused evidence, all they get is a transcript, which places a disproportionate emphasis on the evidence of the complainant because the jury can see it again in a form that is to a human being much more palatable than just reading a transcript.' [Defence lawyer]

7.4 Impact of pre-recordings on timing, delays and workload

Lawyers and judges' views about the impact of the pre-recording hearing on their workload were split, with some focusing on the potential efficiencies in the conduct of the trial and others on the double trial preparation involved in the pre-recorded hearing and the balance of the trial. Lawyers, particularly prosecutors, highlighted the value of pre-recorded hearings in facilitating greater clarity of the relevant issues before the court (both factual and legal) much earlier in the trial process:

'The lawyers know the evidence in advance of the jury part of the trial commencing. The issues, both factual and legal, are, therefore, clearly defined in advance. This results in a much more focused jury trial. It also greatly assists in the preparation of both opening and closing addresses.' [Crown Prosecutor]

Greater focus and clarity on the issues at trial is not a simple matter of procedural efficiency but is also likely to foster a fairer, more equitable and just trial.

On the other hand, some prosecution and defence counsel suggested that the pre-recording of evidence adds to their workload. They explained that this is because they must first prepare for the pre-recording hearing, and then because the balance of the trial often does not take place for several to many months later, then they must prepare again at that later stage:

'You end up double preparing for the pre-record and the trial.' [Crown Prosecutor]

'Preparing the trial twice and anticipating issues that may arise between the pre-recorded hearing and the trial proper.' [Crown Prosecutor]

'A lot more work has to be done upfront so flurry of activity before pre-record.'
[Prosecuting instructing solicitor]

The impact of long delays between the pre-recording hearing and the balance of the trial may have more adverse consequence for the defence particularly where the accused is in custody. The pre-recorded hearing starts the trial process but then further progress and finalisation may be delayed for many months. This causes disjointedness in the trial and may cause difficulties for the defence in terms of recalling details of the evidence presented during the pre-recorded evidence hearing:

'...There's always a danger in that sort of situation, that you may miss something that you might not have missed if it had been continuous.' [Defence lawyer]

As outlined in Chapter 4, court delay data suggest this may be a significant problem, particularly in Sydney, where the average time between the pre-recorded hearing and the trial is currently 36 weeks in the Pilot trials compared with 16 weeks in Newcastle.⁷⁸ Lawyers may need to reconceive their approach to trial preparation to reduce any duplication of preparation as a result of these changes in the trial process.

Not all lawyers found the PRH increased their workload, however; some noted that their early preparation for trial yielded significant efficiencies later in the case:

'More work has to be done upfront as PRH occurs soon into the process. Less work at trial.' [4] [Prosecuting instructing solicitor]

The impact of the pre-recorded hearings on other professionals involved in the prosecution of child sexual assault matters is difficult to gauge. Those who had had experience with pre-recordings were generally supportive:

'Pre-record has taken a lot of the unpredictabilities out of the equation in the lead up to trial.' [Social worker]

A number of lawyers and other professional respondents suggested that the process would be more streamlined if the pre-recorded hearing was timed to take place immediately, or as soon as possible, prior to the balance of the trial.

'We think the balance of trial should be listed pretty much as soon as possible. There shouldn't be these six months or longer delays between the pre-record and the balance of trial. ... ideally you would have pre-recording on day one, and then head into the trial, so that yes, it's done and dusted, and whatever else happens, the trial follows.' [SACPS lawyer]

This may also facilitate greater consistency in judges and counsel involved in the case, thereby making the process more efficient. However, numerous stakeholders noted that this can only be achieved with additional court resources, including more judges dealing with the pre-recorded hearings, and more prosecution and Legal Aid resources.

Duration of the child's testimony

While there was unanimous confirmation that pre-recorded hearings expedite the process for children – children are giving evidence earlier than they would be otherwise – views diverged on whether or not pre-recording reduced the time taken for the child's evidence and the overall duration of the trial.

'[It] saves time as the questioning by the accused's Counsel is more focused.' [3] [Crown Prosecutor]

'The absence of a jury means that many procedural steps can be taken very quickly. It is much easier to disconnect a remote witness room, than it is to have a jury come and go.' [11] [Crown Prosecutor]

Unfortunately, no data are available on the length of cross-examination in trials to allow any comparison of the time taken in the pilot or non-pilot courts. An observational study or analysis of transcripts would be very time-consuming and expensive to cover the number of trials across courts required to obtain a reliable estimate. An estimate might be available in court listings of the number of days that trials are listed for and judicial listings of the numbers of days for the pre-recorded hearings but these data would need checked against the actual number of days that trials actually took, taking into account adjournments and matters that fail to proceed. It is therefore necessary to rely on the experience of and estimates of judges and lawyers. The experience of the

two specialist judges who manage the pre-recorded hearings and also sit on some of the trials that follow is that the length of children’s testimony in pre-recorded hearings is less than in ‘normal’ trials and that the trials are shorter.

This is consistent with the findings of a recent English study which found that children’s exposure to the court process was shorter in a pre-recorded hearing than in the usual trial process. This PhD study, using trial recordings, transcripts, and trial logs, found that the length of the child’s cross-examination in a pilot of pre-recorded hearings in several English courts (17 minutes) was significantly less than in the usual court process (30 minutes) (Henderson and Lamb, 2018a).⁷⁹ The total time for the child’s testimony was also significantly shorter (21 minutes compared with 79 minutes) and less time was taken in breaks (6 minutes compared with 56 minutes).

Overall duration of the trial

Again there are no data on the overall duration of the trial but the court referral data indicate that the child’s evidence is heard during the pre-recorded hearings on average at least 6 months prior to the rest of the trial (see section 4.6). For Crown Prosecutors, getting to the pre-recording stage was considered to be generally prompt, and pre-recording was generally considered either to make it more prompt or have little or no impact on the finalisation of the case:

‘I think the pre-recording takes a bit more time, but a bit of time is then saved when the trial is run.’ [6] [Crown Prosecutor]

Overall, prosecuting instructing solicitors and defence counsel generally reported that pre-recording either slowed down the process of finalisation of a case (by creating delays) or made no difference:

‘There is often a gap between pre-recording and trial. Having a pre-recording means Defence often want to edit the video, which is more time consuming than simply running the trial live before a jury.’ [Prosecuting instructing solicitor]

7.5 Editing of pre-recorded evidence

The editing of pre-recorded evidence emerged as a contentious issue, raising new questions around strategies in questioning witnesses:

‘[I]f there isn’t an edit that’s conducted and you’re doing cross-examination and you’re constantly being pulled up by an intermediary, and that’s played to a jury, then that’s not particularly desirable from a defence point of view, to be seen to being reprimanded in a way. So that could be quite a strong inducement to getting your head around your method of questioning. If, on the other hand, there is an edit, then that would be a reason to perhaps want to push a little bit harder because you know that those portions of the pre-recording are going to be edited out.’ [SACPS lawyer]

Some lawyers took the view that editing a child’s pre-recorded evidence is problematic, and is at odds with how evidence is conventionally adduced at court – evidence before a jury cannot be edited. Some judges have insisted that pre-recorded evidence should not be edited without judicial

permission though it appears there have been different practices in this regard in the Pilot. One Crown Prosecutor suggested that many of the concerns around editing pre-recorded evidence could be alleviated, if parties argued all the legal issues relevant to the child's evidence prior to the pre-recording. This would require all parties to be clear that a pre-recording evidence hearing is just as much a part of the trial proper, as is the balance of the trial.

7.6 Relation of pre-recorded hearing to the balance of the trial

There appear to be different views as to whether the pre-recording is part of the trial proper and this was a recurring concern raised by many in the evaluation, with several potentially adverse flow-on effects for the trial process. These include concerns about the introduction of new evidence in the period between the pre-recorded hearing and the rest of the trial and the potential for a lack of consistency in the rulings of different judges. On one view, the judge that manages the pre-recorded hearing is part-heard but this is not necessarily the view of other legal professionals.

'I have a strong view that the pre-recording of the evidence is the beginning of the trial because that is the evidence that's going to be before the jury. Legal rulings as to admissibility of questions and evidence are being made. That's one of my criticisms of this scheme is that effectively it bifurcates the trial, and you have two different judicial officers presiding over what I regard as being the same trial.' [Defence lawyer]

'... the nature of the pre-trial rulings and the rulings that are made during a pre-recorded hearing can differ significantly between the judge who does a pre-recorded hearing and the judge who does the ultimate trial.' [Senior legal professional]

Parents also raised issues about the length of time between the pre-recorded hearing and the balance of the trial, as a lengthy delay may mean that they cannot talk to their child about the issues raised in the trial for perhaps months or even longer. This is an undesirable situation as it clearly has ramifications for a child's and family's post-abuse recovery and arguably undermines a core objective of the Pilot – permitting children to 'move on' with their life.

'We also had a concern raised by a parent that her daughter gave evidence in a pre-record last September, and now her trial has been adjourned and she won't be giving evidence until later this year. She's really worried that she's been told that she can't talk to her daughter about anything in the meantime.' [SACP and defence lawyer]

7.7 Technology related issues

Judges and lawyers also raised concerns about the quality of the equipment and technology-related problems in court. In one court observation, neither the police tape nor the pre-recorded evidence hearing tape could be heard. While few concerns were reported in relation to playing police interview recordings, some lawyers raised concerns that inadequate technology may affect the quality and efficiency of both pre-recordings and playback:

'As mentioned, technology always fails. Need better system of playing PRH and police interviews – old system of discs has many issues. Need server where recordings can be re-loaded and access from Court (password protected).'
[Prosecuting instructing solicitor]

Technological challenges have long been recognised as undermining the efficacy of witness testimony given outside the courtroom.⁸⁰ It is critical that the recording and playback equipment is reliable and able to produce and project clear properly sized images with good quality sound in the court environment both of the police interview⁸¹ and the child's examination and cross-examination in court. As a former District Court judge in Western Australia with considerable experience of pre-recording, Jackson (2012) stated, it is important "to have good equipment properly installed and know how to use it... It has taken a lot of time, effort and money to get this done, but without it, frustration and system failures follow" (p. 84).

In summary, the pre-recording of the whole of children's evidence is recognised as a positive step in facilitating children giving evidence and ensuring their best quality evidence is presented to the trier of fact. However, in order to ensure that pre-recorded evidence fulfils its objectives of minimising trauma to the witness and facilitates the eliciting of best quality evidence, without undermining fairness in the trial process, the pre-recorded hearing should be conducted in a timely way relative to any pre-trial hearing including the ground rules hearing, and the balance of the trial. All evidentiary and admissibility issues relevant to the evidence of the child should be determined before the pre-recorded hearing and any necessary steps taken in order to ensure that the Ground Rules can be complied with.

8. Rolling-out the Pilot

An important part of this evaluation is to look forward and consider the implications for potentially rolling out the Pilot across NSW and to other vulnerable witnesses, bearing in mind that the special measures introduced by the Pilot are to be integrated into a broader system of criminal justice and will work as part of, and alongside already existing processes, procedures and practices.

Overall there is very strong support among all stakeholders for expanding the Pilot across NSW, and to other vulnerable witnesses, including vulnerable adults and child defendants. Support for expansion was indicated by NSW Police, witness intermediaries, judges, defence lawyers, Crown prosecutors and prosecuting instructing solicitors, Witness Assistance Service staff and other professionals including in Health and FACS. For example:

'I think it is needed most in regional areas where children often suffer serious disadvantage and are in unsupportive dysfunctional environments. The pilot is as valuable for teenagers as it is for younger children. Adolescence is difficult enough without having to give evidence about a sexual assault in front of strangers. I think the pilot is educating all advocates about asking witnesses questions that the witness understands. It has made me rethink how I ask all witnesses questions. I think the reduction in delays and the separation of evidence from verdict diminishes the stress and anxiety for children. The only exception is I have had a couple of child complainants pre-pilot where the delay assisted them to have counselling and be settled in a more stable environment. I think the pilot should be measured on its reduction of stress and trauma to children and not on improved conviction rates'.

[Senior lawyer]

The expansion will face some challenges not faced by the Pilot, particularly related to resources and geographical challenges. Stakeholders involved in the Pilot identified a number of issues which will be important to consider in decisions about any future roll-out of the use of witness intermediaries and pre-recording of the whole of the child's evidence. These include resourcing, targeted and prioritised use of witness intermediaries, recruitment, retention and training of witness intermediaries, involvement of other stakeholders (judiciary, police, WAS, defence and Crown lawyers, FACS and Health), more guidance and training in relation to the role of the witness intermediary, and the role of Victim Services. The experience in the UK with registered intermediaries and pre-recording the whole of the child's evidence indicates similar challenges in taking the scheme beyond a relatively small dedicated group of practitioners to areas and to practitioners with a diverse range of experience and 'cultural' acceptance of the changes in practice.

8.1 Resourcing

Many stakeholders highlighted the need for adequate resourcing for both the witness intermediary scheme in police interviews and at court, and for pre-recorded hearings preceded by ground rules hearings.

Witness intermediaries

The Pilot has provided the opportunity to test the use of witness intermediaries with a large number of child complainants and witnesses at both the police interview (nearly 1,400) and at court (more than 200 to date) and to provide experience for witness intermediaries and other professionals. If the reach of the Pilot is to be expanded to more sites, consideration would need to be given to the need to prioritise the use of witness intermediary resources. While appreciating the role of the witness intermediary in facilitating communication with children, many police and legal professionals and other stakeholders were of the view that this a resource that needs to be targeted rather than available to every child complainant and witness under 16. In particular, the priority should be on young children, children with a disability, cognitive impairment or with trauma or a mental health problem that compromises their capacity to communicate clearly with police or legal professionals.

Pre-recorded hearings

'The [District] Court is under great pressure. It's under-resourced at the present time. Unless additional judicial resources are provided to the Court, the Court cannot undertake an increased usage of early child sexual assault recordings. It will not be able to be implemented with the existing resources of the Court, for numerous reasons.' [Chief Judge]

Over and above the resources required for an expansion of witness intermediaries to other parts of NSW, the most important resourcing issue identified relates to the court system. The NSW court system is already under significant pressure, and many participants pointed to the fact that the workload of the courts has grown significantly over the last decade or so. Figures provided by the District Court indicate that the number of registrations in the District Court for criminal matters has increased by more than 20% from 1,744 in December 2014 to 2,096 in December 2017, and the number of sentence matters has increased over the same period from 1,844 to 2,302. In particular, there has been an increase in sexual offence matters before the court, driven largely by the Royal Commission into Institutional Responses to Child Sexual Abuse. Sexual offences currently make up nearly 35% of all pending trials in the District Court, and of those, 61.3% are child sexual offence matters.⁸² At the same time, trials have become more complex with more multiple complainants and multiple accused.

The plea rate in sexual assault trials is also considerably lower than for other offences putting more pressure on the court. The introduction of the Early Appropriate Guilty Plea (EAGP) scheme also means it is likely that few defendants will plead at the District Court because of the minimal discount at this point. This may counteract any possible increase in guilty pleas after the pre-recorded hearing, once the prosecution case largely reliant on the child witness's evidence is clear.

On the other hand, the involvement and continuity of more senior ODPP lawyers at the Local Court stage and an earlier focus on the incentive to plead scheme may mean that defendants plead guilty before the matter gets to the District Court. The practical impact of the EAGP is yet to be seen.

While it is agreed that it is only fair that child complainants across the state should have access to the benefits provided by pre-recording their evidence, expanding the number of cases with pre-recorded hearings would have a significant impact on court resources. Currently two experienced specialist judges are managing the pre-recordings in the two main Pilot courts, and have dealt with more than 200 pre-recorded hearings in the first two years in Sydney Downing Centre and Newcastle as well as sentencing and other matters. They are able to follow through onto the balance of the trial for a small number of these trials in Sydney only and are now in the position where they are having to adjourn those trials in order to manage the pre-recorded hearings.

Pre-recording is critical, and NSW has lagged well behind the rest of Australia. If there are not adequate resources for the Court, and if there aren't enough judges to do the pre-recordings (with or without the intermediaries), then pre-recording the evidence of the witnesses will be delayed. Without resources for the District Court, then the Pilot and its expansion becomes academic. (District Court judge)

More judges would be required to hear the pre-recordings and ideally to provide greater continuity from the ground rules hearing a week prior to the pre-recorded hearing through to the balance of the trial. One possibility is that more pre-recorded hearings could be managed remotely from central or regional courts but this would still require significantly more courts with the required technological facilities as well as judicial and court resources and more reliable technology and planning to manage the exhibits.

The Pilot currently runs from two Sydney-based Child Abuse Squads and the Newcastle-Hunter Child Abuse Squad, the Sydney Downing Centre and Newcastle District Courts with two specialist judges managing all the pre-recorded hearings in both courts. If the Pilot measures are to be expanded, the load on the court system would increase. Senior legal professionals are strongly of the view that the expansion of ground rules hearings and the pre-recording of the whole of the child's evidence will necessitate the appointment of more judges and other court staff.

There are also cost implications beyond the Court itself for the defence where there is a long delay between the pre-recorded hearing and the balance of the trial for 'refresher fees' to be paid by Legal Aid NSW to the solicitor and counsel for the defendant and the complainant's SACP representatives.

8.2 Involvement of other stakeholders

The success of the Pilot was not only due to the contribution of the witness intermediaries. A range of stakeholders were affected by the Pilot and their contribution was important to its success. These included the judges, police, ODPP and defence lawyers, the JIRT FACS and Health workers and the WAS. After two years of the Pilot, stakeholders who were involved in the Pilot were generally strongly supportive of it and recommended its expansion across NSW. The need for expansion is also evident in the increasing demand for witness intermediaries in non-Pilot matters, as their value is recognised by others in the system.

'I am confident the system can work but it does need the co-operation and motivation of all of the parties.' [Defence lawyer]

While the evaluation found that most of the participants were strongly supportive of the Pilot and its potential to be rolled-out, there was initially a great deal of resistance to the Pilot from some stakeholder groups. In considering future expansion of the Pilot, it is important to recognise that any significant change in a system is bound to disrupt to some extent, and will inevitably result in some 'push back' from elements within the system. As the Ombudsman's JIRT Review found, the Pilot was rolled out 'during a significant period of change' in the way police interviews were conducted and there were, and continue to be evident in this evaluation, some tensions in their introduction into the police interviews (p. 305). There are benefits to FACS and Health sharing with police and the witness intermediary information they may have about the children's trauma reactions or disability.

