

# Prosecuting Child Sexual Assault Cases: Are vulnerable witness protections enough? (Part 1)

## Legal



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## Anne Cossins

PhD; Senior Lecturer, Faculty of Law, University of New South Wales; Convenor of the National Child Sexual Assault Reform Committee; member of the NSW Criminal Justice and Sexual Offences Taskforce

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## Introduction

[1] The purpose of this paper is to analyse the effectiveness of the reforms that have been introduced in the last decade to protect children when they give evidence in court. At the same time, it is important to consider the policy bases behind these reforms and what they were designed to achieve. When doing so, it becomes apparent that the different parts of government that deal with child protection, policing and the prosecution of sex offences against children often conflict in terms of policies, principles and beliefs.

[2] For example, in NSW, the child protection register<sup>1</sup> is based on the premise that child sex offenders have a high risk of re-offending, such that monitoring and management of convicted offenders is necessary once they serve their sentence and return to the community. Ostensibly, the purpose of the register is to prevent re-offending and to provide victims and their families with an increased sense of security, as well as intelligence for the investigation and prosecution of offences committed by recidivist offenders (Whelan 2000:6475). In addition, the *Child Protection (Offenders Prohibition Orders) Act 2004* establishes a scheme to monitor and manage sex offenders who are most at risk of re-offending through child protection prohibition orders.

[3] Despite the fact that recidivism by child sex offenders is a recognised community danger, high attrition rates of reports of child sexual assault (Crime and Misconduct Commission, Queensland 2003; Wundersitz 2003; Fitzgerald 2006)<sup>2</sup> and low rates of conviction for those cases that go to trial (Cashmore 1995; Cossins 2001), indicate that many offenders are free to continue their behaviour, unless we are to accept that every case that does not proceed and every

acquittal is a case of false complaint by the child in question. Because of the difficulties associated with prosecuting child sex offences (see Table 1), and the high level of delay in, and under-reporting of child sexual abuse (CSA),<sup>3</sup> this explanation, which has no empirical evidence to support it, is an unsatisfactory and problematic way to understand the problem of CSA in the Australian community.

[4] When a national database of child sex offenders is established around Australia,<sup>4</sup> each Australian jurisdiction will have in place the preventative steps that governments are prepared to take *after* a child sex offender is convicted. However, it will do nothing to change a criminal justice system that is still weighted against children who complain of sexual abuse (Australian Law Reform Commission (ALRC) & Human Rights and Equal Opportunity Commission (HREOC) 1997). The adversarial system is not designed to deal with the uniqueness of child sex offences compared to other crimes, in terms of the targeting and grooming practices of offenders *and* the evidentiary problems that arise from a victim/offender relationship that is based on an abuse of power (Cossins 2000). Rather than being a process that aims to protect the victim (or other children) from future abuse, the adversarial trial has a well documented history of transforming a child sexual assault trial into an inquiry into the credibility of the complainant through aggressive defence counsel tactics and judicial warnings (ALRC & HREOC 1997; NSW Parliament, Legislative Council, Standing Committee on Law and Justice 2002; Wood 2003; Cashmore & Trimboli 2005). Whilst punishment and deterrence are two of the traditional aims of the criminal justice system, historically, there is no evidence that the prosecution of child sex offences has sought to protect children, generally, from sexual abuse, although the general public might expect that convictions and punishment ought to have this effect.

## The prosecution of child sex offences

[5] Before examining the effectiveness of vulnerable witness protections in detail, this section of the paper summarises the specific obstacles associated with prosecuting child sex offences in an adversarial system, in order to determine whether or not vulnerable witness protections are sufficient to overcome these obstacles.

[6] Decisions to prosecute are influenced by the difficulties in securing a conviction which means that prosecutors will only run those cases that have the highest chances of success according to the “reasonable prospects test” (Crime and Misconduct Commission, Queensland 2003:52).<sup>5</sup> This, in turn, means that the highest chances of success will be in cases in which there is corroborating evidence, although these are likely to represent a minority of CSA cases because of the common problem of delay in complaint (Cossins 2002; Hazlitt, Poletti & Donnelly 2004).<sup>6</sup>

[7] Certainly, the need for reform in the way child sex offences are prosecuted lies in the fact that the criminal justice system has traditionally adopted a perverse attitude in relation to sexual assault — many of the rules of evidence and jury warnings discussed in this article are based on centuries old perceptions of female children and women, more generally, as liars and fantasiers (Boniface 1994; Cossins 2001). Although sexual assault law reformers have attempted to ameliorate these views for two or three decades (Department for Women 1996), such unsubstantiated perceptions have given rise to various directions to juries that are either specific to child sexual assault trials or sexual assault trials in general (*R v BWT* (2002) NSWLR 241) as courts have demonstrated an historical reluctance to deal with allegations of sexual nature made by women and children against men (Boniface 1994; Bavin-Mizzi 1995).

[8] Today, in NSW, for example, a jury sitting on a child sexual assault trial may receive up to nine warnings or directions concerning the evidence of the child complainant and the evidence of any other children who give evidence. Generally speaking, appellate courts have not always considered the impact of multiple warnings and directions (some of which are contradictory)<sup>7</sup> and the likelihood that “the more directions and warnings juries are given the more likely it is that they will forget or misinterpret [them]” (*KRM v R* (2001) 206 CLR 221 at 234, per McHugh J; see also *R v BWT* (2002) NSWLR 241, per Wood CJ at CL).

[9] Indeed, there are a growing number of practitioners and professionals who share the view that:

“... it is an unacceptable oddity in this 21st Century that the criminal processes ... place the entire evidentiary burden of proof of ... [child sexual assault charges] upon the evidence of a child ..., whereas other courts making equally important determinations on the same topic of the sexual abuse of children by family ... routinely ... gain information from many other sources, and positively discourage the concept that the truth can be ascertained by the cross examination of a child (*R v D* [2002] QCA 445 at [44]–[46], per Jerrard JA)”.

