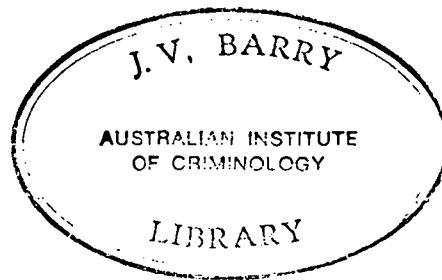


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# THE EVIDENCE OF CHILDREN



**Judy Cashmore**

BA (Hons) (Adel) MEd (Newcastle) PhD (Macq)

*Research Fellow, Social Policy Research Centre, University of NSW*

with a contribution to Chapter II

by

**Kay Bussey**

BEd (Hons) (Qld) PhD (Qld)

*Senior Lecturer in Child Psychology, Macquarie University*



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## **Disclaimer**

The views expressed in this monograph are the views of the individual authors and do not represent any official views of the Judicial Commission of New South Wales, nor are they necessarily shared by the members of the staff of the Commission. Whilst all reasonable care has been taken in the preparation of this publication, no liability is assumed for any errors or omissions.

# I

## INTRODUCTION

Increasing numbers of children, especially very young children, are now giving evidence in criminal court proceedings and concern about the difficulties child witnesses face in this adult oriented system has resulted in two major areas of legal reform. These are the removal or reduction of formal barriers to children's testimony in the form of competence and corroboration requirements, and the introduction of special procedures and physical facilities to reduce the emotional pressures of testifying. Although the implementation of these measures depends largely on judicial discretion, we know little about the credibility of child witnesses in judicial eyes and little about judicial acceptance of these measures. We also know little about the way these procedures and the whole court process are perceived by child witnesses and their parents, nor about the effects that changes in the system have had on the prosecution process.

This monograph brings together three research studies which throw some light on each of these areas. The first examines judicial perceptions about child witnesses, focussing on judicial concerns about the competence of child witnesses and the perceived need to provide special arrangements to meet children's needs. Despite their theoretically neutral role, judges are in a unique position to influence court procedures and ultimately to affect the outcome in ways that can be either helpful or damaging to children's experience at court. Little, however, is known about judicial perceptions. As Melton<sup>1</sup> pointed out:

“With rare exceptions . . . researchers interested in judicial decision-making have been forced to rely on indirect measures, because judges typically are reluctant or unavailable to discuss the bases for their decisions.”

Judicial cooperation in New South Wales, however, allowed this research to be carried out. One aim of this monograph is therefore to provide feedback to the judicial officers who participated in the research. Their assistance is much appreciated by the authors.

The second study reports the views of child witnesses and their parents about their experience at court, and was conducted as part of the work of the DPP's Sexual Assault Review Committee. Its value lies in providing feedback to the legal professionals involved with these children about the way children see the process. In particular, the importance of the judicial role in children's eyes is highlighted by the finding that children's perceptions that the judge was fair were clearly related to their views of the fairness of the defence

1 Hafemeister TL and Melton GB “The impact of social science research on the judiciary” in GB Melton (ed) *Reforming the law: the impact of child development research*, 1987, Guildford Press, New York, p 33.

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lawyer and of the way they were treated at court. The fairer the judge, the fairer the defence lawyer is seen to be. Similarly, the fairer the judge, the fairer children and parents thought the child's treatment at court was. Although parents were often unwilling to put their children through the stress of a court appearance, a supportive judge, or one who was perceived to be supportive, was seen to have a positive effect.

The final study examines the way cases of child sexual assault are prosecuted in New South Wales, and in particular, the changes that have occurred in this process over the last decade. It is based on data from the NSW Bureau of Crime Statistics and Research and on reports completed by DPP solicitors in relation to cases of child sexual assault they dealt with over a 12 month period either at committal or trial. It is reproduced by courtesy of the *Australian and New Zealand Journal of Criminology*.

## II

# JUDICIAL VIEWS OF CHILD WITNESS CREDIBILITY

The traditional legal view of children was that they were unreliable witnesses, prone to fantasy and with incomplete and inaccurate memories of what they have seen or experienced. Their “incapacities” were typically contrasted with adult abilities, and they were seen as a “curious mix: innocent and truthful on the one hand, yet also manipulable and devious”.<sup>2</sup>

A number of important changes concerning child witnesses over the past decade or so have, however, challenged such views. The number of children giving evidence has multiplied with the dramatic increase in child abuse notifications, legislation and court procedures have been changed to lessen the restrictions on child witnesses, and research concerning the abilities and perceptions of child witnesses has increased. A now considerable body of research indicates that the very negative views about children’s abilities as witnesses are not justified.<sup>3</sup> For example, Ceci and Bruck<sup>4</sup> conclude:

“This research shows that children are able to encode and retrieve large amounts of information, especially when it is personally experienced and highly meaningful. Equally true, however, is that no good will be served by ignoring that part of the research that demonstrates potentially serious social and cognitive hazards to young children if adults who have access to them attempt to usurp their memories ...”

While even young children can be reliable witnesses, they will not be effective witnesses, and may not even be heard, if they are not seen as credible by legal professionals and by the fact-finders in court. While lawyers’ and jurors’ perceptions of child witnesses have been subjected to scrutiny, there is little information available about judicial views. There is therefore a gap in the research in relation to judicial perceptions, an important area because of the significant role of judicial officers in court.

Why are judicial views about child witnesses important? The underlying assumption is that judges’ behaviour is affected by their attitudes and their beliefs. Although the relationship between attitudes and behaviour is by no means straightforward, it is generally accepted that attitudes and perceptions

2 Perry NW and Wrightsman LS *The child witness: legal issues and dilemmas*, 1991, Sage Publications, Newbury Park, California, p 24.

3 Ceci S and Bruck M “Suggestibility of the child witness: a historical review and synthesis” (1993) 113 *Psychological Bulletin* 403–439; Spencer J and Flin R *The evidence of children: the law and psychology*, 1990, Blackstone Press, London.

4 Ceci S and Bruck M *ibid* p 434.



have some influence on behaviour and intentions or at least provide some insight into them.<sup>5</sup>

Despite the classical view of the function of the criminal court judge in an adversarial system as that of an “impartial moderator”, judges and magistrates clearly make a number of decisions in the course of a case which can affect its outcome and which may be either helpful or prejudicial to child witnesses. These include assessing the competence of children to testify, controlling questioning and especially cross examination, providing directions to the jury, both in terms of warnings and summing up, modelling child conscious court practice, and allowing the use of special procedures for child witnesses. Finally, magistrates, and judges in cases heard without a jury, act as the fact finder.

The aim of this study then was to examine judicial views about child witnesses. It focussed on judges’ and magistrates’ perceptions of the competence of child witnesses and on their perceptions of the need to provide special arrangements to meet the needs of children. How do judges decide whether a child is competent to give evidence? When do judges consider that children are automatically deemed to be competent to take an oath and need not be examined in the *voir dire*? What do judges and magistrates expect of child witnesses, and what aspects of their ability to testify concern them most? What difficulties, if any, do judges and magistrates believe children face in court, and what special arrangements do they see as acceptable to accommodate them? Furthermore, to what extent are judicial views shared? What is the effect of experience?

## Method

Fifty judicial officers (27 magistrates and 23 judges)<sup>6</sup> in New South Wales responded to a questionnaire, either by interview or by mail,<sup>7</sup> concerning their perceptions of child witnesses. The questionnaires were designed to assess practising judicial officers’ appraisals, concerns, practices and understanding of

5 Azjen, I *Attitudes, personality and behaviour*, 1988, Dorsey Press, Chicago.

6 Magistrates and judges did not differ significantly in terms of experience: an average of 11.2 years on the bench for magistrates compared with 7.7 years for judges.

7 Letters were sent to magistrates and judges inviting them to participate in a research study on child witnesses. An article in a newsletter to magistrates also outlined the study and invited magistrates’ cooperation. City based judges and magistrates were offered the choice of responding by interview or by questionnaire. The majority of magistrates completed the questionnaire themselves, whereas the majority of judges were interviewed. All respondents were informed that their responses would remain anonymous.

issues related to child witnesses. They included both open-ended questions and rating scales related to five areas:

- (1) reported methods and criteria for determining the competence of child witnesses;
- (2) concerns about various aspects of witnesses' ability to testify by age;
- (3) beliefs about the vulnerability and likely sources of trauma to child witnesses;
- (4) the acceptability of special provisions for child witnesses; and
- (5) judicial practices—intervention in cross examination and discretionary corroboration warnings.

### Transcripts of voir dire

Forty five transcripts of the voir dire with child witnesses over a ten year period were examined. All involved child witnesses ranging in age from five to 16 years in child sexual assault matters at committal or at trial. Thirty pertained to cases prior to 1985, ten to cases heard after the 1985 legislative reforms,<sup>8</sup> and five concerned cases heard after the 1991 amendment to the Oaths Act 1900, which removed the need for children to understand the duty to tell the truth in court and brought in a presumption of competence.

## Results and Discussion

### Prevalence of testimony by child witnesses

All the judges and magistrates who participated in the research had some experience with child witnesses, although the extent and recency of that experience varied. There were also differences between judges and magistrates as a group. Magistrates tended to have more experience, with significantly more cases over the preceding two years than judges (an average of 33.9 cases compared with 13.3).<sup>9</sup> The children appearing before magistrates were also involved in a broader variety of cases (sexual assault, physical assault, domestic violence, robbery, and vehicle homicide and injury), and appeared in a broader range of roles—as defendants, non-victim witnesses, and victim witnesses. Only five judges (21.7% of judges) reported cases involving child witnesses who were not alleged victims. A minority of both magistrates (seven, 25.9%) and judges (seven, 30.4%) reported experience with child witnesses younger than seven.

8 The most pertinent of these were changes to the *Oaths Act* 1900 to allow children to give evidence if the court was satisfied that they understood the “duty to tell the truth in court”, and changes to the *Evidence Act* 1898 removing the need for corroboration of unsworn evidence.

9 This difference was statistically significant:  $t(43) = 2.72, p < .01$ .

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### Perceptions of the competence of child witnesses

#### *Age and competence*

When asked at what age they believe a child is too young to give evidence, judges and magistrates responded with a range of ages from 4 to 9-10 years of age. The most common response was five years of age (26%). The majority (62%) indicated that children seven years of age and under were very likely to be too young. A number of judges (n=6, 26.1%) and magistrates (n=4, 14.8%), however, were not prepared to nominate any specific age as being "too young". Their concerns focused, however, on the same aspects mentioned by those who did specify an age—the ability to recall the events in question, to respond in court to questions and give an account of the events, and to distinguish between right and wrong, and between fantasy and reality.

When asked at what age they *assumed* children to be competent witnesses, the most common response was around 12 but responses ranged from seven to

*Table 1  
Age at which Judges and Magistrates Regard Children as Too Young to Give Evidence*

| Age of child    | Magistrates |      | Judges |       | Total |       |
|-----------------|-------------|------|--------|-------|-------|-------|
|                 | n           | %    | n      | %     | n     | %     |
| 4 years         | 5           | 18.5 | 2      | 8.7   | 7     | 14.0  |
| 5 years         | 5           | 18.5 | 8      | 34.8  | 13    | 26.0  |
| 6 years         | 4           | 14.8 | 2      | 8.7   | 6     | 12.0  |
| 7 years         | 4           | 14.8 | 2      | 8.7   | 6     | 12.0  |
| 9-10 years      | 5           | 18.5 | 3      | 13.0  | 8     | 16.0  |
| No specific age | 4           | 14.8 | 6      | 26.1  | 10    | 20.0  |
| Total           | 27          | 99.9 | 23     | 100.0 | 50    | 100.0 |

*Table 2  
Age at which Judges and Magistrates Assume Children are Competent*

| Age of child        | Magistrates |      | Judges |      | Total |       |
|---------------------|-------------|------|--------|------|-------|-------|
|                     | n           | %    | n      | %    | n     | %     |
| 7-8 years           | 2           | 7.4  | 4      | 17.4 | 6     | 12.0  |
| 9-10 years          | 2           | 7.4  | 2      | 8.7  | 4     | 8.0   |
| 11-12 years         | 3           | 11.1 | —      | —    | 3     | 6.0   |
| 12-13 years         | 9           | 33.3 | 9      | 39.1 | 18    | 36.0  |
| 14-15 years         | 7           | 25.9 | 3      | 13.0 | 10    | 20.0  |
| 18 years (for oath) | 1           | 3.7  | —      | —    | 1     | 2.0   |
| No specific age     | 3           | 11.1 | 5      | 21.7 | 8     | 16.0  |
| Total               | 27          | 99.9 | 23     | 99.9 | 50    | 100.0 |

15 years.<sup>10</sup> Again some respondents (eight) refused to specify an age. There was little difference between judges and magistrates.

Judicial views about the presumed age of competence, though similar to those of “jurors” and lawyers in other studies,<sup>11</sup> are particularly significant for what they suggest about judicial determination of competence. Although the legislation regarding children’s competence to testify may be and indeed has been amended to ease the restrictiveness of the requirements, judges and magistrates are likely to continue to ‘test’ children below the age at which they presume children are competent. Experience in the United States and Australia indicates that this is the case.<sup>12</sup> A recent study of prosecutions of child sexual assault in New South Wales, for example, found that the majority of children under 12, and especially children aged five to nine years, were questioned about their understanding of truth and lies although the Oaths Act 1900 was changed in 1991 to presume children are competent; 86% of five to nine year olds were questioned in preliminary local court hearings, and 62% in higher court trials. (See chapter IV of this volume).

#### *Determining the competence of child witnesses*

The way judges and magistrates determine the competence of child witnesses to give evidence was investigated by examining the questions they reported asking to test competence and by examining the basis on which they deemed a child incompetent. A sample of transcripts from both committal and trial hearings was analysed also.

- 10 Significantly, children under 12 are the subject of a specific section of the *Oaths Act* 1900 allowing them to make a declaration rather than be sworn.
- 11 Leippe and Romanczyk (1987) reported that lay respondents or “potential jurors” gave an average age of 11.4 years for the age at which they believed a child becomes “equal to an adult” in resisting suggestions, and 11.0 years for adult-like “believability” or credibility. (Leippe MR and Romanczyk A “Children on the witness stand; a communication/persuasion analysis of jurors’ reactions to child witnesses” in SJ Ceci, DF Ross and MP Toglia (eds) *Children’s eyewitness memory*, 1987, Springer-Verlag, New York, p 155–177).
- 12 Trial judges in the United States reportedly continued to assess and rule on the competence of children despite amendments to the competency requirements to include a presumption of competence. (Myers JEB *Legal issues in child abuse and neglect*, 1987, Sage Publications, Newbury Park, California). Similarly, Goodman reported that children were still asked questions about truth and lying by prosecutors at the beginning of their examination-in-chief, presumably to satisfy the court despite a presumption of competence (Goodman GS, Taub E, Jones D, England P, Port L, Rudy L and Prado L “Emotional effects of criminal court testimony on child sexual assault victims” (1993) *Monographs of the Society for Research in Child Development* No 229).

*Questioning practices and criteria*

Judges and magistrates were asked what questions they ask children to determine if they are competent, firstly, to give evidence, and secondly, to take an oath, and what they look for in their answers. The main features looked for were an understanding of truth and the need to tell the truth<sup>13</sup> (n=36, 72%), an ability to respond to questions and describe events (n=22, 44%), and some understanding of the reason for their involvement in the court hearing (n=8, 16%). In addition, several respondents (n=3, 6%) referred to the need for children to be able to distinguish fact from fantasy.

Judicial responses to these questions indicated considerable dissatisfaction with the oath, and with the competence testing procedure itself. Thirteen respondents (seven magistrates, six judges) said they preferred the non-religious declaration or affirmation rather than the oath because they doubted the value of an oath in a predominantly secular society. One judge, for example, said:

“I don’t worry about hell and all the demons, and whether they’ve read the Bible. I’m inclined to prefer an affirmation unless they actually say ‘Yes, I go to Sunday School’ or something like that.”

Some, mostly judges, expressed dissatisfaction with the competence test in general. Their reasons were twofold. The first was doubt about the value of the competence test. For example:

“Kids will either tell the truth or they won’t. It doesn’t matter what mumbo-jumbo you go through ... it’s not more likely to get them to tell the truth ...”

and

“we delude ourselves into thinking we can tell who’s telling the truth.”

The second was discomfort with the discriminatory aspect of testing children, and not adults. As one magistrate said:

“We’re no longer in a society where everyone knows about the Bible. There is an assumption that an adult knows what the Bible is, and God, and the Christian religion ... but that assumption isn’t well-founded, so why is it fair to differentiate between an adult and a child?”

13 Some respondents expected children to demonstrate an understanding of the seriousness of the need to tell the truth (n=13, 26%) or some expectation that they would be punished if they lied (n=12, 24%).

*Reported experience of deeming children incompetent*

Just under half the respondents (n=21, 42%) reported that they had determined that a child was *not* competent to give evidence, magistrates more so than judges.<sup>14</sup> This is not surprising since magistrates more often than judges would be expected to have seen children appearing as witnesses for the first time. With the introduction of “paper committals”, however, children are now more likely to appear at trial for the first time.

Respondents explained their decisions in terms of the child not understanding the promise to tell the truth, being unable to say what the difference between the truth and a lie was, not understanding the proceedings, or a general lack of mental capacity or inability to respond.

*Analysis of transcripts of voir dire*

Examination of 45 transcripts of the voir dire conducted in committal hearings and trials over a ten year period confirmed the pattern of questioning reported by respondents, although the transcripts did not necessarily relate to hearings over which the judges and magistrates in this study presided. The child witnesses in these cases were between five and 16 years of age, and two witnesses (a five year old and a nine year old) were deemed incompetent.

The transcripts also revealed considerable variation in the linguistic and conceptual difficulty of questions and in judicial expectations of children’s responses. Some judges and magistrates were satisfied with affirmative answers to relatively simple and leading questions, such as “You understand you have to tell the truth here today, don’t you?” or to older children, “You know what it means to swear to tell the truth, don’t you?”. Others expected definitions of truth and lies and an understanding of the consequences of not telling the truth. Several asked very difficult questions which indicated unreasonably high expectations about children’s knowledge of concepts and terminology.<sup>15</sup>

The difficulty of the questions lay in both the linguistic and conceptual demands of the questions. For example, some questions ask for an

14 This difference was significantly different: 15 magistrates (55.5%), six judges (26.1%):  $\chi^2 = 7.26, p < .005$ .

15 Sas observed similar variability in courts in Ontario. She commented on the apparent lack of guidelines for questioning in the voir dire, the opportunity given to defence lawyers to ask additional questions, and the embarrassment children experienced when questioned asked about their religious instruction because of their implied “deficit”. (Sas L *Reducing the system-induced trauma for child sexual abuse victims through court preparation, assessment and follow-up*, 1991, London Family Court Clinic, London, Ontario).

understanding of terminology beyond the capability of children of that age (“surname” for a five year old, and “perjury” for an 11 year old):

**To 5 year old:**

Q: And how do you spell your surname?

A: Um—S-A-L-L-Y.

**To 9 year old:**

Q: In respect to the answers that you give to those questions, are you conscious of the fact that you have an obligation? . . . [No response] Do you know what an obligation is?

A: No.

**To 11 year old:**

Q: Do you know you could be charged with perjury?

A: . . . [Silence]

Others contained concepts which were clearly too difficult for the children involved. For example, the following question to a 5 year old poses two problems:

Q: If you said to me “You’re a judge” and you’re wearing a red cape, and I said to you, “I’m not a judge”, what would you think of me?

A: Um, I don’t know.

First, the question is poorly focussed, directing the child’s attention to the perceived personal characteristics of someone who would make such a denial. Second, the personalised character of the question requires the child to tell the judge that he is “a liar”; many children of this age believe that the judge has the power to send them to gaol, and would be very reluctant to give the required answer.<sup>16</sup>

### Perceptions of the ability to testify by age

Judicial officers, prosecution lawyers and district officers<sup>17</sup> were asked to indicate how concerned they would be on a scale from [1] (“not concerned at all”) to [5] (“extremely concerned, so concerned that you are doubtful that they should testify at all”) about 13 aspects of a witness’s ability to testify for

16 Cashmore J and Bussey K “Children’s conceptions of the witness role” in JR Spencer, G Nicholson, R Flin and R Bull (eds) *Children’s evidence in legal proceedings: an international perspective*, 1989 University of Cambridge, Cambridge; Feben DJ *Age of witness competency: cognitive correlates*, unpublished Honours Thesis, 1985, Monash University, Clayton, Victoria; Flin R, Stevenson Y and Davies G “Children’s knowledge of the law” (1989) 80 *British Journal of Psychology* p 285–297.