8.3 Recruitment, retention and training of witness intermediaries

If the use of witness intermediaries in police interviews and at court is to be expanded, it will be important to recruit and retain witness intermediaries with a range of skills and backgrounds, particularly Aboriginal and male witness intermediaries; 12% of all children in the Pilot, and 17.6% in Newcastle have been Aboriginal but currently there are no Aboriginal witness intermediaries.⁸³ About 11% of the child complainants/witnesses come from a CALD background, and understanding the nuances of interacting with children from diverse backgrounds is crucial.

It is outside the scope of the Pilot evaluation to comment on the adequacy and comparative reimbursement of witness intermediaries engaged in similar professional activities apart from reflecting the concerns of some witness intermediaries about the issues that might constrain their willingness and capacity to continue in that role. The witness intermediaries involved in the evaluation, like those in the UK evaluation,⁸⁴ were very committed and very positive about their role but also see adequate remuneration, ongoing training and peer support to foster collegiality as necessary and important.

'We're all very committed to the pilot, so we drop a lot of things to just turn up. But as a result of dropping things and just turning up, it is causing us to lose a lot of money from our other work. I know I happen to get... Like, if I get a phone call to say, "Oh, there's a police interview; can you do it?" I'll rearrange my clients to attend, because we see the value in it. But as a result, it's probably not changing those practises, either.'

In addition to ongoing training, there may also be a need to develop a professionally informed quality assurance process for witness intermediary assessment reports, similar to the process undertaken for Children's Court Clinician reports.

Clearer and more streamlined processes for engaging witness intermediaries would also facilitate and enhance the impact of the witness intermediary and may also make the role more attractive to a broader group of suitably qualified professionals. As some of the witness intermediaries

indicated, some professionals may not be able to undertake witness intermediary work due to the logistical challenges of the current arrangements and remuneration schedule. There is room for reviewing and streamlining current processes in the appointment of witness intermediaries, though the practical limitations – given how such cases often unfold, the time constraints of the CAU interviewing process and limited resources – need to be acknowledged. Victims Services are often notified that an interview will be conducted on the same day that it happens. In practice this often leaves little time to notify a witness intermediary of a police interview. If a witness intermediary is not available, the police will proceed with the interview without a witness intermediary. If they encounter communication difficulties, they can re-request an intermediary and re-interview the child, with more notice for the witness intermediary.

In a 2018 report on the UK Registered Intermediary Scheme, the most common theme raised by stakeholders was the need for increased availability of Registered Intermediaries (RIs). This was identified as vital for obtaining the best evidence, strengthening prosecutions and so improving access to justice. Several strategies were suggested: greater recruitment, and improved access to information about the availability of existing RIs through centralising this information to a single point of contact or compiling and regularly sharing a list of available RIs. It was also suggested that delays could be reduced by streamlining the process of requesting RIs through the National Crime Agency; real and perceived delays in the process of matching victims with RIs discouraged some police officers from requesting them.⁸⁵ The UK report further recommended that court listings book times for using RIs more precisely and with greater certainty.

8.4 Role of Victims Services

The evaluation found that Victims Services has been invaluable in the implementation of the Pilot. Their role was crucial not only for the recruitment and support of the Witness Intermediaries but also in facilitating other stakeholders' engagement with the Pilot and managing the Implementation and Monitoring Group (IMG). This role is likely to be even more crucial in the roll-out of the Pilot. The ongoing involvement and expansion of Victim Services must be a fundamental component of the expansion.

9. Conclusions

The evaluation has found strong widespread support for the special measures in the Pilot – the use of witness intermediaries in the police investigative process and in the trial process, and pre-recorded hearings presided over by judges, as currently, with expertise, experience and disposition to manage matters involving child witnesses in sexual offence matters. The reasons for this support are that the measures have been seen to go some way to level the ‘playing field’ in communicative capacities for child witnesses, reducing the stressfulness of the investigatory and prosecution process and helping child witnesses to give better quality evidence. The Pilot has therefore achieved its main purposes of reducing the stress for child witnesses-and improving the quality of children’s evidence.

The Pilot introduced all three measures at the same time which means that any effects or conclusions are likely to involve an interaction between the different measures. There were, for example, no pre-recorded hearings without a witness intermediary but if there is to be an expansion of the special measures beyond the current Pilot, it may be that pre-recorded hearings might be conducted with older adolescents or other vulnerable witnesses without communication or other difficulties without a witness intermediary.

The value of obtaining the best quality evidence from child witnesses in the investigation and in court is that it enables the trier of fact to make a better-informed decision about whether or not the accused is proven guilty of the offences beyond reasonable doubt. In some cases, the trier of fact will conclude that the child was not sexually abused or offended against.

The Pilot and its special measures may be an important strategy in reducing attrition and increasing the likelihood of cases proceeding to prosecution, of the accused appropriately pleading guilty at an earlier stage, and of successful final disposition. More data over a longer period to capture more finalised matters are needed to confirm whether the Pilot is associated with these outcomes.

Importantly, the special measures introduced by the Pilot enable evidence to be obtained from very young children and those with disabilities or other vulnerabilities so that they are not left exposed and unable to obtain justice. As the Royal Commission into Institutional Responses to Child Sexual Abuse consultation paper on Criminal Justice stated:

Improving the quality of evidence provided – and, in some cases, providing reliable evidence where at present none can be given – is consistent with the aims of making the criminal justice system accessible and increasing its capacity to produce safe convictions for [institutional] child sexual abuse. (p. 382)

The role of witness intermediaries has been seen to be important in supporting the provision of evidence by child complainants and child witnesses in child sexual assault matters. The skills and expertise of witness intermediaries are generally highly valued, and may provide an educative function with the potential for wide-ranging impact in changing cultural attitudes and the way that criminal justice professionals work with child witnesses. Too often current practices in an adversarial criminal justice system are not child-centred nor appropriate to the developmental

needs of young complainants/witnesses. This is one of the lessons from the UK experience. Most Registered Intermediaries in the UK reported that their work came to be valued by police, judges, Child Protective Services and the Witness Service, and some noted an increase in the value that judges and barristers put on their work.⁸⁶ Witness intermediaries in NSW overall have reported similar experiences.

Pre-recording children's evidence was also seen to benefit child witnesses by allowing children to give their evidence earlier so that they are able to give an account less affected by the impact of time and delays. The other perceived benefit for children is that they spend less time engaged in the criminal justice system and can then 'move on' with their lives. There is some limited evidence that this is the case in terms of the earlier scheduling of the child's evidence and less delay at court, and greater certainty about the timing of the pre-recorded hearing.

Greater certainty about the substance of the complainant's evidence may also mean that both the prosecutor and defence counsel can make more informed plea-bargaining decisions that could lead to earlier resolution of the matter, which is beneficial for both the complainant and the accused (Powell, Westera, Goodman-Delahunty & Pilcher, 2016). A powerful endorsement of the Pilot comes from a parent who has had the experience of both approaches – with and without the Pilot:

'I have had two children be victims of sexual assault, my first child was not involved in the Pilot whereas my youngest was. I was able to notice a dramatic difference in their experience. My older daughter had to go through the whole court process and to this day (years later) she is still not recovered from the ordeal. Whereas my youngest is recovering every day and is moving on because she was supported the whole journey.'

The critical aspect of the process, in addition to the special measures, is the respect and care with which children are treated, and appropriately informed in preparation for what will happen at court. Parents' comments about the way police dealt with their children were strongly positive in terms of their understanding and support. There were, however, some critical comments about the lack of communication about the progress of the matter. When asked to reflect on the effect of going through the court process, one mother said:

'I would never wish this on any person but ... because everybody has been so supportive and kind, from the detective to the barrister, her relationship with all of those people has been really, really supportive and it's about making sure that she's not feeling intimidated, that as much as possible she can feel comfortable ... separating the whole sexual assault from the actual experience with police and law and court and things – I don't think that's been bad.'

Another parent of a 13 year-old commented that the way their child was treated "has instilled respect in my child for the court system – going through the police and court has made them feel like people care about what happened and want to do the right thing. He respects the justice system a lot more because of this". It is important to remember, however, that this is certainly not the experience of many child witnesses in the criminal justice system.

The evaluation has identified some key challenges to implementation which will be important to consider in decisions about any future roll-out of the Pilot. These include the need to resource the courts for pre-recorded hearings; the recruitment, retention and training of witness intermediaries, and maintaining and managing the involvement of other stakeholders (judiciary, police, WAS, defence and Crown lawyers, FACS and Health).

10. Appendices

10.1 Appendix 1: Literature review and background

In child sexual abuse cases, the child complainant's testimony is generally the critical part of the prosecution evidence because there is rarely any corroborative eyewitness or physical or other evidence. Whether or not children can provide compelling evidence depends on their willingness and capacity to respond to questioning by the police and by lawyers if the matter proceeds to trial. It is also a function of the context, the timing and the communication capacities of those who ask the questions. The intimidating environment of the court and the 'strange language' used by legal professionals, particularly in cross-examination, make this stressful and taxing.⁸⁷

A number of reforms have been introduced over the last 30 years to try to overcome the challenges children face when giving evidence. These include closed-circuit television to allow children to give evidence from a remote room, away from the accused and others in the courtroom; the recording of the police investigative interview to be played as their evidence-in-chief, and the presence of a support person including the Witness Assistance Service. However, the Joint Select Committee on Sentencing of Child Sexual Assault Offenders (2014) (the Committee) in their report *Every Sentence Tells a Story* recognised that further changes were needed.⁸⁸ In investigating sentencing options and patterns for child sexual abuse offences, the Committee 'was alerted to the inherent difficulties experienced by children giving evidence in sexual assault cases in NSW'.⁸⁹ This prompted the Committee to make Recommendation 19, that the NSW Government introduce measures to expand the use of pre-recorded evidence to include a child's cross-examination and re-examination.⁹⁰

In response to the recommendation of the Committee, the Child Sexual Offence Evidence Pilot was established (the Pilot). The Pilot had two key objectives: to reduce the stress on child witnesses in the prosecution process and thereby increase the quality of children's evidence. In addition to trialling an expansion in the use of pre-recorded evidence with two specialist judges, the Pilot introduced 'witness intermediaries': accredited professionals with relevant qualifications and skills who can assist the Police in investigatory interviews and the Court to communicate more effectively and reliably with child witnesses. More recently, the Royal Commission into Institutional Responses to Child Sexual Abuse has also recommended the expansion of special measures, including the pre-recording of all the evidence of child witnesses and the use of witness intermediaries.⁹¹

A. Pre-recorded evidence

Since 1999, audio-taped or video-taped interviews with child witnesses compiled in the investigation process have been admitted as a child witness' examination-in-chief in NSW courts.⁹² However, a child has always had to attend the trial, to be cross-examined and re-examined in person.⁹³ This has not addressed problems relating to memory decay in the delay between complaint and the trial, and the stress child complainants experience through protracted contact with a criminal justice system that is not child-friendly. The pre-recording of the entirety of a child's evidence was therefore proposed to allow the child's evidence to be presented at court

at a point closer in time to the complaint, and to conclude a child's involvement with the criminal justice process at an earlier stage of proceedings.

Use of Pre-Recorded Testimony in Existing Jurisdictions

Provisions allowing the pre-recording of a child witness' entire evidence exist in Western Australia (*Evidence Act 1906 (WA) s 106HA*), Victoria (*Criminal Procedure Act 2009 (Vic) s 370*), Queensland (*Evidence Act 1977 (Qld) s 21AK*), South Australia (*Evidence Act 1929 (SA) s 13A*), Tasmania (*Evidence (Children and Special Witnesses) Act 2001*) the Australian Capital Territory (*Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 40Q*), the Northern Territory (*Evidence Act 1939 (NT) s 21E*) and However, there is limited research evaluating these provisions, with most attention directed to the use of pre-recording in Western Australia though lacking rigorous research evaluation (see Jackson, 2012).

In Western Australia, like other states, the child's examination-in-chief is recorded as part of the police interview process. Once the prosecution has filed their indictment, they can make an application to pre-record the child's remaining evidence. This application is typically made at the first arraignment hearing. In response to this application, a judge will make an order setting the date for the pre-recording, including any other necessary directions.

When the child's evidence is pre-recorded in Western Australia, the child sits in a remote room, while the judge, lawyers and accused remain in the courtroom. The child sits facing two screens: one with an image of the judge, and the other with an image of the lawyer asking the question. The child has typically been shown their pre-recorded police interview out of court, prior to the pre-recording. They are asked any further questions in examination-in-chief by the prosecution lawyer. They are then cross-examined, and re-examined if necessary. At trial, the jury are shown a tape of the child's examination-in-chief, and then a tape of the child's further pre-recorded evidence. While it is possible for a child to be subsequently called to testify at trial, former Judge Jackson (2012) noted that this 'has hardly ever been raised' in practice.

Impact of Pre-Recorded Evidence

- **Better evidence?**

Judge Jackson (2012) identified as one of the benefits of the Western Australian scheme children being able to give their evidence earlier in the trial process. He suggested that this resulted in better memory recall, and thus more accurate testimony (see also Zhou, 2010, p. 307). If the result is indeed clearer evidence and fewer inconsistencies in children's testimony, child witnesses may be perceived as more reliable and credible by juries.

While studies on children and memory have demonstrated that children can remember a significant amount of information, even after long delays (Goodman-Delahunty, Nolan & Van Gijn-Grosvenor, 2017), the amount of information that children can recall decreases over time (Pipe, Gee, Wilson & Egerton, 1999; Goodman-Delahunty et al., 2017). Memory loss occurs most rapidly after one month of delay (Jones & Pipe, 2002). Children's capacity to recall and recount events is also affected by the questioning style of the interviewer, with children recalling more

information when asked age appropriate, open-ended questions compared with leading and misleading questions (Jones & Pipe, 2002).

Criminal justice practitioners in the UK have cited the benefits of pre-recording a child's testimony, stating that by enabling the evidence to be recorded closer in time to the complaint, children gave a fuller and more accurate account than would otherwise be produced in court (Burton, Evans & Sanders, 2006). They also raised concerns about delays between the complaint and the pre-recording of evidence. In cases where there was a significant delay in making the pre-recording, such as one case where there was a 16-month delay, there were concerns that the pre-recording might lose its benefit.

- **Reduced Stress for Child Witnesses**

Another intended benefit of pre-recording evidence is reduced stress for child witnesses (Jackson, 2012; Zhou, 2010). Once their testimony is given, children are able to exit the criminal trial early, preventing them from being subjected to further stress and anxiety caused by what may appear to be a never-ending process that has forced the child and their parents to 'put [their] lives on hold' (Cashmore & Trimboli, 2005, p. 28). The stress of the criminal justice process is also likely to adversely affect the quality of evidence given by child witnesses when they are asked to testify at trial (see eg Goodman et al., 1992). Facilitating children's early exit from the process by pre-recording their evidence therefore has two benefits: it may facilitate more accurate testimony, and it enhances the child's psychological well-being.

Further, by having a definite date set for the pre-recording of evidence, children are saved the uncertainties that attend the full trial. Changes to the trial schedule due to jury empanelment, *voir dire* and other witness testimony can mean that children are often kept waiting some time to testify and may even be asked multiple times to return on another occasion to give their evidence (Cashmore & Trimboli, 2005; Powell et al., 2016). Pre-recorded evidence enables a definite time to be scheduled for the child's testimony and this means that long waiting times at court before the hearing, can be avoided.

- **Time Savings or Time Cost?**

There are also possible benefits in pre-recording the child's evidence for the criminal justice system in terms of time saving and shorter trial times. Jackson (2012), for example, suggested that pre-recorded evidence provides greater clarity early in the trial regarding what charges will be proceeded with and what evidence is admissible, and that edited tapes can save valuable court and jury time. Pre-recorded evidence can also be re-played if there is a mistrial or retrial. Jackson (2012) also suggested, however, that pre-recording a child's testimony could add to the court's workload. Pre-recording doubles the court time needed for the child's testimony – lawyers and judges must be present in court when the evidence is recorded, and then view it again when it is played at trial. Pre-recording evidence may also add to lawyers' workloads, as they must prepare their case first for the pre-recording, and then again for the trial.

There is little empirical research examining how pre-recording a child's testimony might affect trial length. However, a recent study in England of 138 pre-recorded matters under section 28 procedures and 84 non-section 28 matters found a number of significant differences, favouring child witnesses in the pre-recorded matters (Henderson & Lamb, 2018a).⁹⁴ Children testified on average 132 days earlier (291 days vs 423 days), earlier in the day, and spent less time at court than children who were not in pre-recorded matters. Both the duration of their cross-examination and the time taken for breaks were also significantly shorter. Unexpectedly, however, the delays for younger children were significantly longer than for older children, regardless of whether their evidence was pre-recorded or not. Henderson and Lamb (2018a) suggest this may be because 'younger children are accorded more special measures (e.g., intermediary assistance) and that coordinating and scheduling these additional provisions inadvertently extends pre-trial delays' (p. 355). There were no differences in the likelihood of a conviction between the pre-recorded and the non-recorded matters.