[10] It is at times difficult to conceptualise all the particular problems and features of the criminal justice system’s response to CSA and to understand how the crime is unique compared to other criminal offences. Such a conceptualisation is set out in Table 1, in light of the extensive knowledge we have of the incidence of CSA in the community and the behaviour patterns of sex offenders. Arguably, there needs to be a closer marriage between this knowledge base and the prosecution of child sex offences. The comprehensive analysis in Table 1 supports the argument that the unique features of CSA require a uniquely different response from the criminal justice system — one that addresses rather than ignores those features.

[11] In particular, Table 1 demonstrates the complexity of successfully prosecuting a child sex offence and the inability of the criminal justice system to effectively reduce the incidence of CSA in the community. It documents the generally inadequate responses of the criminal justice system to the key features of a child sexual assault case:

- (i) one witness to the crime, giving rise to a case of word against word
- (ii) the young age of the victim
- (iii) lack of forensic evidence
- (iv) effects of the power imbalance between victim and offender
- (v) delay in complaint
- (vi) the effect of experiences of multiple offences
- (vii) multiple victims
- (viii) the status of the child’s first complaint, and
- (ix) the focus of the trial on the child’s credibility.

[12] The question is whether, in a modern society, we are prepared to accept this continued criminal justice response to a crime that is extremely difficult to police, under-reported, under-prosecuted, committed by offenders who are prone to recidivism<sup>8</sup> and which leaves victims with psychological and behavioural problems that sometimes remain with them throughout their lives (Bagley & Thurston 1996; Ullman & Filipas 2005). Given the complexity of prosecuting child sex offences, it is likely that radical reform options are required to shift the focus of the trial from an inquiry into the child’s credibility and the degree of unreliability of her/his evidence into an investigation of the allegations made against the accused.

[13] For the past ten years or so, options for reform have been limited to improving the experiences of child complainants when they give evidence. Whilst a desirable goal in itself, it is timely to consider whether reliance on these measures has obscured the more endemic problems associated with prosecuting child sex offences and whether there are other reform options that might address these problems. These issues are discussed in a series of two papers, of which this is the first. Part two also appears in this issue.

[14] This paper discusses two evaluations of vulnerable witness protections that have been conducted in NSW and the United Kingdom to measure the impact of these protections on not only witnesses’ ability to give evidence but also on the trial process. The evaluation by Cashmore and Trimboli (2005) assessed the efficacy of the Child Sexual Assault Specialist Jurisdiction Pilot (hereinafter referred to as the NSW Pilot Program), whilst the evaluation by Hamlyn, Phelps,

Turtle and Sattar (2004) examined the efficacy of a larger range of vulnerable witness protections that have been in place for several years in Britain.

 **Table 1: The adversarial trial processes in child sexual assault cases<sup>9</sup>**

Characteristics of child sexual abuse	Criminal justice response
<p><b>Only one witness: word against word</b>                      CSA involves a sexual act that mostly occurs in private with <b>no eyewitnesses</b> so that the child is the <b>only witness</b>. Extensive <b>grooming</b> by the offender to test the child’s response to sexual overtures, desensitise the child to sexual touching, implicate the child in the offender’s behaviour, prevent the child from reporting the abuse, maintain sexual access to the child (Berliner &amp; Conte 1990; Phelan 1995; Bagley &amp; Thurston 1996).</p>	<p>Use of a <b>lay jury</b>: no expertise about frequency/effects of CSA or grooming methods used by offenders.  <b>Criminal burden of proof</b> is a floating standard that varies from case to case and according to case type (Aronson &amp; Hunter 1998:716). In a CSA case, arguably, that standard is higher because:                      (i) CSA is a cultural taboo – lay jury may be reluctant to accept the validity of the complaint,                      (ii) cultural belief that children fantasise or lie for revenge (Cossins 2000),                      (iii) belief that CSA is committed by deviant men, mostly strangers, whereas the majority of children are abused by men known to them (Cossins 2001),                      (iv) reluctance of juries to accept evidence about cruel, sustained or unusual sexual behaviour.<sup>10</sup>  <b>Adversarial trial processes</b> prevent an inquiry being undertaken in relation to the complaint compared to Family Court proceedings where procedures require the court to investigate allegations of sexual abuse.                      Common law warnings are not excluded by the <i>Evidence Act</i>; a <b>Murray direction</b> is given if there is only <b>one witness</b> to a crime; this warns the jury the child’s evidence “must be scrutinized with great care”<sup>11</sup> before a guilty verdict is given which raises “a question mark over the reliability and/or credibility of the complainant” (Wood 2003:8).  <i>C</i> (1993) 70 A Crim R 378; <i>F</i> (1995) 83 A Crim R 502.                      The difficulties of experts being able to conclude that a child’s psychological state is evidence that s/he has been sexually abused.<sup>12</sup> Courts’ reluctance to accept such opinion evidence when it is available.<sup>13</sup></p>
<p><b>Young age of complainant</b>                      A child complainant is a person <b>under the age of 16 years</b> (in NSW).</p>	<p>The psychological effects of CSA make children peculiarly vulnerable as witnesses (Bagley &amp; Thurston 1996), even though evidence can be given via CCTV.<sup>14</sup>                      Recently children have been exempt from giving oral evidence at committal proceedings (s 91(8) <i>Criminal Procedure Act</i> 1986), thus saving them from being cross-examined at committal.<sup>15</sup>                      Most children give evidence within the court precinct which increases the likelihood the child will see the accused/his supporters outside the courtroom.                      Susceptibility of children to confusion and intimidation from defence counsel. No formal regulation of defence exploitation of the mental immaturity of children, in terms of style/content of cross-examination. Provisions to disallow questions are not drafted with children in mind; such provisions have limited effect at trial (Eastwood &amp; Patton 2002; Wood 2003), although there is now an onus on NSW trial judges to prevent certain questions.<sup>16</sup>                      Although s 165A <i>Evidence Act</i> (1995) prohibits a general warning being given to a jury “of the danger of convicting on the uncorroborated evidence of any child witness”, under s 165B a jury can be warned the child’s evidence <b>may be unreliable</b> because of age. Although the defence must request such a</p>