17 Officers in the NSW Department of Community Services who work in the area of child protection.

## JUDICIAL VIEWS OF CHILD WITNESS CREDIBILITY

witnesses of various ages. The questions were preceded by a short vignette which described repeated sexual assault by a family member.<sup>18</sup>

The main patterns in the mean ratings of concern provided by judges and magistrates,<sup>19</sup> lawyers, and district officers are shown in Figure 1. Statistical analysis<sup>20</sup> indicated that the level of concern clearly decreased with age for all aspects of testifying except for the two items related to honesty—intentional falsification and exaggeration.<sup>21,22</sup> Whereas there was more concern about the general reliability of younger children compared with older children and adults, younger children were seen as no more likely or even as less likely to tell lies or to exaggerate. All three professional groups were less concerned about intentional errors in children's evidence resulting from dishonesty than they were about unintentional errors arising out of fantasy and the influence of others. District officers, however, consistently expressed less concern than

- 18 Judges and magistrates responded to either a “one-off” physical assault by a stranger or a repeated sexual assault by a family member, but there were no significant differences between their responses and regardless of which scenario they were given, the majority referred at some stage to child sexual assault. This is not surprising because child sexual assault is the most common reason that children appear as witnesses in criminal court proceedings. Lawyers and district officers responded to the sexual assault scenario only and to an additional question about the effect on the witness of having to face the defendant in court.
- 19 Whether a respondent was a judge or magistrate, how long they were on the bench, and the number of cases they had dealt with during the last two years involving child witnesses made no significant difference to their ratings.
- 20 Separate (5 (age of the witness: repeated measures)  $\times$  2 (role: judge, magistrate)  $\times$  2 (type of incident: physical, sexual assault)) analyses of variance were conducted on each of the 13 sets of ratings.
- 21 When the age-groups were combined to provide a comparison between children under 12 versus older children and adults, only a minority of judges (19%) and magistrates (8%) believed that children under 12 were more likely than adults to provide intentionally false testimony. In contrast, 90% of judges and 84% of magistrates were more concerned about children's than adults' ability to distinguish fantasy from reality.
- 22 Separate (5 (age of the witness: repeated measures)  $\times$  3 (role: judicial officer, lawyer, district officer)) analyses of variance on each of the 13 sets of ratings resulted in a significant effects for age of the witness (at  $p < .005$  to take account of the test-wise error rate) except for “falsification” and “exaggeration”.

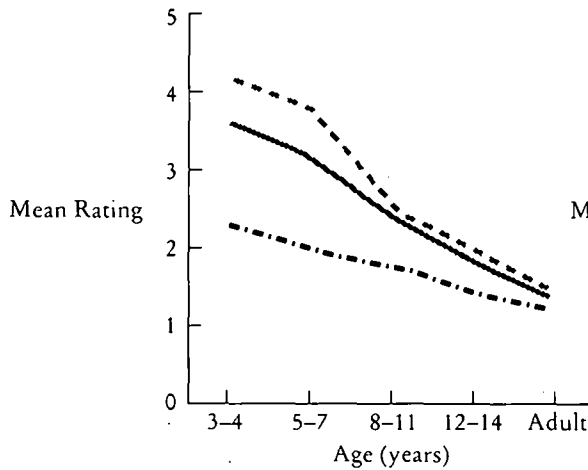


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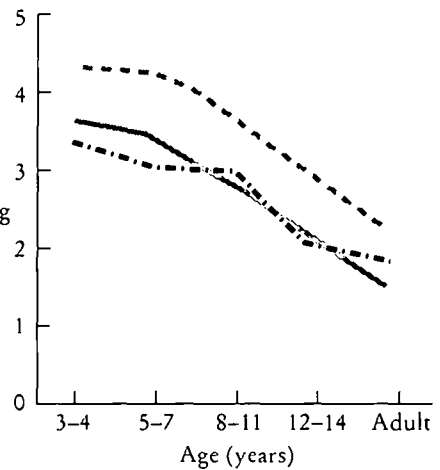
Figure 1  
 Mean Ratings of Concern Given by Judicial Officers,  
 Prosecution Lawyers, and District Officers

--- Judges and Magistrates    — DPP Lawyers    -.- District Officers

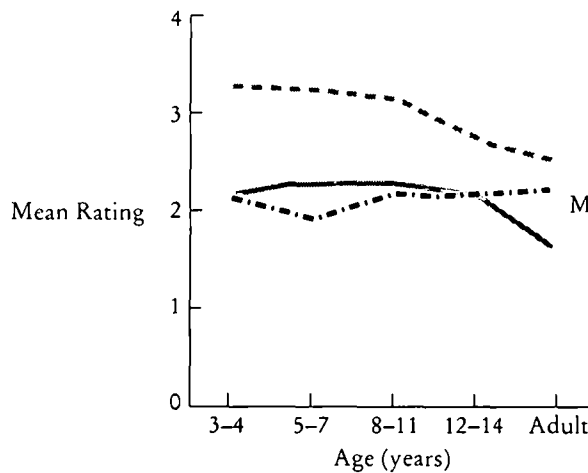
a) Ability to Distinguish Fantasy From Reality



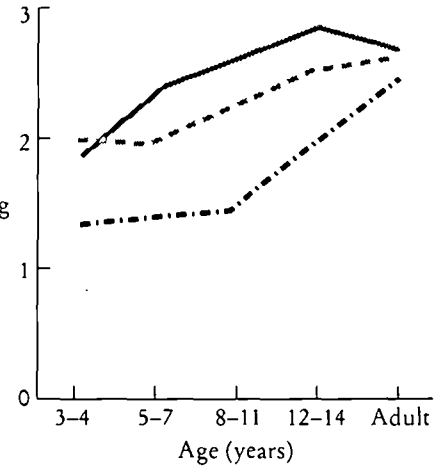
b) Adding Unwitnessed Events After Suggestive Questioning



c) Exaggerating Severity of Events



d) Intentionally Falsifying Truth



prosecution lawyers and judicial officers, and lawyers less than judicial officers, although not all differences were significant.<sup>23</sup>

Further analysis showed where the changes in the level of concern occurred—at about 7–8 and at 11–12 years of age. These two age ranges correspond with the ages (see Table 1) at which the majority of judicial officers assume that children are too young to give evidence (below seven years of age) or are presumed competent without the need for a *voir dire* to test their competence (around 12 years of age).

Some judges and magistrates resisted completing either some or all of these items, saying that they could not generalise and did not want to respond simply on the basis of age.<sup>24</sup> Most, however, made comments which indicated their views and their comments were analysed together with those given by respondents who did complete the ratings.

*Judges' and magistrates' comments on the ratings*

Consistent with the ratings analysis, concern generally decreased as the age of the witness increased. The most common comment was “the younger they are, all other things being equal, the bigger the problem”—except in relation to lying, and in relation to adolescents. Several comments indicated some concern, for example, that adolescents may be more vulnerable to challenges to their integrity and more likely than younger children to provide false evidence to further their own ends. In relation to falsification, for example, one judge said: “The early teens, 11 to 14 or 15, are the most volatile.”

Again the main concern was not the honesty of young witnesses (especially those under 12), but the reliability of their evidence. Children were seen by some to be less reliable—unintentionally—because they lack the necessary skills to report on what happened and because of their perceived susceptibility to fantasy and to the influence of others, either by direct coaching or because of the pressures associated with conflict and divorce.

23 The two-way interaction between age and professional role was significant for three aspects: reporting the elements of the offence,  $F(8, 204) = 3.60, p < .002$ ; fantasy,  $F(8, 206) = 3.76, p < .001$ ; and coaching,  $F(8, 200) = 3.56, p < .002$ . This was the result of district officers being significantly less concerned than judicial officers and lawyers about the capacities of younger witnesses but not older witnesses. Professional role was significant for three other aspects: leading questions,  $F(2, 104) = 6.21, p < .003$ ; threats,  $F(2, 104) = 19.20, p < .001$ ; and intentional falsification,  $F(2, 104) = 6.02, p < .003$ . In all cases, district officers were less concerned than judicial officers, and in some, they were also less concerned than lawyers (intentional falsification, fantasy).

24 Twelve judges resisted completing any ( $n=7$ ) or some ( $n=5$ ) of the ratings. Five magistrates did not complete any ratings.

**Two opposing views about children's propensity to fantasise:**

Magistrate: I think there is no doubt that there are times that reality and fantasy intermingle. But it's interesting because often children are great realists and sometimes what you thought was fantasy was not fantasy at all but confusion or even a misapprehension. But I worry about them in situations of trauma and that there may have been some intervention.

Judge: I do not know—they fantasise. I have four grandchildren and I know that until a transition at about 6 or 7, they can tell the most outlandish stories and are convinced that they have happened. I would be very apprehensive about placing too much reliance on what little kids have said because they can't really separate reality from fantasy.

Again, judicial views are similar to those of mock jurors and lawyers. All were more concerned about the reliability of children's evidence than about their honesty. In one study, for example, five to nine year old children were judged—by 88% of lay respondents—to be significantly more sincere than adults but also more suggestible—by 77% of respondents.<sup>25</sup> In another, mock jurors judged a six year old in a sexual assault scenario to be more credible than a 22 year old. They tended to attribute greater honesty to the younger witness, partly because they presumed that a young child “would probably not know enough about anatomy to lie about her teacher”.<sup>26</sup>

Lawyers have been shown to hold similar views, although it makes a difference what their function is. Prosecution lawyers were more likely than defence lawyers to see children as being more sincere than adults (63% compared with 39%) and less likely to see them as more suggestible (70% compared with 91%).<sup>27</sup> Prosecution lawyers, however, tend to have less

25 Leippe and Romanczyk op cit.

26 Goodman GS, Bottoms BL, Herscovici BB and Shaver P “Determinants of the child victim's perceived credibility” in SJ Ceci, DF Ross and MP Toglia (eds) *Perspectives on children's testimony*, 1989, Springer-Verlag, New York, p 1–22.

27 Two studies on lawyers in Florida found marked differences between prosecution and defence lawyers in relation to the perceived reliability and suggestibility of child witnesses (Leippe MR, Brigham JC, Cousins C and Romanczyk A “The opinions and practices of criminal attorneys regarding child eyewitnesses: a survey” in SJ Ceci, DF Ross and MP Toglia (eds) *Perspectives on children's testimony*, 1989, Springer-Verlag, New York, p100–130; Brigham JC and Spier SA “Opinions held by professionals who work with child witnesses” in H Dent and R Flin (eds) *Children as witnesses*, 1992, J Wiley & Sons, Chichester, p 93–111). Not surprisingly perhaps, defence lawyers took a more negative view and carried this through to the way they tested the testimony of an opposing child witness. They were more likely than prosecutors to report using tactics that focused on the expected vulnerabilities of a child witness (eg, inconsistencies, fear, and confusion).

## JUDICIAL VIEWS OF CHILD WITNESS CREDIBILITY

confidence in child witnesses than child protection workers and police. Clearly, professional role influences perceptions of child witnesses.

### Perceived effects of testifying

#### *Perceived traumatic aspects*

When asked what they thought were the main sources of trauma for child witnesses, judges and magistrates most frequently mentioned the formality of the court environment and the requirement to recount the events in public and “relive the past”. Magistrates were more likely than judges to refer to the confrontation with the accused; nearly half the magistrates mentioned it compared with less than one in five judges.<sup>28</sup>

Not all respondents, however, accepted the view that child witnesses are traumatised by the need to testify. Some (four judges, one magistrate) argued instead that children are no more traumatised than adult witnesses and that the concern about trauma for child witnesses “has gone too far”.

*Table 3  
Judges’ and Magistrates’ Perceptions of the Main Sources of Trauma for Child Witnesses.*

| Age of child                            | Magistrates |      | Judges |      | Total  |      |
|---|-------------|------|--------|------|--------|------|
|   | n (24)      | %    | n (22) | %    | n (46) | %    |
| Formality of court environment          | 13          | 54.2 | 8      | 36.4 | 21     | 45.6 |
| Recounting events esp in public         | 9           | 37.5 | 11     | 50.0 | 20     | 43.5 |
| Confronting accused                     | 11          | 45.8 | 4      | 18.2 | 15     | 32.6 |
| Questioning esp cross examination       | 6           | 25.0 | 4      | 18.2 | 10     | 21.7 |
| Investigation and others’ reactions     | 4           | 16.7 | 6      | 27.3 | 10     | 21.7 |
| Child’s fears and lack of understanding | 5           | 20.8 | 4      | 18.2 | 9      | 19.5 |
| Adversary system                        | 3           | 12.5 | 3      | 13.6 | 6      | 13.0 |
| Little trauma                           | 1           | 4.1  | 4      | 18.2 | 5      | 10.9 |

#### *Perceived beneficial effects of testifying*

Judges and magistrates differed in their views about the likely benefits of testifying—magistrates (52.2%) were somewhat more positive than judges (31.8%).<sup>29</sup> The perceived benefits were the cathartic effect of “getting it out in the open” and “seeing justice done”, although this was qualified by some in terms of whether the child was believed or not. Those who rejected the notion that testifying could be beneficial did so on two opposing grounds. On the one hand, testifying was described as a “necessary evil” (eg, “to be endured

28 This difference is statistically significant: Fisher exact probability  $p = .0554$ .

29 This difference is also statistically significant:  $\chi^2 = 6.71, 2 \text{ df}, p < .04$ .

by the child but cushioned in a variety of ways”). On the other, the idea of “having a day in court” was repudiated because it was seen to encourage vindictiveness.

### **Perceptions of the need for and acceptability of special measures for child witnesses**

Most judges and magistrates acknowledged the need for special provisions for child witnesses at least “sometimes”, though again magistrates were more likely than judges to support their use (95% versus 62%).

**Judge:** In general terms, if the child can get under way, more often than not, they’re honest. The way to get them underway, however, might involve very radical changes to the rules of evidence and the design of courtrooms.

[Q: *Do you think the changes are justified?*]

I must confess I’m coming to that view because of the impact of a number of acquittals. I think the criminal justice system is the only way to deal with it but changes must be made to the criminal justice system.

Those who opposed the use of special measures for child witnesses, however, relied upon two main arguments based on the nature of children, and on the nature of the adversary system and the rights of the accused. In the first category, special measures were seen as either unnecessary or dangerous because they perceived children to be “more resilient than we think” or “likely to tug at the heartstrings”; alternatively, children were seen as “less likely to lie but more vulnerable to the influence of third parties”. In the second category were arguments about the need to maintain the adversary system without change (“it’s a system that has generally served the community fairly well”) and to recognise that the focus of the trial is on the accused and his/her rights (not on the witness). Existing judicial discretion in running the court was seen as providing adequate protection for witnesses without infringing the rights of the accused. These rights included the right to confront one’s accuser and to have all evidence presented in the same way without prejudicing the presumption of innocence.

Courtroom practices and procedures not requiring any special equipment or legislative basis for their use were the measures suggested most often to accommodate child witnesses. They included, for example, allowing the presence of a support person, reducing the formality of the court, and establishing rapport with the child during the voir dire. Judicial intervention was also mentioned as a means of preventing the child being overborne by aggressive cross examination and ensuring that the child understands the questions. Several magistrates also mentioned the importance of children being prepared for their court experience and being able to understand what happens in court.

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*Table 4*  
*Percentage of Judges and Magistrates in Favour of Special Provisions for Child Witnesses*

|   | Magistrates<br>(n = 24) | Judges<br>(n = 22) | Total<br>(n = 46) |
|---|-------------------------|--------------------|-------------------|
| Support person                            | 91.7                    | 86.4               | 89.1              |
| Videotaped interviews                     | 78.3                    | 88.3               | 82.5              |
| Partition (screen)                        | 57.1                    | 59.1               | 63.9              |
| Videotaped depositions at committal       | 68.4                    | 56.3               | 62.8              |
| Closed-circuit television                 | 74.1                    | 45.5               | 61.3              |
| Videotaped depositions at trial           | 55.5                    | 36.8               | 45.9              |
| Closed-circuit television (defendant out) | 50.0                    | 36.4               | 43.5              |

Other special provisions for child witnesses involved environmental and technological innovations to avoid the intimidation of the child by confrontation with the accused and by the physical size and structure of the courtroom. These measures included the use of screens and closed-circuit television, changes in seating arrangements and in the design of the courtroom, and the admissibility of videotaped statements from children.

In both cases—for courtroom practices and environmental/ technological innovations—magistrates were more likely than judges to mention such provisions. Just over twice as many magistrates as judges spontaneously mentioned and advocated changes in courtroom practices (15 magistrates suggested 26 such changes, seven judges suggested ten changes) and environmental/technological innovations (16 magistrates mentioned 25 changes, six judges mentioned six changes). Similarly, more judges (eight) than magistrates (one) rejected the need for special provisions for child witnesses.

### *Support persons*

The presence of a support person in court was clearly the most favoured measure, with 93% of judges and magistrates supporting it. Views varied, however, in relation to where the support person should sit. Judges (n = 11) were more likely than magistrates (n = 4) to oppose the support person sitting next to the child because of concern about perceived unfairness to the accused, especially in front of a jury. Others were more concerned about the support person prompting the witness through eye contact.

### *Screens*

This was one of the least favoured measures, prompting a number of qualifications as to its general usefulness or feasibility, even among those in favour of it. Six respondents (four judges, two magistrates) reserved their judgment, waiting until they had seen them in operation. The nine magistrates and four judges who opposed to the use of screens were mainly concerned about its prejudicial effect, and the unfairness to the accused if she or he is not able to see the witness. Several respondents made highly critical comments (for example, “it’s absurd, it’s like the Iron Curtain” and “there’s something

grotesque about it . . . it's so much more obvious or unsubtle"). Other concerns were the logistical difficulties in some courts and the fact that using screens still leaves the child in the formal atmosphere of the courtroom.

*Closed-circuit television*

The majority of both judges and magistrates favoured the use of closed-circuit television, but with the child rather than the defendant removed from court. Their reasons for this concerned the protection of both the accused and the child—the protection of the accused's right to be present at his or her own trial and the protection of the child from the courtroom. Although most respondents were positive about the benefits of removing the child from the courtroom, a number had reservations about the possibly prejudicial effect of using any such special procedure (n=3), the impact of the testimony via the television medium (n=4), and the possibility that the child could be surreptitiously influenced by others present in the separate room (n=2). Only two referred to the right of the accused to directly confront his or her accuser but others (n=6) rejected this notion when children were involved.

*Video-taped evidence*

Video-taped evidence falls into three categories: (a) out-of-court videotaped investigatory interviews with the child witness, and (b) special videotaped pre-hearing depositions, including examination-in-chief and cross examination, for use at committal or (c) at trial in place of the child's live appearance in the proceedings.

Most judges and magistrates were in favour of videotaped investigatory interviews on the grounds that first, they allow the court to see how information was obtained from the child, and second, that they may facilitate the children's testimony by showing prior consistency, refreshing their memory and promoting their credibility. A group of six magistrates and two judges explicitly referred to the need to introduce legislation to allow the admissibility of the tapes as evidence of prior consistency. Their comments also revealed a number of qualifications or conditions: the need for specially trained interviewers, and the requirement that children be available for cross examination. On the other hand, six judges opposed the use of videotaped statements, except for their currently admissible purpose of showing prior inconsistency. They were in favour of a visual record of the child's statement but rejected the idea of changing the law to allow the videotape to be admissible as part of the evidence-in-chief ("Alterations to the laws of evidence? I think that's going a bit far") or to replace the child's evidence-in-chief ("I think the tribunal of fact should have the opportunity to see how the complainant presents his or her evidence-in-chief").

Support for videotaped depositions at committal and trial was lower, especially for the use of depositions at trial among judges. Judges were more likely than magistrates to oppose the use of depositions at trial and more likely to oppose their use at trial than at committal. Their opposition was

based on the view that a jury needs to be able to see the evidence of the witness tested in person during cross examination. Even some respondents in favour expressed concern about the expected lessened impact of videotaped evidence compared with an “in the flesh” witness.

### **Reported judicial practices**

Judges and magistrates were asked about two discretionary aspects of judicial practice: the circumstances in which they would (a) intervene during cross examination, and (b) warn the jury (or in the case of magistrates, warn themselves) about the danger of convicting on the uncorroborated evidence of a child.

