

SPECIAL MEASURES IN CHILD SEXUAL ABUSE TRIALS: CRIMINAL JUSTICE PRACTITIONERS' EXPERIENCES AND VIEWS

EUNRO LEE*, JANE GOODMAN-DELAHUNTY**, MEGAN FRASER***,
MARTINE B. POWELL**** AND NINA J WESTERA*****

Special measures have been implemented across the globe to improve evidence procedures in child sexual assault trials. The present study explored the day-to-day experiences and views on their use by five groups of Australian criminal justice practitioners (N = 335): judges, prosecutors, defence lawyers, police officers and witness assistance officers. Most practitioners reported routine use of pre-recorded police interviews and CCTV cross-examination of child complainants, but rare use with vulnerable adults. Despite persistent technical difficulties and lengthy waiting times for witnesses, high consensus emerged that special measures enhanced trial fairness and jury understanding. The perceived impact of special measures on conviction rates diverged widely. Defence lawyers disputed that this evidence was as reliable as in-person testimony. All practitioner groups endorsed expanded use of expert witness evidence and witness intermediaries. Ongoing professional development in all practitioner groups will further enhance justice outcomes for victims of child sexual abuse.

I INTRODUCTION

Child sexual abuse poses a serious threat to the health and wellbeing of children.¹ The effects can be lifelong and harmful for victims, and often extend to other community members and the victims' own children.² Law enforcement remains a major tool for the prevention of child abuse. The process of engaging in the criminal justice system (eg, facing the accused, having one's story challenged under cross-examination), however, can compound trauma symptoms. To minimise 'system' impact,³ special measures such as cross-examination of complainants via closed-circuit television (CCTV) and witness intermediaries have been implemented in

* Eunro Lee, Honorary Fellow, Menzies School of Health Research, Charles Darwin University; Jane Goodman-Delahunty, Research Professor, School of Psychology, Charles Sturt University; Megan Fraser, Analyst, Queensland Health Department; Martine B Powell, Director, Centre for Investigative Interviewing, Griffith Criminology Institute, Griffith University; Nina Westera, Postdoctoral Research Fellow, School of Criminal Justice and Criminology, Griffith University (deceased 2017). This research was supported by a grant to Martine B Powell, Jane Goodman-Delahunty and Nina Westera from the Royal Commission into Institutional Responses to Child Sexual Abuse. The views and findings expressed in this article are those of the authors and do not necessarily reflect those of the Royal Commission. Corresponding author: Eunro Lee, eunro.lee@rmit.edu.au.

¹ Laura P Chen et al, 'Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders: Systematic Review and Meta-Analysis' (2010) 85 *Mayo Clinic Proceedings* 618; Karen M Devries et al, 'Childhood Sexual Abuse and Suicidal Behavior: A Meta-analysis' (2014) 133 *Pediatrics* e1331; Roberto Maniglio 'The Impact of Child Sexual Abuse on Health: A Systematic Review of Reviews' (2009) 29 *Clinical Psychology Review* 647; Molly L Paras et al, 'Sexual Abuse and Lifetime Diagnosis of Somatic Disorders: A Systematic Review and Meta-analysis' (2009) 302 *Journal of the American Medical Association* 550; World Health Organization and International Society for Prevention of Child Sexual Abuse and Neglect, *Preventing Child Maltreatment: A Guide To Taking Action And Generating Evidence* (World Health Organization Press, 2006).

² Sarah K Buckle, Sandra Lancaster, Martine B Powell and Daryl J Higgins, 'The Relationship Between Child Sexual Abuse and Academic Achievement in a Sample of Adolescent Psychiatric Inpatients' (2005) 29 *Child Abuse and Neglect* 1031.

³ Sarah Caprioli and David A Crenshaw, 'The Culture of Silencing Child Victims of Sexual Abuse: Implications for Child Witnesses in Court' (2017) 57 *Journal of Humanistic Psychology* 190.



child sexual assault (CSA) trials across the globe.⁴ Special measures aim to improve the quality of complainants’ evidence by reducing the stress of the legal proceedings for witnesses who are often already profoundly distressed and vulnerable to secondary psychological injuries.⁵ The chronically low rate of reporting CSA (estimated at 10 per cent)⁶ is attributed in part to social stigmatic and psychological factors, and has increased following the adoption of more supportive criminal justice procedures for complainants.

Child witnesses are typically deemed ‘vulnerable’ based on their age. Irrespective of age, allegations of violent crimes such as sexual abuse, have been shown to exacerbate vulnerability ‘due to the presence of extreme anxiety, fear, and intimidation inherent in these types of crimes’.⁷ Australian courts first introduced special measures modifying the usual trial procedures for child complainants in the 1990s, first in New South Wales (NSW), and subsequently in all other jurisdictions.⁸ England and Wales implemented special measures in 1999 for vulnerable witnesses.⁹ They have been adopted in most European countries and in North America.¹⁰ In the United States, in general, the defendant’s right to confront the accuser has been determined not to include face-to-face confrontation, but must include the right to cross-examination. However, in 2004, uses of special measures in US courts were limited by a Supreme Court ruling that out-of-court testimony by the complainant was inadmissible.¹¹

Legal professionals including defence attorneys, prosecutors, and judges have supported and expressed optimism about special measures and practices adopted in England, Wales, North America, Australia and New Zealand.¹² Uptake of the measures, however, has been slow in some areas. For example, interviews with 18 judges and lawyers in England showed that

⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Criminal Justice: Executive Summary and Parts I–II* (2017) 253; Cynthia Grant Bowman, ‘The Legal System and Child Sex Abuse — Ross Cheit’s The Witch-Hunt Narrative: Politics, Psychology, and the Sexual Abuse of Children’ (2016) 41 *Law and Social Inquiry* 267; Zsófia A Szojka et al, ‘Challenging the Credibility of Alleged Victims of CSA in Scottish Courts’ (2017) 23 *Psychology, Public Policy, and Law* 200; Rachel Zajac, Nina Westera and Andy Kaladelfos, ‘The “Good Old Days” of Courtroom Questioning: Changes in the Format of Child Cross-Examination Questions Over 60 Years’ (2018) 23 *Child Maltreatment* 186; Emily Henderson, ‘“A Very Valuable Tool” Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales’ (2015) 19 *The International Journal of Evidence and Proof* 154; Kirsten Hanna et al, ‘Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models in New Zealand’ (2013) 20(4) *Psychiatry, Psychology and Law* 527.

⁵ Caprioli and Crenshaw, above n 4; Christine Jane Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (Criminology Research Advisory Council, 2002); Annie Cossins, ‘Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse’ (2009) 33 *Melbourne University Law Review* 68.

⁶ Thomas D Lyon, ‘Interviewing Children’ (2014) 10 *Annual Review of Law and Social Science* 73.

⁷ Caprioli and Crenshaw, above n 4, 196; Heather Norton and R Cooper (eds), *Vulnerable People and the Criminal Justice System: A Guide to Law and Practice* (Oxford University Press, 2017).

⁸ Royal Commission Into Institutional Responses to Child Sexual Abuse, *Final Report: Criminal Justice: Parts VII–X and Appendices* (2017) 19.

⁹ Special measures under the *Youth Justice and Criminal Evidence Act 1999* (UK); Helen Codd, Nigel Thomas and Dianne Scullion, *Children’s Rights Along the Journey from Victims to Survivors: A Review of the UK Literature* (University of Central Lancashire, 2016).

¹⁰ Caprioli and Crenshaw, above n 4.

¹¹ *Crawford v Washington*, 541 US 36, 59, 68–9 (2004).

¹² Samantha J Andrews, Michael E Lamb and Thomas D Lyon, ‘Question Types, Responsiveness and Self-Contradictions When Prosecutors and Defense Attorneys Question Alleged Victims of CSA’ (2015) 29 *Applied Cognitive Psychology* 253; Henderson, above n 5; Samantha J Andrews and Michael E Lamb, ‘How Do Lawyers Examine and Cross-Examine Children in Scotland?’ (2016) 30 *Applied Cognitive Psychology* 953; Elizabeth C Ahern, Stacia N Stolzenberg and Thomas D Lyon, ‘Do Prosecutors Use Interview Instructions or Build Rapport with Child Witnesses?’ (2015) 33 *Behavioral Sciences and the Law* 476.

criminal justice practitioners rarely considered special measures for defendants, even when they were sufficiently vulnerable to qualify for the use of a live videolink.¹³

In jurisdictions where investigative interviews of adult sexual assault complainants are recorded, these are often perceived as unsuitable as evidence-in-chief at trial due to an abundance of irrelevant details.¹⁴ An interview sample of 30 Australian prosecutors who provided feedback on uses of video-recorded interviews as evidence-in-chief revealed perceptions that the cognitive interview format used by some police investigators impaired jurors' credibility judgments of the complainants.¹⁵ The Australian prosecutors recommended improving the quality of police questioning (via a more simplified interview process) and better preparation of child complainants for cross-examination.¹⁶

Whether the documented views, perceptions and reservations about special measures held by criminal justice professionals who work on CSA cases comprise a barrier to the implementation of these measures in practice has not been thoroughly researched. The effectiveness of special measures in practice is a critical issue for courts and police. While the use of CCTV is deemed efficient in terms of minimising the anxiety and distress of CSA complainants and in reducing the potential for possible retraumatisation through ongoing participation in the legal process,¹⁷ few formal evaluations of the prevalence and of professionals' views of these special measures have been conducted.