	<p>warning, when a child is targeted as a sexual object because of their age, it is contradictory to permit the reliability of the child's evidence to be questioned on the <i>grounds</i> of age. Common law warnings are permitted in relation to the unreliability of a child's evidence because of age.</p>
<p><b>Lack of forensic evidence</b> A child sex offence does not always involve sexual penetration/ejaculation leading to a <b>lack of forensic evidence</b>. Some forensic evidence is equivocal in relation to whether penetration has occurred due to the elasticity of the tissues involved (see <i>M v R</i> (1994) 181 CLR 487). Delay in complaint also contributes to a lack of forensic evidence.</p>	<p>Lack of medical knowledge of judges/jurors and the need for expert evidence on such matters: "of concern is the circumstance that ... expert evidence of human sexual behaviour whether normal or abnormal, and of victim response is not admissible" (Wood 2003:7). Although judges are no longer <i>required</i> to give a corroboration warning under s 164 <i>Evidence Act</i>, the warning was not been abolished. If a complainant's evidence is <b>uncorroborated</b>, a corroboration warning is still generally given in NSW. But a new provision (which has not yet come into effect), s 294AA <i>Criminal Procedure Act</i>, means that a judge must not warn or suggest that complainants are, as a class, unreliable witnesses and cannot warn a jury "of the danger of convicting on the uncorroborated evidence of any complainant". Limits on the admissibility of the forensic medical examination of the child as opinion evidence since such evidence must be given in a way that does not bolster the complainant's credibility (<i>R v RTB</i> [2002] NSWCCA 104). It was suggested in <i>R v Dann</i> [2000] NSWCCA 185 that the defence and prosecution could agree not to call any medical evidence or raise any issue about it at trial.</p>
<p><b>Power imbalance between victim and offender: delay in complaint</b> Studies on offender behaviour show that the grooming process creates emotional and/or economic dependence by the child on the offender; creates a power relationship between victim/offender (Berliner &amp; Conte 1990; Phelan 1995; Colton &amp; Vanstone 1996). Grooming contributes to <b>delay in complaint</b> and <b>lack of corroborative evidence</b>. Victim report studies show that the vast majority of children do not complain at the time of the abuse (Fleming 1997; Cossins 2000).</p>	<p>The common law does not deal with the reasons children do not report. It assumes children have the same mental capacity and knowledge as adults to protect themselves by reporting without delay. In nearly every case of delay, a <b>Longman warning</b> must be given: that "it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care ... were satisfied of its truth and accuracy".<sup>17</sup> In <i>R v BWT</i> [2002] NSWCCA 60 at [14]–[15], Wood CJ at CL observed that the effect of <i>Longman</i> is to "give rise to an irrebuttable presumption that the delay has prevented the accused from adequately testing ... the complainant's evidence ... irrespective of whether or not the accused was in fact prejudiced in this way". Recently the <i>Longman</i> warning, although not abolished, has been amended by s 294(3)–(5), <i>Criminal Procedure Act</i> in an attempt to confine the warning to situations where the defendant has suffered a "significant forensic disadvantage" as a result of delay. <b>The Crofts warning<sup>18</sup> must be given if a s 294 direction is given.</b><sup>19</sup> This direction informs the jury that delay does not necessarily indicate a false allegation and there may be good reasons why a complainant delays. The <i>Crofts</i> warning contradicts a s 294 direction since it warns the jury the delay can be used to evaluate the complainant's evidence and credibility. Recently, the <i>Crofts</i> warning was amended in NSW by s 294(2)(c) so that a judge must not warn a jury that delay in complaint is relevant to the complainant's credibility unless there is sufficient evidence to justify the warning.</p>
<p><b>Multiple offences</b> Victim report studies show that CSA often involves <b>multiple offences</b> over weeks, months or years (Cossins 2000). Commonly, offenders will be charged with more than one count of sexual assault. Multiple offences can make it very difficult for children to remember precise details of every individual offence.</p>	<p>Where sex offences are alleged to have been committed on three or more separate occasions occurring on separate days, the prosecution does not have to prove the dates/exact circumstances of each alleged occasion (s 66EA <i>Crimes Act</i> 1900 (NSW)).<sup>20</sup> Where more than one count is prosecuted, the <i>KRM</i> direction<sup>21</sup> may apply: the jury may be told they are to consider each count separately unless the evidence relating to one count is admissible as evidence in relation to another. The jury may also</p>