#### *Willingness to intervene*

Half the respondents indicated that they would intervene, and that they were indeed vigilant, to prevent child witnesses from being harassed by repetitive, intimidating or incomprehensible questioning. The other half were either more qualified in their response (eg, “it’s a fine balancing act but I will intervene to make sure they understand the question”) or clearly reluctant to intervene. Judges, in particular, commented that it is poor technique and counter-productive to badger children; they indicated that defence counsel are usually gentle with children in front of a jury.<sup>30,31</sup>

30 *R v Arthur* (unreported, 24/12/91, SASupCt, King CJ, White, Bollen JJ).

31 One judicial view as to the propriety of intervention with child witnesses was spelt out in an appeal case. A basis for appeal was the claim that “the learned judge erred in that he interfered excessively with the conduct of the trial by questioning” one of the nine year old complainants. In dismissing the appeal, King CJ, for example, stated:

“Although the regular course of a trial involves that the questioning of witnesses by counsel be the norm, the judge undoubtedly has a role to play in ensuring that the true story emerges. He must ensure that there is not misunderstanding between counsel and the witness and is entitled to re-frame questions to avoid any such misunderstanding. He should guard against the possibility that a witness, particularly an uneducated or inarticulate witness or one who is under a disability, has not conveyed his true meaning by the words he has used. He should ask appropriate questions to overcome that danger. He must protect the witness against loaded questions and may intervene to ensure that the witness’s true meaning emerges. These are examples, but by no means exhaustive examples of the circumstances in which a trial judge may, and in some instances ought to, intervene if he is to perform his proper role in the trial.

... Questions from counsel standing at the bar table may intensify that shyness and reticence and produce a reluctance to tell the story. Questions from the presiding judges may provide the reassurance which is necessary for the truth to emerge. In asking questions for that purpose, the judge is undoubtedly, to my mind, performing his proper role in the trial”. Ibid.



**Willing to intervene**

Judge: Yes, I've often told the barrister "I think the witness has answered that question already". In my experience, the barrister usually tries not to appear to be a bully with a child witness but if he goes too far ... I'll say ... sometimes they respond by saying "I'm entitled to test the evidence by cross examining as I like." And I say "No, you're not, take a look at the Evidence Act."

**Reluctant to intervene**

Judge: It's a difficult balancing act but I think it's very important when cross examination is proceeding ... to permit the evidence to be properly tested and if that means, as it inevitably does, that the child has to be distressed, I'm afraid it's part of the system. I just don't see any option ... the only way of avoiding distress carries with it the inevitable consequence that the defendant doesn't get the opportunity of adequately testing the evidence.

Magistrate: That's not our role. My role is to see that the questions are admissible and relevant and to make sure people are doing their job properly, but you are not supposed to intrude into the arena. A lot of counsel when they're confronted with a young child witness, a lot of them realise that bullying is not going to help their case at all ... if they have any sense ... but I've certainly seen defence counsel go on for a long time. In one case the child ran from the courtroom; he was in the witness box for 3 or 4 days but the barrister spoke gently and quietly but he just didn't stop ... on we went. And I felt ... I didn't ... have any power to stop him because he didn't transgress the prohibitions—he had a right.

*Warning the jury*

Judicial views about the need for warnings about the uncorroborated evidence of children also produced varied responses. While some (five judges, one magistrate) indicated that the warning was always necessary, most believed that the need for the warning depends on various factors—the age of the witness (n=12), the perceived reliability of the evidence (n=18), the potential of adult influence (n=6), the likely motivation of the witness (n=5), and the type of case (eg, sexual assault allegations: n=3). Some (n=10) were more likely to warn with younger witnesses (eg, less than ten or 12) whereas two were more concerned about adolescents. The reliability of the evidence was defined in terms of the presence of vague or conflicting statements, poor memory, and long delay from the time of the events. Motivation included the presence of a custody dispute or other conflict between family members (eg children's antagonism toward a step-parent). Concern about adult influence related to parents and "over zealous" social workers.

**Warning always necessary**

Magistrate: Clearly where there is uncorroborated evidence of the child.

Judge: The jury must be warned of the care to be taken in assessing the evidence of a young child.

Judge: On all occasions, with no distinction between child and adult testimony, and no distinction re the nature of the offence.

**Warning contingent upon various factors**

Judge: There should be NO general rule to that effect. A warning should be given when in the judge's opinion, the child's recollection and consistency are demonstrably poor.

Judge: With young children, I would give the warning, saying this sort of evidence is very easy to make up but very hard to disprove, and unless you find corroborating evidence, I have to warn you there are dangers in relying on it ... something like that. [Q: *How old is a young child?*] My rule of thumb is probably anything under about 12, but a lot depends on the case, and the sort of things that crop up during it. If you find there's a 15 year old who has her knife in Mum's ex, I'd probably give the warning whereas you wouldn't with another 15 year old in different circumstances.

Magistrate: Generally where older girls (11+) are involved, boys also, where family members are charged, where there has been a long delay in the complaint being made.

Judge: If their testimony is (1) vague, (2) contradictory, (3) there's been some time since the events confounding the first two factors, (4) where poor interviewing techniques leave open the prospect of suggestion, (5) age and maturity of the child, (6) if the atmosphere in the home has been changed, particularly where custody or resentment are factors.

## Conclusions

Despite their theoretically neutral role, judges and magistrates are in a unique position to determine the competence of child witnesses, to control court behaviour and to model child conscious practices. How they do so, however, probably depends upon their own view of their role, and on their perceptions of the reliability and needs of child witnesses. The findings of this study provide some insight into their views and have implications for several issues—the determination of competence, the extent of variability and the role of judicial experience.

Interestingly, although the focus in competence testing is ostensibly on children's understanding of truth and lies, judges and magistrates held little

concern about children's dishonesty. Indeed, a number of judges and magistrates expressed some concern about the determination of competence and the vast majority believed that children were at least as honest as adults, if not more so. On the other hand, judges and magistrates were significantly more concerned about children's susceptibility to the influence of others and their propensity to fantasise. Children were seen as more likely than adults to accede to leading or suggestive questioning, and to revise their testimony in response to coaching, threats and challenges to their integrity. They were also seen as less likely to be able to distinguish fantasy from reality.

While there was consensus in some areas, there was also considerable variability. This is similar to the results of other research<sup>32</sup> with lawyers. Experience as a judge versus that of magistrate and the number of cases presided over involving child witnesses explained some of the differences in some areas. For example, magistrates were more positive than judges about the possible benefits of testifying, and they were also more sensitive to the difficulty that confronting the accused holds for children. Nearly half the magistrates referred to it as a source of trauma for children compared with less than a fifth of judges. Consistent with these differences, magistrates were also more supportive of special arrangements such as closed-circuit television and videotaped depositions to prevent child witnesses having to face the courtroom and the accused.

More extensive case experience, more common for magistrates than judges, was also associated with greater concern about confrontation with the accused and with greater acceptance of special provisions. The greater the experience, the more child focussed judges and magistrates tended to be. Years on the bench, however, had no effect, a result reported by other studies.

What then are the implications of these findings for the court's management of child witnesses? It is clear that case experience involving child witnesses, but not experience on the bench, seems to have some influence on judicial attitudes towards child witnesses, making them more child focussed rather than less so. Relying on experience, however, is unlikely to be sufficient for several reasons. First, the whole area of child witness research is quite complex and rapidly expanding, and it takes some time to come to grips with the conflicting findings. Second, as legislation changes to take account of increased awareness of these findings, there is evidence that changes in practice do not automatically follow<sup>33</sup>. Third, experience does not necessarily make lawyers or the judiciary better able to communicate with children and appreciate their

32 Leippe and Romanczyk op cit p 159; Luus E and Wells GL "The perceived credibility of child eyewitnesses" in H Dent and R Flin (eds) *Children as witnesses*, 1992, J Wiley & Sons, p 89.

33 Myers op cit ; Sas op cit p 104.

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capacities as well as incapacities. Legal professionals including lawyers and the judiciary receive little, if any, training in these areas, and may be reluctant to recognise the need.<sup>34</sup>

There are, however, signs that lawyers and the judiciary are increasingly interested in further information about child witnesses. A judge in the current study, for example, said:

“Results of research should also be made known to magistrates and judges. Also we should be given more empirical training so that our natural biases are whittled down; we are not infallible. The adversary system is about winning and losing. It is not about truth and justice. One side bears a very heavy onus to prove something in a mystery game, dictated by a whole lot of technical rules, that has nothing to do with truth and justice as the layman would understand that. There are powers to regulate questions but they are never used.”

34 Parkinson P “The future of competency testing for child witnesses” (1991) 15 *Criminal Law Journal* 186–192; Spencer J and Flin R *The evidence of children: the law and the psychology*, 1990, Blackstone Press, London.

### III

## THE PERCEPTIONS OF CHILD WITNESSES AND THEIR PARENTS CONCERNING THE COURT PROCESS:

### Results of the DPP Survey of Child Witnesses and their Parents

The treatment of victims in court proceedings, and in particular that of child witnesses is attracting increasing attention and criticism. With some exceptions, however, there has been little opportunity for the children and their families to express their views about the court process, and for the main players in court to receive feedback from those involved as witnesses. Such feedback about common problems and concerns is important because it can inform legal professionals dealing with child witnesses about ways to improve the children's experience. Various reforms and changes in procedure have been introduced to facilitate the reception of children's evidence and to ease the stress of testifying but it is important to know how the court process and any changes in the process affect the children who are subject to them. Lessening the stress of the court appearance is not only worthwhile in itself but is likely to enhance children's ability to provide evidence.<sup>35</sup>

This paper presents the results of a survey of child witnesses and their parents by the New South Wales Office of the Director of Public Prosecutions Sexual Assault Review Committee. The results of this survey indicate a number of key concerns which are consistent with the findings from other research in the area. They have implications for the court process and for the treatment of child witnesses and adult witnesses also.

## Method

### Questionnaires

Questionnaires for child witnesses and their families included a series of questions dealing with their experiences mostly at court but also to some extent during the investigation process. The questions asked respondents to rate the fairness of the outcome, the court process, and their treatment by the various professionals in court (the judge/magistrate, the DPP solicitor, Crown

35 Goodman G, Taub EP, Jones DPH, England P, Port LK, Rudy L and Prado L *The emotional effects on child sexual assault victims of testifying in criminal court: final report to the National Institute of Justice, 1989, US Department of Justice, Washington DC*; Whitcomb D, Runyan D, De Vos E, Hunter WH, Cross TP, Everson MD, Peeler NA, Porter CQ, Toth PA and Cropper C "The impact of testifying on child sexual abuse victims" (1992) 5 *The Advisor* 2, 20.

Prosecutor, and the defence lawyer), to indicate aspects of the court process that were stressful for them, and to suggest changes which would make it easier for children to testify. Parents were also asked what effect the court experience had had on their child. Copies of the questionnaire for children and for their parents are presented in Appendices A and B.

### **Procedure**

Solicitors from the Office of the Director of Public Prosecutions (DPP) involved in prosecutions of child sexual assault were directed by their office to give an explanatory letter and a copy of the questionnaire to all child witnesses (if they were old enough to complete them) and to their parents at the end of the hearing (committal or trial). Completion of the questionnaires was voluntary. These questionnaires were to be returned to the Office of the DPP. Following some concern about a possible bias in the responses, stamped addressed envelopes were provided with the questionnaires to allow respondents to return their forms directly and without the cost of postage.

### **Participants**

Forty seven children and 43 parents returned completed questionnaires.<sup>36</sup> All the children were witnesses in criminal proceedings in relation to charges of child sexual assault. The average age of the children who responded was 12.8 years. Where parents responded, the average age of their child was 10.6 years.

A comparison of the cases with a year long DPP survey of prosecuted cases of child sexual assault, especially in terms of the age of the children and the outcome of the hearings, suggests that there were some similarities and differences between the current sample and the overall profile of DPP child sexual assault matters. In terms of age, for example, the average age of 10.6 years (parent respondents) and 12.8 years (child respondents) was reasonably similar to the average age of around 12 years for the overall prosecution sample. It would be expected, however, that the age of children for whom parents would respond would be younger and that child respondents may be somewhat older.

In relation to outcome, committal hearings in the survey sample were somewhat less likely to result in committal for trial and the trials slightly more likely to result in a conviction than the overall prosecution data would suggest. Defendants were not committed for trial in six of the 19 committals

36 The response rate is difficult to assess because solicitors from all over the state were asked to pass them onto child witnesses, but they may or may not do so. Although there was no obvious bias in response, the results should be interpreted with some caution. It is possible that solicitors who expected a negative report from the child and/or family did not pass them on.

(31.6%) in which children were the respondents to the questionnaire, and in three of 17 cases (17.6%) in which parents were the respondents. These figures are higher than the DPP data which indicate that about 9% of defendants in committal hearings for child sexual assault in 1991-1992 were not committed for trial. On the other hand, the cases in the current survey were more likely to result in a conviction than prosecutions in general. The defendants were convicted in 18 of the 30 trials (60%) involving child respondents, and in 12 out of 24 cases (50%) involving parent respondents. These figures are somewhat higher than the 36.8% cases in which children gave evidence at trial which resulted in a conviction.

## Results

### Do parents and children believe the process is fair?

Children and their parents were asked to rate the fairness of the outcome, of the way the child was treated in court, and the fairness of various participants—the judge/magistrate, the prosecuting solicitor, the Crown (if a trial), and the defence lawyer. The higher the rating, the fairer children or their parents perceived the outcome or the participant to be.<sup>37</sup>

Figure 2 shows the mean ratings given by parents and children, taking account of the outcome. There were no significant differences between the responses of children and parents involved in committal hearings and in trials except that the outcome of committals was seen as fairer than that of trials. As discussed in Chapter IV of this volume, the defendants in committal hearings were more likely to be committed for trial than the defendants in trials were to be convicted.

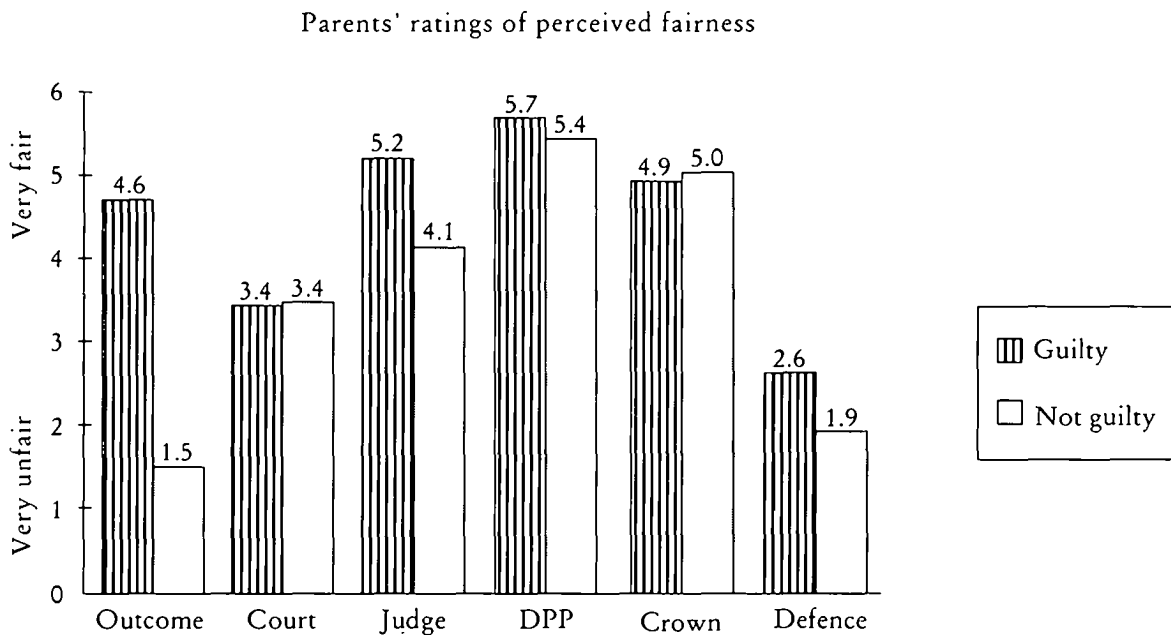
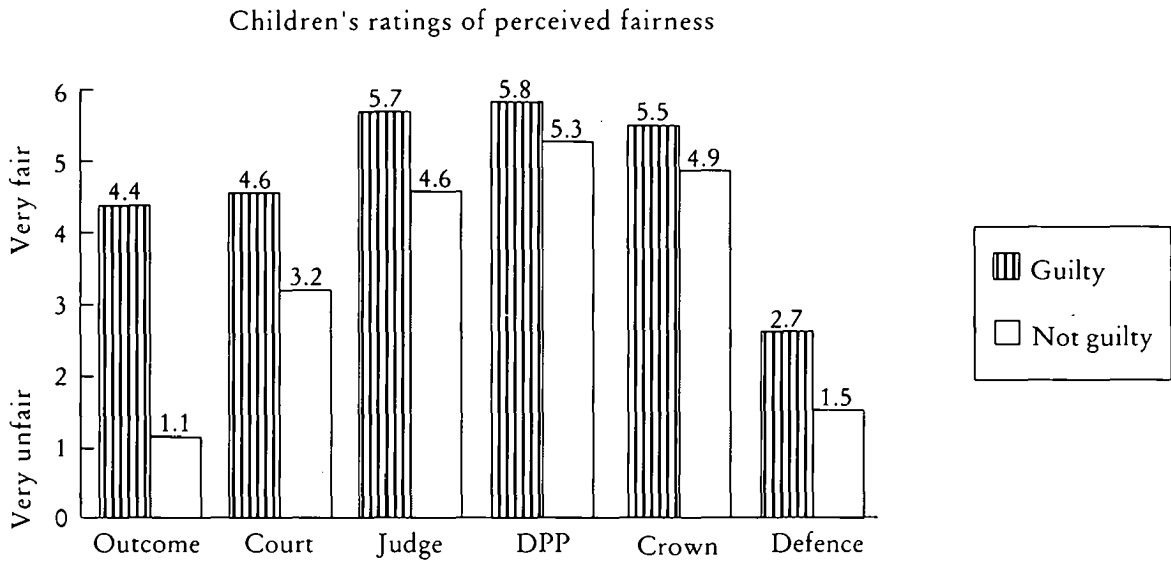
### The outcome

Not surprisingly, the perceived fairness of the outcome was strongly influenced by the result—whether the defendant was committed or convicted or not. Both parents and children rated the outcome as significantly fairer if the defendant was committed or convicted than if he was not. Children who were unhappy with the outcome tended to focus on the inadequacy of the punishment (for example, “He should have gone to jail” and “He got off very lightly . . . I have been scarred for life”) and on the perceived disbelief of their testimony (“I told the truth but everyone believed him because he’s an adult”). Parents also referred to the inadequacy of the sentence and to the problem of children not being believed but tended also to focus on problems

37 The ratings used a six-point scale ranging from ‘1’ = “very unfair” to ‘6’ = “very fair”. The ratings for children also used happy and sad faces based on a scale developed by R Reeve at Macquarie University in 1982.

THE PERCEPTIONS OF CHILD WITNESSES AND THEIR PARENTS

Figure 2  
Children's and Parents' Ratings of Perceived Fairness by Outcome



with the process, including delays, the reduction in charges without proper consultation, and the ability of the defence, but not the victim, to consent to trial without a jury. For example, the parent of a 12 year old boy commented:

“How can you justify five court appearances and three years later? I made my child go to court and tell the truth so that his wounds would heal and also to protect other children. He has suffered mentally all this time and



every time at court and now what do I say to him? Because of the narrow picture presented at court, the jury found ‘him’ not guilty.”

### **The treatment of the child at court**

Parents’ emphasis on the process is also evident in their ratings of the fairness of the way their child was treated in court. The outcome—whether the defendant was committed or convicted—did not affect parents’ ratings (see Figure 2) but it did affect children’s ratings.<sup>38</sup> The reasons parents and children gave for their ratings of the child’s treatment are presented later as part of the general discussion of the problems children face at court.

### **The perceived fairness of the participants**

Both parents and children rated the DPP solicitor highest (ie, as most fair), with the judge/magistrate and the crown prosecutor also rated very highly. The defence lawyer was clearly rated as the least fair and as significantly less fair than the other participants. Indeed most children and parents rated the defence lawyer as unfair (ie, ratings less than three). The reasons that children and parents gave for their low ratings for defence lawyers are presented later in relation to their concerns about cross examination.