Following the changes in New South Wales court procedures for Australian CSA trials¹⁸ a 2002 study based on interviews of 150 child complainants showed uneven uptake of special measures, revealing some gaps between the legislative authorisation and uses in the field by criminal justice practitioners.¹⁹ For example, CCTV proceeded with 57 per cent of child complainants but the remaining 43 per cent were denied both CCTV and the use of screens to shield them from view of the accused. Jurisdictional differences in practice were stark. In Queensland, CCTV was not used at all, and screens were used only intermittently and inconsistently. By contrast, in Western Australia (WA) the evidence of close to one third of child witnesses (30 per cent) was recorded at a pre-trial hearing, and that recording comprised the evidence-in-chief of the complainant at trial, with the remaining 70 per cent of CSA complainants giving their evidence-in-chief via CCTV.

¹³ Samantha Fairclough, "'It Doesn't Happen ... and I've Never Thought It Was Necessary for It to Happen': Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 21 *The International Journal of Evidence and Proof* 209.

¹⁴ Nina J Westera, Mark R Keibell and Becky Milne, 'It Is Better, but Does It Look Better? Prosecutor Perceptions of Using Rape Complainant Investigative Interviews as Evidence' (2013) 19 *Psychology, Crime and Law* 595.

¹⁵ Nina J Westera, Martine B Powell and Becky Milne, 'Lost in the Detail: Prosecutors' Perceptions of the Utility of Video Recorded Police Interviews as Rape Complainant Evidence' (2017) 50 *Australian and New Zealand Journal of Criminology* 252.

¹⁶ Kimberlee S Burrows and Martine B Powell, 'Prosecutors' Perspectives on Using Recorded Child Witness Interviews about Abuse as Evidence-in-Chief' (2014) 47 *Australian and New Zealand Journal of Criminology* 374.

¹⁷ Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working?: Evidence from the Criminal Justice Agencies* (Citeseer, 2006); Becky Hamlyn, *Are Special Measures Working?: Evidence from Surveys of Vulnerable and Intimidated Witnesses* (HM Home Office, 2004); Emma L Rowden, *The Remote Witness Facility for Vulnerable and Child Witnesses: New Perspectives on an Emerging Spatial Typology* (2013) OPUS: Open Publications of UTS Scholars <<http://hdl.handle.net/10453/28004>>.

¹⁸ Judy Cashmore, 'The Prosecution of Child Sexual Assault: A Survey of NSW DPP Solicitors' (1995) 28 *Australian and New Zealand Journal of Criminology* 32.

¹⁹ Judy Cashmore and Lily Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (NSW Bureau of Crime Statistics and Research, 2005); Eastwood and Patton, above n 6.

An evaluation of the pilot program for special measures in New South Wales tested the perceptions of 277 jurors in 25 real trials in which all of the complainants’ evidence-in-chief was presented via pre-recorded videotape and all cross-examination was conducted via CCTV. Results revealed that 78.5 per cent of the jurors perceived the child complainants as consistent/credible and 77.4 per cent perceived the children as convincing. However, in almost two-thirds of the trials (63.6 per cent; $n = 14$) the defendant was acquitted of all charges.²⁰

This field study uncovered an important and ongoing concern when special measures are used, namely that juries may tend to perceive the evidence of child complainants via CCTV as less credible, less trustworthy, and less accurate compared to their in-person evidence in court. However, no systematic comparison of the reliability of in-person versus remote or CCTV evidence is feasible in a field study because the ground truth of the evidence cannot be experimentally controlled, and neither can factors specific to a particular case and witness. To make those assessments, trial simulation experiments are required. Indeed, in trial simulation studies conducted in Sweden, research showed that mock jurors perceived children’s testimony as more convincing in-person than via CCTV, and least convincing when presented via pre-recorded videotape.²¹ Those researchers concluded that proximity in time and place, such as in-person (real-time) questioning, increased the credibility of the child witness whether present from a remote location such as a CCTV facility, or in court. However, parallel studies with adult rape complainants conducted in Australia, and in England and Wales produced contrary outcomes. In a qualitative study, following mock juror deliberations, no differences in conviction rates emerged in response to evidence from an adult complainant given via live videolinks, pre-recorded videotaped evidence-in-chief followed by live CCTV cross-examination, protective screens, and in-person at trial.²² Similar results emerged internationally in a series of quantitative controlled experimental studies. In a trial simulation, when the quality of the audiolink and videolink was high, the mode of presentation of the adult complainant’s evidence (in-person, CCTV or pre-recorded videotape) did not significantly differentiate Australian mock juror perceptions of the complainant or the conviction rates.²³ Other experimental research showed that cognitively, Swedish observers were no better at assessing the veracity of a witness who testified in-person compared to via CCTV.²⁴ This outcome was further supported by a trial simulation with North American mock jurors who were no better at detecting the truth when children testified in-person in open court than via CCTV.²⁵

After speculation that decisions by criminal justice professionals regarding the use of special measures were impacted by their own perceptions of jury responses to evidence presented in this manner,²⁶ a systematic empirical review of prosecutors’ files in CSA cases confirmed that

²⁰ Judy Cashmore and Lily Trimboli, ‘Child Sexual Assault Trials: A Survey of Juror Perceptions’ (2006) 102 *Crime and Justice Bulletins* 1.

²¹ Sara Landström and Pär Anders Granhag, ‘In-Court versus Out-of-Court Testimonies: Children’s Experiences and Adults’ Assessments’ (2010) 24 *Applied Cognitive Psychology* 941.

²² Louise Ellison and Vanessa E Munro, ‘A “Special” Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials’ (2014) 23 *Social and Legal Studies* 3.

²³ Natalie Taylor and Jacqueline Joudo, *The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study* (Australian Institute of Criminology, 2005).

²⁴ Sara Landström, Pär Anders Granhag and Maria Hartwig, ‘Witnesses Appearing Live Versus on Video: Effects on Observers’ Perception, Veracity Assessments and Memory’ (2005) 19 *Applied Cognitive Psychology* 913.

²⁵ Holly K Orcutt et al, ‘Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open Court and Closed-Circuit Trials’ (2001) 25 *Law and Human Behavior* 339.

²⁶ Denise Lievore, ‘Victim Credibility in Adult Sexual Assault Cases’ (Trends and Issues in Crime and Criminal Justice, No 288 Australian Institute of Criminology, 2004); Christine Eastwood, ‘The Experiences of Child

this was the case with respect to certain prosecutors.²⁷ A recent series of interviews with 43 prosecutors, defence counsel, judges and witness assistance officers revealed ongoing concern that the assessment of the credibility of complainants in CSA cases was impaired by the presentation of pre-recorded or CCTV evidence in comparison with in-person testimony in court.²⁸ Whether criminal justice practitioners who are unacquainted with the body of scientific research continue to avoid special measures in favour of in-person evidence from vulnerable complainants because of their perceptions about jury responses to this evidence has not previously been examined.

Qualitative studies reliant on interviews with stakeholders in the criminal justice process have been criticised for their use of small convenience samples,²⁹ and anecdotal reports from self-selected interviewees.³⁰ To date, little quantitative research has been conducted on the views of other Australian criminal justice stakeholders and practitioners regarding the use of special measures in CSA cases. Further insights into the views of stakeholders who work most closely with special measures at trial can assist in determining their effectiveness. The present study engaged a substantial number of practitioners from five Australian criminal justice professions to participate in an online survey. The study aimed to identify (a) the most prevalent methods by means of which complainants give evidence in CSA cases; (b) the extent of any differences in the use of special measures across three participating states (NSW, Victoria and WA); (c) reasons for their use or non-use, and (d) their perceived impact on the credibility of complainants and case outcomes. To our knowledge, this survey is the first to provide an (empirical) picture of current Australian practices for eliciting CSA complainants' evidence.

II METHOD

A Procedure

Using a convenience sampling method, an online survey was administered to five practitioner groups working in the criminal justice systems in NSW, Victoria, and WA.³¹ The target practitioner groups were judges and magistrates, prosecutors, defence lawyers, police officers, and witness assistance officers and court support workers.³² After securing approval from the Human Research Ethics Committee at Charles Sturt University (HREC No. 2015/032) to conduct the study, potential participants in these groups were issued an invitation by the Royal Commission Into Institutional Responses to Child Sexual Abuse, via internal email systems within their respective organisations. In addition, an invitation was issued to Court Network, a

Complainants of Sexual Abuse in the Criminal Justice System' (Trends and Issues in Crime and Criminal Justice, No 250, Australian Institute of Criminology, 2003).

²⁷ Jane Goodman-Delahunty et al, 'Prosecutorial Discretion about Special Measure Use in Australian Cases of Child Sexual Abuse' in Philip Stenning and Victoria Colvin (eds), *The Evolving Role of The Prosecutor, Internationally and Domestically* (Routledge, 2018) 170.