	<p>be told that if they have a reasonable doubt about the child's credibility in relation to one or more counts, that must be taken into account in assessing her/his credibility in relation to the remaining counts.</p>
<p><b>Multiple victims</b>                  Offenders may abuse <b>more than one child</b> and commonly target children from the <b>same</b> family, class, sporting club etc (Colton &amp; Vanstone 1996).</p>	<p>Tendency or coincidence evidence generally not admitted except in the form of relationship evidence.<sup>22</sup>                  Discretion to order separate trials<sup>23</sup> if the victims know each other, in order to prevent the evidence of one being admitted in the trial involving the offences against the other. Based on the belief that complainants who know each other (prior to complaint) have had an opportunity to concoct their complaints.                  If propensity/tendency evidence is admitted for a non-propensity/tendency purpose, a <i>BRS</i> direction<sup>24</sup> requires the trial judge to warn the jury of the limited use to which the evidence can be put.</p>
<p><b>A child's first complaint</b>                  Because of the secrecy surrounding CSA and issues of shame, embarrassment and self-blame, the child's <b>first complaint</b> is likely to be to someone they trust at a time when they feel it is safe to tell.</p>	<p>Exceptions to the hearsay rule prevent evidence by a child's confidant being admitted for its hearsay purpose (Cossins 2002), if, when the child told her/his confidant, the allegation of sexual abuse was not "fresh" in her/his memory.<sup>25</sup> Freshness is to be measured in hours or days.<sup>26</sup></p>
<p><b>Child's credibility</b>                  The combination of delay in complaint, lack of eyewitness evidence and/or corroborative forensic evidence means that the <b>credibility</b> of the complainant will be central to the accused's defence. The most unregulated aspect of the trial is <b>cross-examination</b>.</p>	<p><b>No evidentiary onus</b> on the defence to produce evidence of accusations that undermine the complainant's credibility, such as motivations for revenge.                  Obligation on the trial judge to maintain an impartial role and not interfere in defence lines of inquiry.  <b>No obligation</b> on the accused to give evidence and be cross-examined on accusations made against the complainant or face cross-examination about his own credibility.                  The jury cannot draw an adverse inference from the accused's failure to give evidence;<sup>27</sup> this principle applies in all criminal trials.                  If the accused gives evidence, the prosecution is not permitted to cross-examine him about the complainant's reasons for lying.<sup>28</sup>  <b>Lack of pre-trial defence disclosure.</b> Sexual assault cases rely heavily on the evidence of the complainant and "lend themselves ... to the defence approach of pre-trial silence, and even trial by ambush" (Wood 2003:28).</p>

**↑ The child sexual assault specialist jurisdiction pilot — A qualitative study**

[15] The NSW Pilot Program was established in 2003 after recommendations made by the NSW Legislative Council Standing Committee on Law and Justice to address the obstacles associated with child sexual assault prosecutions and the re-traumatisation experienced by child complainants (NSW Parliament, Legislative Council, Standing Committee on Law and Justice 2002). The pilot program represents a specialist child sexual assault jurisdiction in the District and Local Courts. It commenced operation on 24 March 2003 in Parramatta; by October 2003 it had been extended to courts in Penrith and Campbelltown and, by February 2004, to District and Local Courts in Dubbo (Attorney-General's Department of NSW 2004:1). In theory, the NSW Pilot Program represents a best practice model for protecting vulnerable witnesses without making any major changes to the conduct of proceedings in a child sexual assault trial. Although the pilot is a specialised *approach* which involves the establishment of judicially managed lists for child sex offences, pre-trial hearings and technological innovation, it is not a specialist court. Whilst child sexual assault matters are only heard in specially equipped courts, these courts

continue to hear other criminal matters. In addition, there are no specialist prosecutors or judicial officers involved in the pilot even though education packages were distributed to judges and prosecutors and training seminars for judicial officers were held (Cashmore & Trimboli 2005:12).

[16] The limited specialisation of the Pilot Program reflects its main aims:

- (i) to reduce the stress and trauma experienced by child complainants
- (ii) to increase the skills of legal professionals involved in the program, and
- (iii) to reduce delays in the prosecution of child sexual assault cases (Cashmore & Trimboli 2005).

[17] In relation to the first aim, there is a presumption in favour of admitting the complainant's pre-recorded evidence JIRT<sup>29</sup> interview and/or permitting the complainant to give evidence via CCTV and allowing her/him to have a support person (ss 306ZB and 306ZK, *Criminal Procedure Act 1986* (NSW)). The pilot also includes pre-trial hearings to determine the "special needs of the child and the readiness of the matter to proceed" (Rodger 2003:2). After the introduction of the pilot, s 91(8) of the *Criminal Procedure Act 1986* (NSW) was enacted which means child complainants (who were under the age of 16 at the time of the alleged offence and are currently under the age of 18 years) are exempt from being required to give oral evidence under any circumstances at committal proceedings, thus reducing the number of times a child complainant is subject to cross-examination.

[18] The pilot has involved upgrading District and Local courtrooms with technology that enables the court to hear, see and communicate with the child complainant who is either located in a remote witness room or a CCTV room within the court building. The remote room is a particularly important feature of the Program since it is situated in another building some distance from the courtrooms, its location cannot be detected from the street and it is a secure facility. The remote room was intended to service all the upgraded courtrooms at Parramatta, Penrith and Campbelltown, although in practice this has not occurred (Cashmore & Trimboli 2005). The advantages of the remote room include its location away from the courts (which means that the complainant and her/his family will not see, or be confronted by, the accused) and its child-friendly facilities including a waiting room and a play area.

[19] Cashmore and Trimboli (2005) completed an evaluation of the Pilot Program by observing 17 trials held in the Campbelltown, Parramatta, Penrith and Sydney District Courts from March to December 2004. Eleven of these trials were heard in the specialist jurisdiction and six were held in a comparison registry (Sydney). Interviews were also conducted with ten child complainants, ten parents, fifteen defence lawyers, fifteen prosecution lawyers, six Witness Assistance Service (WAS) officers from the DPP and one technician (Cashmore & Trimboli 2005:9). As noted by the authors, the main limitation of the study was the very small number of trials that were able to be observed during the evaluation period (Cashmore & Trimboli 2005:60).

[20] It could be said that the Pilot Program achieved its aims in relation to the use of special measures for complainants when giving evidence since, in all trials observed in the specialist jurisdiction and the comparison registry, the child gave evidence via CCTV, a support person was present while the child gave evidence, and the pre-recorded JIRT interview was tendered as all or part of the child's evidence-in-chief (Cashmore & Trimboli 2005:13). However, since six of these trials were in the comparison registry, it does not appear that the introduction of the Pilot Program, of itself, was responsible for the degree of usage of these particular measures.