- **Technological Issues**

An early challenge for the pre-recording of evidence in Western Australia was ensuring availability of appropriate technology, equipment and child-friendly spaces for pre-recording the child's evidence and later playing it back in court (see also Australian Law Reform Commission & New South Wales Law Reform Commission, 2010, p. 801; Jackson, 2012).⁹⁵ One of the concerns raised by police, lawyers and judges, in various jurisdictions, where the recording of the police investigative interview with the child are now routinely re-played as the child's examination-in-chief, has been the quality of those pre-recordings and the visual and audio capabilities of the court equipment. Difficulties include: the angle and positioning of the camera that makes the child's facial expressions and hand gestures too distant to capture and readily seen by jurors across a courtroom (Burrows & Powell, 2014; Powell et al., 2016, p. 78); poor lighting so that the child's face is obscured (Burrows & Powell, 2014); and poor sound quality, with microphones failing to pick up certain noises (Burrows & Powell, 2014; Cashmore & Trimboli, 2006; Criminal Justice Joint Inspection, 2012; Powell & Wright, 2009).⁹⁶

- **Impact on juror engagement and assessments of complainant's credibility**

A common concern raised, both in relation to pre-recorded evidence and evidence given through CCTV link, is that regardless of the visual quality, jurors will be less engaged with the witness than if they were giving evidence live in the courtroom (Burrows & Powell, 2014; Burton et al., 2006; Powell et al., 2016, pp. 34, 78). In particular, evidence given with the witness in the courtroom may be thought to be more compelling because it enables jurors to build a greater emotional connection with the witness, and jurors may feel a greater sense of privilege in being able to hear the witness' evidence first hand (Burrows & Powell, 2014; Powell et al., 2016, p. 34). Further, live evidence may be thought to have benefits because it is more congruous with the other evidence in case, and any sources of distractions or interruptions are more overtly identifiable to the jury (Burrows & Powell, 2014; Powell et al., 2016, p. 34). However, in Powell's study some of the judges, lawyers and witness assistance officers expressed different views and were not so concerned (Powell et al., 2016, p. 35).

There is limited empirical evidence to suggest that jurors feel more emotionally disconnected from witnesses when their testimony is pre-recorded or that they can assess a witness' credibility more effectively when they are in court.⁹⁷ Most of this research is based on mock trials,⁹⁸ and some of it is now several decades old so that the poor quality of the video-recording in question, at that time, may be less of an issue due to updated technology.⁹⁹ Existing research is equivocal as to how the mode of delivery of a child's testimony may impact jurors' perceptions of the witness' credibility (as opposed to jurors' accuracy in assessing children's veracity), and jurors' verdicts.

One study with actual jurors in NSW asked them immediately following the trial about their opinions of the use of CCTV and pre-recorded evidence as a child witness' examination-in-chief (Cashmore & Trimboli, 2006). Most jurors (84%) stated that the pre-recorded tape of the child's evidence-in-chief helped them 'a lot' or 'quite a bit' to understand the child's evidence. Significantly, in contrast to suggestions that the filming would obscure key details that jurors needed to assess the witness' credibility, these jurors stated that the tape was helpful because it allowed them to observe the child's body language, demeanour and tone of voice, and to assess the child's credibility. There was no difference by verdict. How pre-recorded evidence may impact jurors' assessments of a child's credibility, and consequently the verdict in the case, is therefore not clear.

- **Perceived fairness of pre-recording the whole of the child's evidence**

Pre-recording the whole of the child's evidence provides certainty in the prosecution case and flexibility of proceeding in the pre-recording in the absence of a jury (Powell et al., 2016, p. 30). Since the child's evidence is central to the case, knowing what this is, can facilitate preparation of both the prosecution and defence case, "potentially shortening and focusing the trial time" (Powell et al., 2016, p. 31). The legal professionals in this study also indicated that certainty about the complainant's evidence also means that both the prosecutor and defence counsel can make "more informed plea bargaining decisions that could lead to earlier cases resolutions ... of benefit to both the accused and the complainant" (p. 31). On the other hand, it has been argued that the accused might be disadvantaged because the defence is required to conduct the cross-examination of the main prosecution witness before they have prepared their entire case (Australian Law Reform Commission & New South Wales Law Reform Commission, 2010, pp. 800-801). The extent to which the pre-recording of evidence impacts on defence case preparation is an issue which requires further research.

It is worth noting, however, that the High Court of Australia has held that the right of an accused to a fair trial is not absolute and is subject to 'the interest of the Crown acting on behalf of the community'.¹⁰⁰ Cossins (2012) suggests that it is increasingly accepted that an accused person's right to cross-examine a witness is not absolute. Even if the pre-recording of a child's evidence does complicate the preparation of the defence case, this does not automatically mean that the accused has been denied their right to a fair trial.

Conclusion – key questions regarding pre-recorded evidence

Research raises a number of questions concerning how pre-recorded evidence operates in practice:

- How do legal professionals view the pre-recording of children’s evidence?
 - Are there any differences in the way that judges, the prosecution and defence lawyers perceive any benefits to child complainants, witnesses and to their own work?
 - Are there any concerns? How do these differ by profession?
 - How do those who support child witnesses and other non-legal professionals view the benefits and disadvantages of pre-recording children’s evidence?
- Is there any evidence that pre-recording children’s testimony has had any impact on the accused’s right to a fair trial?
- Are children spending less time waiting to testify when their evidence is pre-recorded?
- Is pre-recording of cross-examination occurring sufficiently early in time for it to be useful in preventing the memory decay of child witnesses?
- How has the pre-recording of evidence impacted on the time taken to finalise a matter?
- Has the pre-recording of evidence had any observable impact on jurors’ engagement with the witness and their deliberations and outcomes in cases?
- Is there appropriate technological infrastructure to enable pre-recording to take place?
- Have technological issues impacted on the recording and playback of a witness’ evidence?

B. Witness Intermediaries

There has been a consistent call to reform the rules concerning the cross-examination of child witnesses because of ‘a fundamental conflict between the aims of cross-examination and criminal justice policy objectives concerning the questioning of children’.¹⁰¹ While the criminal justice system aims to obtain accurate testimony from child witnesses, cross-examination is often used to confuse, unsettle or undermine a witness, to negate their testimony or bring their credibility into question.¹⁰² Even when cross-examination is not deliberately used to attack a child’s testimony, it has repeatedly been observed that the linguistic style of cross-examination is at odds with best practice surrounding the questioning of child witnesses (see also Powell et al., 2016, p. 39). An early Australian study of the questions that child witnesses were asked during cross-examination indicated that children of the same age who were not under stress were unable even to repeat the question and maintain any sense or meaning in many questions (Brennan & Brennan, 1988).¹⁰³ In court observations, Cashmore and Trimboli (2005) found that Crown Prosecutors and Joint

Investigation Response Team (JIRT) Officers were rated as matching the child's linguistic style to a much greater extent than most defence lawyers.

There are a number of reasons why cross-examination styles of questioning conflict with children's linguistic styles. The language and the way that lawyers ask questions is often complex and involves legal terminology which can confuse many adult witnesses, let alone child witnesses (Cossins, 2009; Ellison, 2002; Powell et al., 2016, p. 39). Multiple questions, the use of negatives and double negatives, tag questions, compound and leading questions can be very confusing, and when child witnesses are stressed, their capacity to process questions is less than in familiar contexts and everyday discussion (Cossins, 2009; Ellison, 2002; Gross & Hayne, & Zajac, 2003; Hanna et al., 2012; Hanna, Davies, Henderson & Hand, 2013; Powell et al., 2016, p. 39). As a result, children frequently misunderstand the questions they are asked in the courtroom but are reluctant or do not know how to ask for clarification (Zajac et al., 2003). Children may therefore give incorrect answers in cross-examination, not because of a lack of knowledge or failure in memory, but because the questioning style does not enable them to give their best evidence (Nathanson & Saywitz, 2003).

While less common now than a decade ago, age-inappropriate language may also be accompanied by 'aggressive', 'sarcastic/condescending' or 'accusatory' styles of questioning or by questioning that repeatedly but more gently suggests that children would not remember (Cashmore & Trimboli, 2005, p. 49). There is now, however, a greater expectation that judges will intervene to restrict 'improper questions' that are 'misleading or confusing' or 'unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive', or asked 'in a manner or tone that is belittling, insulting or otherwise inappropriate'.¹⁰⁴ Defence lawyers and judges in Powell et al.'s (2016) study have also indicated that cross-examination styles have changed and that treating a child aggressively or disrespectfully would be counterproductive as it would potentially bias jurors against the accused.

Regardless of the actual style of questioning, children's language capacities are generally no match for the language and structure of the questions lawyers ask, particularly when children are under stress. In a number of jurisdictions, witness intermediaries have been introduced to facilitate more developmentally appropriate questioning of child witnesses (Cossins, 2009; Goodman-Delahunty et al., 2017, p. 90; Hanna et al., 2013; Plotnikoff & Woolfson, 2015).

Intermediaries in England and Wales

Intermediaries are permitted in courts in England and Wales pursuant to s 29 of the *Youth Justice and Criminal Evidence Act 1999* (UK). These intermediaries are available to a range of different witnesses, on grounds of age or incapacity. The intermediary scheme may also be used for some accused persons.

While the wording of s 29(2) of the *Youth Justice and Criminal Evidence Act 1999* (UK) suggests that an intermediary acts similarly to an interpreter, 'communicat[ing] to the witness, questions put to the witness, and to any person asking such questions, the answers given,' Cooper (2016) states that the role of an intermediary involves much more than this. In the UK, intermediaries conduct a formal assessment of the witness' communication needs. They then prepare a written

report setting out findings and recommendations as to the appropriate language and questioning style. Witness intermediaries may be used during the initial police interview and also to assist during the trial. Prior to a trial, an intermediary will provide an assessment of the child's communication capacities and understanding of concepts relevant to their evidence (such as time, sequencing, dates and before/after) with recommendations of how to facilitate the child's capacity to communicate, manage their stress and provide reliable testimony. Both the prosecution and defence lawyers are encouraged to discuss their examination questions with the witness intermediary, as an independent and neutral officer of the court, prior to the trial. In a ground rules hearing before the trial, the judge then discusses the recommendations with the intermediary and the lawyers and provides formalised written court directions.

At the trial, intermediaries are sworn in, similar to interpreters. They monitor the questioning and alert the judge to any issues that arise. Unlike the scheme in South Africa (discussed below), intermediaries are not involved in questioning the child on behalf of the lawyers. Intermediaries may ask a child questions only at the court's direction (Henderson, 2015). The witness intermediary scheme in New South Wales has been designed to operate in a very similar way to the UK model, with intermediaries being trained to utilise their specialist knowledge to advise others without taking over the questioning process (Cooper, 2016).

- **Overall impressions of the Intermediary Scheme**

While judges and lawyers showed initial resistance to the introduction of intermediaries, there is now widespread support for the intermediary scheme in England and Wales (Plotnikoff & Woolfson, 2012). In her study involving interviews with 25 criminal judges, 16 advocates and 10 Registered Intermediaries (RI), Henderson (2015) found that all of the advocates supported the use of intermediaries in vulnerable cases, and all judges, except one who was 'lukewarm' rather than negative, were supportive of the intermediary scheme. Further to this study, the carers of children required to give evidence have expressed their support for the scheme, not only for assisting the child to communicate with the court, but also in helping them cope with the stress of giving evidence (Plotnikoff & Woolfson, 2007, pp. 60-61). Overall, the intermediary scheme is seen as having enhanced access to justice for vulnerable people (Henderson, 2015).

The key benefit of intermediaries has been to facilitate more effective communication between lawyers and child witnesses. Judges and lawyers have praised the usefulness of intermediaries' written reports and recommendations, with one lawyer stating that '[y]our intermediary report can be your greatest tool because it tells you how to get what you need to get' (Henderson, 2015, p. 158). Further, intermediaries have had benefits beyond the immediate cases they are employed in, with one judge commenting that they found themselves applying strategies they learnt from an intermediary in their other cases (Henderson, 2015, p. 158).

By enabling witnesses to communicate their evidence more effectively, witness intermediaries have enabled more cases to be prosecuted, and possibly facilitated an increase in guilty pleas. During the pathfinder project, where the intermediary scheme was piloted, lawyers commented that in at least six cases, the case would likely have not reached the trial stage but for the involvement of the intermediary (Plotnikoff & Woolfson, 2007).

- **Challenges in understanding the utility of witness intermediaries**

One issue that emerged in England and Wales was misconception and a lack of knowledge among the police, lawyers and courts about the skills that intermediaries possess and the ways they can be used in the criminal justice process. For example, the Criminal Justice Joint Inspection (2012) observed that intermediaries were rarely used when a child's examination-in-chief was being pre-recorded, even though they were able to provide assistance at this stage of proceedings. Further, some judges and lawyers perceived intermediaries as having very little use, as they 'simply sit with the witness and appear to do very little' (Criminal Justice Joint Inspection, 2012, p. 31). Greater familiarity and experience with the work of an intermediary appears to increase positive evaluations of the intermediary scheme (Criminal Justice Joint Inspection, 2012; Plotnikoff & Woolfson, 2007). Thus, this appears to be an initial obstacle for the criminal justice system to overcome rather than a pervasive challenge.

- **Appointment of intermediaries**

Henderson (2015) observed mixed views about the manner in which intermediaries were appointed to cases. About a third of the judges and lawyers commented that too few intermediaries were appointed, and they were appointed too late in the proceedings. Conversely, some lawyers and judges suggested that too many intermediaries were being appointed in an untargeted way. In particular, there was an assumption that many lawyers and judges were familiar with how to communicate with children since they had interacted with young children, including their own. Accordingly, it was suggested that intermediaries be reserved for cases where the child was particularly vulnerable (Henderson, 2015, pp. 162-163; Plotnikoff & Woolfson 2015, p. 105).

- **Intermediaries intervention during questioning**

The concern held by a number of lawyers was that intermediaries would be too interventionist and interrupt frequently during questioning, thus disrupting the flow of questioning and counsel's rapport with the witness. This was not a common experience, however. Very few of the lawyers and judges in Henderson's study (2015) stated that intermediaries were 'too involved' or 'too forceful' (p. 163). The majority of advocates felt that these fears were misplaced, and some even commented that interventions were more a reflection of the lawyer's skill in questioning than an intermediary's overzealousness (Henderson, 2015, p. 164). Conversely, some judges and lawyers felt that intermediaries occasionally intervened too little and needed to develop 'the confidence to speak up'. On the other hand, again further experience indicated that a good assessment and appropriate recommendations by the witness intermediary and appropriate planning of the questions might avoid the need for intervention in the police interview or in court (Henderson, 2015, p. 164; see also Plotnikoff & Woolfson, 2015, p. 207).

- **Intermediaries' impressions of the Scheme**

In her interviews with intermediaries, Henderson (2015) found that many intermediaries strongly believed in the utility of their role. They also commented, however, that they found the job to be difficult, time-consuming, and poorly remunerated.

A consistent challenge for the intermediaries was that lawyers did not follow the ground rules hearing recommendations. In 2014, 16 of 28 intermediaries surveyed said that advocates ‘sometimes’ abided by the ground rules; only two intermediaries said advocates ‘always’ abided by the ground rules (see also Cooper, 2011; Cooper, 2014). Henderson’s (2015) interviews with intermediaries also indicated that some judges and lawyers were reluctant to accept their recommendations, although a more collaborative attitude was developing. One strategy that some intermediaries had adopted was to request the judge to make directions at the ground rules hearing. This way, if inappropriate questioning styles were used at the trial, the intermediary could refer back to the outcome of the ground rules hearing (Henderson, 2015, p. 159). However, Plotnikoff and Woolfson’s (2007) early pathway finding was that many judges and lawyers would not intervene in seemingly inappropriate questioning when an intermediary was present. The presumption appeared to be that it was the intermediary’s job to identify, and react to, inappropriate questions (Henderson, 2015, p. 164; Plotnikoff & Woolfson, 2015, p. 207). This fails to take into account the narrow opportunity available to intermediaries to intervene in the trial process. This means that there needs to be some consensus between lawyers, judges and intermediaries about who bears the responsibility for responding to inappropriate questions.

There has been very limited empirical research on the impact of a witness intermediary. One study in England by Collins, Harker and Antonopoulos (2017) investigated the possibility that the presence of an intermediary might bias jurors against child witnesses; 100 participants watched a mock cross-examination of a child witness, either with or without an intermediary present. The child’s credibility and believability were rated more highly when the intermediary was present to assist them to testify, which is consistent with the likely improved communication capacities.

Conclusion – key questions regarding the use of witness intermediaries

Review of the experience of witness intermediaries in other jurisdictions, and particularly England and Wales, raises a number of questions for the operation of the NSW Pilot and its evaluation:

- Are Witness Intermediaries in the Pilot seen to be effective and intervening appropriately in questioning of child witnesses?
 - Do lawyers and judges feel that Witness Intermediaries have assisted them to communicate with the witness?
 - Do children/parents feel that Witness Intermediaries have assisted them/their child to communicate with the lawyer and judges?
- Are Witness Intermediaries fully and appropriately utilised at all relevant stages of the prosecution process?
- Do Witness Intermediaries and those who are involved with them feel that they have sufficient and appropriate training and professional support?

- Is there any evidence that Witness Intermediaries have had an impact on the outcome of cases?
 - Have Witness Intermediaries facilitated more cases proceeding to trial?
 - Have Witness Intermediaries impacted on guilty pleas?
 - Have Witness Intermediaries resulted in more guilty verdicts and convictions?
- Is there any evidence that Witness Intermediaries have had any impact on the accused's right to a fair trial?