²⁸ Nina J Westera et al, 'Special Measures in Child Sexual Abuse Cases: Views of Australian Criminal Justice Professionals' (2019, in press) 30 *Current Issues in Criminal Justice*.

²⁹ Anne Cossins, 'Prosecuting Child Sexual Assault Cases: Are Vulnerable Witness Protections Enough?' (2006) 18 *Current Issues in Criminal Justice*, 299.

³⁰ Oliver C Robinson, 'Sampling in Interview-based Qualitative Research: A Theoretical and Practical Guide' 11 *Qualitative Research in Psychology* 25.

³¹ The survey was accessed via the software Unipark. Police officers in Victoria accessed the survey from a software platform managed by Deakin University.

³² For brevity, hereafter, both judges and magistrates are referred to collectively as 'judges' and witness assistance and court support officers are referred to collectively as 'witness assistance officers'.

court support service operating in Victoria. Participants received no financial incentive for their participation.

B Participants

A total of 335 Australian criminal justice practitioners completed the survey, as shown in Table 1. Notably, WA practitioners were over-represented compared to the national population composition,³³ comprising approximately one quarter of the participants. More than 40 per cent of the participants had received no training regarding CSA cases. Participants in Victoria reported attending more CSA training than participants in other jurisdictions.³⁴ Police officers comprised the largest group of practitioners ($n = 98$, 29.3 per cent); the remaining four participating practitioner groups were relatively similar in size.

Overall, the gender composition achieved was approximately even. Most witness assistance officers were women, whereas the proportion of women in the police sample was the lowest of all five groups. Participants’ experience with CSA cases ranged widely, with a median of eight years, but two-thirds (67.1 per cent) had between one and 10 years of relevant CSA experience. The number of CSA cases on which participants reported working across their careers varied enormously, as some groups specialized in CSA cases more than others. Half of the participants had worked on more than 60 CSA cases,³⁵ one out of ten participants, and in particular, the witness assistance officers, police officers and judges, reported working on more than 500 CSA cases.³⁶ Half of the participants reported experience with between 20 and 750 cases of historical CSA,³⁷ (i.e., cases where the alleged offences occurred five years or more prior to reporting the matter to authorities).

By profession, witness assistance officers had the most CSA training whereas criminal defence lawyers had the least. While half of the participants reported fewer than 30 hours of specialised CSA training, a small proportion of practitioners had up to 1,000 hours of CSA case training.³⁸ By profession, significant jurisdictional differences emerged in the amount of CSA training reported by judges, prosecutors, and police officers.³⁹ On average, participants evaluated their CSA training as useful.⁴⁰ In their open-ended responses, participants suggested that useful areas for further training included ‘investigative interviewing skills in offender interviews’ and ‘understanding the psychological trauma to a child complainant’.

³³ Australian Bureau of Statistics, *Australian Demographic Statistics, Sep 2017* (Catalogue No 3101.0, 2018) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3101.0>>.

³⁴ $\chi^2(2, N=337) = 10.14, p = .006$.

³⁵ Data showed that 75% of participants worked on fewer than 150 CSA cases; 9.2% reported more than 500 CSA cases.

³⁶ In all, 11 witness assistance officers, seven police officers, five judges, four prosecutors, and four defence lawyers reported experience with more than 500 cases each.

³⁷ Overall, a total of 21 professionals reported working on more than 250 historical cases across their careers: witness assistance officers ($n = 11$); police officers ($n = 3$), judges ($n = 3$), prosecutors ($n = 2$), defence lawyers ($n = 2$).

³⁸ One defence lawyer and four witness assistance officers reported attending in excess of 800 hours of CSA training across their careers.

³⁹ Far more judges in Victoria reported receiving CSA training (86.7%, $n = 13$), than judges in NSW (38.9%, $n = 14$) and WA (14.3%, $n = 2$). WA prosecutors (73.9%, $n = 17$) and defence lawyers (42.9%, $n = 6$) were more likely to have received CSA, compared to NSW prosecutors (31.6%, $n = 6$) and defence lawyers (32.1%, $n = 9$) and Victorian prosecutors (69.6%, $n = 16$) and defence lawyers (29.4%, $n = 5$). Among police officers (91.5%, $n = 43$) and witness assistance officers (93.8%, $n = 15$), participants in NSW reported the highest rate of training.

⁴⁰ $M = 5.22$ on a scale from 1–7, $SD = 1.5$.

Table 1. Participants' Training and Experience with Child Sexual Abuse Cases, by State

| State | Proportion of participants (%) | | | | | Total |
|----------------|--------------------------------|------|------|--|--|-------|
| | NSW | VIC | WA | | | |
| | 43.6 | 27.8 | 28.7 | | | 100 |
| Trained in CSA | 59.8 | 69.5 | 46.9 | | | 58.8 |

| | Judge | Prosecutor | Defence | Police officer | Assistance officer | Total |
|--------------------|-------|------------|---------|----------------|--------------------|-------|
| Professional Group | 19.4 | 19.4 | 17.6 | 29.3 | 14.3 | 100 |
| Trained in CSA | 44.6 | 60.0 | 33.9 | 69.4 | 85.4 | 58.8 |
| Gender (female) | 48.4 | 76.8 | 40.7 | 34.7 | 95.8 | 54.2 |

| | Median | Range |
|------------------------------------|--------|--------|
| Years of experience with CSA cases | 8 | 1–40 |
| Number of CSA cases | 60 | 0–5025 |
| Number of historical cases | 20 | 0–750 |
| Hours of CSA training | 30 | 0–1000 |

C *Survey Questionnaire*

The survey included three groups of measures with a total of 28 items. The topics assessed were: (1) jurisdictional practice regarding the use of special measures for CSA complainants; (2) perceived impact of special measures on complainants' credibility and case outcomes; and (3) related views on special measures. Most responses were recorded on a 7-point Likert-type scale, or binary or multiple-choice options such as 'yes', 'no', or 'don't know'.⁴¹ Other questions were demographic items ($n = 13$) regarding participants' characteristics and experiences (as described above in the participants section).⁴² A copy of the survey questionnaire is attached marked Appendix 1. Responses were analysed with exploratory factor analysis (EFA).

III RESULTS

A *Current Practice for Taking Evidence from Child Complainants*

1 *Prevalence of Observed Use of Special Measures*

Participants from NSW, Victoria and WA reported that pre-recorded police interviews, supplemented by evidence given via CCTV from a remote witness facility or at the court,⁴³

⁴¹ As shown in Appendix 1, Likert scale response options ranged from 1 = 'strongly disagree' to 7 = 'strongly agree', or 1 = 'least credible' to 7 = 'most credible'. The option 'don't know' was provided to avoid guessing responses. Its endorsement was excluded from analysis when necessary, for example with items 'Evidence via CCTV decreases the quality of evidence', and 'Rate the impact of the following procedures on the veracity of a child complainant's cross-examination: CCTV from a remote room on the court premises'. A few items sought 'yes/no' responses, such as 'Have you observed expert evidence on children's behaviour in CSA cases in past two years?' A nominal scale with three categories was used for questions such as 'Do you think that the use of special measures has changed the conviction rate?' with options 'Yes, it increased', 'Yes, it decreased', or 'No'.

⁴² In addition, seven open-ended questions on recommended practices were asked. Responses to those questions are analysed in a separate paper.

⁴³ References to CCTV use apply to remote witness facilities at the courthouse or at another location.

was the most common current observed practice (74.3 per cent) for taking evidence from child CSA complainants.⁴⁴ This procedure was rated most prevalent in NSW (83.9 per cent), followed by Victoria (69.6 per cent), and WA (64.1 per cent). The second most prevalent observed practice was the use of pre-recorded police interviews as evidence-in-chief at trial, with supplementary evidence and cross-examination at a pre-trial hearing (12.2 per cent). This method of taking complainants’ evidence was most common in WA (20.7 per cent), followed by Victoria (18.1 per cent). The third most prevalent observed practice, the taking of all evidence via CCTV, was far less common, reported by 12.6 per cent of NSW, 8.5% of VIC and 7.6 per cent of WA practitioners.⁴⁵ Three response options were not endorsed by participants as currently practised, namely the child witness giving all evidence on direct and cross-examination at a preliminary hearing, giving all evidence live in court from behind screen, and giving all evidence live in court.

For adult CSA complainants, the most frequent observed current practice was for all evidence to be given via CCTV (Victoria: 74.7 per cent, NSW 60.3 per cent, WA: 56.8 per cent). The second most common observed current practice was for all evidence to be given in-person in court (WA: 28.4 per cent, NSW: 27 per cent, VIC: 15.7 per cent). Fewer than one in ten adult CSA complainants used the third most common method of adducing evidence: pre-recorded police interviews, with supplementary evidence tendered via CCTV.⁴⁶

2 *Perceived Consistency of Practice and Policy*

The majority of participants (88.7 per cent) perceived no gaps between the most commonly observed practice for child complainants to give evidence and current policy in their jurisdiction. Exceedingly few participants (0.9 per cent) regarded practices in their state as inconsistent with prevailing policy, while 10.4 per cent of the participants stated that they did not know. The results did not differ across the states,⁴⁷ or by professional group within the states.⁴⁸

For adult CSA complainants, 77.7 per cent of the participants viewed the most commonly observed practice as congruent with the current policy in their jurisdiction, whereas 21.1 per cent responded that they did not know. Only 1.2 per cent responded that the most common practice was inconsistent with current policy. These results did not differ across states.⁴⁹ However, police officers’ perceptions varied by state: 38.7 per cent of police officers in WA reported that they did not know whether practice and policy were consistent in their state, followed by NSW (17.8 per cent) and Victoria (5.6 per cent).