[21] The benefits of CCTV were measured in terms of the complainants' appreciation at "not having to see the defendant or be in the courtroom" and the fact that "CCTV and the use of the pre-recorded interview made testifying easier than it would have been without these measures" (Cashmore & Trimboli 2005:61). These findings are similar to the results of a previous Australian study in which Eastwood and Patton (2002) found that giving evidence via CCTV from a remote room improved the experiences of child complainants. In particular, they

found that “[t]he degree of separation offered by the comprehensive use of CCTV and/or pre-recording clearly reduced the trauma of cross-examination” for child complainants in Western Australia, compared to the experiences of child complainants in NSW and Queensland (Eastwood & Patton 2002:61).<sup>30</sup> Although neither of these studies interviewed representative samples of children,<sup>31</sup> the results strongly suggest that there is a link between the use of CCTV facilities and improved experiences for child complainants.

[22] In relation to the other aims of the Pilot Program, Cashmore and Trimboli (2005:23) reported that it had no impact on reducing delays which occurred at various stages — from first complaint to investigation, investigation to committal, committal to trial and court outcome to sentence. From arrest to court outcome, the median number of days was “very similar for the specialist jurisdiction and for the comparison registry” (Cashmore & Trimboli 2005:26), that is, 400 in the specialist jurisdiction and 411 in the comparison registry.

[23] The Pilot Program also had little or no impact on the courtroom culture and the conduct of the trial. In each trial observed, Cashmore and Trimboli (2005) rated the linguistic style of the cross-examiner and the child to assess the extent to which they matched, using a four point scale. Compared to the linguistic style of the JIRT officers who are trained in interviewing techniques, the linguistic style of defence lawyers was *least* likely to match that of the child. Instead, defence counsel used “difficult vocabulary and complex sentence structure” and “[c]onsistent with the court observation ratings, children [also] rated the defence lawyers’ questions as harder than those of the prosecution” (Cashmore & Trimboli 2005:47). Defence lawyers were more likely to interrupt children during their evidence and when it came to lawyers’ professional manner towards the child, only defence lawyers (compared to prosecutors and JIRT officers) were rated as being aggressive, sarcastic, or accusatory towards the child (Cashmore & Trimboli 2005:48–49). This confirms observations made in a range of reports (see, for example, ALRC & HREOC 1997; NSW Legislative Council Standing Committee on Law and Justice 2002) that defence counsel regularly use language that is likely or designed to confuse and intimidate child complainants. Not surprisingly, and consistent with an overseas study (Dublin Rape Crisis Centre and the School of Law, Trinity College Dublin 1998), defence lawyers were rated as the least fair of all court participants by complainants.

[24] Over the years there has been anecdotal evidence that judges are reluctant to intervene in the conduct of cross-examination (see, for example, Cashmore & Bussey 1995) and this evidence was confirmed by Cashmore and Trimboli (2005). In all the trials observed, judicial intervention was least common “to protect the child witness from badgering or oppressive questioning, [or] to support and encourage the child” (Cashmore & Trimboli 2005:52), with only 20.6 per cent of judicial interventions being made to control cross-examination (Cashmore & Trimboli 2005:54). Although judicial intervention varied considerably according to the trial judge, it did not vary according to the complainants’ age or the style of questioning by the defence (Cashmore & Trimboli 2005:52). In fact, judges intervened *less* frequently in the specialist jurisdiction to protect the child from badgering, compared to the comparison registry (20 versus 40 interventions in the comparison registry), or to support the child (4 versus 46 interventions in the comparison registry) (Cashmore & Trimboli 2005:52). Although Cashmore and Trimboli (2005: 61) concluded that it was unclear as to the effect of the “specialist education” delivered to some judicial officers and prosecutors, it is arguable that the relative lack of judicial intervention in the specialist jurisdiction indicates that the educational packages received by judges had little impact on their control of proceedings.

[25] This view is confirmed by some of the professionals interviewed, who considered that the specialist jurisdiction had little impact on CSA trials except in relation to improvements in facilities and case management practices (Cashmore & Trimboli 2005:57). One of the most telling comments was from a Crown Prosecutor who said:

“We were told very little about [the pilot program]. I found out we were supposed to have specialist training and there would be certain crowns put aside for these sorts of matters and there would be certain members of the bench put aside to do those kinds of trials, and there would be case management — but none of that



happened. In fact, we had a judge who had no idea about the way things work, had never heard of the CCTV system, the remote room and the ability of a child to play their interview as evidence (Cashmore & Trimboli 2005:58).”

[26] This study, therefore, shows that vulnerable witness protections, alone, will not change courtroom cultural practices, such as the tactics and language used by defence counsel and lack of judicial intervention. However, this study still leaves unanswered the question whether or not special protective measures for children have any impact on the particular difficulties associated with prosecuting child sexual assault matters, as well as attrition and conviction rates. Because the NSW Pilot Program introduced protective measures for children that have been in practice in the UK for several years, and because a comprehensive study of the UK measures was based on interviews with representative samples of witnesses, it is useful to examine the study by Hamlyn et al (2004) to determine the link, if any, between vulnerable witness protections and court processes and outcomes.

## **Special measures under the *Youth Justice and Criminal Evidence Act* — A quantitative study**

[27] The non-representative samples of the studies by Eastwood and Patton (2002) and Cashmore and Trimboli (2005) can be contrasted with a much larger cohort of vulnerable witnesses (including children) who were the subject of a recent UK study on special measures available under the *Youth Justice and Criminal Evidence Act* 1999 (UK).<sup>32</sup> The study interviewed 552 and 569 vulnerable and intimidated witnesses in two separate phases: phase 1 (November 2000 to February 2001) and phase 2 (April to June 2003). In phase 1, 34 per cent of witnesses were under 17 years (188) and in phase 2, 42 per cent were under 17 years (239). 42 per cent of witnesses under the age of 17 were victims of sexual assault in phase 2, whilst 52 per cent were victims of sexual assault in phase 1. CCTV was available to 43 per cent of the child witnesses interviewed in phase 1 and to 83 per cent of the child witnesses interviewed in phase 2 whilst the use of pre-recorded evidence-in-chief rose from 30 per cent in phase 1 to 42 per cent in phase 2 for child witnesses (Hamlyn et al 2004:66).