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10.2 Appendix 2: The UK Witness Intermediary Scheme

As noted above, the NSW approach witness intermediaries is modelled on the UK system. Use of intermediaries in the UK is now well established.¹⁰⁵ Intermediaries are provided for under Section 29 of the *Youth Justice and Criminal Evidence Act 1999*. Registered intermediaries have been in use since the pilot of the ‘Witness Intermediary Scheme’ (WIS) commenced in 2004.¹⁰⁶ They have been available in all 43 police forces and Crown Prosecution Service (CPS) areas in England and Wales since September 2008.¹⁰⁷

In the UK, intermediaries are referred to in the legislation as a statutory ‘special measure’ which can be used in cases of vulnerable and/or intimidated witnesses.¹⁰⁸ Their purpose is to facilitate complete, coherent and accurate communication.¹⁰⁹ This encompasses communication at meetings between witnesses and the police and/or the Crown Prosecution Service, in the *Achieving Best Evidence* (ABE) interview, during any identification procedures and during the trial process. This also includes communication at meetings between the defence solicitor and a defence witness.¹¹⁰

Intermediaries in the UK play a fundamental role in relaying questions and/or answers between a witness and any persons asking such questions in order to facilitate communication and understanding on the part of the witness.¹¹¹ They assess and report (orally or in writing) to the court the needs of the vulnerable person, and set out steps to be taken.¹¹² During a hearing, intermediaries prevent miscommunication from arising, and ‘actively intervene when miscommunication may or is likely to have occurred or to be occurring’.¹¹³ However, in performing their role, intermediaries in the UK cannot interfere with the process of cross-examination and as is the case in, NSW, they are not ‘supporters’ of the witness. Rather, they are neutral and independent officers of the court, responsible only to the court.¹¹⁴

The explanatory note to the UK legislation highlights that, without this special measure, evidence given by witnesses can range from being unintelligible to being intelligible but of a worse quality than it could otherwise be.¹¹⁵ Quality, in this regard, is intended to mean more than intelligibility. Rather, “it encompasses completeness, accuracy and being able to address the questions put and give answers which can be understood (both as separate answers and when taken together as a complete statement of the witness’s evidence)”.¹¹⁶

Intermediaries in the UK are matched through the Witness Intermediary Matching Service, managed by the National Crime Agency on behalf of the Ministry of Justice.¹¹⁷ Intermediaries are generally specialists, either through training or unique knowledge of the witness. Alternatively, they may have skills to overcome specific communication problems, such as those caused by deafness.¹¹⁸ The UK approach recognises both registered and unregistered intermediaries. A ‘Registered Intermediary’ (RI) is someone recruited, trained and accredited by the Ministry of Justice. They are security-cleared and must comply with a code of practice and professional ethics overseen by the Ministry of Justice.¹¹⁹ Unregistered intermediaries are not required to abide by these codes and standards. Typically, only registered intermediaries can be appointed to carry out a Section 29 function. However, subject to the court’s agreement, a non-registered intermediary can be appointed to assist a witness.¹²⁰

For RIs to be used in the UK, parties to the proceedings must make application to the court. Alternatively, the court can raise the question on its own motion.¹²¹ When an application is raised, two criteria must be satisfied:

i. The witness must be deemed vulnerable

This is a decision for the court. Witnesses are eligible if they are a “child witness”¹²² – a witness under the age of 17 at the time of the hearing.¹²³ Alternatively, the court may consider whether the quality of evidence given by the witness would likely be diminished because of:

- A mental disorder within the meaning of the *Mental Health Act 1983*;¹²⁴
- Significant impairment of intelligence and social functioning;¹²⁵
- Physical disability or disorder.¹²⁶

There is a presumption of intermediary assessment for all children aged 11 and under.¹²⁷

ii. Evidence likely to be diminished

The court can also determine eligibility for assistance if the court is satisfied that the quality of the evidence provided by the witness will likely be affected by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.¹²⁸ In making this determination, the court can have regard to the nature of the alleged circumstances of the offence,¹²⁹ the age of the witness,¹³⁰ social and cultural background and ethnic origins,¹³¹ domestic and employment circumstances,¹³² and any religious beliefs or political opinions of the witness.¹³³ The court can also consider behaviour towards the witness by the accused,¹³⁴ accused’s family members,¹³⁵ or other persons likely to be an accused in the proceedings.¹³⁶ However, if the witness in respect of a sexual offence is a witness in proceedings for that offence, the witness is automatically eligible pursuant to section 17 unless the witness indicates otherwise.¹³⁷

Under section 30 of the *Youth Justice and Criminal Evidence Act 1999*, communication aids can be required for use at trial. The role of the RI in this regard is to assist with the selection or creation of aids.¹³⁸ The use of communication aids in the UK with child complainants of sexual assault is well developed and offers NSW a rich resource in development of its practices and tools to facilitate communication with child witnesses.

As is the case in NSW, RIs in the UK can be called upon during police interviews. In these circumstances, the intermediary and interviewing officer must plan the interview together. The RI facilitates communication between the interviewee and witness but the RI is not a joint-interviewer. As discussed in Chapter 5, the UK experience of police and intermediaries collaborating in planning the police interview offers NSW some important insights to thinking through the witness intermediary and police working relationship. Approaches for facilitating police-intermediaries collaboration in the UK have developed over time and through sustained practice; police guidance, *Achieving Best Evidence*, in the UK is very detailed on the expectation of planning the interview and on planning with the intermediary.¹³⁹ These lessons from the UK experience may provide guidance on how to strengthen the collaboration between police and witness intermediaries in NSW.

Ground-rules hearings in the UK model

In the UK, the court is required to invite representations to be made by the parties to the proceedings and by any intermediary.¹⁴⁰ Discussion of ground rules is required in all intermediary trials between the judge or magistrates, advocates and intermediary before the witness gives evidence.¹⁴¹ As iterated by the Rt Hon The Lord Judge:

*“the objective [of the ground-rules hearing] is to sort out what the problems are, identify them, and then, subject to the judge’s ruling, how they must be resolved and the trial conducted.”*¹⁴²

During such hearings, the intermediary is required to be present but does not have to take an oath.¹⁴³ The judge can require advocates to consult the intermediary regarding the wording of questions and, if there is any disagreement over the proposed wording, it is for the judge to decide what is appropriate. Moreover, the judge will interrupt questioning if he or she thinks it inappropriate, even if the intermediary does not intervene.¹⁴⁴ There have been cases of courts using the recommendations of an intermediary’s written report to create a framework for the appropriate questioning of witnesses, which included that cross-examination questions be provided ‘to all parties’ and the intermediary ahead of the trial.¹⁴⁵

Such practices highlight how the use of witness intermediaries may influence broader changes in trial practice and perhaps reframe fundamental notions of what constitutes appropriate, fair or best practice questioning of child witnesses, including in cross-examination within an adversarial paradigm of criminal justice and trial advocacy. This has implications for changes in trial culture and in deeply entrenched advocacy practices.

Quality Assurance

The Intermediaries Registration Board (IRB) oversees the Witness Intermediary Scheme (WIS) in the UK, setting the strategic direction, managing policy and generally operating the WIS.¹⁴⁶ The Quality Assurance Board (QAB) reviews and regulates professional standards. The QAB can refer matters in case of complaints to the IRB as appropriate.¹⁴⁷ These UK bodies and governance structures offer NSW some models for thinking through the professional recognition, longer-term regulation and professional development of witness intermediaries, should the Pilot be rolled-out more broadly. Quality assurance measures in NSW have been implemented but are still relatively embryonic given the Scheme is still in its early days. A Witness Intermediary Registration Panel comprising nominated representatives of the Australian Psychological Society, Speech Pathology Australia, Occupational Therapy Australia and Australian Association of Social Workers assisted with the recruitment and selection of witness intermediaries in NSW and also meets regularly to advise on issues of complaints and professional compliance, training, registration and related issues.

10.3 Appendix 3: The Victorian Intermediaries Pilot Program

The stated purpose of the Victorian Program is to “empower vulnerable witnesses to give their best evidence, ensuring that communication with the witness is as complete, coherent, and accurate as possible, helping to bring offenders to justice”¹⁴⁸ and to uphold Victoria’s obligations pursuant to their *Charter of Human Rights and Responsibilities*. Section 8(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) recognises equality before the law. Specifically, it ensures that every person is afforded “equal protection of the law without discrimination and has the right to equal and effective protection against discrimination” including discrimination based on age and physical features.¹⁴⁹ The Victorian Act is designed “to protect children and persons with a cognitive impairment during cross-examination,” recognise the vulnerability of children and persons with a cognitive impairment, as well as, provide a mechanism by which their evidence will be “as valuable as the evidence of those who are not as vulnerable.”¹⁵⁰ Moreover, the Victorian Act also upholds Section 15 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which provides for freedom of expression, including the right to impart information and ideas of all kinds. The key purpose of intermediaries in the Victorian Program is to assist those vulnerable persons who otherwise would have difficulties in understanding or imparting information to express themselves. Furthermore, the Victorian Act “promotes the right to a fair hearing ... by ensur[ing] that the most reliable evidence is adduced from vulnerable witnesses, which in turn will result in a fairer hearing.”¹⁵¹ A child’s right to protection is upheld by the program pursuant to Sections 10(b), 17(2), 23(3) and 25(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) by providing child witnesses with the opportunity to be assisted by an intermediary in court in order to facilitate more effective communication and reduce trauma. The rights recognised in criminal proceedings pursuant to Section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are engaged in examination of witnesses, however, not in a way that would unfairly infringe the rights of an accused.

The Victorian Program like the NSW Pilot operates at any stage of proceedings (including appeal or rehearing).¹⁵² However, in contradistinction to the NSW Pilot, the Victorian Pilot also extends to the accused in a criminal proceeding, as well as, “any witness (including a complainant) if, at the time at which the proceeding commences, the witness is a person under the age of 18 years or is a person with a cognitive impairment”.¹⁵³ Accordingly, as discussed further below, the Victorian and NSW Schemes both have elements of the UK Witness Intermediary Scheme but neither is identical in scope or structure to the UK Model. All three schemes overlap with some common elements but there are various differences between them.

Appointment of witness intermediaries

Witness intermediaries in Victoria, as in NSW, are selected via the Department of Justice and Regulation and a court may appoint an intermediary from the “panel of intermediaries”.¹⁵⁴ As in NSW, the “panel of intermediaries must be comprised of persons who have tertiary qualification in psychology, social work, speech pathology, teaching or occupational therapy or has other prescribed qualifications, training, experience or skills”¹⁵⁵ and it is incumbent on the Secretary to the Department of Justice and Regulation to remove a person if the Secretary is no longer satisfied

that the person is a suitable person to be appointed as an intermediary.¹⁵⁶ The stated functions of the witness intermediaries in Victoria are: “(a) to communicate or explain to a witness for whom an intermediary is appointed, questions put to the witness to the extent necessary to enable them to be understood by the witness; and (b) to communicate or explain to a person asking questions of a witness for whom an intermediary is appointed, the answers given by the witness in reply to the extent necessary to enable them to be understood by the person”.¹⁵⁷

Consistent with the position in NSW, witness intermediaries in Victoria must act impartially when assisting communication with a witness,¹⁵⁸ and when an intermediary has been appointed, the evidence of the witness must be given in the presence of the intermediary.¹⁵⁹

Ground rules hearings

A significant difference between the NSW legislation and the Victorian legislation is that in Victoria the legislation explicitly provides for ground rules hearings - a pre-trial process that involves all parties and the judge to address a number of issues, including the manner and content of cross-examination. The ground rules hearing is required to be held in any matter in which an intermediary has been appointed, and must take place before the commencement of any hearing at which a witness is to give evidence.¹⁶⁰ The prosecution, defence counsel (or the accused if the accused is unrepresented) and the intermediary appointed for a witness must attend the ground rules hearing. Section 389E(1) of the *Criminal Procedure Act 2009* (Vic) allows the court to "make or vary any direction for the fair and efficient conduct of the proceeding" and Section 389E(2) provides a non-exhaustive list of the directions the court may make in a ground rules hearing:

- (a) a direction about the manner of questioning a witness;
- (b) a direction about the duration of questioning a witness;
- (c) a direction about the questions that may or may not be put to a witness;
- (d) if there is more than one accused, a direction about the allocation among the accused of the topics about which a witness may be asked;
- (e) a direction about the use of models, plans, body maps or similar aids to help communicate a question or an answer;
- (f) a direction that if a party intends to lead evidence that contradicts or challenges the evidence of a witness or that otherwise discredits a witness, the party is not obliged to put that evidence in its entirety to the witness in cross-examination.

The operation of intermediaries and ground rules hearings are intended to work in tandem with other pre-existing relevant legislation. Specifically, Section 368 of the *Criminal Procedure Act 2009* (Vic) deals with the admissibility of recorded evidence-in-chief which is admissible as evidence in a summary hearing, special hearing or trial, as if its contents were the direct testimony of the witness.

Overall, the selection, roles and function of witness intermediaries in NSW are equivalent to those in Victoria. However, The NSW and Victorian Pilots differ in two ways. First, the Victorian

legislation¹⁶¹ requires that a witness be available for cross-examination and re-examination if recorded evidence is tendered as examination-in-chief, whereas the NSW Pilot enables child witnesses to tender their cross-examination and re-examination evidence as a pre-recording. Second, provisions relating to the ground rules hearing are legislated in Victoria. They are not currently included in the NSW legislation but they are court-ordered.

10.4 Appendix 4: Outcome evaluation measures requested in tender

Quantitative measures

- Reduction in hearing time; *
- Reduction in attrition rates between the time of complaint and prosecution as well impact on attrition rates during the trial process;
- Increase in guilty pleas;
- Reduction in time taken to hear child victims' evidence and reduction in cross-examination times; *
- Increase in cases (involving younger children, children with an intellectual disability or communication disorder and Aboriginal and Torres Strait Islander child witnesses) proceeding to Court; *
- Increase in conviction after trial;
- Reduction of time between complaint to police and giving evidence;
- Participation of Aboriginal and Torres Strait Islander witnesses – police interviews only. *

Qualitative measures

- Improved experience of the justice process for the child witness and their family; *
- Reduction in traumatisation of child witnesses; *
- Best quality evidence presented by child witness (questions and responses comprehended by the child, Police and the Court);
- Impact of the Pilot on defendants, including their rights to procedural fairness and a fair trial;
- Impact on Aboriginal and Torres Strait Islander child witnesses,* including consideration of the availability and use of Indigenous and non-Indigenous Children's Champions (Witness Intermediaries) in these proceedings;
- Potential impact of the introduction of Witness Intermediaries on stakeholders.

* **Limited or no available data**

10.5 Appendix 5: Pilot evaluation participants and procedures

Parents

All parents whose children have been part of the Pilot – either by being interviewed by police with a witness intermediary and/or by having their evidence pre-recorded for trial over the past 6–12 months were included, with the exception of parents who are the alleged offenders in the matter, and where advice from Police or the DPP indicated concerns for the child’s wellbeing. At the time a witness intermediary was appointed, parents were asked for their consent and given information about the evaluation of the Pilot (see Appendix 6). An information pack with postcards, participant information sheets and contact details for the researchers was mailed to parents by Victims Services.

We aimed to interview 20 parents, either by phone or in-person. The questions in the online survey and the interview schedule focused on their child’s experience of talking with police, with a witness intermediary, and of giving evidence in court. Unfortunately, we had a very low response rate from parents, with 19 parents providing feedback via the online survey and an additional 5 by telephone.

Children

For children aged 8 and older for whom there were no police or Witness Assistance Service concerns, postcards were included for children in the mail-out by Victims Services where the child’s involvement in the pilot occurred within the last 6 to 12 months. Parents and children’s informed consent as outlined in the ethics approval were required for children’s participation in an interview or via the online survey or by providing responses on the enclosed child’s postcard with reply paid envelope. The online RedCap survey and interview schedule included a series of screens and sliding scales which asked:

- the people children talked with about what happened to them – the police, the witness intermediary and the lawyers
- the recording of their police interview
- whether they gave evidence at court that was recorded for the trial at a later date, and how they felt about that
- the way they were treated at court including the way the questions were asked, and
- the perceived fairness of the outcome, the judge, and the lawyers.

There were no questions relating to the reasons children were talking with Police or going to court.

Witness Intermediaries

All witness intermediaries who have participated in a police interview with a child or conducted an assessment for court or assisted the child’s evidence in court since the beginning of the pilot

were included. Victim Services contacted witness intermediaries and provided the relevant material and invited them to provide feedback about their experiences to the evaluation team via an online survey, a telephone interview, or a group discussion.

Several focus groups were conducted with witness intermediaries, one in Sydney and three in Newcastle, to allow some in-depth discussion of the practices and the challenges involved in being a witness intermediary in these matters.

Police, Prosecution and Defence Lawyers and non-legal Professionals

Police, prosecution and defence lawyers and nonlegal professionals who have been involved in the Pilot were invited to participate via their representative on the Implementation Monitoring Group (IMG). The email invitations were extended to senior police, senior ODPP lawyers, the Bar Association, Public Defenders, the Law Society, NSW Legal Aid, NSW Health, and FACS.

Participants were invited to complete the online survey with a specific link tailored for their group, by means of a discussion group or individual interview for:

- Police
- Lawyers including prosecutors, defence lawyers and SACPS lawyers
- Witness Assistance Service
- NSW Health
- FACS

Interviews with Judges

The Chief Judge, and two specialist judges who have conducted the pre-recorded hearings in both Sydney and Newcastle were interviewed at the end of the Pilot so that the questions could be informed by the feedback provided by others involved in the Pilot. Several judges who have heard cases in which a witness intermediary was involved and in which the pre-recorded hearings and the police investigative interview were played at trial, were also interviewed.

10.6 Appendix 6: NSW Department of Justice Information Sheet

Information sheet



Child Sexual Offences Evidence Pilot ODPP and Witness Assistance Service

What is the Child Sexual Offence Evidence Pilot?

The Child Sexual Offence Evidence Pilot has been developed to assist child victims through the trial process in sexual offence matters. The NSW Government is committed to the implementation of this reform, with the aim of reducing traumatisation and lengthy court processes for child victims.

The pilot includes the introduction of Witness Intermediaries (Children's Champions) and an expansion in the use of pre-recorded evidence.

The pilot commenced on 31 March 2016 in two locations – Newcastle District Court and the Sydney District Court (in the Downing Centre).

What is pre-recording of evidence?

Part of the pilot is the expansion of the use of pre-recording of evidence. Previously, only the initial interview conducted by the police was allowed to be pre-recorded and a child victim was then required to attend court to provide further evidence. Legislation now allows for all the evidence of a child victim to be pre-recorded before the trial date.

This separate pre-recording takes place before a judge and lawyers, not a jury, and the child victim can give their evidence from outside the courtroom, from a special remote witness room, so they do not have to be in the same room as the accused person.

What is the role of the Witness Intermediary?

The Witness Intermediary (Children's Champion) is an accredited professional with specialist training who will assess the child victim's communication needs and will tell the judge, the ODPP and the Defence the best ways to communicate with the child victim when they are giving evidence at the pre-recorded hearing.

The Witness Intermediary is not a support person. They are independent and impartial participants in the process. Victims Services, within the Department of Justice, are responsible for the Witness Intermediary scheme.

How will this assist the child victim?

The court process can be extremely lengthy, highly stressful and traumatic for child victims who have to give evidence in sexual offence proceedings. It is anticipated that the expansion of the use of pre-recorded evidence and the introduction of Witness Intermediaries will reduce the stress and trauma experienced by these children, who will no longer have to wait for the trial date to give their evidence and who will be given more certainty about when they give evidence, along with a possible reduction in the time they need to spend at court. Child victims will also be assisted to communicate the best they can.