Parents’ and children’s ratings were affected by both the actual outcome and by their perception of the fairness of the outcome. The outcome—whether the defendant was committed for trial/found guilty or not—made a difference to the ratings given by some children and parents. When the defendant was committed for trial or found guilty, the judge or magistrate and the defence lawyer, were perceived to be fairer than if the defendant was acquitted or not committed for trial. The outcome made no difference, however, to their ratings for the prosecution lawyers (DPP solicitors and crown prosecutors). Children and parents rated the prosecution lawyers equally highly whether the defendant was committed for trial/found guilty or not.

Parents and children who perceived the outcome to be fair also tended to report that the way the child was treated in court was fair,<sup>39</sup> and that the judge/magistrate was fair. The judge/magistrate was, however, the only court

38 Children’s ratings differed significantly according to the outcome. The mean rating for perceived fairness of their treatment at court was 4.58 when the defendant was committed for trial or convicted, and 3.20 when he was not,  $t(40) = 2.82, p < .004$ . The respective mean ratings for parents were 3.45 and 3.38.

39 The correlation between perceived fairness of the outcome and the perceived fairness of the way the child was treated in court was .50 for children ( $n = 40, p < .05$ ) and .43 ( $p < .05$ ) for parents.

participant whose rating was related to the perceived fairness of the outcome.<sup>40</sup> The “fairer” the outcome, the fairer parents and children perceived the judge/magistrate and the child’s treatment at court to be.

Similarly, the fairness of the judge/magistrate, of the defence lawyer and of the way the child was treated at court were inter-related. The fairer the judge/magistrate was seen to be, the fairer the child’s treatment in court.<sup>41</sup> The fairer the defence lawyer, the fairer the child’s treatment in court,<sup>42</sup> and the fairer the defence lawyer, the fairer the judge/magistrate was seen to be.<sup>43</sup>

While responding to these questions, parents and children made a number of comments that are taken up below in the discussion of the problems children experienced in giving evidence and the concerns they and their parents had about the process.

### What were the major concerns of child witnesses and their parents?

#### Major Concerns of Child Witnesses

- \* Having to face the defendant
- \* Cross-examination
- \* Difficulty of the language
- \* Procedural and administrative concerns:
  - Closed court
  - Absence of support persons
  - Delays, adjournments
  - Intimidating courtroom environment

#### Having to face the defendant

Clearly the major issue for children and their parents was seeing the defendant in court and in the waiting area or court precincts. Over 75% of child respondents and 65% of parent respondents referred to seeing the defendant as either the worst aspect or the aspect they would most like to change in

40 The correlation between the perceived fairness of the outcome and of the judge was .43 ( $p < .01$ ) for parents and .36 ( $p < .05$ ) for children.

41 The correlations were .38 for children, and .45 for parents.

42 The correlation for children’s ratings was significant ( $r = .44$ ) but not for parents ( $r = .23$ ).

43 The correlation for children was .38, and for parents .34. Both are significant at .05.

relation to going to court. Typical of these comments is the comment of a 13 year old girl:

“It would have been a lot easier for me if I didn’t have to be in the same room as X and not to be in the court room for such a long time and to have to watch him swing around on his chair like nothing had happened. It made me nervous. If I could change it, I would.”

In contrast, when judges and magistrates were asked to indicate the main sources of trauma for child witnesses, confronting the accused was nominated by less than half the magistrates (45%) and by few judges (18%). Most magistrates (74%) and judges (61%) were, however, in favour of the use of closed-circuit television.<sup>44</sup>

These results confirm the findings of a number of other studies. Children in several studies have consistently reported that their main concerns about testifying were fear of the defendant and fear of seeing the defendant in court.<sup>45</sup> Even children not personally involved in court proceedings have expressed surprisingly high levels of fear of retaliation in response to vignettes about a child who witnesses a crime, including the fear that the accused may jump over the benches in the courtroom and hurt them.<sup>46</sup>

Children and parents suggested the use of screens and closed-circuit television as a means of separating the child from the defendant. When they were used, they were seen as being very helpful, although problems were reported in some cases with the placement or the extent of separation achieved by screens. Screens did not preclude the possibility of the child seeing the defendant in the waiting room and did not wholly obstruct the view of the defendant’s body eg, legs and feet. Several parents were very angry that they were not informed until after the trial that there had been a separate waiting room or that an application for closed-circuit television could have been made.

Unfortunately, the current legislation in relation to the use of closed-circuit television (*Crimes Act* 1900 s 405D(1)) places two hurdles in the way of children being able to use closed-circuit television: first, the prosecution has to apply to the court, and second, the court has to be satisfied either that the

44 Cashmore J and Bussey K, chapter II of this volume.

45 Flin R., Stevenson Y and Davies G “Children’s knowledge of court proceedings” (1989) *80 British Journal of Psychology* 285–297; Goodman et al 1989 see footnote 35; London Family Court Clinic *Reducing the system-induced trauma for child sexual abuse victims through court preparation, assessment and follow-up: report on the Child Witness Project*, 1991, London Ontario; Morgan J and Zedner L *Child victims: crime, impact and criminal justice*, 1992, Clarendon, Oxford.

46 Cashmore J and Bussey K “Child witnesses in court” (1989) 1 *Judicial Officers Bulletin* No 14, 3–5.

child would suffer “mental or emotional trauma” if they had to testify in the courtroom or that the evidence would be better ascertained if they were able to testify via closed-circuit television.<sup>47</sup> Research both here<sup>48</sup> and overseas,<sup>49</sup> and anecdotal evidence here indicates, however, that some prosecutors may not suggest or may otherwise discourage the use of closed-circuit television because of their own reluctance to become familiar with the equipment or because they believe that children are more effective witnesses in court than via closed-circuit television. An English crown prosecutor, for example, was reported by Morgan and Zedner as saying:

“Even if the CPS [Crown Prosecuting Service] is told about the child’s requirements . . . the barrister—even if instructed to the contrary—may not do as the CPS requests. For example, the barrister may decide that it is more important to let the jury see the fearful reaction of the child, than to make an application for screens. Over and above the evidence, the emotional impact is important, and the Crown is at liberty to use this as much as the defence.”<sup>50</sup>

Contrary to the belief held by some lawyers and judicial officers, research provides little support for the view that confrontation—seeing the defendant—is productive with children.<sup>51</sup> There is no evidence, for example, that physical confrontation with the accused makes it more likely that the witness will tell the truth or that such confrontation assists the fact-finder to detect lying by a witness. Indeed, the presence of the accused can *reduce* the accuracy of identifications and the willingness of witnesses to report what “an offender” has done.<sup>52</sup> Anxiety caused by the presence of the defendant may also decrease

47 Similarly, “alternative arrangements” such as screens may be directed by the court, “of its own motion or on the application of the prosecution”.

48 Cashmore J with de Haas N *The use of closed-circuit television for child witnesses in the ACT*. Research Paper 1, 1992, Australian Law Reform Commission, Sydney.

49 Davies G and Noon E *An evaluation of the live link for child witnesses*, 1991, Home Office, London.

50 Morgan J and Zedner L *Child victims: crime, impact and criminal justice*, 1992, Clarendon, Oxford, p 141.

51 Saywitz KJ and Nathanson R “Children’s testimony and their perceptions of stress in and out of the courtroom” (1993) 17 *Child Abuse and Neglect* 613–622.

52 Spencer J and Flin R *The evidence of children: the law and psychology*, 1990, Blackstone London; Goodman G, Levine M, Melton GB and Ogden DW “Child witnesses and the confrontation clause: The American Psychological Association Brief in *Maryland v. Craig*” (1991) 15 *Law and Human Behavior* 13–30; Peters D “The influence of arousal and stress on the child witness” in J Doris (ed) *The suggestibility of children’s recollections*, 1991, American Psychological Association, Washington DC, p 60–76.

children's *ability* to retrieve information from memory.<sup>53</sup> Furthermore, a number of studies have shown that most people are not particularly good at detecting deception and may do as well using transcripts.<sup>54</sup> One of the main reasons for this is that "the signs that are frequently associated with lying—like hesitancy, blushing, and a reluctance to look the questioner in the eye—are signs, not of lying, but of stress".<sup>55</sup> The presence of the accused may then be not only stressful but counterproductive to its intention.

### Various aspects of cross examination

Problems associated with cross examination were commonly reported by both children and their parents. Next to seeing the defendant, this was the aspect most commonly mentioned by children as being stressful and needing to be changed. For about 30% of the children, cross examination was the worst part of testifying. The main problems were being accused of lying, the harshness of the questioning techniques, and the length of cross examination.

#### Concerns about cross examination

Being accused of lying  
Harshness of the questioning  
Length and repetitiveness of questioning

#### *Accusing the witness of lying*

Accusing the witness of lying is a common tactic by defence lawyers and one that they may see as necessary to comply with the rule that if a party intends to call evidence contradicting what a witness has said, the witness should be confronted with this contrary view.<sup>56</sup> Such confrontation is likely to be particularly stressful for children, to an extent that may surprise most adults. One survey of 4th to 6th graders found that being accused of lying is very stressful for children—exceeded only by going blind, losing a parent and

53 Goodman G and Hegelson VS "Child sexual assault: Children's memory and the law" (1985) 40 *University of Miami Law Review* 18; p1–208; Goodman et al see footnote 35.

54 Kohnken G "Psychological approaches to the assessment of the credibility of child witness statements" in J Spencer, G Nicholson, R Flin and R Bull (eds) *Children's evidence in legal proceedings: an international perspective*, 1990, Cambridge University Press, Cambridge, p39–51; Kraut RE "Humans as lie detectors: some second thoughts" (1980) 30 *Journal of Communication* 209–216; Zuckerman M, DePaulo BM and Rosenthal R "Verbal and non-verbal communication of deception" in L Berkowitz (ed) 14 *Advances in Experimental Social Psychology*, 1981, Academic Press, New York, p 1–59.

55 Spencer and Flin 1990 op cit p 232.

56 *Browne v Dunn* (1893) 6 R 67.

having to stay down a grade at school.<sup>57</sup> Given that defence lawyers commonly accuse children of lying during cross examination, it is hardly surprising that children rated defence lawyers as being much less fair in their treatment than judges, DPP solicitors or crown prosecutors.

**Sixteen year old:** The worst part was being told I was a liar by the defence, and when a heap of lies gets told and I'm powerless to do anything to defend myself.

**Nine year old:** The only good thing about going to court was that it proved we weren't telling lies.

Apart from direct accusations of lying, children also reported difficulty with the implications of questions. The implication in questions that start with "Why didn't you . . ." is that they are somehow guilty and responsible. One child said, for example:

"The defence treated me like I was in the wrong. They don't seem to have any sympathy at all. I know it's their job but it shouldn't be that harsh."

#### *Length and repetitiveness of questioning*

The final complaint about cross examination related to the length and repetitiveness of questioning. Several parents were highly critical of lengthy cross examination (up to ten hours) both because of the stress it induced and because children had difficulty maintaining concentration with few breaks. Children specifically commented on the repetitiveness of questions. For example, one child said:

"He kept on asking the same questions and he went on and on. I didn't understand what he was doing."

It is worth noting that repetitive questions with children can be very confusing and may induce inconsistent answers as children try to understand what is required. As several studies have shown, children may change their answer when the question is repeated believing that the first answer was wrong or somehow unsatisfactory.<sup>58</sup>

Protection for witnesses against repetitive, harassing and intimidating cross examination is a matter for judicial discretion but it seems that some judges and magistrates are more reluctant to intervene in cross examination than

57 Yamamoto K "Children's ratings of the stressfulness of experiences" (1979) 15 *Developmental Psychology* 581-582.

58 Moston S "Social support and children's eyewitness testimony" in H Dent and R Flin (eds) *Children as witnesses*, 1992, Wiley, Chichester, p 32-46.

others.<sup>59</sup> Several parents and one child articulated their expectation that the judge in their case should have exercised this discretion more fully. A parent of an 11 year old said, for example, “Judges should instruct defence counsel to vet his questions”. The expectation that the judge/magistrate will control questioning may underlie the positive relationship between parents’ and children’s judgements about the fairness of the defence lawyer and the fairness of the judge/magistrate. The fairer they perceived the defence to be, the fairer they thought the judge. A 14 year old said:

“Right from the start I felt that the judge hated me and he was on their side, especially the way the barrister was bringing up totally irrelevant things and the judge didn’t care.”

The problems outlined above were exacerbated for children by two factors. The first was strong judicial warnings to the jury about the dangers associated with children’s evidence. Warnings were seen as unfair especially when the defendant did not give evidence. The ability of the defendant to give a statement from the dock<sup>60</sup> and face no questioning was the second exacerbating factor.

One child summed it up, saying:

“I had to answer lots of questions for about five hours. The solicitor kept on saying I lied and that I did things that I didn’t. He kept on and on about things. My grandfather never had to answer any questions.”

### Difficulty of the language

Parents’ and children’s complaints about the difficulty of the language used in court concentrated on cross examination although they were not confined to it. Children referred to long and complicated questions they could not understand and to trick questions that involved “changing the words around”. Parents referred to “language that was too complex”, “developmentally inappropriate”, and that required specific time related information that children could not be expected to remember.

Not surprisingly, many of the comments from parents and children were quite general:

**Twelve year old girl:** The questions asked by the defence were too complicated and he’d repeat questions after I’d answered them.

59 Cashmore and Bussey 1993 op cit.

60 At the time of the surveys, New South Wales and Tasmania were the only Australian states where defendants could make a statement from the dock. This right was removed in NSW from 10 June 1994 by the *Crimes Legislation (Unsworn Evidence) Amendment Act No 26*.

## THE PERCEPTIONS OF CHILD WITNESSES AND THEIR PARENTS

**Nine year old girl:** I didn't give all my evidence because of how they asked me questions.

**Parent of 15 year old girl:** The questions were intimidating and confusing.

**Parent of nine year old girl:** The language was too complex . . . legal officers don't seem to understand child development issues and the difference in the way adults use language compared to children.

**Parent of ten year old:** The defence repeatedly asked the same questions over and over again, and did not accept the child's answers which were answered word for word on each occasion for over one and a half hours.

Detailed analyses of the difficulties children experience with court language have, however, pinpointed some specific problems for children.<sup>61</sup> Brennan and Brennan's *Strange Language* study, in particular, presented very worrying data about the extent of children's misunderstanding of the questions asked in court. The difficulties included specific and difficult vocabulary (eg, "allegation", "fabrication", "taunt"), legal references (eg, "His Worship", "my friend"), particular expressions (eg, "I put it to you that", "No, I'll withdraw that"), use of the negative, ambiguous questions, and complex structures. Examples of the types of questions that cause problems are presented in Table 5.

There are several reasons for concern about the difficulty children experience with inappropriate language in court. The first and most obvious is that a trial can be considered fair only if witnesses are able to understand the questions they are required to answer. Secondly, children's behaviour in court and their perceptions of the court process have been shown to be substantially affected by the difficulty of the language. In one study, children were judged to answer more questions, be less anxious, happier, more cooperative, and more effective when defence lawyers used more appropriate language.<sup>62</sup> The appropriateness of the language also affected children's perceptions of their court experience. The more lawyers adapted their language to that of the children, the fairer children rated the court process and their treatment there. The harder children found it to understand the questions, the less they

61 Brennan M. and Brennan R *Strange language: child victims under cross-examination*, 1988, Riverina Literacy Centre Wagga Wagga; Graffam Walker A "Questioning young children in court: a linguistic case study" (1993) 17 *Law and Human Behavior* 59-82.

62 Analysis of the accommodation that lawyers make to children's language in one study (Cashmore 1992 see footnote 48) found that the language of defence lawyers was judged by the researchers and other courtroom participants to be consistently more difficult than that of prosecution lawyers. Defence lawyers were alone in believing that their questions were as easy to understand as those asked by magistrates and prosecuting lawyers.



thought they had had a chance to say what they wanted in court, and the harder they said it was to answer the questions.

Children's responses to the DPP questionnaire supported these findings. A number of children commented that the defence lawyers' questions were difficult and repetitive, and this was one of the reasons children gave for judging their treatment by defence lawyers to be unfair.

*Table 5  
Typical Examples of Questions that Cause Difficulty for Children\**

|   |
|---|
| <p><b>Legal references</b><br/>                 You told His Worship ...<br/>                 No, I'll withdraw that ...<br/>                 I put it to you that ...</p> <p><b>Specific and difficult vocabulary</b><br/>                 You walked perpendicular to the road?<br/>                 It's pure fabrication, isn't it?<br/>                 You did that to taunt him?</p> <p><b>Use of the negative</b><br/>                 It's the case, is it not, that you didn't ...?<br/>                 Do you not dispute that?<br/>                 Are you saying none of that ever happened? [Child shakes head]. Does that mean it did happen or it didn't?</p> <p><b>Ambiguous questions</b><br/>                 How many times did you tell the policeman X did ...?<br/>                 How do you say he forced you to? I was forced to. [Repeated].<br/>                 How do you say you were forced to? I just said it.</p> <p><b>Conceptually difficult</b><br/>                 How long did he touch you? [Frequently answered]. For 5 minutes.</p> <p><b>Challenging**</b><br/>                 It's all a pack of lies, isn't it?<br/>                 You don't like your step-father, do you, Mary? You've invented all this, haven't you Mary in order to get him out of the house?</p> <p># Taken from Cashmore (1992).<br/>                 ## Taken from Glaser D and Spencer JR "Sentencing, children's evidence and children's trauma", (1990) <i>Criminal Law Review</i> 371 at p 378.</p> |
|---|

## Other procedural and administrative concerns

Several other aspects of the court experience also generated concern among child witnesses and their parents. They ranged from quite specific aspects of the court environment to more general and well known issues such as delays and adjournments.

### Closed court

Having to repeat the embarrassing details of sexual assault in front of a court full of strangers is recognised as being a very stressful aspect of testifying for both children and adults.<sup>63</sup> Recent research has also shown that, not only is it stressful, it also interferes with children's ability to provide reliable testimony. Children's recall was less complete and less accurate if they "gave evidence" in a courtroom than if they did so in a more familiar environment which they also reported was less stressful.<sup>64</sup>

Data collected by DPP solicitors on cases heard in 1991/92 indicated, however, that some judges were reluctant to close the court on the grounds that the public has a right to be present and/or that a non-publication order is sufficient (see chapter IV of this volume). Similarly, in the current survey, several children and parents reported that children had to give evidence in open court or that the closure of the court was not effective. One 14 year old girl said, for example, that the way she was treated at court was unfair because "of the way any Tom, Dick or Harry just came in and sat in the room listening to me". She went on to say "I just couldn't believe how the judge could be so incensitive [sic]". A ten year old commented: "It was supposed to be a closed court but the blinds and windows were not closed and his family kept looking at me and making faces."

### Absence of support persons

Although the presence of a support person is quite commonly accepted, there is evidence that some judges and magistrates are reluctant to admit support persons because they fear their mere presence (or eye-contact) will encourage the child to continue with a false allegation.<sup>65</sup> In the current survey, several parents reported problems, especially with their own exclusion from court as witnesses. Restrictions on the presence of support persons for children (eg, support persons not being allowed in court, a child not being allowed to take her favourite doll into court, and of a child being separated from her mother overnight to prevent any coaching while the child was still giving evidence), were also reported in the *Systems Abuse Report*. One parent was also critical of alleged defence tactics to unsettle the child by listing but then not calling the child's counsellor as a witness, precluding her from being present in court as a support person for the child.

63 Spencer and Flin op cit; Whitcomb D, Shapiro ER and Stellwagen LD *When the victim is a child: issues for judges and prosecutors*, 1985, National Institute of Justice, Washington DC, and see footnote 52.

64 Saywitz and Nathanson op cit.

65 Cashmore and Bussey 1993 op cit; chapter II of this volume.

Concerns about the presence of support persons are not supported by some recent research which suggests that social support, although not necessarily parental support, can improve children's ability to give evidence and their accuracy.<sup>66</sup>

### Delays—adjournments, immediate sentencing, waiting at court

The problem with delays is well-known, and complaints about delay are not unique to child sexual assault matters.<sup>67</sup> Delay occurs at several stages of the process—between reporting the assault and charging the defendant, between charge and committal, between committal and trial/sentence—and is exacerbated if the case is listed but not reached. In 1991–92, the average time from charge to committal or summary hearing was 162 days or about 23 weeks, and from committal to trial, 337 days or about 48 weeks. About 30% of cases during this time were not reached the first time they were listed, and a smaller percentage (around 10%) were listed from two to five times before they were finalised.<sup>68</sup>

A number of parents (n=24, 55.8%) mentioned that delay at some stage was a significant problem for their children and for them. One parent, for example, said that the worst part of going to court was “waiting for it to get to court, and then all the breaks between the case being heard”. This parent was one of several who complained about the distress to their children as a result of adjournments where the case was adjourned part-heard when children were part-way through their testimony. In several cases, children in rural areas had to wait up to six months to complete their testimony. Again, parents were suspicious that lengthy cross examination was a defence tactic to unsettle children. One parent said, for example:

“We have lived with this trial pending for two years. He has been allowed to delay at every stage.”