3 *Reasons for Non-use of Special Measures with Child and Adult CSA Complainants*

Participants indicated the extent of their agreement with nine potential reasons for the non-use of special measures for CSA evidence in their jurisdiction, and could specify others if not listed.

⁴⁴ Derived from participant responses to the survey question: ‘The most frequent current practice in my jurisdiction for child complainants of sexual abuse is: (a) Pre-recorded investigative interview, other evidence via CCTV (remote or in courthouse); (b) Pre-recorded investigative interview, other evidence at a preliminary hearing (c) All evidence via CCTV (remote or in courthouse); (d) All evidence at a preliminary hearing; (e) All evidence live in court from behind screen; (f) All evidence live in court; (g) Don’t know’. See Appendix 1.

⁴⁵ Differences across the states were statistically significant ($\chi^2(8, N = 327) = 31.826, p < .001$).

⁴⁶ Differences across the states were not statistically significant ($\chi^2(10, N = 291) = 10.951, p = .361$).

⁴⁷ $\chi^2(4, N = 327) = 6.118, p = .191$.

⁴⁸ $\chi^2(2, N = 327) = 1.103, p = .576$ - $\chi^2(4, N = 327) = 6.178, p = .186$.

⁴⁹ $\chi^2(4, N = 329) = 5.734, p = .220$.

As shown in Figure 1, faulty or missing technical equipment was the most likely reason for non-use,⁵⁰ followed by logistic difficulties and judicial discretion. Avoidance of an appeal based on jury access to pre-recorded evidence in deliberations was the least likely of the given reasons. Variability in responses was not explained by jurisdiction,⁵¹ but by professional group membership.⁵² In other words, depending on which professional group was canvassed, explanations provided for the non-use of special measures differed.

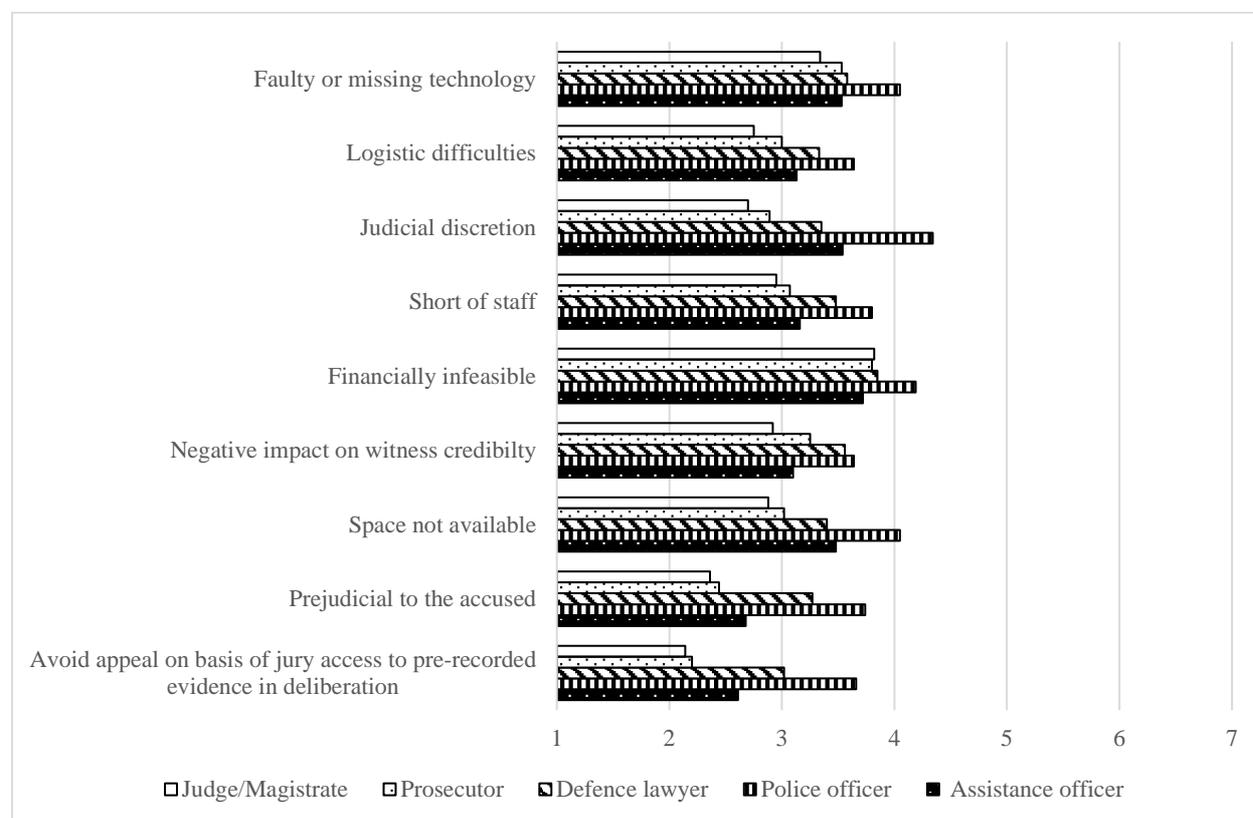


Figure 1. Perceived Reasons for Non-use of Special Measures, by Practitioner Group

Police officers endorsed all available explanations for non-use of special measures more readily than did members of other professional groups, while judges rated non-use to a lesser extent than did members all other professional groups. Significant differences emerged across the professions for four of the endorsed reasons: staff shortages,⁵³ avoiding appeals based on jury access to pre-recorded evidence in deliberation,⁵⁴ prejudice to the accused,⁵⁵ and judicial discretion.⁵⁶ Defence lawyers cited prejudice to the accused as a reason for non-use of special measures more frequently than did all other professional groups,⁵⁷ except police officers.⁵⁸

⁵⁰ $M = 3.91, SD = 2.01.$

⁵¹ Wilk's Lambda = .906, $F(18, 496) = 1.402, p = .125, \eta_p^2 = .048.$

⁵² Wilk's Lambda = .709, $F(36, 931) = 2.482, p < .001, \eta_p^2 = .082.$

⁵³ $F(4, 256) = 4.371, p = .002, \eta_p^2 = .064.$

⁵⁴ $F(4, 256) = 13.101, p < .001, \eta_p^2 = .170.$

⁵⁵ $F(4, 256) = 10.117, p < .001, \eta_p^2 = .137.$

⁵⁶ $F(4, 256) = 11.191, p < .002, \eta_p^2 = .149.$

⁵⁷ $M = 3.27, SD = 1.85.$

⁵⁸ $M = 3.74, SD = 1.84.$

Judges were least likely to endorse the exercise of a judicial discretion as a reason for non-use of special measures.⁵⁹

4 *Duration of Waiting Period at Court Before CSA Complainants Give Evidence*

Across the states, participants reported from their recall for the previous 24 months that CSA complainants waited on average two to five hours (40 per cent, $n = 122$) before giving evidence at a hearing or trial in their districts. The duration of the waiting period for more than one quarter of complainants before giving their evidence exceeded one day (26.9 per cent, $n = 82$). In NSW, compared to Victoria and WA, reported waiting periods for significantly more complainants exceeded five hours (16.0 per cent, $n = 21$; cf Victoria 7.0 per cent, $n = 6$; WA 13.6 per cent, $n = 12$) and exceeded one day (38.9 per cent, $n = 51$, cf. Victoria 26.7 per cent, $n = 23$; WA 9.1 per cent, $n = 8$).

5 *Use of Expert Evidence on the Behaviour of Sexually Abused Children*

Overall, across all jurisdictions, in the past two years, one in every five participants (19.9 per cent, $n = 61$) reported observing expert evidence in CSA trials on the topic of the behaviour of sexually abused children. These rates were fairly similar in NSW (20.6 per cent, $n = 27$) and Victoria (27.3 per cent, $n = 27$), while the rate in WA was lower (11.4 per cent, $n = 10$). In terms of participants’ professional group, counsel for the prosecution and the defence had more experience in this regard than members of other professional groups: 15.9 per cent of judges reported observing this type of expert evidence in the past two years ($n = 10$), along with 24.6 per cent of prosecutors ($n = 15$), 31.5 per cent of defence lawyers ($n = 17$), 13.8 per cent of police officers ($n = 12$), and 17.5 per cent of witness assistance officers ($n = 7$).

Participants who had observed expert evidence were asked whether they perceived that the expert evidence on children’s behaviour was helpful to a jury. More than three-fifths of the participants (62.7 per cent, $n = 37$) endorsed the use of this type of expert evidence as helpful to a jury. Support for expert evidence was higher in Victoria (75.0 per cent) than in the other two states. In terms of participants’ professional group, more prosecutors (35.1 per cent, $n = 5$) than police officers (24.3 per cent, $n = 9$) and judges (18.9 per cent, $n = 9$) held this view. These trends by professional group were similar across states.