How will parents/guardians/carers be involved?

Parents, guardians and carers will be part of the process of engaging a Witness Intermediary by providing consent, by liaising with Victims Services, who will arrange for the child victim to be assessed by a Witness Intermediary, and by bringing the child victim to the assessment interview.

10.7 Appendix 7: Additional figures

Figures 5.7a and b show the proportion of matters by the timing of the plea for the different courts and for the pre-and post-Pilot periods for matters in which the most serious offence was sexual assault; this includes the serious but infrequently charged offence under section 66EA(1), persistent sexual abuse of a child and indecent assault.¹⁶² While there is some variation between the Pilot and non-Pilot courts and in the Pilot courts before and after the Pilot began and by the most serious offence, these differences are not significant. The biggest difference is the drop in the proportion of early pleas for indecent assault and the increase in late pleas which might reflect a shift after the pre-recorded hearing; but the opposite trend applies when the most serious offence is sexual assault.

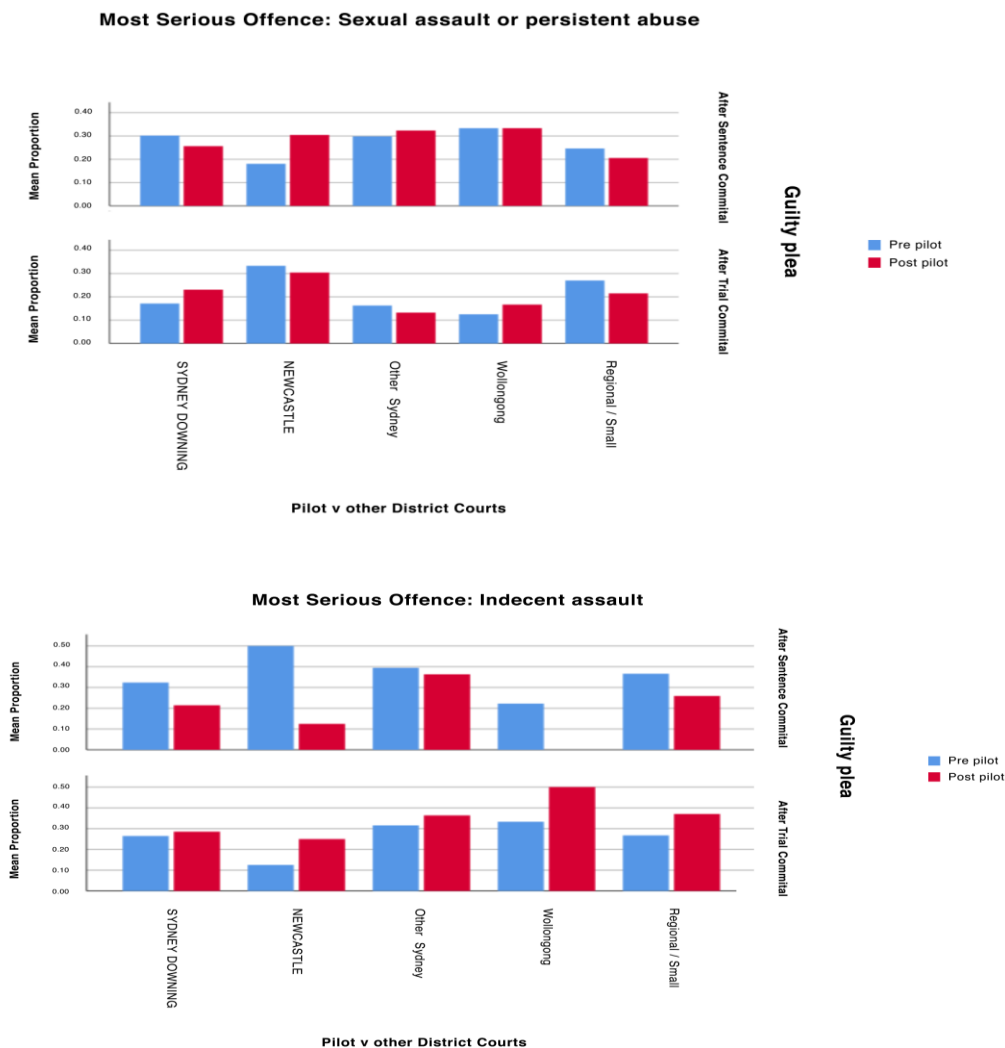


Figure 5.7 a and b. Proportion of finalised appearances with G plea by timing and most serious offence: (a) sexual assault and persistent abuse of a child and (b) indecent assault

Time to Finalisation

Figure 5.8 shows the average time in weeks from committal to finalisation for the Pilot and non-Pilot courts in relation to the timing of the Pilot for the most serious offence. It indicates a significant increase from the pre- to the post-Pilot period in all courts with the exception of Newcastle District Court and Wollongong (though the number of finalised matters in Wollongong was very small, only 8). It is not clear whether this is related to the Pilot.

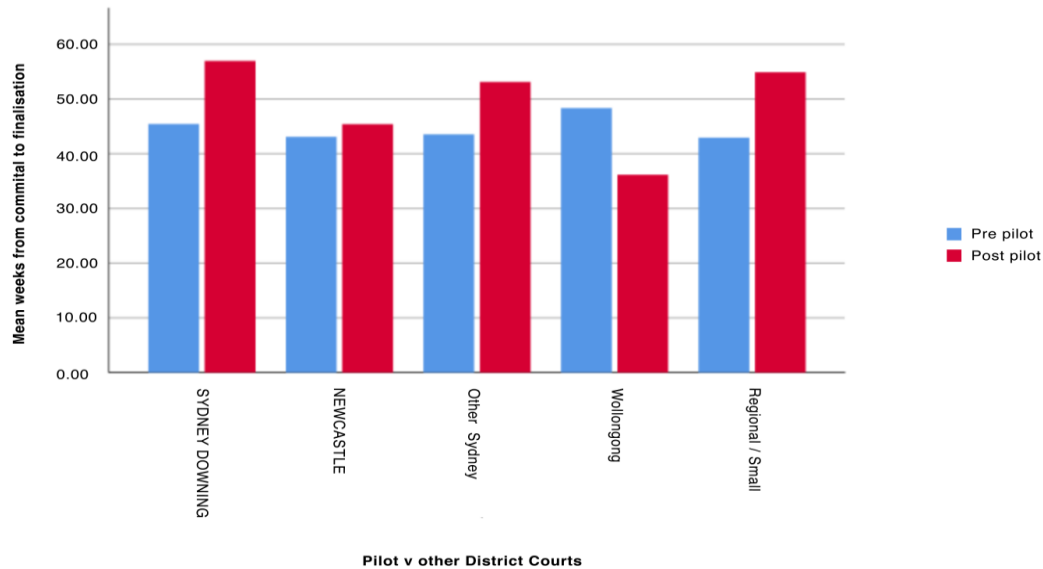


Figure 5.8 Mean number of weeks from committal to finalisation for finalised appearances where most serious charge was sexual assault/persistent sexual abuse of child

10.8 Appendix 8: Stakeholder Quotes from Interviews and Surveys

The overall impact of the Pilot

The purpose of the Pilot is to reduce stress and increase the quality of children's evidence. The purpose was not to obtain more guilty pleas or save reams of court time and these by-products, although welcome if present, should not be allowed to overshadow the real gains in terms of child health and welfare, restored faith in the justice system, and a more accommodating and fairer justice system. [Senior ODPP lawyer]

The value of the witness intermediary for court purposes just can't be overstated. We've certainly seen that with matters at Newcastle where we've had a pre-recorded assessment conducted and it has been prepared by the witness intermediary. Just the process of getting the ground rules hearing leading up to the prerecording evidence, and the impact that has had on getting the matters before the court in so much more a timely fashion and the ability for there to be some rules as to how the complainants can be questioned at the court by both the prosecution and the defence. I still have a number of offices in my zone where we still have children, having extensive delays getting to court, there being no witness intermediary or other processes from the child sexual evidence defence evidence pilot in place, meaning that there could be 2-4 years delay and the child is subjected to further delays and other tactics at court and all the implications of lengthy cross examinations, for days, with all the aspects of tag questions, multiple questions, which are still very much a common practice in xxx courts by some defence barristers. [Senior Police]

A. WITNESS INTERMEDIARIES

The nature of the witness intermediary role

'And I think the other issue too is, when we're told: Are you available for a court matter that will go for two days, or three days?' and you turn up, and often... I've heard this is more of a pattern, that the accused pleads guilty, we then go home, and then we've cancelled our clients, and moved things around for those following two days; we don't get any pay at all.' [Newcastle witness intermediary]

Response to introduction and use of witness intermediaries

'[The witness intermediary] is more crucial at court proceedings and appears to be where they better support the child. [For] initial interviews, I have not noticed much difference with use of WIP.' [Police]

'Some [witness intermediaries] really want to know what the allegations / report is before they meet the child ... Some don't understand that they aren't supposed to know. I've had a child not be exact or sure of a specific date of the offence. An intermediary gave her a calendar and she picked dates that it happened. The child was wrong about the dates and during the court matter the prosecution was served with an alibi notice, so the offence could not have happened on this day. This makes the child appear unreliable. As police, we do not have to restrict our charges to certain dates... [I]t does not matter if a child does not pick a certain date. If witness intermediaries could [have it] explained how a general police investigation is run, as well as how the court proceedings are run, this could help them understand our roles as investigators.' [Police]

Witness intermediary assessments

'The whole process of a JIRT interview is extremely rushed. Like to the point of getting the referral, to the phone call, showing up, the assessment, the interview. It's sort of – it is a rush, like you know honestly, the first little five minutes of assessment is really – we are just finding critical points to find out how their language skills are.' [Newcastle witness intermediary]

'Some witness intermediaries spend too long with their assessment, which results in loss of concentration at the end of the interview. Some witness intermediaries cover topics that MUST be included during the recording of the interview (e.g. understanding of questions), which is doubling up the time used away from the interview itself.' [Police]

'When an intermediary is taking too long with the child before the investigation or it is clear the intermediary hasn't made a connection, it is difficult to tell the intermediary that the interview needs to start before the child gets too tired of answering questions.' [Police]

'The service that witness intermediaries provide does not negate the need for adequate information sharing between the JIRT partner agencies, and other relevant service providers, about the individual child and their disability. For example, services that have previously worked closely with the child may be able to suggest effective strategies for engaging them, as well as provide other information useful to the investigation. To this end, respondents to the JIRT workforce survey emphasise the importance of a consultative, planned approach by the JIRT program – particularly in relation to the interview process. The Ombudsman's report suggests that the local planning and response procedures be amended to include specific factors and actions to be considered when responding to reports that involve children and young people with disability.' (p. 254).

Training support and professional development

'The witness intermediary in my matter was too obviously on the child's side. She was making facial expressions of disapproval and disbelief as the cross-examination progressed. The judge was asked to tell her to keep her expression neutral. So I think there needs to be training that their job is only to assist the child to understand the question and, therefore, give their best evidence. It is not to defend the child against the cross-examiner. It was evident that the witness intermediary had no or very little experience of court or cross-examination and was emotionally affected by what she saw. The witness intermediaries should have prior experience of court or should be trained so they understand what cross-examination is like.'
[Prosecuting instructing solicitor]

'[The witness intermediary] had little to no experience of court or cross-examination and felt that she was defending the child against the cross-examiner and even the prosecution.'
[Prosecuting solicitor]

'[The most challenging thing about working with witness intermediaries is] the interventions of the witness intermediaries, especially when they don't adhere to their own ground rules or when they do not show any discretion in deciding when an intervention is necessary.'
[Defence lawyer]

'I had an incident the other day with one of the police officers and I wasn't given as much information – even their train of thought with the interview and they were thinking – they'd

received some information that the child was actually not telling the truth. So, during the interview I thought the child was looking a bit anxious and they were sort of going around in circles a little bit so I suggested doing some drawing of the different places that they were discussing and the police officer said – “No, not now” and sort of left it. I thought, “okay I won’t pursue it”. The next time I had an interview it was with the same officer and I said – ‘why was it that you didn’t want to do that?’ and they said – “actually I was trying to see if she would contradict what she was saying”. Had I known that, I wouldn’t have stepped in.’

‘That’s why we are always really timid in those JIRT interviews, we are just not sure. We did have a Professional Development evening probably six months ago with Judge Ellis and he said “Just jump in, say whatever, they’ll just cut you out of the recording or just stop the interview and go out”. That was comforting to know but it’s also going – “Oh geez, that’s a big call to make especially if its flowing, you just don’t know.”’

‘Sometimes I feel that the question could be asked in a different way or that the Detective could approach the questioning in a different way; however, it is difficult to intervene as the Detectives know which direction they are going in with the questioning and my suggestion may not be beneficial in that circumstance. Very rarely the Detective was not open to any intervention or suggestion so it made it difficult to be an active participant. We have to be very careful with when and how we intervene in case the matter goes to court and the Detectives are always very conscious of ensuring that the Defence does not find cause to bring up issues with the case. For this reason, it can sometimes be difficult to intervene even if we can see that an intervention is needed or that we may think may help. Knowing a bit about the case and the direction the Detective is planning to go in with their line of questioning would help for in the pre-interview assessment and in the interview’.

‘[We should] have witness intermediaries come to Legal Aid / DPP to do a workshop about communicating with children, younger and older, and explain their qualifications and role in court/at police station.’ [23] [Defence lawyer]

‘[There should be] more training together, so we both have a better understanding of each other’s roles & responsibilities.’ [Police]

‘You know we could all work very much collaboratively, I definitely think the police are working more collaboratively. You know, the Defence Barristers and the Crown, we are all working together.’ [Newcastle witness intermediary]

‘I’ve found most of what I’ve learnt hasn’t come from the training, it’s come from talking with the other Intermediaries and finding out what works for them and just sort of bouncing different situations.’ [Newcastle witness intermediary]

‘I think [peer review] would be good. I know they’ve discussed setting up a focus group now for the reports and a focus group for the assessments. So I think that’s going to come up where we can, I guess in that focus group.’ [Sydney witness intermediary]

‘It would be good if there is an info booklet or similar about WI’s (similar to the Victim’s Services VIS or Sentencing booklets) that could be given to the complainant’s or defence. I am not sure if there is one, but if there is I haven’t seen it.’ [Prosecuting instructing solicitor]

‘The problem that we have is to really make it clear that they are independent of [Police], and I think that’s one of the things that has concerned [Police] with other government agents, saying

'well we work with [Police] as part of this child protection regime' and we have people who are qualified to be witness intermediaries. I am very cautious and concerned that there is no suggestion that the witness intermediaries are seen as [not being] impartial. What we have actually done though, we've now looked at introducing a component of the witness intermediaries in [the police] child interviewing course, so police undertaking the course will understand the roles and responsibility of witness intermediaries....What becomes problematic is if we keep telling witness intermediaries about what police are interviewing, what effects of offences are, they may get distracted from their role and consider whether they need to become more investigatively involved and we don't want that'.

'Witness intermediaries are great when used properly and they remember the reason they are there. I have had to remind them on numerous occasions to stop interrupting. They need to remember it is not their interview, rather a police interview, they are there solely to assist if there is an issue with communication. In theory it is a great idea, however the witness intermediaries can at times be difficult to manage, in an already difficult situation. At the present, I would rather complete an interview without a witness intermediary.' [Police]

The matching process

'The witness intermediary program is great; however, they are only needed on some occasions, as in when a child has a mental health or intellectual problem, not with every interview, especially with adolescents.' [Police]

Needs to be an acceptance via NSW Police to use Health and FACS for expertise in engaging children. [JIRT Health]

It would be useful to have more information for JIRT Health about utilising child intermediaries, and also the ability to liaise with all parties in the process, e.g. NSW Police CAS, JIRT Health, SAS, etc, to ensure that there is a cohesive and streamlined response. [JIRT Health]

This process has been led entirely by police who often have limited training in child development and vulnerabilities. The expertise and knowledge of FaCS staff who have tertiary qualifications in areas such as Social Work and Psychology has rarely been sought. Generally, referrals are made by police prior to the agencies briefing where this information could be freely exchanged and discussed. [FACS Manager]

The use of WI's at interview for children and young people without evident/diagnosed communication difficulties is problematic. Targeted and carefully matched WIs for interviews with children with cognitive and other communication difficulties would definitely assist in eliciting better information for child protection assessments and the criminal process. [FACS Manager]

'In reality, the older a child is, unless they have some cognitive impairment or a language difficulty, or a learning difficulty, or something along those lines, in reality, probably the value of the witness intermediary is questionable.' [Legal Aid defence lawyer]

Role of witness intermediary at police investigative interview

'Any process that further enables a child / disabled child to communicate accurately has to be construed as being more fair to the court process.' [Police]

'The WI is totally independent to the investigation. They are there to support the victim/child. These victims are children that are being exposed to an adult environment at 'court' and having to deal with 'adult' situations – i.e. interview and so forth.' [Police]

'Having the intermediary there evens things up for the vulnerable.' [Police]

'I think the police are receptive and open and changing. They are a very structured organisation and to allow someone like Speechies in that are a lot more fluid and flexible and that kind of thing, they've really adapted quite well I think. But I think...they see us in the court, how we work and it really benefits them for sure as well as the kids. I'm really glad to be a part of it and involved in it.'

Role of witness intermediary at court

'To have an intermediary is of such great benefit as the questions that are asked and accepted by the court in the pre-recordings are such that the child can understand them properly. Without a WI questions would be asked of the victim that the victim would more than likely not understand and answer incorrectly. This is unfair for everyone as they are potentially not getting the correct answer to the question asked. Court is not an environment for 'game playing' especially where children are involved. So the more assistance the child victim can get the better.' [Police]

It has taken a lot of pressure off my role as court support person. I was not able to speak up for the client in my role, and this was always very frustrating. [Sexual assault service worker]

Parents and children's views

'Now honestly, it was also such a difficult time that things tended to blur a little bit, and it was fairly overwhelming for all of us. A couple of other people spoke to us. And then what happened was that this other woman, I think the one that you're having a pilot about... [Interviewer: The witness intermediary] Yes. She also came and introduced herself. ...