A second aspect of delay which parents criticised was the long delay in several cases between the end of the trial and the sentence being handed down. Both are subject to judicial control.

66 Goodman G and Schwartz-Kenney BM “Why knowing a child's age is not enough: Influences of cognitive, social, and emotional factors on children's testimony” in H Dent and R Flin (eds) *Children as witnesses*, 1992 Wiley, Chichester; Moston op cit.

67 “Many women” who responded to the 1992 Sexual Assault Phone-in conducted by the NSW Sexual Assault Committee reported the “lengthy time between the assault and the trial as the worst aspect of going to court” (NSW Sexual Assault Committee *Sexual Assault Phone-in Report held November 1992*, 1993, Ministry for the Status and Advancement of Women, Sydney, p 37).

68 NSW Office of DPP Survey of Child Sexual Assault Prosecutions, see chapter IV of this volume.

Parents were also critical of the amount of time children had to wait at court before or while testifying. In several cases, children had to wait several hours in cold windowless rooms while there was lengthy legal argument. Indeed it is common for children to be told to be at court between 9 and 10 am although in a trial, the empanelment of the jury, opening addresses and legal argument often takes several hours. This means that children may have to wait up to five hours or more (eg, after the lunch break) before giving evidence. In the words of one parent:

“Why can’t they sort out all those preliminary matters before the case starts or before the child is called? We couldn’t even go anywhere more pleasant to wait because we didn’t know when she would be called.”

### **Court environment**

As indicated earlier, the main aspects of the court environment that children and their parents commented upon were the presence of the defendant and the presence of a number of people unknown to the child. Less obvious but still significant is the intimidating formality of the courtroom and the inappropriate design of some courtroom furniture. In some cases, because they could not be seen while sitting, children had to stand during the whole of their testimony. In another, the child was propped up on cushions and had afterwards commented to her mother that she had to hold on tightly to the arms of the chair because she was scared she was going to fall off.<sup>69</sup> Suitable chairs are a minimal requirement, easy to procure and inexpensive but their need is often overlooked by court officials.

### **What is positive about going to court?**

Despite the concerns that a number of parents and children expressed in relation to the court experience, for a majority of parents (62.7%) and about half the children (51.1%), there were some positive aspects about going to court. Several questions asked about possible positive aspects of going to court—whether there was anything good about going to court, and for parents, whether going to court was helpful at all and whether it was harmful.

Half the children and between a fifth and a third of the parents said there was nothing good (30.8%) and nothing helpful (21.6%) about going to court. Both children’s and parents’ responses were linked to the outcome of the case. They were more likely to say there was nothing good about going to court if there was no finding of guilt in their case than if there was. For example, the

<sup>69</sup> Common sense also suggests that young children on fixed chairs are likely to move around less and so appear less fidgety and more credible than if they are seated on swivel chairs.

defendant was not found guilty or not committed in 39% of cases in which children reported no benefit from going to court compared with only 17% of cases in which the child reported some benefit. For parents, the figures were 67% and 37.1%, respectively, indicating that parents were about twice as likely to say there was nothing good about going to court when the defendant was not committed or convicted than when he was.

Children and parents reported three main perceived benefits of going to court for the children involved. The most commonly reported was a feeling of vindication and a belief that justice had been done (11 children, 23.9%; 15 parents, 36.6%). This was mainly a response by younger children (under 12). A ten year old said, for example, that the best thing about going to court was that "he got punished for what he did to me". Similarly, several parents wrote in terms of "justice being done" and the fact that their child "knew now that there is a system that will punish bad people". Although most children and parents who spoke in terms of "justice being done" were involved in cases that resulted in a determination of guilt, this was not the case for all. One 17 year old said, for example, "I done my best to put a criminal behind bars where he belongs but unfortunately it was a hung jury."

The second reported benefit was a sense of self-efficacy and satisfaction in being heard (nine children, 19.5%; seven parents, 17.0%).<sup>70</sup> All the children who expressed this view were over 12. One 16 year old girl said, for example:

"Having the chance to say what happened. Now everything is out in the open and people finally know the truth."

This did not necessarily depend upon a guilty finding. For example, in one case in which the defendant was not convicted, a 12 year old girl said:

"I could tell people what he had done to me and I was able to show him that I could tell other people what was going on without the things that he threatened happening, like being put in a girls' home, if I told anyone."

The third was a cathartic effect, the ability to deal with the pain of the assault and its consequences and put it behind them (three children, seven parents). Again, this was generally expressed by older children. For example, a 16 year old said the best part was:

"Getting it over and done with and facing my greatest fear."

and a 14 year old said that the good aspects of going to court were:

70 Similarly, parents reported that the most common harmful aspect of going to court for their child was not being heard or not being allowed to tell the truth in court.

“Meeting people who really cared about what happened to me. Beginning again and leaving the past behind instead of not telling and having to deal with feelings of guilt and depression alone later.”

### **Knowing what you know now, what would you do again/ advise others?**

Finally, parents were asked whether, in the light of the court experience, they would do anything differently if they were in the same situation again or what they would advise a friend to do in the same situation. Just over half the parents responded positively (21, 51.2%) and eight of these indicated that they would not prosecute the matter “knowing what they know now”. All of these were cases in which the defendant was either not committed for trial or found not guilty. One parent commented, for example:

“I would never put my child through such a trauma and stress again. If anything like this ever happens to my family, friends, I would advise them to never put their children through this. I cannot understand a system in which specialist evidence is disregarded and a judge tells a jury that the child was probably lying and not to believe her.”

Another said:

“I would encourage my child not to take it to court. I have always believed in honesty and in the justice system but I was let down.”

Three parents reported extreme frustration and anger, indicating that they could understand why “people take the law into their own hands”. A further six parents indicated that they would advise anyone making the decision whether to prosecute to seek further information and consider seriously the effect on the child and the ability of the child to withstand the delays, the lack of support in court and defence tactics in cross examination.

Three said that next time they would ensure that the child was separated from the view of the defendant, and four commented on the importance of preparation for the child and support throughout and after the hearing.

On a more positive note, 13 parents said they would not do anything differently. Six of these noted their appreciation for the support provided by the police and prosecutors involved in the case, and one even said that “Court for me was a growth experience. There are things I learned to control through court, my anger being the greatest.”

### **Could the DPP have done anything to make it easier for you and your child?**

About half the parents (51.1%) had no complaint about the way they and their child were treated by the DPP—they did not suggest that the DPP should have done anything else or spend more time talking with them after

the case. About a third (34.9%) of parents, however, said the DPP could have made things easier for them or for their child. The outcome of the case and the type of hearing made no difference. Parents' satisfaction or otherwise with the DPP's role did not depend on whether the defendant was committed for trial or convicted or not. The main complaint was a lack of communication both before (nine parents) and after the case (11 parents).<sup>71</sup> Several parents commented on the need for pre-hearing contact with the child, rather than meeting the child on the morning of the hearing, and on the importance of preparation and the ability to communicate effectively with children.

Other complaints were that DPP staff made little effort to protect the child from difficult questions and from contact with the defendant by applying for a screen or closed-circuit television or by providing information about separate waiting areas.

On a positive note, nine parents were very appreciative of the effort that DPP staff made, especially in terms of keeping them informed, preparing them for the experience, and being aware of the stress the child and the parents were under.

#### Comments on DPP personnel

- He could have met with her at least a week before court. A six year old child who has been assaulted by a male needs more than ten minutes of time the evening before court to relax with a male solicitor.
- I had to ask all the questions about what I wanted to know. There was no full length discussion or time for preparation.
- They could have asked for a short stop when the child became distressed and asked the defence to explain questions that were making her confused.
- We were promised that a screen would be placed in front of the criminal but it was not placed there until we made a big fuss.
- We were very pleased to talk about the case after it was all over. It helped me to understand why things happened as they did.
- He was extremely helpful and explained the procedures to her. He kept in touch and let us know the sentencing decision.

71 This complaint was also made by respondents to the Sexual Assault Phone-In: 85% of victims who had been to trial believed that their contact with the Office of the Director of Public Prosecutions had been insufficient (op cit p 39). On the other hand, the Report noted that child sexual assault victims were more likely to see a solicitor before the trial and "their overall satisfaction level was higher" (op cit p 39).

## Conclusion

The consistent message from the children's and parents' responses to the questionnaire is an expectation of justice. What is involved in their concept of justice? To what extent is it affected by the outcome of the case?

It is clear that both children's and parents' notions of justice concerned the court process as well as the outcome and involved more than a determination of the defendant's guilt although this was undoubtedly important. The perceived fairness of the various participants and of the court process itself were affected by the actual outcome but not to the extent that the perceived fairness of the outcome was. Judges, magistrates and prosecutors were still judged to be fair even if the outcome was not. The perceived fairness of the outcome was, however, not surprisingly, very markedly affected by the actual outcome.

In addition to the actual outcome, the ability to be heard and to be informed about the court process came through clearly as being very important to both children and parents. This should not be surprising because the literature on procedural justice indicates that the perception that one has been heard is an important predictor of one's satisfaction with the process. In the current survey, the importance of being heard came through in three main concerns. These related to the preparation and provision of information to children and their parents, the difficulty of the language used in court, and the ability of the court process to respect and meet the needs of children to prevent them from being unnecessarily intimidated by the experience.

First, children need to be prepared for their testimony—they need to know who will be present, what will happen, and what is expected of them. Preparation along these lines does not constitute coaching but is necessary to allow children to meet the demands of the court and cope with their experience there.<sup>72</sup> They also deserve to be informed about the progress of the case including the outcome.<sup>73</sup> Second, children cannot be heard if they cannot

72 The Women's Health and Sexual Assault Education and Resource Unit of the NSW Health Department has released a manual, *Nothing but the truth* to assist workers involved in preparing adult and child witnesses in sexual assault proceedings to "establish consistent practice and common goals, and to dispel the myth that preparing a witness for court is improper" (*Nothing but the truth: court preparation for adult and child witnesses in sexual assault proceedings*, 1993, Western Area Health Service, Rozelle, p 1).

73 Other studies have also reported that witnesses commonly complain that they were not informed about the progress of the case and about the court process: for example, Morgan and Zedner (op cit) in relation to child victims of physical assault, and Shapland J, Willmore J and Duff R *Victims in the criminal justice system*, 1985, Gower, Aldershot, and most recently, the NSW Sexual Assault Committee's *Sexual Assault Phone-In* op cit.



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understand the questions they are asked. Third, they cannot be heard and they are not likely to feel that justice has been done if they are intimidated by the presence of the defendant, the formality of the courtroom or the tactics of the cross examiner.

The implications of these findings are fairly clear. For example, it seems obvious that lawyers should avoid using language that confuses children and tactics that intimidate them. This may require more judicial intervention, or of education lawyers, or both. The children's expressed concern about having to face the defendant indicates the importance of the use of measures such as closed-circuit television and screens. Again, judicial intervention may be useful in suggesting various means to separate the child from the defendant and otherwise assisting children to give effective testimony. Sensitivity to these needs should help to ensure that more child witnesses and their families walk away from the court feeling that at least they were heard and that the process was fair, regardless of the result.

## IV

# THE PROSECUTION OF CHILD SEXUAL ASSAULT CASES: A SURVEY OF NSW DPP SOLICITORS

The law in relation to child sexual assault has changed considerably over the past decade.<sup>74</sup> In the mid 1980s, changes relating to the prosecution of child sexual assault offenders were introduced in New South Wales and other Australian states. They included easing the requirements children have to meet to satisfy the court that they are competent to testify, removing the statutory requirement for a warning about corroboration, removing the prohibition against conviction on the uncorroborated unsworn evidence of a child, and changing the penalty structure.<sup>75</sup> Further changes to the penalty structure, the competence requirements for child witnesses in the *Oaths Act* 1900 and “special arrangements” for child witnesses, such as screens and closed-circuit television, followed in the late 1980s and early 1990s.

The effect of these changes is not easy to establish. Routine court statistics (such as those collected and analysed by the NSW Bureau of Crime Statistics and Research) provide information on charges, outcomes and sentencing but they do not provide the answers to questions specifically related to legislative changes, especially in relation to changes in court procedure. They do not indicate whether any children gave evidence in a particular case, and if so, how their competence to testify was determined. They do not provide information on the use of any “special arrangements” such as closed-circuit television or support persons to assist child witnesses.

Such information can be obtained only by specially designed studies, such as those conducted by the NSW Bureau of Crime Statistics and Research (Cashmore and Horsky 1988, Goodwin 1989).<sup>76</sup> These studies provide data on the early 1980s but it is now necessary to update this information and provide

74 At the same time, there has been a marked increase in the number of notifications of child sexual assault, probably due to increased public awareness, mandatory notification, and to increased services for victims.

75 Other measures included an extension of mandatory notification of child sexual assault to various professional groups, pre-trial diversion of offenders, and procedures designed to protect children by putting further controls on bail conditions and apprehended violence orders.

76 Unfortunately, only the first stage of a two-stage monitoring process embarked upon by the Bureau of Crime Statistics and Research was completed so it is not possible to draw any firm conclusions about the reforms of the 1980s (Goodwin A *Child sexual assault: the court response II*, 1989, NSW Bureau of Crime Statistics and Research, Sydney).

a comparison of pre- and post-reform figures. The aim of this chapter is therefore to present an update on court statistics and to present the results of a survey by the NSW Office of the Director of Public Prosecutions (DPP) of prosecuted cases of child sexual assault in New South Wales.

## Method

The survey consisted of all cases of child sexual assault reported by solicitors prosecuting these cases for the NSW DPP during the 12 month period from April 1991 to April 1992. These cases included committal and summary hearings in Local Courts and trials in District and Supreme Courts.

All solicitors dealing with child sexual assault cases were directed by the Office of the DPP to complete specially designed forms, one for Local Court matters and one for trial matters. There is no guarantee, however, that all cases were completed but there is no reason to suspect any systematic omissions.

## Results

In total, 254 cases at committal or summary disposal and 263 cases which went to trial in the higher courts were included in the survey.<sup>77</sup> The majority of these cases at both the local and higher courts involved one complainant. There was more than one complainant in 39 cases at the local court level and 51 cases at higher courts, totalling 309 and 329 complainants, respectively (Table 6).

*Table 6  
Breakdown of Cases in the Local and Higher Courts*

| No. of complainants | Local | Higher |
|---------------------|-------|--------|
| 1                   | 215   | 212    |
| 2                   | 23    | 36     |
| 3>                  | 16    | 15     |
| Total cases         | 254   | 263    |
| Total complainants  | 309   | 329    |

<sup>77</sup> A further 20 cases in the local court and 37 cases in the higher courts involved victims who were 18 or older at the time of the hearing.

### Characteristics of cases

The complainants in both types of court proceedings were mostly female (79.3% in the local courts and 77.8% in the higher courts).<sup>78</sup> The youngest complainant was only a few months old but the average age for both types of hearing was around 12 years of age (11.81 years in the local courts and 11.96 in the higher courts). There was no difference in the average age of male and female complainants.

Figure 3 shows the relationship between the complainant and the defendant by type of court. In both types of hearing, the majority of alleged offenders were known to their victims, either as a member of their family or household (33.5% local court cases, 39.1% higher court cases), as a family friend or baby-sitter (19.5% and 13.5% respectively), or as a friend, neighbour or acquaintance of the child (17.1% and 19.6% respectively). Just over a quarter were unknown to the victim, a substantial increase on earlier figures of 14.1% in 1982<sup>79</sup> and 13.3% in 1984.<sup>80</sup> These figures for strangers are also higher than survey incidence figures would suggest<sup>81</sup> suggesting that cases involving defendants outside the family were more likely to be prosecuted than those involving family members.

Table 7 shows the offences with which defendants were charged at the local and higher courts. The single most common charge was for indecent assault, constituting 38.7% of charges at local courts and 48.9% of charges at higher courts. Various categories of sexual intercourse made up 53.7% of local court charges and 45.4% of higher court charges. There was little change from the initial charges to those that were proceeded with, although changes to the charges occurred following an application for a “no bill” in 15 cases dealt with in the higher courts.

### Local courts

The majority of cases dealt with in the local courts were committal hearings (165 cases). In 150 cases, the defendant was committed for trial, but in 15 cases the defendant was not committed. In 41 cases, a plea was entered and the defendant was committed for sentence. Thirty two cases were dealt with as

78 Gender was not recorded for 15 cases in the higher courts. The percentages are calculated using the cases where gender was recorded.

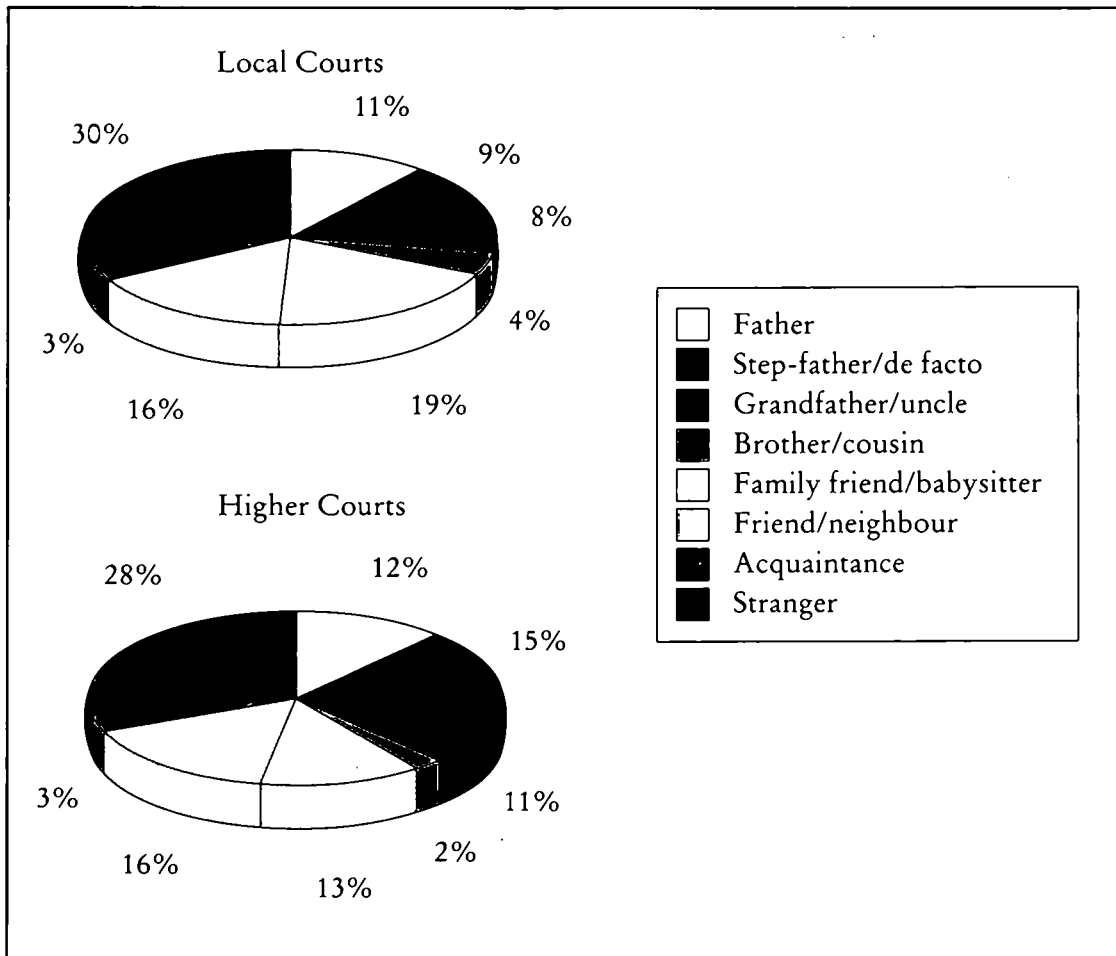
79 Cashmore J and Horsky M ‘The prosecution of child sexual assault’ (1988) 21 *Australian and New Zealand Journal of Criminology* 241–252.

80 Goodwin op cit.

81 Russell DEH *Sexual exploitation: rape, child sexual assault and workplace harrasment*, 1984, Sage, Beverley Hills, California.