B *The Influence of Special Measure on Complainants’ Credibility and Reliability*

1 *The Perceived Impact of Special Measures on the Credibility of Evidence-in-chief of CSA Complainants*

Participants rated the perceived impact on the credibility of a child complainant of nine methods of giving evidence in-chief.⁶⁰ Pre-recorded interviews were perceived to have the least detrimental impact on the credibility of a child complainant followed by ‘questions by counsel with intervention by the judge as needed’ and ‘pre-recorded evidence conducted at a preliminary hearing’ (as presented in Figure 2)⁶¹ In-person evidence in court with the assistance of an intermediary was perceived as most detrimental.⁶² The variability of the

⁵⁹ $M = 2.70$, $SD = 1.56$.

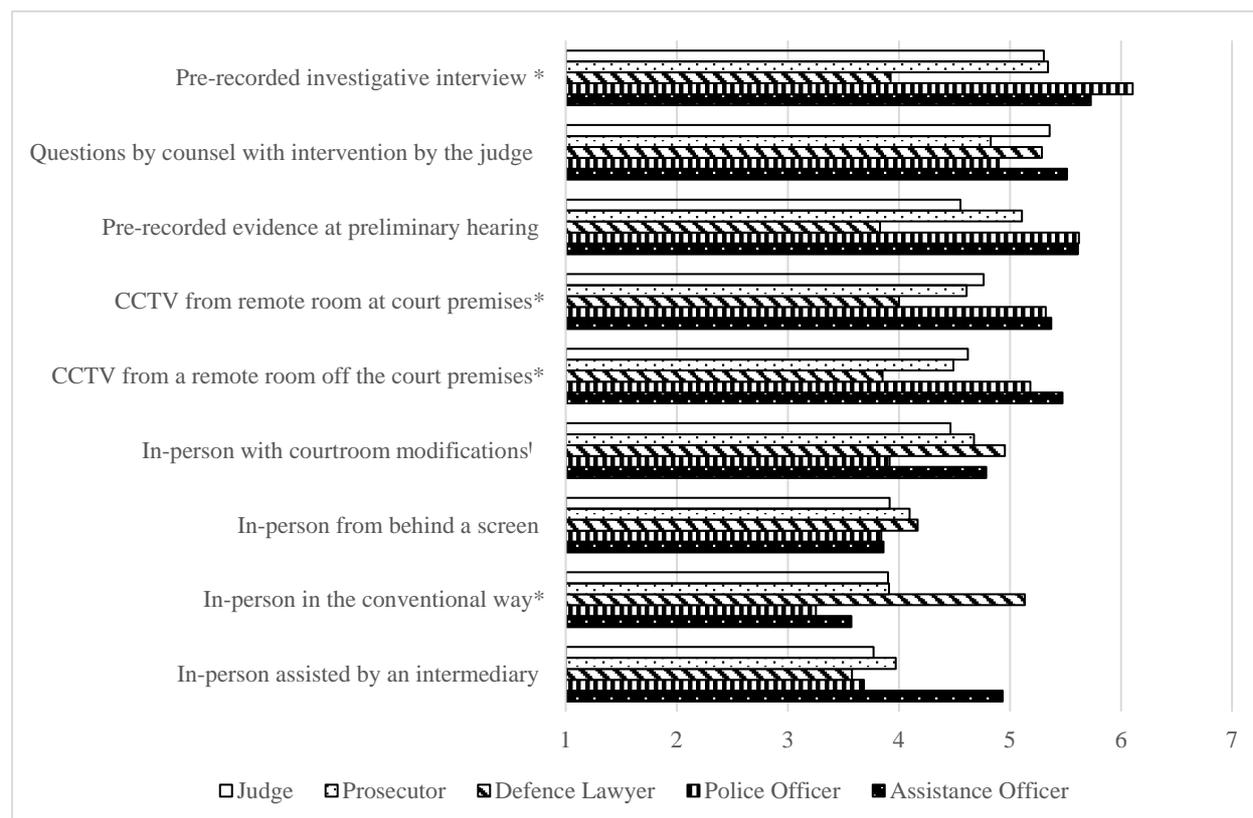
⁶⁰ Perceived impact was measured as no assessment of the ground truth of the evidence was feasible.

⁶¹ $M = 5.34$, $SD = 1.59$.

⁶² $M = 3.89$, $SD = 1.80$.

responses was not explained by jurisdictional differences,⁶³ but rather, by professional group membership.⁶⁴ In other words, the professional groups viewed the effects of the nine different methods of evidence in different ways.

Police officers and witness assistance officers rated the impact of CCTV and pre-recorded evidence more favourably than the other professional groups. Significant differences by professional group emerged for five specific methods of giving evidence: CCTV on court premises;⁶⁵ CCTV from a remote room off the court premises;⁶⁶ pre-recorded interviews of evidence-in-chief;⁶⁷ pre-recorded evidence at a pre-trial hearing,⁶⁸ and in-person evidence given in the conventional way.⁶⁹



Note. *Statistically significant differences across practitioner groups ($p < .05$)

Figure 2. Perceived Credibility of Evidence-in-chief of Child Sexual Abuse Complainants Using Special Measures.

⁶³ Wilk's Lambda = .866, $F(18, 340) = 1.415, p = .122, \eta_p^2 = .070$.

⁶⁴ Wilk's Lambda = .562, $F(36, 639) = 2.950, p < .001, \eta_p^2 = .134$.

⁶⁵ $F(4, 178) = 7.015, p < .001, \eta_p^2 = .136$.

⁶⁶ $F(4, 178) = 5.781, p < .001, \eta_p^2 = .115$.

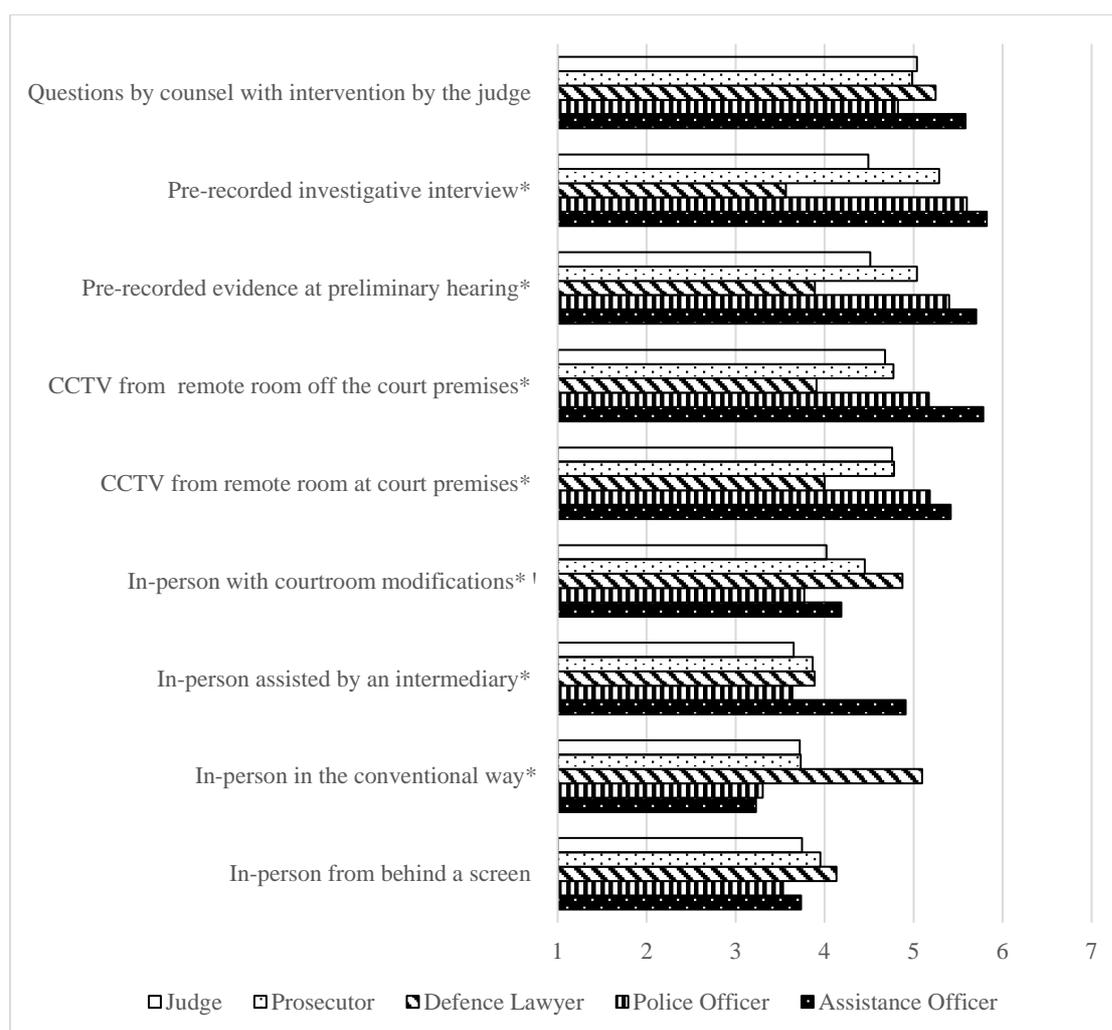
⁶⁷ $F(4, 178) = 15.098, p < .001, \eta_p^2 = .253$.