And then they took our daughter into a room where she had this interview while we waited outside. From memory, there were at least four people, at minimum four, if not more in the room with her.'

This woman's adolescent daughter remembered the witness intermediary as that "nice lady" She was there to support me in case I was crying. She had coloured markers".

Perceived fairness of witness intermediary at court

'One of the concerns we had, and these are mainly hypothetical given I've only had one – and she performed entirely appropriately, I thought, throughout the trial – one of the concerns was the way in which these intermediaries assist a young person to give evidence. The potential for assisting the lawyers to understand the child's evidence, and the jury to understand the child's evidence, could be a slippery slope to assisting the child to give compelling evidence, and actually influencing the actual content and quality of the evidence itself.'

Perceived impact on the child complainants' evidence

'I believe that the best thing about witness intermediaries is the confidence they provide to children during court proceedings. I believe they are an important part of court proceedings and stop the child from being attacked by defence solicitors.' [Police]

'The questions to the children (by prosecution and defence) are more directed and age appropriate. This therefore helps the child give better evidence. Having a witness intermediary also focuses the proceedings, and in my experience, requires defence to be more organized and prepared for cross examination. The child also gains support from having someone they have met previously in the court room 'looking out' for them.' [Prosecuting instructing solicitor]

'Having the intermediary there evens things up ... less tricks played by defence counsel. Less intimidation of the witness. Less badgering of the witness. Questions framed appropriately and not in a way juts to trick/badger/intimidate the witness into making a mistake.' [Police]

'The majority realise that it will take much longer if they do not adapt their questions. Some agree with the philosophy, some don't but most appreciate it looks bad to be asking questions that a child may not understand.' [Crown Prosecutor]

'Lawyers usually adhere to the suggestions of the intermediary, mostly because the Judge requires such adherence.' [Defence lawyer]

'The judge is likely to be more interventionist.' [Defence lawyer]

'The lawyers have been prevented from traditional cross-examination. The witness intermediary, together with the judge, will not allow this to occur.' [Defence lawyer]

'If it results in a more accurate reflection of what the complainant's evidence is, then it cannot be unfair to the accused (in the legal sense). It prevents defence counsel from having an unfair advantage by manipulating the questions in such a way as to trick a child into answering them in an inaccurate manner. Surely a criminal justice system should facilitate the most accurate evidence available.' [Crown Prosecutor]

'An accused person is entitled to a fair trial. While the WI may assist in precluding the deterioration of the quality of the evidence, which may not be in the accused's interests ultimately, the provision of a fair trial does not confer on the accused an entitlement to systems that result in poor quality evidence.' [Prosecuting Instructing Solicitor]

'[It was] the most simple timeline you have ever seen, just a black line on a page and a year but a school year so the child was in year one and year two at the time. So he had two different coloured pieces of paper, year one and year two, broken down into terms and the child's birthday. The most effective thing. I've never seen anything like it because asking children about times is notoriously difficult...The timeline, her little face lit up. You could just see the difference in her expression. Yep, yep, yep, like she totally understood what we were talking about. It was amazing. So that's what I'm looking for from witness intermediaries because I think if they can give me, you know, I don't need to be told use simple language or use the language the child uses. I get that. Give me the tricks. Give me the stuff that's going to be helpful.' [Defence lawyer]

Witness Intermediary Assessments and Ground Rules Hearings

'I think it's important. You need the rules before you can begin the process.' [SACPS and defence lawyer]

'I think it is a good idea. I mean, giving the ground rules hearing some prominence is a step in the right direction in terms of everybody being able to ask questions in a way that makes sense.' [Legal Aid defence lawyer]

B. PRE-RECORDING HEARINGS

Perceived benefit in reducing the stress for child witnesses

'The child is able to give her evidence and be ready to go without the concern of bumping into other hostile witnesses etc. That this can be completed away from the circus affair of a trial that normally takes place, even though in some cases it still occurs with the pre-recording but I believe it is not as significant.' [Police]

'It's done and dusted for the victims. They can then move on with their lives.' [Police]

Perceived benefit in reducing the stress for child witnesses

'[The] benefits to the child are huge. They are able to get to court quickly and get their evidence finished and move on with their lives. The pre-records are also much less formal than a trial so the child is able to relax a little, feel more comfortable, resulting in better evidence. It also facilitates the smooth running of a trial whereby the child and jury don't have to wait around all day to get the evidence completed. We can simply play the recording which is prepared, edited and ready to go.' [Prosecuting instructing solicitor]

'Having a victim dealt with early so they can move on with their lives.' [Prosecuting instructing solicitor]

Perceived benefit in improving the quality of evidence

'[The] [c]hild's part is completed a lot earlier when they are likely to be able to recall.' [Police]

'[Pre-recording is] good for the young ones especially, who would have forgotten by the time the matter proceeds to trial.' [Police]

Parents' views

'She was very scared of the pre-recorded hearing and did not know what to expect, she thought she may be in trouble. The court issue itself distresses her. However, having the pre-recorded hearing was amazing as she has now had her day in court and she no longer needs to worry about it henceforth and she can move on. So the pre-recording hearing is a big positive.' [Parent of 13 year-old]

'The pre-recorded hearing made it much clearer for her to focus and not get stressed out.' [Parent of 8 year-old]

'She struggled to remember a lot of things but everything that she did remember, she felt supported to open up and discuss with the court. She felt that the Judge was very supportive and caring.' [Parent of 13 year-old]

Impact of pre-recordings on timing, delays and workload

'The opportunity for the parties to be clear on the issues prior to the trial - no element of surprise if the victim suddenly gives new or different evidence in a trial.' [Prosecuting Instructing solicitor]

'Focusing on the whole trial overall when you are just adducing evidence for one part of it – i.e. keeping all the evidence in mind, when you are going to call it months later.' [5] [Crown Prosecutor]

'There is certainly a doubling up of what unavoidably needs to be done to represent your client. It doesn't bother me having a long time before a trial. It's nice. But for a client, especially one who's in custody, it's really hard having a part of a trial, which it is, and then nothing for pretty much a year before the rest of their life is worked out.' [Legal Aid lawyer]

'... whenever you have disjointedness, it's unsatisfactory. If you've got continuity, you've got a flow, you've got a thought process in mind as to how to run the matter and what to do, when you do nothing in it for a year or 10 months and then pick it up again, then I think there is a danger for the accused person. [...] You then go a year later or whatever it is, 10 months later, you've got to recall how they presented themselves and so forth. We don't have unlimited or free access to those DVDs. We've got to then make arrangements to go and view them again at the DPP and so on and so forth, right? That's all part of the cost and disjointedness of the process, to remind ourselves what it was like, how did they answer that question and so on and so forth. ...There's always a danger in that sort of situation, that you may miss something that you might not have missed if it had been continuous.' [Defence lawyer]

'Although we have to take the time for the pre-record, it takes much less time at trial and it is much, much easier to run the trial. Also, much, much easier for the child witness.' [Prosecuting instructing solicitor]

In most cases the pre-recording has gone ahead, so usually you are able to manage your time better because you know when the witness/complainant is required and you can plan your time. This is better for the complainant because they know when they are required and do not have as much time waiting which is difficult for many children. [Witness Assistance Service officer]

Overall duration of the trial

'It largely just changes the order in which preparation takes place.' [Crown Prosecutor]

Relation of PRH to the balance of the trial

'The difficulty for us is, we've always got material after a trial starts, that's just the nature of being in a trial and the way that investigations are done, but, when it's a pre-record they just got so much time to do it, and it's difficult for us then, I mean we feel like, we feel like what we're doing is we have to disclose everything, we do that by way of our cross examination and then everyone just goes and fixes up the holes. So, it does feel like the prosecution has sort of been given a second shot at the case after we've had to effectively disclose our case by virtue of our cross examination.' [Defence lawyer]

*'I would never **not** do a pre-record for a child. ... but what's hard about that too, I can't talk to her. I can't. She's come out of it late last year... She's completely been told to shut down and not tell me anything. I'm not allowed to ask her anything. So how can you as a mother - I don't even really know what happened. So it's over for her but not for me. ... When I'm done later this year, do I really want to sit down with her and 'tell me what happened?' It's like opening a wound again, isn't it? So there's an element of unfairness there as well because invariably in these events one parent, if not both, are going to be the witnesses. Now we're her support system.'* [Parent]

'[I]t runs counter to human nature, doesn't it, to have a trial looming, and a child who is savvy enough to know that's coming up, and not to talk to your child about it.' [SACPS lawyer]

'Especially if the mother is a complaint witness whom the child is alleged to have said straight away or whenever, "Mummy or Daddy, this is what happened." Having a 12-month period where the child is living with that parent and expecting that the topic won't even be raised is just absurd.' [Legal Aid lawyer]

Technology related issues

'We still rely on discs which are prone to being damaged and the equipment can fail. [We] need to look at better systems whereby recordings can be preloaded into a server. Avoids having to carry around discs.' [Prosecuting instructing solicitor]

'There is frequently noise in the background or outside. Sometimes the child is obscured when demonstrating something that happened. Often the officer misunderstands the child and then the child adopts the officer's mistake when subsequently answering a question based on the mistaken premise. The officer can mix up right and left. Occasionally the battery runs out or the equipment malfunctions and no one notices. A child describes what they have drawn in a diagram by pointing and it is not shown to the camera so 18 months later the child and officer are being asked to remember what the child pointed out.' [Crown Prosecutor]

'The quality of the sound recording can be a problem.' [Defence lawyer]

'There is a wide spectrum of technical proficiency in the court officers and they don't get a lot of training. Some are great. Others don't know how to turn the screens on (not a joke). There has been a significant improvement in officers recording the evidence properly. When sexual assault evidence started being recorded there were often gaps or audio only, etc.' [Crown Prosecutor]

Pre-recording evidence and perceptions of fairness

'[The biggest challenge is] the short window from committal to trial to prepare the case adequately, especially with the delays occasioned by legal aid.' [Defence lawyer]

Interviewee 1: There was one where there was an application that was granted, and that was because, following the pre-recording the police conducted some further investigations and served further evidence. Interviewee 2: Of course, that's facilitated, too, by the delay. If the trial were to come on quickly after the pre-recorded hearing, there wouldn't be the opportunity to do that. Clearly, this scheme wasn't designed to allow that to occur. It's contrary to the actual objective of reducing trauma for a victim. [SACP lawyer]

'When the child watches their child interview with the DPP, to prepare for the pre-recorded evidence.... it has been the case where the child watches their interview and says... 'Oh that's not right, this is right', and wants to make a few changes to their evidence. Some are minor changes, others are quite major. I suggest this process takes place a few days before the child is due to give pre-recorded evidence, not on the morning of ... so as the child can provide another statement of that information of changes to the recording can be noted formally.... prior to the pre-recording takes place.' [Police]

Impact of pre-recording on outcomes in the case

'I don't think having the pre-record will make any difference as to pleas. For the reason that, if the clients want the complainant to give evidence, if they staunch, they staunch. It's not going to matter whether it's going to be in two months or whether it's going to be nine months. It's not going to make any difference.' [Defence lawyer]

'I don't know if that's because listening to the recording is a lot more laborious than having a live witness so it means that we sort of feel, it feels like we're taking more breaks. I don't know if we are. Feels like we are.' [Defence lawyer]

'...in my view is you've got to draw the line somewhere in terms of how many witnesses you pre-record, because at some point the trial simply becomes... You play the JIRT interview. You play the pre-recorded hearing. ... You play the pre-recorded evidence of the tendency witnesses. Then what, you pre-record some of the complaint witnesses. The jury sits there for days, watching videos. The well-known Sudoku trial where all the jury were playing Sudoku was caused by the sheer boredom of being forced to watch videos for days. There's zero engagement with the jury physically as human beings. The absence of any warm-bodied person involved in a trial, the fact that the quality of the videos that they're watching is not generally very good. Often, the screens are approximately a kilometre away in the jury rooms depending on how good the rooms are that they've got. There are real problems around doing trials that are just videotaped.' [Legal Aid lawyer]

10.9 Appendix 9: Suggested tips for witness intermediaries based on the UK experience and UK guidelines:

Advice from Joyce Plotnikoff and Richard Woolfson, to be included in their forthcoming new report.

Police – witness intermediary preparation and planning

Discussions between police and the witness intermediary at the planning stage should include:

- the arrangements for leading the interview,
- legal and confidentiality requirements, and
- the exact role that the intermediary will take and how police and the witness intermediary will communicate during the interview.

Preparation for and conducting a witness assessment

Preparation of the witness for the interview and a rapport stage prior to formal questioning during the interview is essential. This will allow the witness to have some familiarity with the personnel who will be involved in the interview, including the interviewer and intermediary.

Some witnesses with a learning disability communicate using a mixture of words and gestures (e.g. Makaton signs/symbols when used as an augmentative communication system).

General factors to be explored by the witness intermediary via the preliminary assessment prior to the police interview include:

- The child's preferred name/form of address;
- The child's ability and willingness to talk within a formal interview setting to a police officer, children's social care worker or other trained interviewer;
- An explanation to the child of the reason for an interview;
- The ground rules for the interview;
- The opportunity to practice answering open questions;
- The child's cognitive, social and emotional development (e.g. does the child appear to be 'streetwise' but in reality has limited understanding?);
- The child's use of language and understanding of relevant concepts such as time and age (as a general rule of thumb, an intermediary may be able to help improve the quality of evidence of any child who is unable to detect and cope with misunderstanding, particularly in the court context, i.e. if a child seems unlikely to be able to recognise a problematic question or tell the questioner that they have not understood, assessment by an intermediary should be considered)

[Extracted from: *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures:*

https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf].

Tips for writing written assessments

- Should distinguish ‘why’ questions as being more complex, requiring understanding of motivation – self or others.
- Should not recommend use of short tags – tags of any length are poor practice for a child.
- Should provide clear definitions/explanations of what is being recommended e.g. what is meant by a ‘visual scaffold’ or ‘scaffolding the reader’.
- Should try and include suggestions of how to monitor the child’s progress throughout the process.
- Should explain why any negative makes question more difficult for children.
- Witness intermediaries could suggest relaying answers if necessary.
- Asking questions to clarify understanding could be done by intermediary.
- When recommending use of a timeline include a description of how to create it.
- Suggest sitting alongside witness is to be preferred to sitting behind them.
- Rather than testing witnesses ‘understanding of idiomatic language, it is better to recommend avoiding figurative language altogether.

Communication aids

- Court-approved aids which have been used at police interview and trial include those used to:
 - facilitate questions e.g. visual time lines. These are sometimes assembled by the witness or with witness assistance during the interview e.g. marked with years/ the witness’s age; and factual events such as key moves, holidays, birthdays, school, photos of buildings etc. Such aids may be approved for use at trial or made solely for the purpose of trial
 - facilitate answers e.g. cards containing the words ‘yes’, ‘no’ and ‘I don’t know’ and a balanced selection of pictures/ symbols
 - avoid asking the witness descriptive peripheral detail by providing models or photos (sometimes from a child’s eye-view) e.g. of locations; photos may act as a ‘signpost’ to introduce questions
 - avoid asking the witness to demonstrate intimate touching on their own body. Alternatives include body diagrams (e.g. lexiconlimited.co.uk/body-outline); figures with removable clothes etc; a ‘word map of parts of the body’ for a witness too embarrassed to point to an outline
 - help the witness focus by reminding them of illustrated ‘rules’ e.g. ‘no guessing’; ‘if I get it wrong, tell me’; ‘say if you don’t understand’; ‘say if you don’t know’; and with cards e.g. ‘listen now’; ‘think before you answer’

- help the witness follow a visual sequence of question topics or what is going to happen next at court, or to help the witness count down the number of topics or questions remaining e.g. posting counters (something nice to hold) into a box
- help the witness monitor and indicate stress levels e.g. a scale or coloured ‘traffic light’ symbols to which the witness can point
- help the witness indicate when they need a break
- help keep the witness calm (‘emotional containment’).
- In addition to pen and paper, a wide range of generic aids are available or easily created but some specific to the needs of the witness or the case require additional preparation time. Aids must be neutral, not leading; those offering options must be appropriately balanced. Many aids are especially effective if chosen or made with the witness’s participation.
- At interview, the use of aids is likely to require a board or tray suitable for their display or a table cloth to ensure that aids and drawings show up on camera.

Subjects for intermediary advice and discussion before interview include the following:

- how to set up the interview room
- the most effective method of questioning and enabling the witness to answer (e.g. if writing or typing answers, or is soft-spoken, whether the intermediary should read or repeat answers)
- the use of communication aids. Those involving reminders and rules for answering questions, for example, are generally available from the outset; discuss when others may be introduced. Decide whether the witness’s use of aids, and the aids themselves, will be clearly visible on screen (discuss whether the camera operator can ‘zoom in’)
- whether the information sought should be prioritised, to make optimum use of the witness’s concentration span
- how to pace questions according to the witness’s need for ‘processing time’
- how the officer and the intermediary will check on the witness’s understanding
- the ‘signposting’ of topics and changes of topics
- whether the intermediary’s declaration and other explanations at the start of filming should take place before the witness comes into the room (common)
- the number and roles of people in the room, if this may affect communication. The role of a supporter in the interview room (if this person’s presence is crucial to the witness, wearing headphones playing music if the supporter should not hear the evidence)
- frequency and duration of breaks (including letting a child leave the interview room to see the carer and to return when they like)

- how the intermediary will intervene.

Planning the intermediary's contribution at interview

The intermediary's responsibility during the interview is to facilitate communication, which may be non-verbal. The role includes helping the witness to listen and monitoring for signs of confusion, poor attention and fatigue; the intermediary may suggest that a break be taken. This allows the officer to focus on the investigation.

Intermediaries are not joint interviewers. Their intervention requires careful planning. There should be mutual understanding about:

- how the officer will indicate a need for the intermediary's assistance
- how the intermediary may clarify a question or answer (the latter may involve repeating or reading out answers) and alert the interviewer to any other potential difficulty
- how and when communication aids may be introduced
- whether the intermediary may need to describe the use of communication aids; hold an aid or a witness's drawing up to the camera; or verbalise for the record any non-verbal communication from the witness, e.g. gestures or use of Makaton signs.