THE EVIDENCE OF CHILDREN

Figure 3  
Relationship between Defendant and Complainant by Type of Court<sup>82</sup>



summary matters, and 17 of these resulted in a conviction (53.1% conviction rate).

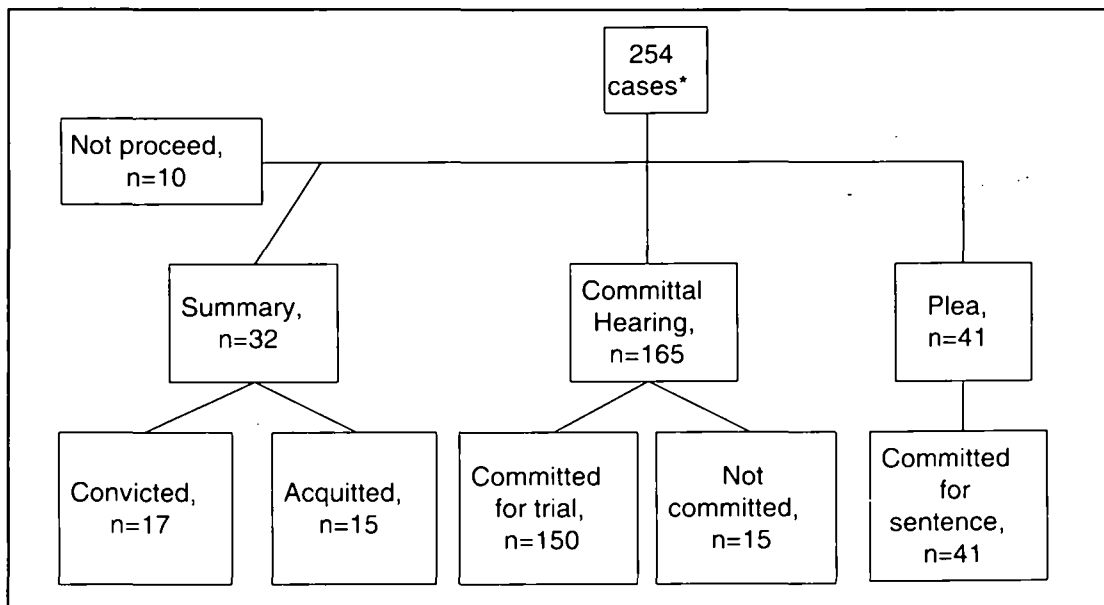
In ten cases, the matter was terminated and the defendant discharged of all charges.

Several factors were examined for their influence on the outcome of the case. Of these, only the age of the complainant and the relationship between the complainant and the defendant had any effect. Children involved in cases which terminated were younger than those involved in cases which proceeded.

82 Percentages shown are for cases where the relationship was known. The relationship between the defendant and the complainant was unknown for 11 local court matters and 18 higher court cases.

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Figure 4  
Outcomes of Local Court Cases



\* Missing data on outcome for 6 cases

Table 7  
Most Serious Charge Proceeded with

|                                 | Local courts |              | Higher courts |              |
|---------------------------------|--------------|--------------|---------------|--------------|
|                                 | n            | %            | n             | %            |
| Sexual intercourse (aggravated) | 19           | 6.6          | 8             | 3.4          |
| Sexual intercourse              | 39           | 13.6         | 42            | 13.4         |
| Under 10                        | 45           | 15.7         | 33            | 10.5         |
| Under 16                        | 31           | 10.8         | 37            | 11.8         |
| Carnal knowledge                | 4            | 1.4          | 2             | 0.6          |
| Homosexual intercourse          |              |              |               |              |
| Under 10                        | 10           | 3.5          | 10            | 3.2          |
| Under 16                        | 6            | 2.1          | 10            | 3.2          |
| <b>Total sexual intercourse</b> | <b>154</b>   | <b>53.7</b>  | <b>142</b>    | <b>45.4</b>  |
| Indecent assault                | 111          | 38.7         | 153           | 48.9         |
| Act of indecency                | 20           | 7.0          | 13            | 4.2          |
| Common assault                  | 2            | 0.6          | 5             | 1.5          |
| <b>Total</b>                    | <b>287*</b>  | <b>100.0</b> | <b>313*</b>   | <b>100.0</b> |

\* Missing data for 22 local court cases and 16 higher court cases.

For example, the average age of complainants in cases which terminated was 8.4 years, compared with an overall average age of 11.8 years. In particular, 31.8% of cases involving children under five did not proceed beyond committal or did not result in a conviction in summary proceedings, compared with 15.3% of cases overall. There was little difference in age, however, between cases heard summarily which resulted in a conviction (average age of 12.22 years) and those in which the defendant was discharged (average age of 12.72 years).

The effect of the relationship between the complainant and the defendant on the progress of cases was not strong but close family members were more likely to be committed for trial than other defendants. For example, 70.4% of cases involving family members (but not brothers/cousins) were committed for trial compared with an overall average of 59%.

On the other hand, whether or not the child complainant gave evidence and whether or not the matter was investigated by a Child Mistreatment Unit (CMU) had little effect on the likelihood that the case would proceed beyond committal. It would be unwise to draw any conclusions about the relative results of CMU and patrol investigations from these figures, however, because it is likely that CMUs deal with cases that are more difficult to prove. The fact that the cases involving CMUs were more likely to be committals for trial (68.9%) than committals for sentence (14.9%) or summary matters compared with those not involving CMUs (57.9% and 27.5%) lends some support to this suggestion.

### Higher courts

About half the cases in the higher courts (n = 129, 49.1%) were committals for sentence (Figure 5). Three cases were “no billed” but they comprised only 8.5% of the 35 applications for a no bill.

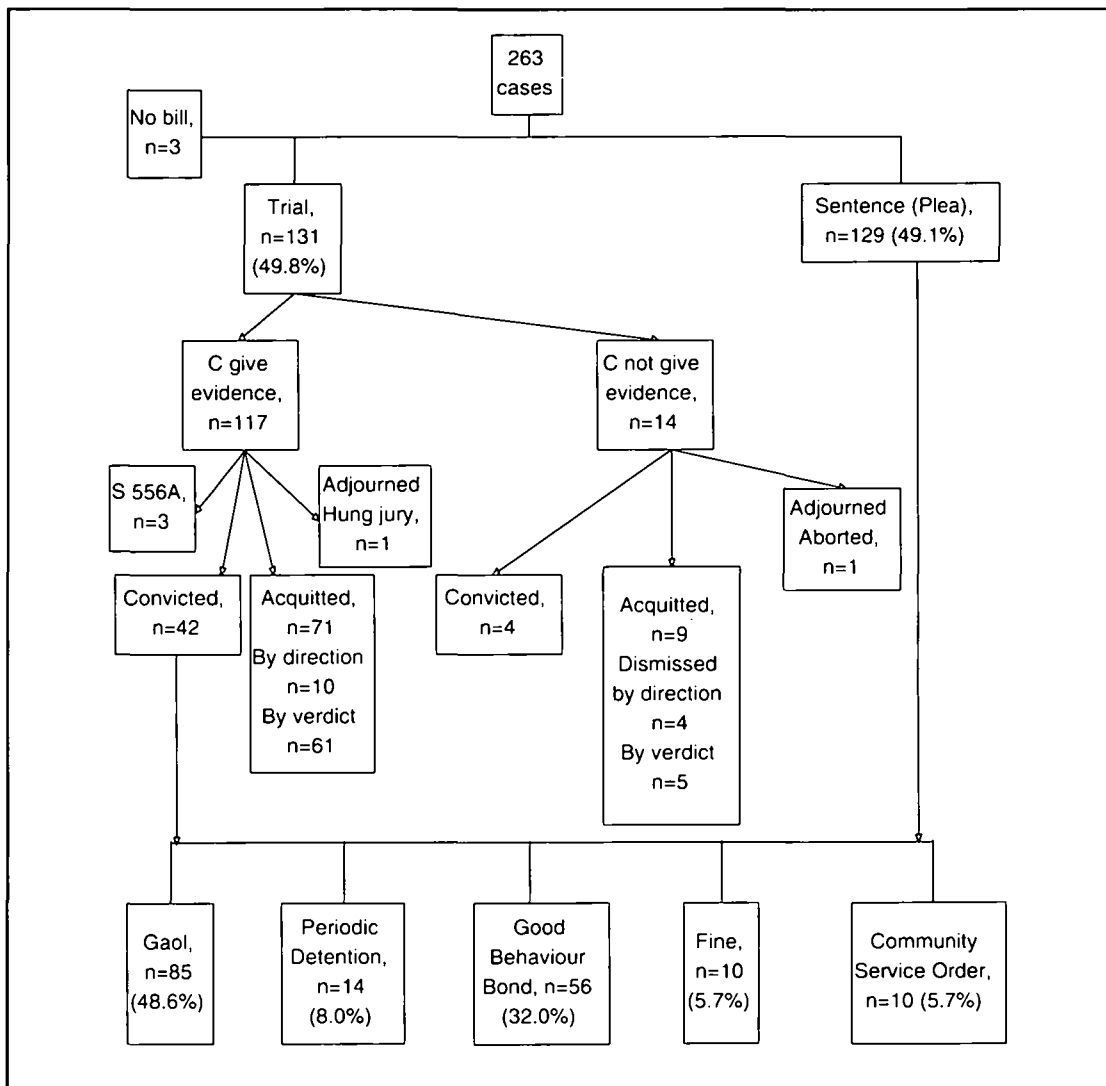
The remaining 131 cases went to trial. In 14 cases the child did not give evidence and five of these cases did not proceed because the child complainant was unable to give evidence or refused to do so. Two of these cases proceeded to sentence, however, in relation to other victims. Forty six trials (39.3%) resulted in a conviction.

There were several categories of cases which did not result in a conviction (Figure 5). Where the children gave evidence, three cases resulted in the charge being dismissed under s 556A of the *Crimes Act 1900*; although proven, no conviction was recorded. One case resulted in a hung jury. The defendant was acquitted by the jury in 61 cases (46.6% of trials) and by direction in ten cases (7.6% of trials).

The acquittal rate was affected by the age of the complainant. The highest rate of acquittal by *direction* was 37.5% for complainants under five years of age; three out of the eight trials involving complainants of this age resulted in

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Figure 5  
Outcomes of Higher Court Cases



a directed (not guilty) verdict.<sup>83</sup> In one case, the complainant, a four year old girl, was deemed incompetent to testify and a directed verdict resulted. Four trials involving children of this age, however, resulted in a conviction although none of the children gave evidence; there were also guilty pleas in four other cases.

83 In one other case, the judge gave the *Prasad* direction resulting in a verdict of not guilty, which apparently surprised the judge: *R v Prasad* (1979) 23 SASR 161.



For the oldest group of child complainants, there was only one case of a directed verdict (2.9%); this case involved a 15 year old who refused to give evidence. On the other hand, the defendants in 21 cases (61.8% of trials for this age group) were acquitted by the jury.

The overall conviction rate (taking pleas into account) was not, however, affected significantly by age although there was a trend for a lower conviction rate for cases involving complainants aged 10 to 11 years (61.5%) and 15 to 17 years (59.4%) compared with complainants of other ages (72.0% for 5 to 9 year olds, and 71.8% for 12 to 14 year olds).<sup>84</sup> The conviction rate was also not affected by the relationship between the complainant and the defendant, although there was a trend toward a higher rate for strangers (73.8%) compared with an overall rate for family members and defendants in positions of trust in relation to the complainant of 64.7%. Whether the proceedings occurred in the urban/metropolitan or country areas was also not significant.

## Outcome/Sentence

Information was available on sentence for 173 of the convicted offenders. The most common sentence was a custodial sentence, with 85 offenders sentenced to an average term of 40.4 months and 14 sentenced to periodic detention, ranging from six to 24 months, and averaging 15 months. Seventeen offenders were given a deferred sentence. Although the effect was not statistically significant, offenders who pleaded guilty tended to be less likely to receive a custodial sentence; 46.8% of offenders who pleaded guilty received a custodial sentence compared with 54.1% of those who did not plead.

Seventy offenders received a good behaviour bond, with an average length of 3.21 years and an average bond of \$1514. Conditions were attached to the majority of recognizances, with the most common being acceptance of supervision from Probation and Parole and counselling. Four of these defendants also received community service orders, and seven a fine. Three received a combined sentence consisting of a fine, a good behaviour bond and a community service order. In total, then, ten offenders were fined an average of \$1230, and 19 received community service orders, averaging 329 hours.

Solicitors completing the returns on which this paper is based indicated that the sentence was "manifestly" inadequate in 12 cases; another six considered the sentence lenient but not "manifestly" inadequate.

Of equal interest were the comments made by solicitors to justify the adequacy of sentences, mostly non-custodial sentences. "Strong subjective factors" were outlined. These included the age and health of elderly offenders,

84 The conviction rate in cases involving complainants over 18 years of age was 35.1%.

the lack of any prior convictions, the wishes of the victim (that the offender not be gaoled), the presence of supportive friends and character witnesses for the offender, a perceived lack of effect upon the victim, and the view expressed in psychiatric reports that the offender was “unlikely to re-offend”. These factors were seen as making gaol an “inappropriate” sentence.

### **Victim impact statements**

The original intention of Victim Impact Statements (VIS) was to ensure that the full effect of the crime upon the victim could be known to the court<sup>85</sup> but their status has been uncertain for two reasons. First, they have no statutory basis because the relevant legislation (s 447C of the *Crimes Act 1900*) has not been proclaimed. Second, a number of counselling services have a policy of not providing them because they are seen to be time consuming and counterproductive since they expose the victim to further scrutiny and to possible cross examination as to the effects of the offence(s) on them. The official policy of the NSW Office of the DPP in relation to Victim Impact Statements is that they “should only be requested and made available with the informed consent of the victim”. Further, “if a victim chooses not to participate, the sentencing court must not speculate upon the reasons why, or the fact that a statement has not been produced” and judgements are outlined in their policy statement to this effect.<sup>86</sup>

In the year under study, Victim Impact Statements were obtained and considered in only a minority of cases (13.8%). Forty one were obtained (23.4% of convictions) but only 24 were considered by the court (13.8% of convictions and 58.5% of cases in which they were obtained). They were criticised by the judge in three cases.<sup>87</sup>

The age of the victim had some effect on the likelihood of a Victim Impact Statement being obtained and considered by the court. The highest frequency was for five to 11 year olds for whom 22 statements were obtained (about half the total number obtained); 59% of these statements were actually considered by the court (19% of cases leading to a conviction). For children 12 and older, they were obtained and considered in only 9% of cases. It seems likely that the reason for the difference was the greater refusal rate by older victims.

85 Clause 16 of the Charter of Victim Rights states that the victim has the right “to have the prosecutor make known to the court the full effect of the crime upon them”. This charter became official government policy in July 1989.

86 NSW Office of the Director of Public Prosecutions document on Victim Impact Statements.

87 In one case, in particular, the judge indicated that he would not accept the conclusions of the report, and the solicitor commented on the “hostile” attitude taken by the judge, which was seen as “unnecessary and an embarrassment for the Crown”.

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In addition to formal Victim Impact Statements, evidence was provided in six cases by the police officer-in-charge (three cases), a doctor (two cases) and a psychologist (one case) as to the effect of the offence on the child. In two cases the victim did not want evidence as to the effects given.

### Trends in the prosecution of child sexual assault

How do these figures compare with other statistics in the area? First, how do they compare with other data collected by the NSW Office of the DPP on the disposal of prosecutions of all offences handled by the DPP? Second, how do they compare with data on child sexual assault prosecutions collected by the NSW Bureau of Crime Statistics and Research?

Table 8 presents the DPP's District Court statistics on the disposal of trials over three years. It indicates that the proportion of child sexual assault cases in which there is a plea and which go to trial is quite similar to that for all offences if the small number of cases which fell into the "other category" in the survey is taken into account.<sup>88</sup> There is some difference in the percentage of guilty and not guilty verdicts, with a somewhat lower conviction rate for child sexual assault matters (38.0%) than for offences overall (around 45%). This is not surprising given the difficulty of proving sexual assault allegations, especially relying upon the evidence of a child.

*Table 8  
Disposal of Trial Matters in the District Court by Year*

|                         | Child sexual assault survey |              | All offences |              |
|-------------------------|-----------------------------|--------------|--------------|--------------|
|                         | 1991/92<br>%                | 1990/91<br>% | 1991/92<br>% | 1992/93<br>% |
| Plea                    | 49.1                        | 42.4         | 44.9         | 43.4         |
| Trial                   | 49.8                        | 42.6         | 41.0         | 44.1         |
| Other**                 | 1.1                         | 15.0         | 14.1         | 12.5         |
| <i>Trial Verdicts</i>   |                             |              |              |              |
| Guilty                  | 38.0                        | 44.9         | 46.7         | 45.9         |
| Not guilty              | 51.2                        | 44.3         | 43.4         | 44.9         |
| Not guilty by direction | 10.8                        | 10.8         | 9.9          | 9.2          |

\* Cases no billed late, bench warrant issued for non-appearance of accused or other (accused died etc).

Table 9 provides a comparison of the current figures with the NSW Bureau of Crime Statistics figures and also a picture of the trend in prosecutions for

88 It is likely that solicitors would not have completed a form if there was a change of venue or an adjournment.

## THE PROSECUTION OF CHILD SEXUAL ASSAULT CASES

child sexual assault over the last decade. Although the figures are based on different time periods (calendar year versus April to April), the survey figures are fairly similar to the NSW Bureau of Crime Statistics Higher Court figures, and are in fact closest to the 1990 figures. Overall, just under half the cases have gone to trial since 1988, and just over half have involved a plea. For cases that went to trial over the same period, between 33% and 43% resulted in a finding of guilt. The survey data seems then to be representative of prosecutions of child sexual assault.

More importantly, these figures indicate marked changes in the plea rate and the associated conviction rate after substantial amendments to legislation related to child sexual assault and other changes in response to the recommendations of the NSW Child Sexual Assault Task Force (1985). The main change was a sharp decrease in the guilty plea rate and a marked increase in the number of cases going to trial, from a low of 34 trials in 1982 to 148 in 1988 and a high of 233 trials in 1990. While the number of trials increased, the percentage of guilty verdicts fell from a high of 58.8% in 1982 to a low of 38.6% in 1990. Commensurate with these changes was a fall in the overall conviction rate.<sup>89</sup> As already indicated, it is likely that these changes resulted from legislative reforms in the mid 1980's and from other community and government initiatives in relation to child sexual assault.

*Table 9  
Disposal of Child Sexual Assault Prosecutions*

|         | Plea rate | Cases at trial |      | Guilty at trial | Conviction rate | Imprisonment rate |
|---------|-----------|----------------|------|-----------------|-----------------|-------------------|
|         | %         | n              | %    | %               | %               |                   |
| 1982    | 83.6      | 34             | 19.3 | 58.8            | 92.3            | 40.3              |
| 1984    | 79.0      | 61             | 20.9 | 47.8            | 87.3            | 42.6              |
| 1988    | 55.0      | 148            | 45.3 | 33.8            | 70.0            | 40.5              |
| 1989    | 55.0      | 149            | 44.7 | 39.9            | 75.0            | 48.7              |
| 1990    | 50.6      | 233            | 49.4 | 38.6            | 70.3            | 45.5              |
| 1991    | 55.5      | 179            | 45.0 | 41.3            | 74.1            | 47.4              |
| 1992    | 58.0      | 143            | 42.6 | 43.4            | 76.5            | 57.6              |
| 1991/2* | 49.1      | 131            | 49.8 | 38.0            | 66.5            | 47.4              |

\* DPP survey data; all other data from NSW Bureau of Crime Statistics and Research

### Issues related to child witnesses

Children's experience at court is likely to be affected by both administrative and procedural practices, and by changes in these areas introduced in the mid

89 The imprisonment rate has been fairly consistent at around 40%–45% except for 1992 when the proportion of offenders jailed increased to 57.6%.

1980s and later. Many of these issues also affect adult witnesses, especially sexual assault victims, but special efforts were also specifically made to improve the situation for child witnesses.

## Delays

One of the problems commonly reported in relation to courts, especially where children are concerned, is the delay and the time taken for cases to reach a hearing and finalisation. Although delay is also a problem for adult sexual assault complainants, there is reason to believe that the effects may be more serious for children, both in terms of their emotional adjustment and the reliability of their evidence. Children have a different sense of time to adults and six or 12 months seems like a life time to them. There is also some research evidence that children's memory for events may be more seriously affected by long delays than adults.