[28] This study found there was a clear relationship between the use of special measures, such as CCTV, and improvements in witnesses experiences in court (Hamlyn et al 2004), which is consistent with the findings of Eastwood and Patton (2002) and Cashmore and Trimboli (2005). In particular, Hamlyn et al (2004:53–112) found that improvements in the experiences of vulnerable witnesses included:

- a significant reduction in overall anxiety levels and anxiety caused by the courtroom environment in all witness subgroups between phases 1 and 2 (77 per cent in phase 1; 70 per cent in phase 2)
- although victims of sex offences were more prone to distress and anxiety generally, they were less likely than average to feel anxious (from the court environment) in both phases as a result of the special measures
- for child witnesses, anxiety as a result of the court environment dropped from 28 per cent in phase 1 to 16 per cent in phase 2 which corresponds with the fact that 83 per cent of child witnesses gave evidence via CCTV in phase 2
- witnesses using special measures found cross-examination less distressing; 41 per cent said they had been upset a lot by cross-examination compared with 56 per cent of those who did not use a special measure
- child witnesses were less likely than others to be upset by cross-examination, with only 35 per cent in phase 2 saying the experience had upset them “a lot” (Hamlyn et al 2004:53). This appears to have been due to the use of CCTV which was available to 83 per cent of those under the age of 17 years in phase 2

- 90 per cent of witnesses in phase 2 who used CCTV found it to be helpful in giving their evidence, the main reason being that they were able to give evidence without “having to see the defendant or anyone else in court”
- witnesses who used special measures were “(slightly) more likely to report that they had been able to give their evidence completely accurately”, and
- victims of sexual assault were more likely to say “that the [special] measures enabled them to give evidence that they would not otherwise have been willing or able to give (44 per cent)”.

[29] The UK study found there was “convincing evidence that the measures have led to an increase in satisfaction among [vulnerable witnesses] both with the [criminal justice system] generally and with specific aspects of their experience of giving evidence” (Hamlyn et al 2004:113). In particular, because a third of all vulnerable witnesses who used a special measure said that they would not have been willing and able to give evidence without the special measure, the study concluded that:

“... some of the cases now finding their way to court and resulting in conviction might never have reached court before the introduction of special measures, due to [witness unwillingness to give evidence or] witness withdrawal or termination by the CPS due to doubts about how witnesses would perform in open court (Hamlyn et al 2004:113)”.

[30] However, Hamlyn et al’s (2004) findings confirm that other outcomes, such as increased conviction rates, are not likely to be achieved *merely* by the introduction of vulnerable witness protections, as discussed below.

## Conclusion

[31] A number of studies have used the degree of secondary victimisation experienced by complainants as a method of assessing the impact of the criminal justice system and/or the effectiveness of specific law reform measures (Law Reform Commission of Victoria 1991; NSW Department for Women 1996; Heenan & McKelvie 1997; ALRC & HREOC 1997; Eastwood & Patton 2002; Victorian Law Reform Commission 2004). In doing so, these studies have recognised the impact of re-traumatisation on a complainant’s ability to give evidence and on case outcomes. However, as yet, there is no evidence that improving victims’ experiences in court has a demonstrable impact on prosecutorial delays, conviction rates, improving the culture of the courtroom or any other aspect of the trial process. In the British study by Hamlyn et al (2004) there was no evidence that conviction rates were affected by the availability of special measures for vulnerable witnesses, whilst the number of trials studied by Cashmore and Trimboli (2005:22) was considered too small to draw any conclusions about the effect of the Pilot Program in NSW on conviction rates.

[32] Whilst it was hoped that the NSW Pilot Program would overcome long delays, ameliorate “child-unfriendly processes”, the formality of the court environment and curb intimidating and complex cross-examination (Cashmore & Trimboli 2005:59), its failure to meet these *particular* objectives meant that the Program had a limited ability to reduce the stress and trauma experienced by child complainants. On the positive side, the Pilot Program created a child-friendly environment in the form of a remote witness room that was beneficial for those complainants who had access to it, but it is clear that in order to prevent all children seeing the accused in the waiting areas of the courts, improved access to this remote room will be needed or more remote rooms will need to be built.

[33] Contrary to the recommendations of the NSW Legislative Council Standing Committee on Law and Justice (2002) trials in the Pilot Program were not conducted by prosecutors and presided over by judicial officers specially trained in child development and the dynamics of child sexual assault. This meant that judicial officers and prosecutors did not necessarily have

the skills or knowledge to minimise the stress experienced by child complainants and to make the connection between stress levels and the child's ability to give best evidence, particularly during the cross-examination process.

[34] Cashmore and Trimboli (2005) concluded that there was a "lack of evidence of any real benefits produced by the specialist jurisdiction beyond the use of the remote witness" since

"... there was little to distinguish the specialist jurisdiction from the comparison registry ... In fact, there is little evidence that the specialist jurisdiction was implemented as proposed or that the courts at Parramatta, Penrith and Campbelltown actually constituted a specialist jurisdiction in any real sense (Cashmore & Trimboli 2005:64)".

[35] Because the British study by Hamlyn et al (2004) involved a representative sample of vulnerable witnesses, it constitutes the best available evidence that the outcomes of special measures (in particular the use of CCTV) are confined to decreasing the anxiety and distress of such witnesses, improving the experience of cross-examination, possibly improving the quality of the witness' evidence and increasing the willingness of victims of sexual assault to give evidence, thereby increasing the number of cases that go to court. Since this is what these special measures, for the most part, were designed to achieve, there should be no surprise in terms of their benefits, as well as their limitations. This means that the introduction of special measures to protect children as witnesses will always be an insufficient reform measure for addressing not only the effect of delays in prosecuting cases but also most of the difficulties set out in Table 1 in relation to the conduct of CSA trials.