It is good practice to take a break before the end of the interview so that the intermediary can alert the interviewer to any potential miscommunication that may require clarification.

Once the cameras are running, the intermediary may appear to be a silent bystander. This is open to misinterpretation. Criminal justice professionals may conclude when watching the recording that the intermediary had no role to play. This has sometimes been put forward to support an argument that an intermediary is not required at trial. Judicial guidance in England and Wales and W points out that a lack of intervention is more likely to be due to the interviewer following the intermediary's advice and that, in any event, an intermediary may be needed because questioning at trial is more challenging and stressful.

ENDNOTES

- ¹ *The Child Sexual Assault Taskforce Report on Special Measures in Child Sexual Assault Proceedings* (September 2015) stated that the “objectives of the reforms are to reduce trauma experienced by child complainants in criminal child sexual assault proceedings whilst also protecting the rights of the accused to a fair trial, by:
- removing children from the formal Court setting where possible, and reducing the length of time they are engaged with the Court process; and
 - ensuring language used in both investigatory interviews and in Court is appropriate for the child’s developmental stage or otherwise meets their communicative needs, facilitating the provision of the child’s best evidence.” (p. 33).
- ² In 2013 Amy Watts, a solicitor with the NSW ODPP, was awarded a Churchill Fellowship to investigate models of registered intermediaries for child victims/witnesses in the criminal justice system – Ireland, UK, Austria, Norway. Amy’s work and advocacy were influential in fostering the witness intermediary scheme in NSW.
- ³ In 2010, the Australian and NSW Law Reform Commissions’ (2010) report on family violence recommended that all jurisdictions should permit the pre-recording of a child complainant’s evidence at a pre-trial hearing (Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, October 2010, Recommendation 26–7, p. 1, 233). In 2012, the NSW Ombudsman’s report, *Responding to Child Sexual Assault in Aboriginal Communities*, recommended that the Department of Attorney General and Justice consider the pre-recording of the whole of the child’s evidence as well as the establishment of a registered intermediary scheme based on that in England and Wales (Recommendation 59 (c) and (e), p. 173).
- In 2014, the New South Wales Parliament Joint Select Committee on Sentencing of Child Sexual Assault Offenders in its report, *Every Sentence Tells a Story – Report on Sentencing of Child Sexual Assault Offenders* (Report 1/55 October 2014) recommended that:
- ... the NSW Government introduces trial measures to expand the use of pre-recorded evidence to include all evidence given by child victims (similar to the Western Australian and Victorian models) with a view to assessing whether this approach effectively lessens the stress and duration of court proceedings for child witnesses, without affecting the defendant’s right to a fair trial. (Recommendation 19, p. 95).
- ⁴ *The Child Sexual Assault Taskforce Report* in 2015 (p. 8) stated that:
- 1.23 The overriding purpose of the Pilot is to reduce trauma, delay and rates of attrition in CSA proceedings. Stakeholders noted that these problems are most significant in the District Court.
- ⁵ The amending legislation amended Schedule 2 of the *Criminal Procedure Act 1986* (NSW) and inserted a new ‘Part 29 Provisions relating to child sexual offence evidence pilot scheme’.
- ⁶ Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 81.
- ⁷ Sexual assault (*Crimes Act 1900* (NSW) s 61I), aggravated sexual assault (s 61J), aggravated sexual assault in company (s 61JA), assault with intent to have sexual intercourse (s 61K), indecent assault (s 61L), aggravated indecent assault (s 61M), act of indecency (s 61N), aggravated act of indecency (s 61O), sexual intercourse with a child under 10 (s 66A), attempting, or assault with intent, to have sexual intercourse with a child under 10 (s 66B), sexual intercourse with a child between 10 and 16 (s 66C), attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16 (s 66D),

persistent sexual abuse of a child (s 66EA), procuring or grooming a child under 16 for unlawful sexual activity (s 66EB), sexual offences against a person with a cognitive impairment by a person responsible for their care (s 66F), sexual intercourse with a child between 16 and 18 under special care (s 73), incest (s 78A), incest attempts (s 78B), bestiality (s 79), attempt to commit bestiality (s 80), sexual assault by forced self-manipulation (s 80A), causing sexual servitude (s 80D), conduct of business involving sexual servitude (s 80E), child abduction (s 87), procuring, enticing or leading away a person for prostitution (s 91A), procuring a person for prostitution by fraud, violence, threat, abuse of authority, or use of drugs (s 91B), promoting or engaging in acts of child prostitution (s 91D), obtaining benefit from child prostitution (s 91E), exercising lawful control over premises used for child prostitution (s 91F), use of a child under 14 for production of child abuse material (s 91G), kidnapping (s 86), and any attempt, conspiracy or incitement to commit one of the aforementioned offences.

8 Explanatory Note, *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Bill* 2015 1–2.

9 New South Wales, *Parliamentary Debates*, Legislative Assembly, 22 October 2015, (Gabrielle Upton, Attorney General).

10 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 81.

11 The provisions contained within Part 29 of the *Criminal Procedure Act 1986* (NSW) are additional to the existing provisions in that Act with respect to the giving of evidence, rights of the accused person and powers of the Court and do not affect these except as provided by the proposed Part, regulations or rules of court: *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) cl 92.

12 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 84.

13 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 85.

14 Criminal Procedure Act 1986 (NSW) s 306U.

15 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 86.

16 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 87.

17 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 88.

18 Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW) cl 89.

19 Criminal Procedure Amendment (Child Sexual Offence Pilot) Act 2015 (NSW) cl 91.

20 Victoria is the most recent Australian jurisdiction to introduce legislation for use of witness intermediaries. Shared experience stands to benefit both Victoria and NSW in the implementation of their respective Pilot schemes. The Victorian Intermediaries Pilot Program (the Program) was enacted under the Justice Legislation Amendment (Victims) Act 2018 (Vic) (the Victorian Act) with assent on 27 February 2018. The Victorian Act amended the Criminal Procedure Act 2009 (Vic) and inserted a ‘Part 8.2A – Ground rules hearings and intermediaries’. The Program will commence 1 July 2018; its duration is not specified in the legislation. Appendix 3 provides a summary of the Victorian scheme.

21 Youth Justice and Criminal Evidence Act 1999, s 29(2).

22 *Equal Treatment Bench Book* [82], see also Criminal Procedure Direction 2014, 3F.4.

23 *R v Cox* [2012] EWCA Crim 549.

24 Lord Judge, ‘*The Evidence of Child Victims: The Next Stage*’ (Speech delivered at the Bar Council Annual Law Reform Lecture, 21 November 2013) 9.

25 The Child Abuse Squads at Chatswood and Kogarah were combined in June 2017 to become the Central Metropolitan Child Abuse Squad (CAS). Liverpool came into the pilot in January 2018 as a result of the amalgamation of Bankstown and Liverpool to form the South West Metropolitan CAS.

26 Survey data were collected and managed using REDCap electronic data capture tools hosted at University of Sydney]. REDCap (Research Electronic Data Capture) is a secure, web-based application designed to support data capture for research studies, providing: (1) an intuitive interface for validated data entry; (2) audit trails for tracking data manipulation and export procedures; (3) automated export procedures for seamless data downloads to common statistical packages; and (4) procedures for importing data from external sources. Harris, P.A., Taylor, R., Thielke, R., Payne, J., Gonzalez, N. Conde, J.G. (2009). Research electronic data capture (REDCap) – A metadata-driven methodology and workflow process for providing translational research informatics support. *Journal of Biomedical Information*, 42(2), 377-81.

27 Draft surveys were provided to legal and non-legal professionals, to Joyce Plotnikoff and to Victims Services and to a number of professionals for comment, and pilot-tested before ‘going live’.

28 Victims Services manage the referral and appointment process for witness intermediaries for Police referrals as well as Court referrals. The child’s needs are outlined on the referral form from the police or from the ODPP and a witness intermediary with a matching skill set is allocated by Victims Services.

29 $\chi^2 = 21.94$ 1 *df*, $p < .0001$.

30 In the case of a court referral, Victims Services is also responsible for matching a witness intermediary to a witness. The Judge orders the appointment of a witness intermediary and the Court provides this Court order to Victims Services. The Witness Assistance Service/ODPP then assist the witness’ guardian to complete a referral form that outlines any communication issues the witness may have. Once submitted to Victims Services, a match is made with a witness intermediary who has the required skillset to assist this witness.

31 $\chi^2 = 22.51$, 2 *df*, $p < .0001$.

32 In one, the witness intermediary attended the first day of the PRH but was unavailable for the second day. Another intermediary from the same professional background stepped in to assist. In the second matter, the witness intermediary who attended the police interview withdrew from the program before the matter proceeded to court. Another WI was allocated.

33 The mean or average delays in Newcastle and Sydney were significantly different (36.2 weeks and 25.7 weeks) ($t = 2.36$, 96 *df*, $p = .020$) reflecting the 115 week and other long delays in Sydney but the median delays were similar (26 weeks in Newcastle and 27 weeks in Sydney).

34 Sexual offences against children have been categorised in this report into four main types of offence:

- sexual assault involving sexual intercourse/penetration – without consent or as defined as unlawful because of the age of the victim and/or the relationship between the victim and the offender
- indecent assault – contact sexual offence not involving sexual intercourse/penetration
- acts of indecency – non-contact sexual offences
- child pornography.

These categories are in line with the definitions and categories of sexual offences used by the New South Wales BOCSAR, the Judicial Commission of New South Wales. In some analyse, the focus was on the first two categories: sexual assault and indecent assault.

35 The drop in the percentage of child reports – conversely the increase in the percentage of adult reports –

from 2014 is likely to reflect the activity and publicity of the Royal Commission which involved many adult survivors reporting their abuse to the Royal Commission and to the Police. The number of adult reports more than doubled from 677 in 2011 to 1,403 in 2017.

36 Cashmore, J., Taylor, A., Shackel, R., Parkinson, P. (2016). *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*, August 2016, (pp. 1 - 309). Sydney, Australia: Commonwealth of Australia; Cashmore, J., Taylor, A., Parkinson, P. (2017). The characteristics of reports to the police of child sexual abuse and the likelihood of cases proceeding to prosecution after delays in reporting. *Child Abuse and Neglect*, 74, 49-61.

37 Figures supplied by Detective Chief Inspector Peter Yeomans.

38 Cashmore et al. (2016) at p. 27.

39 Advice from NSW Police Force Detective Chief Inspector Andrew Waterman.

40 These data are not available to the evaluation team.

41 The 2017 figures are not included in the graph because our experience with the COPS and Court data is that the trend in the last year's data may change when the data for the following year are added and the 2017 are backfilled/updated.

42 The pre-post comparison is based on the timing of the introduction of the Pilot in March 2016; the first referrals for a witness intermediary assessment and a pre-recorded hearing occurred in late May 2016.

43 One problem with the court data is that they do not include any information on the age of the complainant, so the analyses exclude any matters in which the time between the offence and arrest is greater than 5 years since earlier research indicated that the bulk of these matters are historical matters, reported when the complainant is an adult. This reduced the number of finalised cases from 2,968 to 2,147.

44 The only data that relate to the age of the child are the references in the broad categories of offences to children under 10 or under 14 or under 16, but this does not indicate how old the child is at the time of the prehearing or the trial.

45 $\chi^2 = 3.51, 1 df, p = .06$. The odds ratio was 0.745 ($\text{Exp}(B) = .745$).

46 The Code of Conduct for witness intermediaries comprehensively outlines the duties and professional responsibilities of witness intermediaries in NSW. Their impartiality and independence are key to their professional role and the function they fulfil.

47 Schedule 2 of *Amendment of Criminal Procedure Act 2015* also includes teachers, although Victims Services has not yet recruited any teachers since this amendment.

48 Witness intermediaries have undertaken cultural sensitivity training with Aboriginal trainers from the Children's Court and Department of Justice. A number have also undertaken their own training externally in relation to the ATSI community and sensitivities (Victims Services, communication).

49 The need for greater diversity in witness intermediaries, especially culturally, is recognised by Victims Services.

50 Respondents were asked: 'In your experience, are the witness intermediaries well matched to the needs of the child complainant/ witnesses?' and 'What, if any, changes do you think are needed to focus on the needs of the child in the investigation process?'

51 The witness intermediary's report concerning Aboriginal cultural implications for the child's response to

questioning stated:

'For Aboriginal people, the concept of 'women's' or 'men's business' is important. Topics of conversation, particularly with respect to personal and sexual matters, are not discussed with members of the opposite sex. It is likely that C may have difficulty disclosing or discussing personal and sensitive matters if there is a person present of the opposite sex.

Recommendation: Consider strategies that are supportive of cultural gender communication restrictions when C is asked to discuss sensitive personal information. C may feel distressed if asked to discuss such matters in the presence or view of men.

Similarly, in relation to question/answer discourse, the witness intermediary report stated:

2. Question/Answer discourse pattern

Direct questioning in an interview style of discourse is not a typical feature of Aboriginal communication patterns for giving and receiving information. In Aboriginal culture, information exchange occurs indirectly over time and is likely to occur in a conversational manner. This contrasts with most non-Aboriginal people who are socialised to expect question and response type of information seeking process from when they were very young. Any experience gained of this discourse pattern would be through her engagement with the education system, however classroom teacher - student discourse does not involve requesting information of a personal nature. C is less practiced in this interview style of discourse than most non-Aboriginal Australians and her difficulties with this dynamic are likely to be compounded with the addition of the requirement to engage in questions about sensitive information.

Recommendations:

(A) I would recommend that where possible counsel ask more open ended questions that accommodate for C's information giving style. Introduce a topic for discussion in a non-specific way and encourage more specific detail through conversation rather than direct questioning.

(B) Should C have difficulty providing the information verbally to a question, consideration should be given to allow her to write her response on paper and the Witness Intermediary can read her response to the Court if C is unable to do it herself.

(C) In addition, I would suggest counsel provide with some point of context when questioning C's evidence as she may not understand why parts of her story are being questioned in isolation or as fragments to the whole story she has given during her police interview.

52 The *Procedural Guidance Manual* stipulates a third party must be present during assessment of the witness by the witness intermediary: "preferably the police case officer/interviewing officer will be present as this will enable the officer to gain significant first-hand experience of the witness's communication needs." (p. 15).

53 Cooper, P. and Mattison, M. (2017). Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English Intermediary Model, 21(4) 351, 358.

54 https://www.churchilltrust.com.au/media/fellows/Watts_Amy_2013.pdf p. 18

55 Plotnikoff and Woolfson, p. 28.

56 NSW Ombudsman Report on Review of JIRT (2017), chapter 18: The Child Sexual Offence Evidence Pilot, p. 305.

57 A witness intermediary assessment report to police may be one or two pages if written. It is likely to focus on guidance for questioning the witness in a way which will promote complete, accurate and coherent communication with the witness. The police interviewer will usually have had the advantage of

sitting in on the children's champion assessment of the witness; this is likely to assist the planning discussion. The children's champion should agree with the police interviewer how the children's champion will intervene to assist the interviewer if that becomes necessary: *Children Champion's (Witness Intermediary) Procedural Guidance Manual (2016)*.

58 Plotnikoff, J. and Woolfson, R. (2015). *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants*. Bristol: Policy Press, p. 77.

59 Plotnikoff and Woolfson, pp. 71, 75, 77, 81-82.

60 Plotnikoff and Woolfson, pp. 14, 282–285.

61 See for example, Brennan, M. and Brennan, R. (1988) *Strange language: Child victims under cross examination*. (Wagga Wagga, N.S.W.) : Riverina Murray Institute of Higher Education).

62 $t = 2.96, 217 df, p = .003$.

63 Mean = 60.2 (SD = 59.8) in Newcastle and 46.3 days (SD = 34.98) in Sydney: $t = 2.04, 166 df, p = .043$.

64 In some assessments, for example, the child was asked to explain terms about geographical terrain although these were not relevant to the child's evidence and quite difficult terms for children of that age. In others, the child was described as 'developing in line with developing guidelines' without indicating what the implications were for the specific type of language and questions that were appropriate for that age. In other assessments, the report did not recommend structuring breaks into the evidence scheduling leaving it to the judge and the child to ask for breaks. [Examples from critique of some redacted reports by Joyce Plotnikoff].

65 There is empirical evidence from a recent observational study in England which found that ground rules hearings which "placed restrictions and limitations on the duration, content, and manner of questions" children could be asked in a 28 pilot study cases were associated with significantly fewer suggestive questions and more option-posing questions than defence lawyers in non-pilot cases (Henderson & Lamb, 2018b, manuscript under review, University of Cambridge).

66 Judicial College, *Equal Treatment Bench Book'* (February 2018) [2-27: 123]:
<file:///Users/nick/Desktop/equal-treatment-bench-book-february2018-v5-02mar18.pdf>

67 *Dinc* [2017] EWCA Crim 1206, Ground 1 (no paras in this judgment). See also *R v Lubemba* [2014] EWCA Crim 2064, para 35. And also para 43: 'So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the ground rules hearing to invite defence advocates to reduce their questions to writing in advance'.

68 Advice from the District Court.

69 Only one respondent to the survey, a defence lawyer, disagreed with the use of aids.

70 This is consistent with the differences that Powell et al. (2016) found between defence lawyers and judges, prosecutors, police and support persons in an online survey with 335 professionals concerning the use of alternate measures for child witnesses. Defence lawyers were less likely than other respondents to indicate that questioning the witness by a witness intermediary is fair to the complainant, or facilitates the jury understanding of the evidence (pp 64–65).

71 Plotnikoff and Woolfson (2015)'s reflections on the experience in England and Wales suggest this is an ongoing process, and still part of the process for witness intermediaries after ten years with new professional players (p. 98).