⁶⁸ $F(4, 178) = 9.579, p < .001, \eta_p^2 = .177$.

⁶⁹ $F(4, 178) = 6.283, p < .001, \eta_p^2 = .124$.

2 The Perceived Impact of Special Measures on the Credibility of Responses of a Child Complainant on Cross-examination

Participants rated the impact on a child’s credibility of nine possible methods of giving evidence on cross-examination (see Appendix 1). Questions by counsel that prompted an intervention by the judge (as needed) were perceived to enhance the child complainants’ credibility on cross-examination to the greatest degree,⁷⁰ followed by ‘pre-recorded investigative interview’ and ‘pre-recorded evidence conducted at a preliminary hearing’ (see Figure 3). Giving evidence in-person from behind a screen yielded the lowest credibility ratings.⁷¹ The variability of the responses was not explained by state,⁷² but was attributable to professional group membership.⁷³



Note. *Statistically significant differences across practitioner groups ($p < .05$).

Figure 3. Perceived Credibility of Child Sexual Abuse Complainants on Cross-examination Using Special Measures, by Practitioner Group.

⁷⁰ $M = 5.08, SD = 1.59$.

⁷¹ $M = 3.78, SD = 1.63$.

⁷² Wilk’s Lambda = .862, $F(18, 342) = 1.461, p = .101, \eta_p^2 = .071$.

⁷³ Wilk’s Lambda = .591, $F(36, 642) = 2.692, p < .001, \eta_p^2 = .123$.

Defence lawyers rated conventional in-person cross-examination at trial as most favourable to the complainants' credibility, whereas police officers and witness assistance officers rated CCTV or pre-recorded evidence/interviews as more favourable. Significant differences emerged across the professional groups for seven special measures: CCTV from a remote room on court premises;⁷⁴ CCTV from a remote room off the court premises;⁷⁵ pre-recorded interview;⁷⁶ pre-recorded evidence at a preliminary hearing;⁷⁷ in-person evidence with the assistance of an intermediary;⁷⁸ in-person evidence with courtroom modifications;⁷⁹ and in-person evidence given in the conventional way.⁸⁰ Courtroom modifications included features such as one-way glass, alternative seating arrangements, removal of wigs and gowns, and clearing of the public gallery.

Another veracity measure, participants' perceptions of the reliability of a CSA complainant's evidence, was strongest at trial when a pre-recorded police interview was used as a special measure (26.7 per cent, $n = 82$). Yet consensus on this point was somewhat low, endorsed by one in every four participants. A congruent finding emerged in NSW, where one-third of the participants favoured the reliability of this special measure (33.6 per cent, $n = 44$). By comparison, the largest proportion of participants in Victoria reported that complainants were most reliable when giving all evidence in-person in court (27.3 per cent, $n = 24$).⁸¹ Across all states, one in five participants rated CCTV from a remote room and conventional in-person evidence as the next most reliable method to present a complainant's evidence (21.3 per cent, $n = 65$ and 21 per cent, $n = 64$, respectively). In WA, CCTV from a remote room was rated as more reliable than in-person evidence (29.5 per cent, $n = 26$ vs 18.2 per cent, $n = 16$).

Participants expressed more consensus that the complainants' reliability was weakest when all evidence was given in the conventional way in-person at trial (39.4 per cent, $n = 121$). This view was congruent across all three states.⁸² Between one-fifth and a quarter of the participants reported that they did not know which method of giving evidence was the least reliable (21.8 per cent). Evidence via pre-recorded police interviews was ranked third amongst methods for taking evidence perceived as the least reliable (NSW: 11.5 per cent, $n = 15$; Victoria: 14.8 per cent, $n = 13$; WA: 11.4 per cent, $n = 10$).

Observations by the five professional groups as to the reliability of the different methods for taking the complainants' evidence differed. Over half of defence lawyers rated complainant's reliability as strongest when giving in-person evidence, without the use of any special measure (57.4 per cent, $n = 31$). No more than 13 per cent of any other professional group endorsed in-person evidence as the most reliable method for complainants' evidence. Similarly, defence lawyers were the least likely to view the complainant's reliability at trial as strongest when giving evidence via CCTV from a remote room, whether on court premises (13 per cent, $n = 7$) or off (0.0 per cent); via a recorded police interview (11.1 per cent, $n = 6$); via video-recorded pre-trial hearing (5.6 per cent, $n = 3$); or in-person with an intermediary (1.9 per cent, $n = 1$).

⁷⁴ $F(4, 179) = 4.295, p = .002, \eta_p^2 = .088$.

⁷⁵ $F(4, 179) = 5.919, p < .001, \eta_p^2 = .117$.

⁷⁶ $F(4, 179) = 13.244, p < .001, \eta_p^2 = .228$.

⁷⁷ $F(4, 179) = 7.929, p < .001, \eta_p^2 = .151$.

⁷⁸ $F(4, 179) = 3.306, p = .012, \eta_p^2 = .069$.

⁷⁹ $F(4, 179) = 2.860, p = .025, \eta_p^2 = .060$.

⁸⁰ $F(4, 179) = 4.068, p < .005, \eta_p^2 = .083$.

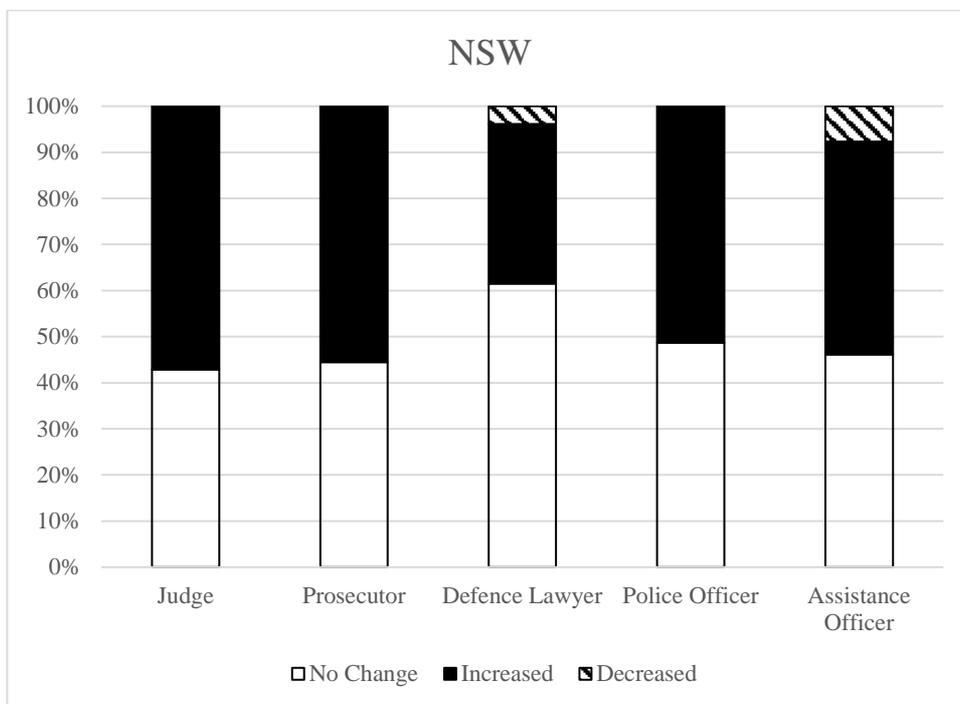
⁸¹ Differences across the states were statistically significant ($\chi^2(14, N = 307) = 29.865, p = .008$).

⁸² Differences across the states were not statistically significant.

Police officers (41.4 per cent, $n = 36$) and witness assistance officers (25 per cent, $n = 10$) rated the complainant’s reliability as strongest in pre-recorded police interviews. Prosecutors (27.9 per cent, $n = 17$) and judges (33.3 per cent, $n = 31$) both endorsed the use of CCTV from a remote room on court premises as the most reliable measure. Half of the participating judges in WA reported that they did not know which method of giving evidence was the least reliable (50.0 per cent, $n = 7$), as did witness assistance officers (43.8 per cent, $n = 7$).⁸³

C *The Perceived Influence of Special Measures on Conviction Rates in CSA Trials*

In terms of the perceived impact of special measures on conviction rates in CSA cases, the proportion of participants (47.5 per cent, $n = 145$) who reported that they increased conviction rates was roughly equivalent to that of participants who perceived no change in conviction rates (45.9 per cent, $n = 140$). A small proportion of participants, approximately one in every 20 participants (6.6 per cent, $n = 20$), believed that conviction rates decreased because of the use of special measures. These results were congruent across NSW, where 49.6 per cent ($n = 65$) of participants perceived an increase in conviction rates, and 48.9 per cent ($n = 64$) reported no change, and in WA, where 51.1 per cent ($n = 45$) reported an increase in conviction rates, and 38.6 per cent indicated no change ($n = 34$). In Victoria, a higher proportion of participants reported no perceived change in conviction rates attributable to the use of special measures (48.8 per cent, $n = 42$), whereas two-fifths perceived an increase in conviction rates (40.7 per cent, $n = 35$). Across all three states the proportions of the opinions were significantly different.⁸⁴ These differences across professional groups within the states were not statistically significant,⁸⁵ whereas defence lawyers were least likely to perceive that the use of special measures increased conviction rates across states. Of note, a higher proportion of defence lawyers in Victoria perceived a decrease in conviction rates, compared to other professional groups (Figure 4).