[36] In particular, the adversarial culture of the courtroom and its focus, through unregulated cross-examination, lack of judicial intervention and judicial warnings, on the credibility of child complainants does not appear to be affected by vulnerable witness protections.

[37] If the *sole* aim of reform is to improve the experiences of child complainants, the available evidence suggests that this can be achieved by prosecuting child sexual assault cases within the same jurisdiction as other criminal cases. However, all other aspects of CSA trials remain very much the same in terms of the problems associated with the lack of corroborating evidence, the restrictive laws of evidence in relation to opinion evidence, multiple victims and/or multiple offenders, the vulnerability of children to cross-examination, the lack of regulation of cross-examination,<sup>33</sup> the number and complexity of jury directions, the impact of delay in complaint on the conduct of the trial and the centrality of the child's credibility to the trial and its outcome. Although the NSW Government established a taskforce to consider these and many other issues associated with the prosecution of sex offences in NSW, out of the 70 recommendations made by the taskforce (Criminal Justice and Sexual Offences Taskforce 2006), only six have been implemented.<sup>34</sup> Three of these reforms (see Table 1) do tackle some of the problems associated with judicial warnings although it remains to be seen how the NSW Court of Criminal Appeal and the High Court will interpret the legislative attempts to abolish the corroboration warning and make changes to the circumstances in which the *Longman* and *Crofts* warnings can be given.

[38] Prevention of CSA is just as important as making child victims' experiences less stressful in court. What is at stake for politicians having to tackle this issue is whether CSA is considered a significant enough problem to embrace radical changes which might offer real solutions to decreasing attrition rates, increasing reporting and conviction rates and thereby offering treatment programs to higher numbers of offenders and protecting present and future generations of children. Faced with similar problems, some overseas jurisdictions have introduced specialist courts for dealing with the prosecution of sex offences and family violence offences, together with intensive case management for reducing delays. The next paper in the series considers the issue of specialisation in more detail by examining the experience of specialisation in Canada and South Africa and two particular reform options:

(i) a specialist sex offences court based on the adversarial model, and

- (ii) a “less adversarial” approach based on a Family Court of Australia pilot program.

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\* Paper first published in full in *Current Issues in Criminal Justice* (2006) 18(2) 299.

<sup>1</sup>This register was established under the *Child Protection (Offenders Registration) Act* 2000 (NSW) and began operation in October 2001. It is modelled on the register under the *Sex Offenders Act* 1997 (UK) and is the first of its kind in Australia.

<sup>2</sup>A study by the Crime and Misconduct Commission (2003:58–59) found that in Queensland for the period 1994–2001, approximately 17 per cent of sexual offences reported to police result in a conviction in the higher courts. Wundersitz (2003:10) reported a much lower figure of 9.9 per cent of those charged with a sex offence being found guilty of out of 952 incidents. Fitzgerald (2006:4) found that criminal proceedings are only initiated in relation to 15 per cent

of the incidents of child sexual assault reported to police in NSW and that “approximately eight per cent of recorded incidents involving children ... result in a sexual offence being proven in court” (Fitzgerald 2006:4).

<sup>3</sup>A recent survey of the literature by the author found that a majority of sexually abused children do not disclose immediately *or* within one month of abuse (Baker & Duncan 1985; Finkelhor, Hotaling, Lewis & Smith 1990; Anderson, Martin, Mullen, Romans & Herbison 1993; Fleming 1997; Smith, Letourneau, Saunders, Kilpatrick, Resnick & Best 2000; Kogan 2004; Alaggia 2004; Ullman & Filipas 2005) and that a majority of children either only disclose the abuse one or more years after it occurred or not at all (Finkelhor et al 1990; Anderson et al 1993; Roesler & Wind 1994; Smith et al 2000; London, Bruck, Ceci & Shuman 2005). For example, Fleming (1997) reported that only 10 per cent of Australian women who said they had been sexually abused as children ever reported the abuse to police, a doctor or a community agency.

<sup>4</sup>In July 2003, the Australasian Police Ministers’ Council announced that legislation similar to the *Child Protection (Offenders Registration) Act 2000* (NSW) would be adopted in each state in Australia by July 2004. See *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offender Reporting and Registration) Act 2004* (NT); *Child Protection (Offender Reporting) Act 2004* (Qld); *Community Protection (Offender Reporting) Act 2005* (Tas); *Serious Sex Offenders Monitoring Act 2005* (Vic); *Sex Offenders Registration Act 2004* (Vic); *Community Protection (Offender Reporting) Act 2004* (WA); Child Sex Offenders Registration Bill 2006 (SA).

<sup>5</sup>That is, “can it be said that there is a reasonable prospect of conviction by a reasonable jury (or magistrate) properly instructed” (Crime and Misconduct Commission, Queensland 2003:52). This is the test in most Australian jurisdictions.

<sup>6</sup>In a study of appeals in child sexual assault cases in NSW, Hazlitt, Poletti and Donnelly (2004) reported that 67 per cent of offenders were sentenced more than 10 years after the commission of their offences.

<sup>7</sup>See Table 1 and the contradiction between a s 294 direction and the *Crofts* warning.