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- 72 NSW Justice - Victims Services & Support:
https://www.victimsservices.justice.nsw.gov.au/sexualassault/Pages/sexual_assault_courtprocess/sexual_assault_goingtocourt.aspx
- 73 Table 6. NSW Higher, Local and Children's Criminal Courts: Number and median court delay (days) for defended hearings/trials, proceeded to sentence only and sentenced by the lower courts after a guilty plea in finalised court appearances by bail status and court level. *NSW Criminal Courts Statistics January 2013 to December 2017*. New South Wales Bureau of Crime Statistics and Research.
- 74 Continuity of the witness intermediary and prosecution lawyers would be beneficial for children but is not easy to achieve. Current practice in the Pilot seeks, where possible and practicable, to ensure the same witness intermediary is used for multiple police interviews and subsequent court proceedings. However, it is not uncommon for child witnesses to interact with multiple prosecution lawyers, more than one witness intermediary, and a number of other professionals during a case. This is likely to cause stress, confusion and uncertainty for child witnesses and may undermine their capacity to give best quality evidence.
- 75 *Child Sexual Assault Taskforce Report* recommendation 8 (p. 34).
Similarly, the Second Reading Speech for *the Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Bill 2015* stated that:
“The bill contains important safeguards for the rights of an accused to a fair trial, the key to which is the requirement of full disclosure of the prosecution case before any prerecorded hearing takes place.” (Legislative Council Hansard – 28 October 2015)
- 76 Under cl 87 of the amending legislation, a witness may be recalled only by leave of the court and only if satisfied that (a) the witness or other party has become aware of a matter of which the party could not reasonably have been aware at the time of the recording, or (b) it is otherwise in the interests of justice to give leave.
- 77 Confirmed by Judicial Commission on request July 2018.
- 78 In non-Pilot matters, in Sydney and non-metropolitan courts, the delays in the District Court are considerably longer.
- 79 Henderson, E. and Lamb, M. ‘Pre-recording Children’s Testimony: Effects on Case Progression’ [2017] *Criminal Law Review* 345.
- 80 Cashmore, J. and Trimboli, L. (2006). *Child sexual assault trials: A survey of juror perceptions*. NSW Bureau of Crime Statistics and Research. *Contemporary Issues in Criminal Justice* 102; Jackson, H. (2012). Children's evidence in legal proceedings – The position in Western Australia. In J. R. Spencer & M. E. Lamb (Eds.), *Children and cross-examination: Time to change the rules?* (pp. 75–94). Oxford, United Kingdom: Hart Publishing; Powell, M., Westera, N., Goodman-Delahunty, J. & Pilcher, A. S. (2016). An evaluation of how evidence is elicited from complainants of child sexual abuse. Royal Commission into Institutional Responses to Child Sexual Abuse; see also discussion in background literature review (p. 76 of this report).
- 81 NSW Police Force have advised that they are currently trialling the use of additional Pan Tilt Zoom (PTZ) cameras in newer interview suites to provide better quality images and sound.
- 82 Information provided by Chief Judge of the District Court of NSW, Justice Price.
- 83 This is consistent with the recommendation of the Ombudsman’s *Report on the JIRT Review* (pp. 307–308).
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84 Plotnikoff and Woolfson (2015) raised similar concerns about the sustainability of the Registered Intermediaries scheme in England and Wales in the wider roll-out of the scheme in terms of the remuneration rates, and the unregulated scheme for intermediaries for vulnerable defendants (see pp. 297–298). See also Henderson’s (2015) findings about intermediaries’ commitment and comments about the role being difficult, time-consuming, and poorly remunerated, cited in the background literature review on p. 82 of this report.

85 <https://s3-eu-west-2.amazonaws.com/victimscmm-prod-storage-clhgxgum05k1/uploads/2018/01/Voice-for-the-Voiceless-.pdf> 76, 79.

86 <https://s3-eu-west-2.amazonaws.com/victimscmm-prod-storage-clhgxgum05k1/uploads/2018/01/Voice-for-the-Voiceless-.pdf> 75.

87 Brennan & Brennan (1988) *Strange Language*: Cashmore & Trimboli, 2005; Cossins, 2012; Henderson, 2012; Plotnikoff & Woolfson, 2012; Report of the Home Office Advisory Group on Video Evidence, 1988).

88 As outlined in *Every Sentence Tells a Story*: “Previous reviews dealing with the use of pre-recording of evidence have generally supported its use in trials involving young children. The Wood Royal Commission supported the use of pre-trial recordings on the basis that:

- Evidence is received while it is fresh in a child’s mind.
- It enables a child to put traumatic events behind them and move on with their lives.
- It allows counselling to begin at an earlier stage, where this might be postponed so as not to affect the integrity of a child’s evidence.
- In the event of a re-trial or appeal, the child’s evidence can be presented in the form of a videotape; therefore they are not required to reappear.
- Where inadmissible evidence is received, it can be deleted by editing the recording.” (para 5.118).

89 Joint Select Committee on Sentencing of Child Sexual Assault Offenders, 2014, [5.100]

90 Provisions allowing for the pre-recording of a child’s examination in chief were already in place.

91 Royal Commission into Institutional Responses to Child Sexual Abuse *Criminal Justice Report Recommendations* (2017): Report recommendations 52-55, 59-61.

92 Pre-recording was introduced in the *Evidence (Children) Act 1997* (NSW); the relevant provision is now contained in the *Criminal Procedure Act 1986* (NSW) ss 306S, 306U.

93 Note that this could be done in another room through CCTV link or with the use of a screen, see *Criminal Procedure Act 1986* (NSW) ss 306ZB, 306ZH.

94 This was an extensive and expensive study involving the transcription, de-identification and coding of over 200 trials.

95 While this was an issue when pre-recording was introduced, Jackson (2012) noted that this technology is now routinely used in the courtroom for a range of different purposes.

96 These were also issues that were commented upon in the Taskforce discussions and report.

97 Ellison and Munro (2014) asked mock jurors to deliberate on an adult sexual assault trial, where the complainant testified through a pre-recorded examination-in-chief, followed up by a cross-examination through a CCTV link. While a small minority of jurors commented on the fact that the CCTV link took away some of the reality of the complainant being present in the courtroom, Ellison and Munro (2014)

noted it was not clear that these concerns had any real bearing on those jurors' verdicts. Further, the majority of the mock jurors made no reference to the pre-recorded evidence or the CCTV link during their deliberations.

⁹⁸ Landström, Granhag and Hartwig (2007) found, for example, that although jurors rated live evidence as more convincing than video evidence in a mock trial, jurors' ability to accurately assess children's veracity was mediocre in both conditions.

⁹⁹ Goodman et al. (1998). Eaton, Ball and O'Callaghan (2001), for example, compared children testifying live in court, through a CCTV link, and through pre-recorded testimony in a mock trial. They found that children were perceived as significantly more credible when evidence was given live or through pre-recorded testimony than when it was given through a CCTV link. However, the accused was perceived as more 'definitely guilty' when evidence was given live in court as compared to pre-recorded evidence. Thus, comparing evidence given live in court with pre-recorded evidence, the mode of delivery had no impact on credibility, but did have an impact on verdict.

¹⁰⁰ *Dietrich v R* (1992) 177 CLR 292, 335 per Deane J, quoting *Barton v R* (1980) 147 CLR 75, 101 per Gibbs ACJ and Mason J.

¹⁰¹ See Ellison, 2002; Plotnikoff & Woolfson, 2012, p. 22; Spencer & Lamb, 2012.

¹⁰² Cossins, 2009; Ellison, 2002; Hanna, Davies, Crothers & Henderson, 2012.

¹⁰³ US linguist Anne Graffam Walker has provided important analysis and clear guidelines about the pitfalls of the linguistic differences between children and lawyers and the "practical application of linguistics to the critical task of communicating accurately with children in the legal system": Graffam Walker, A. (1999, 2013) *Handbook on Questioning Children: A Linguistic Perspective*. Washington, DC: ABA Center on Children and the Law.

¹⁰⁴ Babb. L (2008) What does s 41 of the Evidence Act mean to you as a judicial officer? *NSW Sexual Assault Trials Handbook*, Judicial Commission of NSW.

Section 41 of the Evidence Act states that:

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a disallowable question):

(a) is misleading or confusing, or

(b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture or ethnicity, age or mental, intellectual or physical disability).

¹⁰⁵ Lord Judge, '*The Evidence of Child Victims: The Next Stage*' (Speech delivered at the Bar Council Annual Law Reform Lecture, 21 November 2013) 9.

¹⁰⁶ Section 29 came into force on 23 February 2004; S.I. 2004/299.

¹⁰⁷ The Registered Intermediary Procedural Guidance Manual (Ministry of Justice, 2015) 4.

¹⁰⁸ Youth Justice and Criminal Evidence Act 1999, s 29(1).

¹⁰⁹ Youth Justice and Criminal Evidence Act 1999, ss 16(1)(b), 16(5), as cited in as cited in Equal Treatment

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- Bench Book [81].
- 110 Registered Intermediary Procedural Guidance Manual 2015, [3.12].
- 111 Youth Justice and Criminal Evidence Act 1999, s 29(2).
- 112 *Equal Treatment Bench Book* [82], see also Criminal Procedure Direction 2014, 3F.4.
- 113 *R v Cox* [2012] EWCA Crim 549.
- 114 Lord Judge, ‘*The Evidence of Child Victims: The Next Stage*’ (Speech delivered at the Bar Council Annual Law Reform Lecture, 21 November 2013) 9.
- 115 Youth Justice and Criminal Evidence Act 1999, Explanatory Note 84.
- 116 Youth Justice and Criminal Evidence Act 1999, s 16(5).
- 117 The Registered Intermediary Procedural Guidance Manual (Ministry of Justice, 2015) 20, [3.14].
- 118 Youth Justice and Criminal Evidence Act 1999, Explanatory Note 124.
- 119 Crown Prosecution Service, Special Measures – Legal Guidance: <https://www.cps.gov.uk/legal-guidance/special-measures>
- 120 Crown Prosecution Service, Special Measures – Legal Guidance: <https://www.cps.gov.uk/legal-guidance/special-measures>
- 121 Youth Justice and Criminal Evidence Act 1999, s 19(1)(b).
- 122 Youth Justice and Criminal Evidence Act 1999, s 21(a).
- 123 Youth Justice and Criminal Evidence Act 1999, s 16(1)(a).
- 124 Youth Justice and Criminal Evidence Act 1999, s 16(2)(a)(i).
- 125 Youth Justice and Criminal Evidence Act 1999, s 16(2)(a)(ii).
- 126 Youth Justice and Criminal Evidence Act 1999, s 16(2)(b).
- 127 Criminal Practice Directions 2014, para 3F.5.
- 128 Youth Justice and Criminal Evidence Act 1999, s 17(1).
- 129 Youth Justice and Criminal Evidence Act 1999, s 17(2)(a).
- 130 Youth Justice and Criminal Evidence Act 1999, s 17(2)(b).
- 131 Youth Justice and Criminal Evidence Act 1999, s 17(2)(c)(i).
- 132 Youth Justice and Criminal Evidence Act 1999, s 17(2)(c)(ii).
- 133 Youth Justice and Criminal Evidence Act 1999, s 17(2)(c)(iii).
- 134 Youth Justice and Criminal Evidence Act 1999, s 17(2)(d)(i).
- 135 Youth Justice and Criminal Evidence Act 1999, s 17(2)(d)(ii).
- 136 Youth Justice and Criminal Evidence Act 1999, s 17(2)(d)(iii).
- 137 Youth Justice and Criminal Evidence Act 1999, s 17(4).
- 138 UK Witness Intermediary Tool Kit, [4.1].
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139 See *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*:
https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf. A new version of these guidelines are due out shortly and will place even more emphasis on police planning.

140 Criminal Procedure Rules 2015, 3.9(7)(a).

141 Criminal Practice Directions 2014, 3E.2.

142 Lord Judge, *'The Evidence of Child Victims: The Next Stage'* (Speech delivered at the Bar Council Annual Law Reform Lecture, 21 November 2013) 4.

143 Instead, the intermediary must make a declaration per Criminal Procedure Rules 2015, 18.7.

144 The Advocate's Gateway, *Ground rules hearings and the fair treatment of vulnerable people in court – Toolkit 1* (1 December 2016) The Inns of Court College of Advocacy, [2.1]
<http://theadvocatesgateway.org/images/toolkits/1-ground-rules-hearings-and-the-fair-treatment-of-vulnerable-people-in-court-2016.pdf> ; see generally, *R v Lubemba*; *R v JP* [2014] EWCA Crim 2064, [44].

145 The Advocate's Gateway, *Ground Rules Hearings and the Fair Treatment of Vulnerable People in Court – Toolkit 1* (1 December 2016) The Inns of Court College of Advocacy, 9
<http://theadvocatesgateway.org/images/toolkits/1-ground-rules-hearings-and-the-fair-treatment-of-vulnerable-people-in-court-2016.pdf>.

146 The Registered Intermediary Procedural Guidance Manual (Ministry of Justice, 2015) 13, [2.1].

147 The Registered Intermediary Procedural Guidance Manual 45, [3.108].

148 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2017, 4359 (Martin Pakula, Attorney General).

149 Equal Opportunity Act 2010 (Vic) s 6.

150 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2017, 4355 (Martin Pakula, Attorney General).

151 Charter of Human Rights and Responsibilities Act (2006) (Vic) s 24.

152 Criminal Procedure Act 2009 (Vic) s 389 F (2).

153 Criminal Procedure Act 2009 (Vic) s 389 F(1)(a).

154 Criminal Procedure Act 2009 (Vic) s.

155 Criminal Procedure Act 2009 (Vic) s 389H(2)(a) and s 389H(2)(b).

156 Criminal Procedure Act 2009 (Vic) s 389H(3).

157 Criminal Procedure Act 2009 (Vic) s 389I(1).

158 Criminal Procedure Act 2009 (Vic) s 389I (2).

159 Criminal Procedure Act 2009 (Vic) s 389K (1).

160 Criminal Procedure Act 2009 (Vic) s 398B (3) and s 389C (1).

161 Criminal Procedure Act 2009 (Vic) s 368(1)(c)(ii).

¹⁶² Cashmore et al. (2016). *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases*, at p. 98:

One offence (s 66EA (1)), persistent sexual abuse of a child, was introduced in 1998 ‘to overcome the problems of proving particulars (time, date and place) following the decision of the High Court in *S v The Queen* (1989) 168 CLR 266’ in recognition of the difficulties that children may have in pinpointing and articulating these particular details. The offence provides that ‘a person who, on three or more occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a “sexual offence”, is liable to imprisonment for 25 years. This offence is rarely charged, however; there have been only 62 charges under s 66EA since 2000, with an average of four charges per year, and ranging between two and 10.

District Court Criminal Practice Note 11

CHILD SEXUAL OFFENCE EVIDENCE PROGRAM SCHEME – DOWNING CENTRE

COMMENCEMENT

This Practice Note revises the version published 17 December 2015.

INTRODUCTION

The purpose of this Practice Note is to facilitate the operation of the Child Sexual Offence Evidence Program Scheme, which commenced on 31 March 2016, in the Sydney District Court. The Scheme has been extended to 30 June 2022. The *Criminal Procedure Act 1986* (“CP Act”) was amended by the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* No 46, which came into force on 6 November 2015. The Act inserted Part 29 into Schedule 2 of CP Act.

The Part generally applies to proceedings for prescribed sexual offences commenced after the commencement of the Part (s 83).

SUMMARY OF AMENDMENTS

1. All evidence of a child under 16 must be given by way of pre-recorded evidence, and such evidence may be given for a child under 18 (s 84). Pre-recorded evidence hearings are conducted where additional oral evidence in chief, cross-examination and re-examination is recorded before Judge Traill or Judge Shead SC. The Prosecution and Defence are represented to conduct any additional evidence in chief, cross-examination and re-examination of the child complainant. This is the evidence of the complainant at the balance of the trial.
2. Witness intermediaries, who are officers of the Court, are appointed to assist the parties and the Court to communicate with child complainants. Their role includes explaining questions to, and the answers of, child complainants (ss 88-90). A ground rules hearing concerns the provision of information to the Court about how counsel should question the witness to elicit reliable evidence.

PRACTICE DIRECTION

1. From 6 August 2019, all prescribed sexual offences (s 3 CP Act) committed for trial from the Local Court to the **Downing Centre District Court**, where the complainant is under 18 at the time of committal for trial, are to be listed for arraignment and case management call over on a **Monday at 9.15am**, no later than 14 days after committal for trial.
2. This list will be known as the **Child Sexual Assault List** and will be managed separately from the general arraignments list.
3. For matters in the Child Sexual Assault List, the Court expects the Prosecution to be represented by either the Crown Prosecutor or Solicitor Advocate briefed to appear at trial and will also expect Counsel who represents the accused at trial to appear. Judges in the Downing Centre will be requested, as much as possible, to accommodate Counsel who are required to appear in the Child Sexual Assault List.
4. The Court will expect the Prosecution to present an indictment in accordance with s 129 of the CP Act (that is, within 4 weeks of committal for trial) and with an expectation that an indictment be filed in court as soon as possible after committal.
5. For matters in the Child Sexual Assault List, the Judge will set a timetable for the filing of the Prosecutor's Notice (s 142 of the CP Act), the Defence Response (s 143 of the CP Act) and the Prosecutor's Response to the Defence Response (s 144 of the CP Act), bearing in mind the provisions of the amending legislation that pre-recorded hearings are to be "held as soon as practicable" after the first appearance in court: s 85(1).
6. The Court will set a ground rules hearing date (GRH), a pre-recorded evidence date (PRH) and fix a trial date for the balance of the trial, following the pre-recorded evidence hearing. A witness who gives evidence at a pre-recorded evidence hearing cannot give further evidence without the leave of the Court (s 87).
7. The Court will appoint a witness intermediary in accordance with the provisions of Division 2, s 89.
8. The GRH will ordinarily be set down at least one week before the PRH.
9. There is an expectation that representatives for both the Crown and Defence appearing at the pre-recorded hearing will continue as representatives in the balance of the trial.

10. Practitioners should ensure that Legal Aid applications have been lodged and finalised immediately after committal for trial and representatives briefed both for the Crown and Defence will be available for a pre-recorded hearing within approximately 2 months and thereafter at the balance of the trial.
11. The Crown should provide the Court with a copy of the indictment, Crown Case Statement, s 142 Notice and s 143 Notice, JIRT interviews, discs and exhibits at least 2 weeks prior to the PRH.
12. The Child Sexual Assault List will be conducted in a Court to be advised in the Downing Centre.

The Hon Justice D Price AM
Chief Judge of the District Court
6 August 2019