⁸³ Differences across professional groups within the states were statistically significant: $\chi^2(28, N = 305) = 91.866, p < .001$.

⁸⁴ $\chi^2(4, N = 307) = 11.768, p = .019$.

⁸⁵ $\chi^2(8, N = 305) = 14.164, p = .078$.

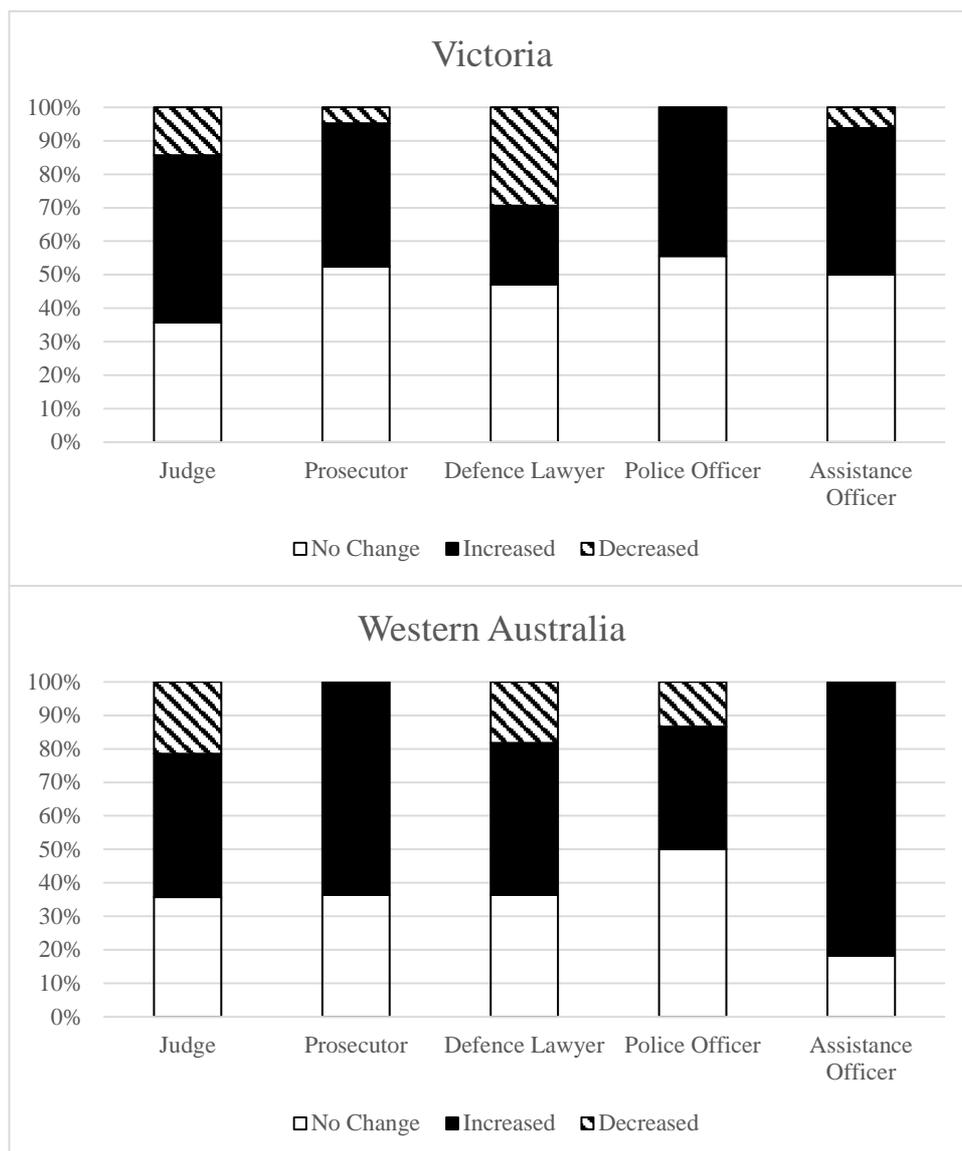


Figure 4. Proportion of Perceived Influence of Special Measures on Conviction Rates in Child Sexual Abuse Trials, by State and Profession

D *Perceived Best Special Measures for the Veracity of CSA Complainants' Evidence*

1 *Best Procedure Overall for the Credibility of Child CSA Complainants*

Of the nine possible options to present a child complainant's evidence at trial, participants selected the one that they viewed as the best procedure overall for the credibility of the complainant. Overall, participants rated pre-recorded interviews as the best procedure although this degree of consensus was modest, endorsed by approximately one third of the participants (34.9 per cent, $n = 107$). Pre-recorded police interviews were consistently ranked as the best method for the credibility of a complainant's evidence across all three states although the proportions were significantly different, with NSW (38.2 per cent, $n = 50$) showing the highest rate of agreement, followed by WA (37.1 per cent, $n = 33$) and Victoria (27.6 per cent, $n =$

24).⁸⁶ Approximately one quarter of the participants (25.7 per cent, $n = 79$) rated CCTV evidence from a remote room on the court premises as the second best procedure for the credibility of a child complainant.

By professional group, one in five defence lawyers regarded conventional in-person evidence as the best procedure for the credibility of child complainants (20.4 per cent, $n = 14$).⁸⁷ This rate of support by defence lawyers for the conventional method of giving evidence exceeded that by members of all other professional groups by more than a factor of three, ie, 6.5% was the highest rating given to the conventional method of giving evidence by all other professional groups.

2 *Best Procedure for the Credibility of the Evidence of an Adult CSA Complainant*

Across all jurisdictions, participants identified conventional in-person evidence as the best procedure for the credibility of adult CSA complainants (24.2 per cent, $n = 76$). This finding was congruent across states while the consensus rate was low. Overall, defence lawyers were the professional group most likely to endorse in-person evidence as the best procedure for the credibility of adult complainants (50.0 per cent, $n = 27$), although the extent to which defence lawyers held this view varied across jurisdictions. In NSW, 69.2 per cent of defence lawyers ($n = 18$) favoured in-person evidence as the best measure for these purposes, more than twice the rate in other states: 29.4 per cent in Victoria ($n = 5$), 36.4 per cent in WA ($n = 4$). Across jurisdictions, pre-recorded interviews were rated as the best procedure overall for the credibility of adult complainants by more police officers (12.5 per cent, $n = 11$) than by any other professional group. A high proportion of judges reported that CCTV from a remote room at the courthouse was the best procedure (28.6 per cent, $n = 18$), whereas witness assistance officers rated CCTV from a remote room off the court premises (19.5 per cent, $n = 9$) more favourably. These results also differed from state to state: judges in NSW identified CCTV from a remote room on court premises as the best procedure (40 per cent, $n = 14$); whereas Victorian judges listed pre-recorded investigation interviews (28.8 per cent, $n = 4$), and WA judges identified in-person evidence (22.2 per cent, $n = 14$). NSW and WA witness assistance officers favoured CCTV from a room off the court premises as the best practice (30.8 per cent, $n = 4$; 19.5 per cent, $n = 8$ respectively), compared to Victorian witness assistance officers who were most likely to favour conventional in-person evidence (23.5 per cent, $n = 4$).⁸⁸

E *Practitioners’ Views of Special Procedures Used in CSA Trials*

Of the 12 evaluative statements about the impact of special measures in CSA trials, four statements yielded substantially high average ratings (scores exceeding 5.45 out of a maximum of 7). The four statements yielding unequivocal agreement from most participants were that (a) waiting to testify at trial was stressful for complainants;⁸⁹ (b) giving evidence via CCTV reduced traumatic experiences of complainants;⁹⁰ (c) the benefits of video technology outweighed the technical difficulties;⁹¹ and that preparation of the complainant by the Crown to give evidence at trial reduced complainant confusion.⁹²

⁸⁶ $\chi^2(20, N = 307) = 40.940, p = .004$.

⁸⁷ Differences across professional groups were statistically significant: $\chi^2(40, N = 307) = 123.065, p < .001$.

⁸⁸ Differences across professional groups were statistically significant: $\chi^2(36, N = 307) = 83.864, p < .001$.

⁸⁹ $M = 6.35, SD = 1.78$.

⁹⁰ $M = 6.03, SD = 1.44$.

⁹¹ $M = 5.55, SD = 1.61$.

⁹² $M = 5.45, SD = 1.67$.