Three measures of delay were used: the time from charge to committal, the time from committal to trial or sentence, and the number of times the case had been previously listed for hearing but not reached.

The average time from charge to committal/summary hearing was 161.9 days or about 23 weeks or six months. There was little variation associated with the age of the complainant but considerable variation by area. The greatest mean delay, for example, was 313.9 days or around 45 weeks in the northern areas of Port Macquarie, Tamworth and Lismore compared with an average for the metropolitan areas of around 23 weeks, and a low of 20 weeks for Dubbo.

Several solicitors were quite critical of police handling of the investigation which resulted in delay and poor preparation. In one case, for example, there was a delay of two years between assault and charging; a complaint was given to the police but was not followed through because the police lost the statement—the case was reactivated after another incident. In another case, poor preparation by the police and their slowness in serving the subpoenas meant further delay in the case going to a hearing.<sup>90</sup>

The average delay from committal to trial was considerably longer than that from charge to committal, at 337.4 days or about 48 weeks.<sup>91</sup> There was, however, similar variability by area, with a high mean for the greater Sydney

90 Very few cases were referred to the DPP as required within 48 hours of charging; the time varied from several days to more than two years.

91 These figures correspond with the figures released by the NSW Bureau of Crime Statistics and Research, taking into account the likelihood that most defendants were on bail rather than in custody.

metropolitan area (including Campbelltown and Penrith) of 456 days or 65 weeks, and a low mean, of 239 days (34 weeks) for the southern rural areas of Wagga Wagga, Albury and Queanbeyan.

Contributing to and exacerbating the experience of delay for child witnesses was the number of times the case was listed for hearing before it was finally heard. Although the majority of cases in both courts (68%–72%) were dealt with on the first occasion they reached court, around 30% were not. A small percentage (9% to 11%) had been listed two to five times previously. One case that went to trial was heard on the first occasion but the committal had been mentioned or listed nine times before it was finally heard.

Evidence that previous listings or hearings affected children's performance was provided by two cases. In one case that went to trial in the country, the case had been listed three times previously, and then did not go ahead because the complainant (a 14 year old state ward) refused to give evidence. The solicitor commented in relation to this case, "Perhaps the wishes of the victim would have been different had the trial proceeded earlier". In another case, a previous trial had resulted in a hung jury. The instructing solicitor commented that "the victim was far less impressive in giving evidence [the second time] whereas the accused by comparison made a much more effective dock statement"; the outcome was a not guilty verdict.

### **Court procedures for child witnesses**

Children gave evidence at both the local court and higher courts. In the local court, 168 child complainants gave evidence in summary and committal hearings; four children gave evidence in cases which were then committed for sentence following a guilty plea. The age of the children who gave evidence ranged from three to 17, with an average age of 12.5 years.

Seventy one cases in the local court proceeded by tendering statements only, as "paper committals".<sup>92</sup> Several cases were terminated, however, because the complainant was unwilling or unable to give evidence. One, for example, involved a six year old who, in the words of the solicitor, was "upset/traumatised at the prospect of going to court to give evidence". In another, a

92 Since March 1992 when s 48EA of the *Justices Act* 1902 legislation was proclaimed, victims of certain "offences involving violence" have not been required to give evidence in committal proceedings without the court being satisfied that there are "special reasons . . . in the interests of justice" why that person should be required to attend. The data suggest, however, a trend away from calling children even before this legislation was proclaimed and for children to be increasingly less likely to be called from the beginning of the period under study (April 1991) through to April 1992. In the first 50 cases, for example, children were called to give evidence in 65% of cases but this figure fell to 48% and the 39% for the last 50 and 25 cases respectively.

seven year old “broke down and admitted to making up some parts of the evidence which were not directly related to the alleged offences”.<sup>93</sup> A third case involved an older complainant, a 15 year old who “was too traumatised and not strong enough to give evidence” in a case involving ten defendants.

In the higher courts, 145 children gave evidence at trial. Their average age was 13.1 years, ranging from five to 17 years. Fourteen children did not give evidence although the matter proceeded to trial; most (nine) were under six years of age, and were not called but one four year old was called and deemed incompetent. The other five children ranging in age from nine to 15 years refused to give evidence or declined to continue their testimony. In one case, a nine year old giving evidence against her mother’s de facto partner broke down during cross examination and declined to continue her testimony. In another case, an eight year old was unable to give any evidence at all against her step-grandfather “despite lengthy attempts by the Crown Prosecutor”.

### Form of the oath

In 1991, s 33 of the *Oaths Act* 1900 was amended to ease the competence requirements for young child witnesses.<sup>94</sup> This amendment was intended to provide a presumption that children are competent and to shift the “focus from their admissibility of their evidence to the weight that should be attached to it”.<sup>95</sup> Two conditions must be satisfied before children (generally for children under 12) are allowed to give evidence. First, the court must explain to the child that it is important to tell the truth. Second, the child must make a declaration such as “I will not tell any lies in this court”.<sup>96</sup>

Table 10 shows the frequency with which children appearing in both types of court were sworn or allowed to make a declaration according to age.

93 This is a direct quote of the solicitor’s account of events. It should be noted, however, that it is not uncommon for children to retract their allegations (Sorenson T and Snow B “How children tell: the process of disclosure in child sexual abuse” (1991) LXX *Child Welfare* 3–15).

94 The *Oaths (Children) Amendment Act* 1990 came into effect on 6 January 1991. See also Cashmore J and Parkinson P “The competency of children to give evidence” (1991) 3 *Judicial Officers Bulletin* 1–4.

95 Cashmore and Parkinson op cit p2.

96 NSW Office of the DPP *Child sexual assault prosecutions manual*, 1993, The Office of the Director, Sydney, 2.1.

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Table 10  
Frequency of Form of Oath by Age and Type of Court

| Local Courts  |             |            |             |             |            |
|---------------|-------------|------------|-------------|-------------|------------|
| Age (years)   | Sworn       | Affirm     | Declare     | Unsworn     | Total      |
| 0-4           | —           | —          | 3           | 1           | 4          |
| 5-9           | 2           | 1          | 16          | 1           | 20         |
| 10-11         | 10          | 1          | 19          | —           | 30         |
| 12-14         | 50          | 2          | 3           | —           | 55         |
| 15-17         | 20          | —          | —           | —           | 20         |
| <b>Total</b>  | <b>82</b>   | <b>4</b>   | <b>41</b>   | <b>2</b>    | <b>129</b> |
| <b>%</b>      | <b>63.6</b> | <b>3.1</b> | <b>31.8</b> | <b>1.5</b>  |            |
| Higher Courts |             |            |             |             |            |
| Age (years)   | Sworn       | Affirm     | Declare     | Unsworn     | Total      |
| 0-4           | —           | —          | —           | 4           | 4          |
| 5-9           | 4           | —          | 10          | 3           | 17         |
| 10-11         | 11          | 2          | 11          | 7           | 31         |
| 12-14         | 29          | 3          | 4           | 4           | 40         |
| 15-17         | 33          | —          | —           | —           | 33         |
| <b>Total</b>  | <b>77</b>   | <b>5</b>   | <b>25</b>   | <b>18</b>   | <b>125</b> |
| <b>%</b>      | <b>61.6</b> | <b>4.0</b> | <b>20.0</b> | <b>14.4</b> |            |

Table 10 clearly shows that most children over 12 were sworn whereas children under 12, and especially those under nine, mostly made a declaration. Comparing the two types of courts, it appears that magistrates have been more prepared than judges to ask young children to make a declaration whereas children in higher court proceedings were more likely to give evidence unsworn than children in local court proceedings (14.4% compared with 1.5% in local courts). Affirmations in both courts were rare.

Solicitors completing these returns were asked to comment upon any difficulties with the administration of the oath or declaration. Several emerged, including apparent judicial unfamiliarity with the procedure under the Amendment, and not appreciating the presumption of competence. Some magistrates, in particular, were seen to have asked questions that were too difficult for the child and questions that dealt only with the Bible and the child's ability to take an oath. Magistrates were more likely than judges to ask questions about the meaning or distinction between truth and lies and about children's understanding of the oath. Magistrates questioned 58.9% of child witnesses whereas judges questioned 44.4%. Not surprisingly given the framing of the Amendment Act, children under 12 were more likely than older children to be questioned. Children aged 5 to 9 years, in particular, were the group most likely to be questioned; 85.7% of child witnesses in this age group were questioned about their understanding of truth and lies in local courts, and the figure was 61.9% in higher court proceedings.



### Warning to the jury

Children's evidence has traditionally been regarded in law with some suspicion and until relatively recently it was not possible to convict without corroboration on the unsworn evidence of a child.<sup>97</sup> Furthermore, there was also a duty to warn of the danger of convicting on the sworn evidence of a child. In 1985 the law was amended to remove the difference in status between sworn and unsworn evidence from children and to remove the requirement for the judge to warn the jury about the danger of convicting on the uncorroborated evidence of a child witness.<sup>98</sup> Case law has, however, since changed the situation, and accepted practice now is that the warning is generally given if requested by counsel.<sup>99</sup>

In the current study, a number of cases noted the *Murray* direction in relation to the "necessity for the jury to be satisfied beyond reasonable doubt of the truthfulness of the witness who stands alone as proof of the Crown case".<sup>100</sup> Overall, a warning was given in 57 trials (43.5% of cases); it is unclear, however, exactly how many of these cases involved the *uncorroborated* evidence of the child complainant.

The age of the complainant had little influence on whether or not the judge warned the jury, although there was a trend for warnings to be given less often for 12 to 14 year olds compared with other child witnesses. Warnings were given, for example, in 41.5% of cases for 12 to 14 year olds compared with 57.1% of cases involving five to nine year olds and 53.5% of 15 to 17 year olds. This may, however, reflect some difference in the proportion of cases in which the child's evidence was uncorroborated rather than a difference in judges' propensity to give a warning for children of different ages.

Somewhat surprisingly, the warning seems to have had little effect on the verdict. Indeed, the trend was for a *greater* likelihood of conviction when the

97 Spencer and Flin op cit.

98 NSW Crimes (Child Assault) Amendment Act 1985 s 5 and Schedule 1(6).

99 *R v Murray* (1987) 11 NSWLR 19.

100 In *R v Murray*, Lee J went on to say:

"In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable".

warning was given than when it was not.<sup>101</sup> The conviction rate for cases in which a warning was given was 42.9% compared with 34.4% of cases in which no warning was given. The picture is somewhat more complicated than this, however, because this effect seems to have been influenced by the age of the child and the strength of the warning given. For children 12 and older, the conviction rate was greater when a warning was given than when it was not (51.2% compared with 36.6%) whereas the opposite was true for children under ten (25% compared with 40%).<sup>102</sup> In three cases involving children under ten, the judge stressed the “danger” of convicting on uncorroborated evidence, especially that of a child. In one case involving an eight year old child, the daughter of the accused, for example, the judge further added that “it has been the experience of the courts recently that there had been a couple of cases of men wrongly convicted” in similar situations; a verdict of not guilty was returned. In another case, involving a seven year old, the jury returned a not guilty verdict following the *Prasad* direction,<sup>103</sup> which, according to the prosecuting solicitor, “led the jury to believe there was little merit in the Crown case, although this was not the intention of the judge who stated he was very impressed with the evidence and demeanour of the one Crown eye-witness; His Honour was very surprised by the verdict”.

### Reliability of children’s evidence as an issue

The reliability of children’s evidence has traditionally been suspect but considerable recent psychological research has indicated that children’s abilities have generally been under-estimated and are affected by context including the way they are questioned.<sup>104</sup> In this study, two issues concerned with the reliability of children’s evidence emerged. The first concerns so-called “contamination” of their evidence by suggestive questioning and even deliberate coaching. The second concerns the (unrealistic) demands on children concerning the detail of their evidence.

Following what has become known as the “Mr Bubbles” case in August 1989, there have been various suggestions that the “contamination” of

101 This trend is consistent with the findings of an earlier study on simulated juries (LSE Jury Project (1973) April *Criminal Law Review* 208–223) suggested that corroboration warnings might have the opposite effect to what might be expected—that they might encourage a guilty verdict rather than discourage it. As Spencer and Flin (1990 *op cit*) point out, however, it is almost impossible to study the exact effect because of the difficulty, if not illegality, of research on jury deliberations.

102 For children aged ten to 11, the conviction rate was about the same, whether or not a warning was given (37.5% compared with 40%).

103 *R v Prasad* *op cit*.

104 Spencer and Flin 1990 *op cit*.

children's evidence has become an important issue in defence. In this study, however, contamination was raised in only a small proportion of cases: in 7.4% of local court matters, and in 4.9% of higher court matters. The content of the alleged contamination included suggestions that the child had been coached or tutored, and questions to the child about who they had spoken to about the incident(s). One case involved a custody dispute in relation to a sibling of two complainants, not the complainants themselves.

Age influenced the likelihood of contamination being raised; in general, the younger the child, the greater the likelihood. In trial matters, for example, contamination was raised in 23.8% of cases involving children under ten, and in only 4.7% of trials involving children between the ages of 15 and 17. The pattern was less clear for local matters, however, with 10 to 11 year olds being the most frequent targets (30.8%) and 12 to 14 year olds the least frequent (6.9%).

The second issue was raised in the comments on several cases. It concerns the problems children may have giving evidence about the details of the incident(s), and particularly their timing. In two cases, the eight and 11 year old complainants involved "mixed up the dates" and applications to vary or amend the dates in the indictments were refused; in each case the accused was not convicted on a directed verdict. The instructing solicitor in another case commented on the "incredible" not guilty verdict in a case involving a strong 17 year old witness, whose evidence was corroborated by two other witnesses. The only problem with the evidence was that the complainant had some difficulty with the dates of the alleged offences.

### **Special provisions for child witnesses**

A number of special provisions have been made available over the last five years or so to make the court and the legal process more attuned to the needs of child witnesses. These provisions include court closure to exclude unnecessary observers, the presence of a support person (who can be exempted from the order to close the court), and closed-circuit television and screens to prevent the child seeing the accused. Others have been administrative changes and involve encouraging prosecution advocates to continue their involvement with the case and to provide feedback to complainants and their families.

#### **Court closure**

Applications for a closed court were made in 124 local court proceedings and in 93 trials.<sup>105</sup> Magistrates were more likely than judges to grant such

105 It was not necessary to close the court in another seven cases which were dealt with as Children's Court matters (the defendant was under 18) because such hearings are always closed to the public.

applications, refusing only one application (0.8% of applications) compared with judges' refusal of nine applications (9.7%). The main reason given for refusing the application was the public's right of open access to the courts; a non-publication order was deemed sufficient to protect the complainant. Five judges and one magistrate expressed this view, but in all of these cases the complainant was 14 years of age or older; one, however, had an intellectual disability.

### Support persons

Where the court was closed, exemptions from the closure were almost invariably obtained when requested. In a number of cases, however, it appears that children did not have or did not request the presence of a support person. There was no application for exemption for the support person in 17 local court matters and in 23 higher court cases. Most of these cases involved older children. For example, 18 trials (78.3%) and nine local court matters (52.9%) involved children over 12.<sup>106</sup> It was noted that some (older) complainants did not wish anyone to be present and that there was no one available for others, but it is unclear how many younger children were not asked or did not have anyone available to them.

In five cases, there was clear information that a support person for the child was not able to be present when the court was closed. In three cases, the child's counsellor was unable to be present in court because she was called by the defence as a witness.<sup>107</sup> In a local court case, the defence objected to the presence of the complainant's mother's new partner when the defendant was the mother's former partner; the partner left voluntarily. The other case was due to the intervention of the Crown Prosecutor who did not allow the complainant's boy friend to be present although the complainant wanted him to be there. In one further case, it was noted that the judge had specific concerns about the placement of the support person. The comment noted that:

“At first, His Honour refused to allow the support person to sit in the sight of the victim. After much argument, the support person was allowed to sit behind the Crown but the judge would not let her sit near the victim in the witness box. The victim (an 11 year old, allegedly assaulted by her mother's de facto) had expressed fear of the accused prior to the trial. His Honour commented that he didn't want anyone in his court who would influence a witness”.

106 There was no information about the presence of a support person when the court was not closed.

107 This is allegedly a tactic sometimes used by the defence to unsettle the child. It is possible this happened more frequently, and also in cases in which the court was not closed, but the solicitor completing the return noted it in only three cases.

### Screens and closed-circuit television

Children's greatest concern about giving evidence is having to confront the defendant.<sup>108</sup> Screens and closed-circuit television may be used to overcome this problem by preventing the child from viewing the defendant. Furthermore, closed-circuit television allows children to testify away from the formal and intimidating atmosphere of the courtroom. Before children are able to use closed-circuit television, however, the court has to make an order for its use on application by the prosecution.<sup>109</sup> Similarly, "alternative arrangements" such as screens may be directed by the court, "of its own motion or on the application of the prosecution".<sup>110</sup>

The likelihood of an application was clearly influenced by two factors: first, the type of hearing involved, and the age of the child. Applications for both screens and closed-circuit television were made in only a small proportion of cases and they were more frequent in local courts than in higher courts, and for younger than older children.

Applications for screens were made in relation to 45 children in local court proceedings<sup>111</sup> and in relation to 16 in the higher courts. For closed-circuit television, 17 applications were made in local court matters and four at trial in the higher courts. Overall, then, there were applications for either a screen or closed-circuit television in relation to 62 children (20.1%) in local courts and in relation to 20 children (6.1%) in the higher court matters. It is clear then that applications were about three times more likely in the local courts than in the higher courts. Several cases suggest that one explanation for this difference may lie in the control exercised by Crown Prosecutors. In several trials, for example, solicitors commented that children had asked for a screen or closed-circuit television but that the Crown Prosecutor involved was opposed to their use and had refused.

Applications were also more likely to be made for younger than for older children. In trial matters, all the children for whom applications were made for closed-circuit television were under ten (three eight year olds and one five year old). In the local court, 14 of the 17 children (82.3%) were under 12 and four of these were under ten. Applications for screens were more frequent for older children but the majority were still under 12 (60% in local court matters and

108 Cashmore and Bussey 1989 op cit; Cashmore chapter III of this volume; Flin, Stevenson and Davies op cit; Goodman et al, in press; London Family Court Clinic op cit; Whitcomb et al 1985 op cit.

109 NSW *Crimes Act* 1900 s405D(1).

110 NSW *Crimes Act* 1900 s405F(i).

111 One was made by the magistrate.

## THE PROSECUTION OF CHILD SEXUAL ASSAULT CASES

75% in trials). Applications for screens were also more likely to be made for higher court matters in the country than were local court matters.<sup>112</sup> This may be because closed-circuit television was only available at this stage in Sydney.<sup>113</sup>

All applications for closed-circuit television were granted. It was not used, however, in three cases because the child did not give evidence (two cases) and because of technical problems with the equipment (one case). In two cases involving two child witnesses, only one child—the victim—was able to use closed-circuit television; the other—a witness but not the victim—used a screen. In one case, for example, the ten year old victim used closed-circuit television but her twin brother was not able to do so and used a screen instead. This is because the legislation applies only to victims of child sexual assault under the age of 16.<sup>114</sup>

Applications for screens were more likely to be refused than for closed-circuit television, especially in the higher courts. Only one application for a screen was refused in the local court but four were refused and two not pursued in the higher courts. Screens were disallowed for two main reasons: likely prejudice to the accused because of “possible speculation by the jury as to the reason for the use of a screen” and the unsuitable lay out of the court for a screen.<sup>115</sup> In the one local court matter in which a screen was disallowed, a 12 year old boy was seen as “too old” to need a screen. In the two trials in which the application was not pursued, the seating was arranged so that the accused was out of the child’s line of sight from the witness box. In one trial in which an application was refused, two girls aged nine and seven were reportedly “very intimidated” by the presence of the extended family in support of the accused. They broke down a number of times in cross examination and the outcome was a not guilty verdict.

112 Of the 45 applications for screens in local courts, 23 were in metropolitan local courts and 22 in country courts. In the higher courts, 11 related to country courts.

113 The use of closed-circuit television was originally introduced in two courts—a Local Court in the Downing Centre and a Supreme Court at Darlinghurst. Its use has since been extended to other courts in Newcastle, Wollongong and regional centres.

114 NSW *Crimes Act* 1900 s405D(1) states that:

“In any criminal proceedings in which it is alleged that the accused person has committed a prescribed sexual offence on a child, the court may, on the application of the prosecution, make an order permitting the child’s evidence to be given by means of closed-circuit television facilities”.