<sup>8</sup>Recidivism studies use a variety of methods (being charged with a sex offence; being convicted; being imprisoned) for measuring recidivism without acknowledging that the vast majority of victims never report. If the measure of recidivism is changed and the follow-up period extends into decades, recidivism rates change markedly (Prentky, Lee, Knight & Cerce 1997). It is also necessary to distinguish between reoffending rates and *reconviction* rates since “the probability of a serious sexual offender being reconvicted ... is relatively low” (Hood, Shute, Filzer & Wilcox 2002:371). Thus, measures of recidivism could merely represent the probability of an offender being reported, charged or convicted rather than being an accurate measure of re-offending. Self-report studies appear to be a more reliable indicator of recidivism (Abel, Becker, Mittelman, Cunningham-Rathner, Rouleau & Murphy 1987; Abel, Becker, Cunningham-Rathner, Mittelman & Rouleau 1988; Salter 1995).

<sup>9</sup>Notes to table:

- (i) Some of the warnings, procedures, rules of evidence and legal principles discussed are *specific* to sexual assault trials or child sexual assault trials; others are rules of general applicability to all criminal trials. Whether the rules are of specific or general application, they may weigh heavily against securing a conviction in a child sexual assault trial.
- (ii) The table sets out the judicial warnings and rules of evidence as they apply in only one jurisdiction, NSW, due to the complexity of doing so for all eight Australian jurisdictions.

<sup>10</sup>Number (iv) is based on a personal communication from Judge Helen O’Sullivan, District Court, Queensland, July 2004.

<sup>11</sup>*R v Murray* (1987) 11 NSWLR 12 at 19, per Lee J.

<sup>12</sup>See *HG v R* (1997) 197 CLR 414 at 428, per Gleeson CJ.

<sup>13</sup>*C* (1993) 70 A Crim R 378; *F* (1995) 83 A Crim R 502.

<sup>14</sup>See s 6 *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s 21A *Evidence Act* (NT); ss 21A and 21AP–AR *Evidence Act 1977* (Qld); Pt 6 of Ch 6 of *Criminal Procedure Act 1986*, (NSW); s 13 *Evidence Act 1929* (SA); *Evidence (Children and Special Witnesses) Act 2001* (Tas); ss 106N and 106R *Evidence Act 1906* (WA); s 37C *Evidence Act 1958* (Vic).

<sup>15</sup>See also ss 69(3), 104 *Justices Act 1902* (WA); s 21AB *Evidence (Protection of Children) Act 2003* (Qld); s 57A *Justices Act 1959* (Tas).

<sup>16</sup>See s 41 *Evidence Act 1995* (NSW).

<sup>17</sup>*Longman v R* (1989) 168 CLR 79 at 91, per Brennan, Dawson and Toohey JJ. See, further, *Crampton v R* (2000) 206 CLR 161; *Doggett v R* (2001) 208 CLR 343; *R v BWT* [2002] NSWCCA 60.

<sup>18</sup>*Crofts v R* (1996) 186 CLR 427.

<sup>19</sup>Section 294 *Criminal Procedure Act 1986* (NSW). Analogous provisions in other jurisdictions include: s 61 *Evidence Act 1958* (Vic); s 71 *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s 36BD *Evidence Act 1906* (WA); s 34I *Evidence Act 1929* (SA); s 371A *Criminal Code Act 1924* (Tas); s 4 *Sexual Offences (Evidence and Procedure) Act* (NT).

<sup>20</sup>Analogous provisions in other jurisdictions include: s 47A *Crimes Act 1958* (Vic); s 229B *Criminal Code Act 1899* (Qld); s 74 *Criminal Law Consolidation Act 1935* (SA); s 321A *Criminal Code* (WA); s 125A *Criminal Code Act 1924* (Tas); s 131A *Criminal Code* (NT); s 56 *Crimes Act 1900* (ACT).

<sup>21</sup>*KRM v R* (2001) 206 CLR 221.

<sup>22</sup>Sections 97 and 98 *Evidence Act 1995* (NSW); see *De Jesus v R* (1986) 68 ALR 1; *Hoch v R* (1988) 165 CLR 292; *R v OGD* (No 2) (2000) 50 NSWLR 433.

<sup>23</sup>There is a general discretion to order separate trials under s 21 *Criminal Procedure Act 1986* (NSW).

<sup>24</sup>*BRS v R* (1997) 191 CLR 275.

<sup>25</sup>Section 66(2) *Evidence Act 1995* (NSW). Such evidence might be admissible for a non-hearsay purpose; if so, s 60 *Evidence Act 1995* (NSW) would apply.

<sup>26</sup>*Graham v R* (1998) 195 CLR 606.

<sup>27</sup>*Azzopardi v R* (2001) 205 CLR 50; s 20 *Evidence Act* (1995).

<sup>28</sup>See *R v Gilbert* NSWCCA, 10 December 1998; *R v Dennis* [1999] NSWCCA 23.

<sup>29</sup>Joint Investigative Response Team. These teams, comprising specially trained police officers and Department of Community Services personnel, were introduced after recommendations by the Wood Royal Commission (Royal Commission into the New South Wales Police Service 1997) to conduct investigations into reports of child sexual assault.



<sup>30</sup>This study was carried out before the NSW Pilot Program was established. <sup>31</sup>Eastwood and Patton interviewed 63 children (18 in Queensland, 9 in NSW and 36 in WA).

<sup>31</sup>Eastwood and Patton interviewed 63 children (18 in Queensland, 9 in NSW and 36 in WA).

<sup>32</sup>Vulnerable witnesses under the UK Act include those under the age of 17; with a physical disability; with a mental disorder or with a significant impairment to intelligence or social functioning; those who fear or experience intimidation and victims of a sexual offence.

<sup>33</sup>Section 41 *Evidence Act 1995* (NSW) does place an onus on trial judges to intervene in relation to cross-examination questions that are misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive or put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate. However, there is no monitoring of the extent to which trial judges comply with this provision. In addition, it is possible for trial judges to conduct trials without greater intervention since the judge, him- or herself, has to be of the opinion that the question is improper in the way described.

<sup>34</sup>*Criminal Procedure Amendment (Sexual and Other Offences) Act 2006*.



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