Recommendations from the Children’s Evidence Task Force in relation to this and other matters concerning the use of closed-circuit television are currently under consideration.

115 In one case, the judge stated that he had a “view” about these matters and refused the application without further comment.

Concern about the effect of screens or closed-circuit television on the outcome of the hearing, and especially trials, is likely to be one reason for the low application rate. Although the numbers are quite small and should be interpreted with caution, there appears, however, to have been little effect on the outcome. In local court matters, where screens were used, the committal/conviction rate was 77.5% compared with an overall rate of 83.8% of cases in which children gave evidence. For closed-circuit television, it was 86.6%. For trials in the higher courts where children gave evidence, 50% of cases in which a screen was used resulted in a conviction compared with an overall conviction rate of 35.9%. All three cases in which closed-circuit television was used resulted in acquittal, but the number is so small and the cases in which it was used very selective so that it is difficult to draw any conclusion.

### **Administrative procedures**

Two procedures have been implemented by the NSW Office of the DPP in order to provide a better service to child complainants. These include some attempt to provide continuity of representation where it is considered necessary, and feedback to child witnesses and their families.

### **Continuity of representation**

Continuity of involvement of the lawyer(s) involved in the case from committal to trial or finalisation has “self-evident” benefits to child witnesses.<sup>116</sup> It minimises the number of people that the child needs to get to know and to whom they have to repeat the story of what has happened to them. It also has advantages for the prosecution case in increasing the chance that the child will be willing and able to “come up to proof”. Unfortunately, however, continuity can be difficult to arrange in terms of prosecutors’ workloads and some advocates are reluctant to instruct at trial. To what extent then has continuity been achieved?

There were two measures of continuity. First, at the end of the committal proceedings, the advocates were asked to indicate whether they would be continuing on the case to instruct at trial. Continuity was expected in 40 cases, 18.4% of cases which proceeded. This constituted 28.7% of cases in which the child gave evidence at committal.

The second measure concerned the number of children who had previous contact with the instructing solicitor at trial. There was continuity for 56 children, representing 38.6% of children who gave evidence at trial. There was

116 NSW Office of the Director of Public Prosecutions, *The policy and procedure of the Office of the Director of Public Prosecutions in child sexual assault prosecutions*, 1992, The Director of Public Prosecutions, Sydney, p 2.

some variation by age, with fewer children in the ten to 11 year age group received continuity (16.1%) compared with other age groups, and in particular 64.7% of five to nine year olds.

### DPP follow-up

The victim was reportedly advised of the result in 77% of cases, and the family in 88% of cases. A number of solicitors reported doing so by advising the police officer-in-charge of the case, but several expressed the view that it was not their responsibility to ensure that the complainant was advised of the result. Indeed the Office of the DPP's *Child Sexual Assault Prosecutions Manual*<sup>117</sup> indicates that "all victims [are] to be advised, *upon request* of the outcome of proceedings". This is in line with government policy as expressed in the Charter of Rights for Victims<sup>118</sup> but in contrast with the NSW Child Protection Council's *Interagency Guidelines*<sup>119</sup> which clearly suggest that it is the responsibility of the DPP to "fully explain" the outcome of criminal court proceedings to "the child/family/care-giver". In practice, it makes sense for the DPP solicitor and the police officer-in-charge to discuss and decide who is best placed in terms of their relationship with the family to inform the child and his/her family. It may also be useful for the solicitor to ask children or their families whether they wish to be advised of the outcome so that their wishes are clear. Alternatively, it may be more appropriate for this information to be provided by the child's counsellor if the child has one.

### Discussion

The findings of the current survey provide information on the way cases of child sexual assault were dealt with in the criminal justice system over a 12 month period during 1991-1992. This provides an update on earlier studies by Cashmore and Horsky<sup>120</sup> and Goodwin,<sup>121</sup> and shows the effect of changes introduced in the mid 1980s in relation to the prosecution of child sexual assault. It also provides valuable information on court procedures and judicial practice in relation to child witnesses, information that was not available in the earlier studies.

117 op cit.

118 NSW Attorney General's Department *Charter of victims' rights*, 1989, Sydney.

119 NSW Child Protection Council *Interagency guidelines*, 1991, Parramatta, NSW.

120 Cashmore J and Horsky M *Child sexual assault: the court response I*, 1987, NSW Bureau of Crime Statistics and Research, Sydney; Cashmore and Horsky 1988 op cit.

121 op cit.



## THE EVIDENCE OF CHILDREN

In terms of updating the earlier findings, the DPP's survey of prosecuted cases and the Bureau of Crime Statistics and Research's figures indicate a continuation and stabilisation of the trend toward a reduced guilty plea rate, an increased number of cases going to trial, and a lower conviction rate both at trial and overall.

There are a number of possible explanations for these changes. First, there has been a dramatic increase in the number of allegations of child sexual assault investigated by the NSW Department of Community Services and the Police Department with growing awareness of child sexual assault, the introduction of mandatory notification for various professional groups and increased resources for investigation. The Report of the NSW Child Sexual Assault Task Force<sup>122</sup> stated, for example, that in the first six months of each year from 1980 to 1984, "the number of notifications totalled nine (1980), 48 (1981), 170 (1982), 320 (1983) and 661 (1984)." Substantiated notifications since 1986/87 now range around 2500 per year<sup>123</sup> so it is clear that only a small proportion of confirmed cases are prosecuted. Nevertheless, the number of prosecuted cases has multiplied since the early 1980s.

While the number of notifications has increased markedly, there have also been a number of changes which have removed or reduced some of the obstacles for young child witnesses. The major obstacle was the difficulty of the test for receiving the (sworn) evidence of young children and the inability to convict on the uncorroborated unsworn evidence of a child. Hence if a child was too young to understand and take an oath and there was no material evidence to corroborate the child's evidence, there was no point in attempting to prosecute the case. With legislative reform, the test for the child's competence to testify has been eased, and unsworn evidence has the same weight as sworn evidence.<sup>124</sup> The requirement for corroboration has been also been removed.<sup>125</sup> As a result, it is now possible for even very young children to give evidence.

122 NSW Child Sexual Assault Taskforce, *Report*, 1985, Govt Printer, Sydney, p 23.

123 NSW Department of Community Services *Annual Report of the NSW Department of Community Services 1991-1992*, Sydney, p 12.

124 Section 33 of the *Oaths Act* 1900 has been amended twice: first in November 1985, and again in January 1991 in light of the difficulties resulting from the 1985 amendment which required the child to understand "the duty of speaking the truth before the court".

125 The *Evidence Act* 1898 was amended in November 1985 to remove the requirement that a judge warn the jury that it is unsafe to convict on the uncorroborated evidence of a child. Section 405C of the *Crimes Act* 1900 was amended in November 1985, and again in November 1987. Section 405C(2) provides that a judge is not required to warn the jury that it is unsafe to convict a person charged with a prescribed sexual offence on the uncorroborated evidence of the complainant, regardless of the complainant's age.

## THE PROSECUTION OF CHILD SEXUAL ASSAULT CASES

Before these amendments, it was rare for children under ten to give evidence. In 1982, for example, only one child was under ten at trial, and the average age was 13.2 years.<sup>126</sup> In 1992, 17 children were under ten, and the average age was just under 12.

The increase in the number of young witnesses and the drop in the average age of witnesses may also explain the decrease in guilty pleas and the consequent rise in the number of cases going to trial. Younger witnesses are generally seen as more vulnerable and less reliable so it is likely that the defence is now more inclined to put the case to the test, with the expectation that the child will not come up to proof. Indeed the decrease in the conviction rate at trial (from 58.8% in 1982 to an average of around 38% in the late 1980's and early 1990's suggests that their expectation may be correct. Cases involving young children are probably harder to prosecute successfully.

126 Cashmore and Horsky 1988 op cit.

# APPENDICES

## Appendix A

### QUESTIONNAIRE FOR CHILDREN INVOLVED IN COURT CASES

It would be very helpful if you would answer *some or all* of the following questions. This is because this information allows the Office of the Director of Public Prosecutions to find out where there are problems with prosecutions and to take action to solve those problems. Information from the parents and children involved in committal hearings and trials in which children give evidence is therefore very important.

As you will see from the questions, there is no need to provide any identifying information. Please add any additional comments you wish.

*If the most recent court hearing was a trial, please answer the questions in terms of the trial. Add any comments you wish about the committal, but please say if you are referring to the trial or the committal. [A trial is where there is a judge and jury, and a committal is where there is a magistrate.]*

**PLEASE MARK HERE BY TICKING ONE BOX  
WHETHER YOU ARE ANSWERING IN TERMS OF:**

- a committal hearing*
- a trial*
- both*

1. **How old were you:**
  - (a) at the time of the assault?  
\_\_\_\_\_
  - (b) at the time of the hearing (Committal/Trial)?  
\_\_\_\_\_
2. ***If it was a committal hearing, was the person committed for trial?***

*Please circle one  
YES/NO*
- b. **How did you feel about that?**
3. ***If it was a trial, was the defendant found guilty?***

*Please circle one  
YES/NO*
- b. ***If the defendant was found guilty, do you know what the sentence was?***

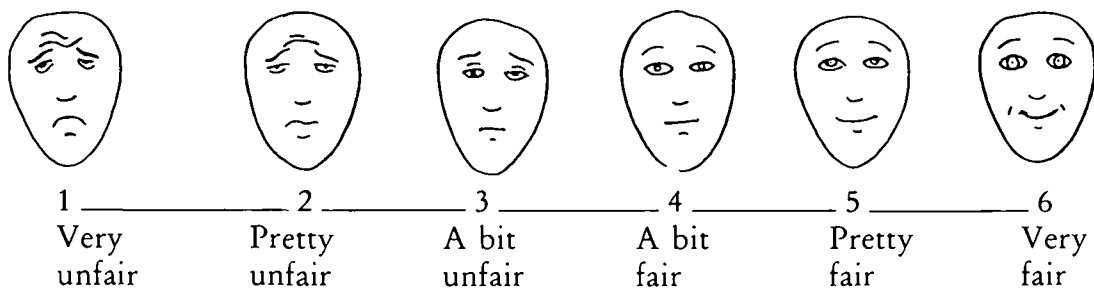
APPENDICES

- c. How do you feel about that?
- 4. Is the result what you wanted to happen?

*Please circle one  
YES/NO*

*If no: What result did you want?*

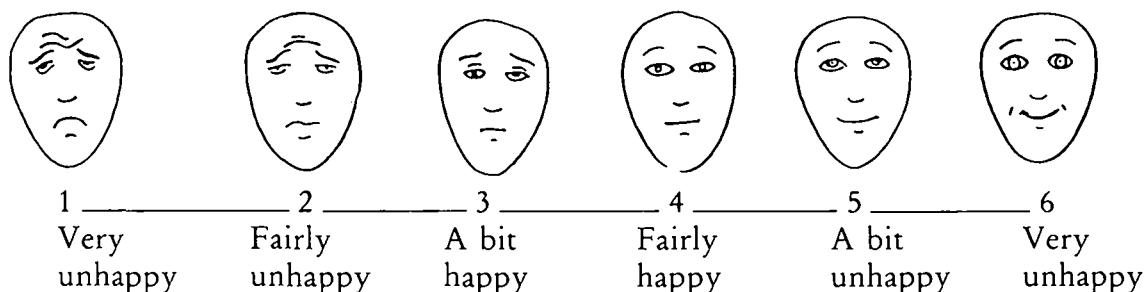
- 5. Do you think that the result is fair?



*Please explain:*

- 6. *If you didn't give evidence, do you know why you didn't?*

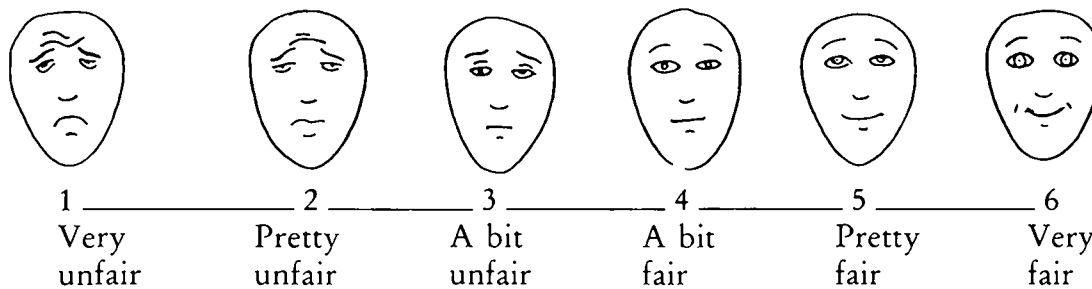
- 6b. How do you feel about not giving evidence?



*If you didn't give evidence at court, please skip these questions  
and go to Q10.*

THE EVIDENCE OF CHILDREN

7. Do you think that the way you were treated in court was fair? How fair/unfair was it?



*If unfair, please explain:* What do you think was unfair?

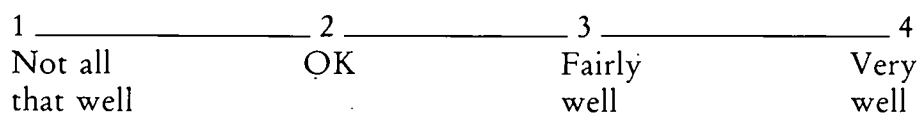
*If fair, please explain:* Anything about it that wasn't fair?

PLEASE USE THE SAME PICTURE SCALE  
TO ANSWER THESE QUESTIONS:

8. How fairly do you think you were treated by:

- a. The Judge/Magistrate
- b. The solicitor from the DPP?
- c. The Crown Prosecutor (if trial)
- d. The Defence

9. How well do you think you gave evidence?



10. Do you think anything could have been done to make it easier for you?

*Please circle one*  
YES/NO/DON'T KNOW

APPENDICES

11. Do you think the solicitor from the DPP could have done anything to make it easier for you?  
*Please circle your answer:*  
YES/NO/DON'T KNOW  
*If yes, please explain: What could they have done?*
12. Did the solicitor from the DPP talk to you enough after the case?  
*Please circle:*  
YES/NO
13. Was there anything good about going to court?  
*Please circle:*  
YES/NO  
*If yes: What was that?*
14. What was the worst part of it all?
15. Is there anything you know now that you wish you'd known before you went to court?
16. If you were able to change things, what changes would you make so that it is easier for children to go to court?
17. Would it have been easier if you did not have to:  
(a) be in the courtroom while you gave evidence?  
*Please circle your answer:*  
EASIER/HARDER/NO DIFFERENCE  
(b) see the defendant while you gave evidence?  
*Please circle your answer:*  
EASIER/HARDER/NO DIFFERENCE  
(c) If you had a choice, would you rather use closed-circuit television so you could be in another room while you gave evidence?  
*Please circle your answer:*  
YES/NO/DON'T KNOW
18. If a friend was in the same position as you were and they asked you whether to continue the case to court, what would you say?

PLEASE ADD ANY OTHER COMMENTS YOU WISH

## Appendix B

|  |
|--|
| QUESTIONNAIRE FOR PARENTS OF CHILDREN<br>INVOLVED IN COURT CASES |
|--|

It would be very helpful if you would answer *some or all* of the following questions. This is because this information allows the Office of the Director of Public Prosecutions to find out where there are problems with prosecutions and to take action to solve those problems. Information from the parents and children involved in committal hearings and trials in which children give evidence is therefore very important.

As you will see from the questions, there is no need to provide any identifying information. Please add any additional comments you wish.

*If the most recent court hearing was a trial, please answer the questions in terms of the trial.*

*Add any comments you wish about the committal, but please say if you are referring to the trial or the committal. [A trial is held at a District or Supreme Court with a judge and jury, and a committal is held at a Local Court with a magistrate.]*

|   |
|---|
| Please mark here whether you are answering in terms of: |
|---|

- |  |
|--|
| <ul style="list-style-type: none"><li>• a committal hearing</li><li>• a trial</li><li>• both</li></ul> |
|--|

1. **How old was the child:**

(a) at the time of the assault?

---

(b) at the time of the hearing (Committal/Trial)?

---

2. **Do you know what the charges were?**

*Please circle one:*  
YES/NO

*If yes: What were they?*

APPENDICES

3. *If it was a committal hearing, was the person committed for trial?*  
*Please circle one:*  
YES/NO

b. How do you feel about that?

4. *If it was a trial, was the defendant found guilty?*  
*Please circle one:*  
YES/NO

b. If the defendant was found guilty, what was the sentence?

c. How do you feel about the sentence?

5. Is the result what you wanted to happen?  
*Please circle one:*  
YES/NO

*If no: What result did you want?*

b. What result did (child) want?

6. If your child didn't give evidence, do you know why?

6b. How do you feel about your child not giving evidence?

If your child didn't give evidence at court, please skip these questions and go to Q3.

7. Do you think that the result is fair?  
1 \_\_\_\_\_ 2 \_\_\_\_\_ 3 \_\_\_\_\_ 4 \_\_\_\_\_ 5 \_\_\_\_\_ 6  
Very      Pretty      A bit      A bit      Pretty      Very  
unfair      unfair      unfair      fair      fair      fair

*Please explain:*

8. Do you think that the way (child) was treated in court was fair?  
How fair/unfair was it?  
1 \_\_\_\_\_ 2 \_\_\_\_\_ 3 \_\_\_\_\_ 4 \_\_\_\_\_ 5 \_\_\_\_\_ 6  
Very      Pretty      A bit      A bit      Pretty      Very  
unfair      unfair      unfair      fair      fair      fair



THE EVIDENCE OF CHILDREN

*If unfair:* What do you think was unfair?

*If fair:* Anything about it that wasn't fair?

PLEASE USE THE SAME RATING SCALE  
TO ANSWER THESE QUESTIONS:

9. **How fairly do you think the child was treated by:**

- a. The Judge/Magistrate
- b. The solicitor from the DPP?
- c. The Crown Prosecutor (if present eg at trial)
- d. Defence

10. **Do you think there were any problems in the way s/he was questioned?**

*Please circle one:*  
YES/NO

**What do you think the main problem(s) were?**

11. **How well do you think (child) performed as a witness?**

|                      |         |                |              |
|----------------------|---------|----------------|--------------|
| 1 _____              | 2 _____ | 3 _____        | 4 _____      |
| Not all<br>that well | OK      | Fairly<br>well | Very<br>well |

12. **Did you give evidence?**

YES/NO

b. **How did you find that?**

c. **How fairly do you think *you* were treated in court?**

APPENDICES

13. Do you think the solicitor from the DPP could have done anything to make it easier for you and your child?

*Please circle:*  
YES/NO

*If yes:* What could they have done?

For your child:

For you:

14. Did the solicitor from the DPP talk to you enough *after* the case?

*Please circle:*  
YES/NO

15. Do you think the police could have done anything at any stage to make it easier for you and ... (the child)?

*Please circle:*  
YES/NO

*If yes:* What could they have done?

For your child:

For you:

16. Do you think the Department of Community Services staff could have done anything at any stage to make it easier for you and ... (the child)?

*Please circle:*  
YES/NO

*If yes:* What could they have done?

For your child:

For you:

17. Were you given enough information about what was going on and about what would happen next?

*Please circle:*  
YES/NO

18. Is there anything you know now that you wish you'd known before your child went to court?

THE EVIDENCE OF CHILDREN

19. What effect do you think going to court has had on (child)?

b. Do you think going to court was helpful to (child)?

*Please circle:*  
YES/NO

If yes: How helpful?

1 \_\_\_\_\_ 2 \_\_\_\_\_ 3 \_\_\_\_\_ 4 \_\_\_\_\_  
Not at all                      A bit                      A fair bit                      A lot

c. How has it helped him/her?

d. Do you think going to court was harmful to (child)?

*Please circle:*  
YES/NO

If yes: How harmful?

1 \_\_\_\_\_ 2 \_\_\_\_\_ 3 \_\_\_\_\_ 4 \_\_\_\_\_  
Not at all                      A bit                      A fair bit                      A lot

e. How has it harmed him/her?

20. Was there anything good about going to court?

*Please circle:*  
YES/NO

If yes: What was that?

21. What was the worst part of it all?

a. For you?

b. What was the worst part for (child)?

22. Do you think your child knew all s/he needed to know before s/he went to court?

APPENDICES

23. If you were able to change things, what changes would you make so that it is easier for children to give evidence?

24. Knowing what you know now, would you do anything differently?

*Please circle:*

YES/NO/DON'T KNOW

If yes, what would you do differently?

PLEASE ADD ANY OTHER COMMENTS YOU WISH

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