Table 2. Practitioners' Evaluations of Special Measures: Factor Loadings and Item Averages

| Item | Factor 1 | Factor 2 | Factor 3 | Mean | SD |
|--|----------|----------|----------|------|------|
| Beneficial Professional Support | | | | | |
| Questioning via an intermediary is fair to the complainant. | 0.90 | | | 4.50 | 1.76 |
| Questioning via an intermediary facilitates jury understanding of the evidence | 0.93 | | | 4.20 | 1.78 |
| Expert evidence on children's behaviour is necessary. | 0.44 | | | 4.71 | 2.02 |
| Areas to improve in pre-recorded police interviews | | | | | |
| Pre-recorded police interviews vary too much in quality to be effective. | | | 0.90 | 3.67 | 1.80 |
| Pre-recorded police interviews contain too much irrelevant information. | | | 0.61 | 4.34 | 1.86 |
| Risks of eliciting evidence via CCTV | | | | | |
| Juries perceive evidence via CCTV or video as less credible. | | 1.02 | | 3.52 | 1.69 |
| Juries perceive evidence via CCTV or video as unfair to the accused. | | 0.73 | | 3.04 | 1.46 |
| Evidence via CCTV decreases the quality of evidence. | | 0.40 | | 3.32 | 1.92 |

Note. Mean ratings above the number 4 reflect participant agreement; *SD* = standard deviation

The remaining eight items with more variant responses were subjected to Exploratory Factor Analysis (EFA).⁹³ The results yielded three underlying factors as shown in Table 3. The first factor specified the benefits of further professional support in CSA trials from expert witness evidence and witness intermediaries; the second factor indexed two areas for improvement in pre-recorded police interviews; and the third factor construed risks of eliciting evidence via CCTV.⁹⁴

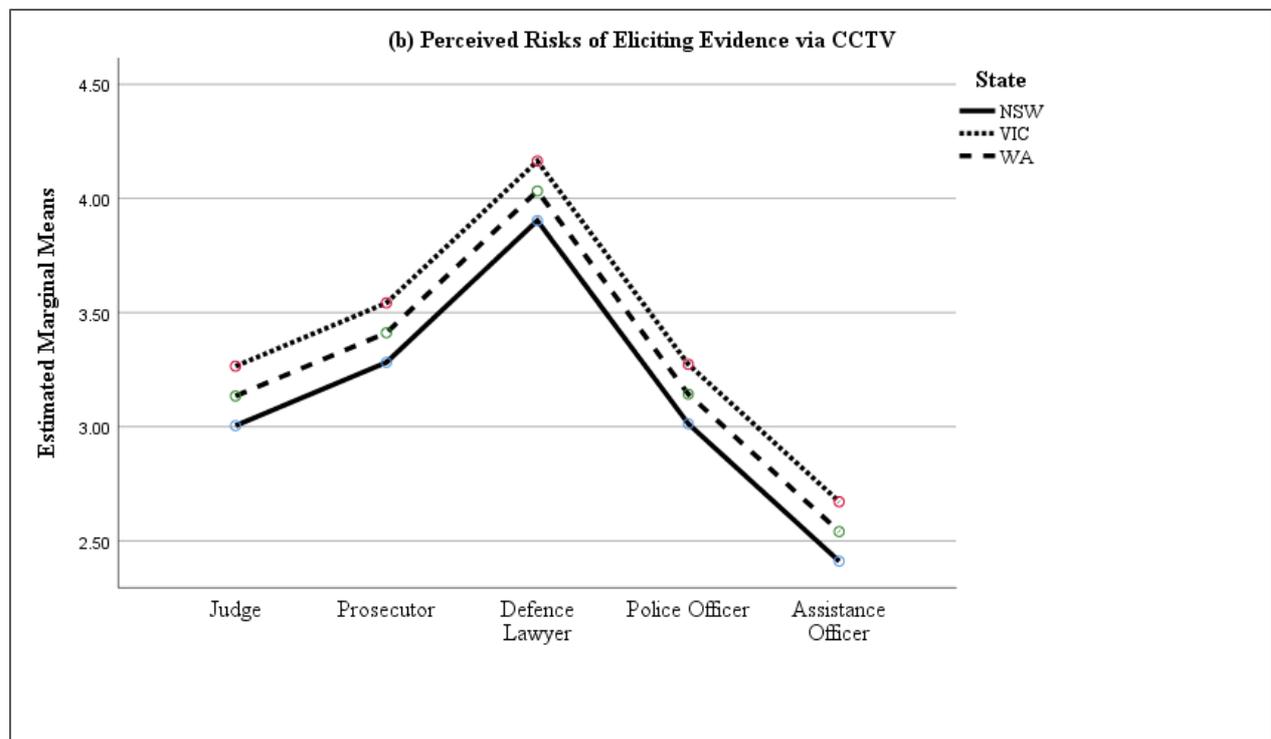
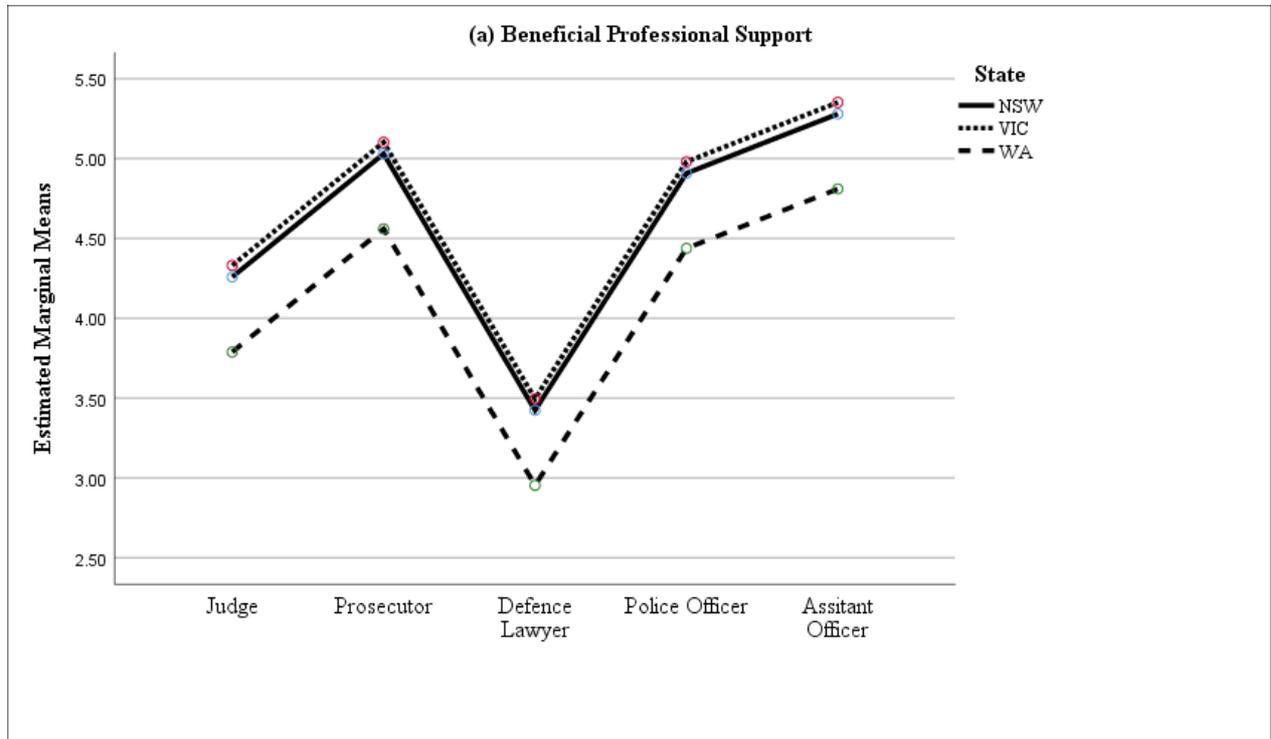
Regarding these three factors, practitioners' views of special measures in CSA trials varied significantly across states and practitioner groups.⁹⁵ Parameter estimates suggested that the benefits of expert evidence on children's behaviours following exposure to child sexual abuse, and witness intermediaries were evaluated more positively by practitioners from NSW and

⁹³ The extraction method was Unweighted Least Squares, to accommodate variables measured by a Likert scale. Promax rotation was used to allow correlations between factors.

⁹⁴ The reliability of each factor was satisfactory: $\alpha = .780, .745$ and $.754$ respectively while the second factor was limited, not satisfying the psychometric standard of having three or more items per factor.

⁹⁵ The bootstrapping method was used due to the violation of the normal distribution assumption in the three dependent variables. The effect of state: Pillai's Trace: $.052, F(6, 562) = 2.49, p = .022, \eta_p^2 = .026$, the effect of profession: Pillai's Trace: $.279, F(12, 846) = 7.24, p < .001, \eta_p^2 = .093$.

Victoria compared to those from WA (see Figure 5a). By profession, defence lawyers viewed the benefits and deficits of pre-recorded police interviews significantly differently from witness assistance officers, while the views of other practitioner groups on this topic did not differ (see Figure 5b). Regarding evidential risks of CCTV use in CSA trials, the views of all the professional groups differed significantly from one another (see Figure 5c).



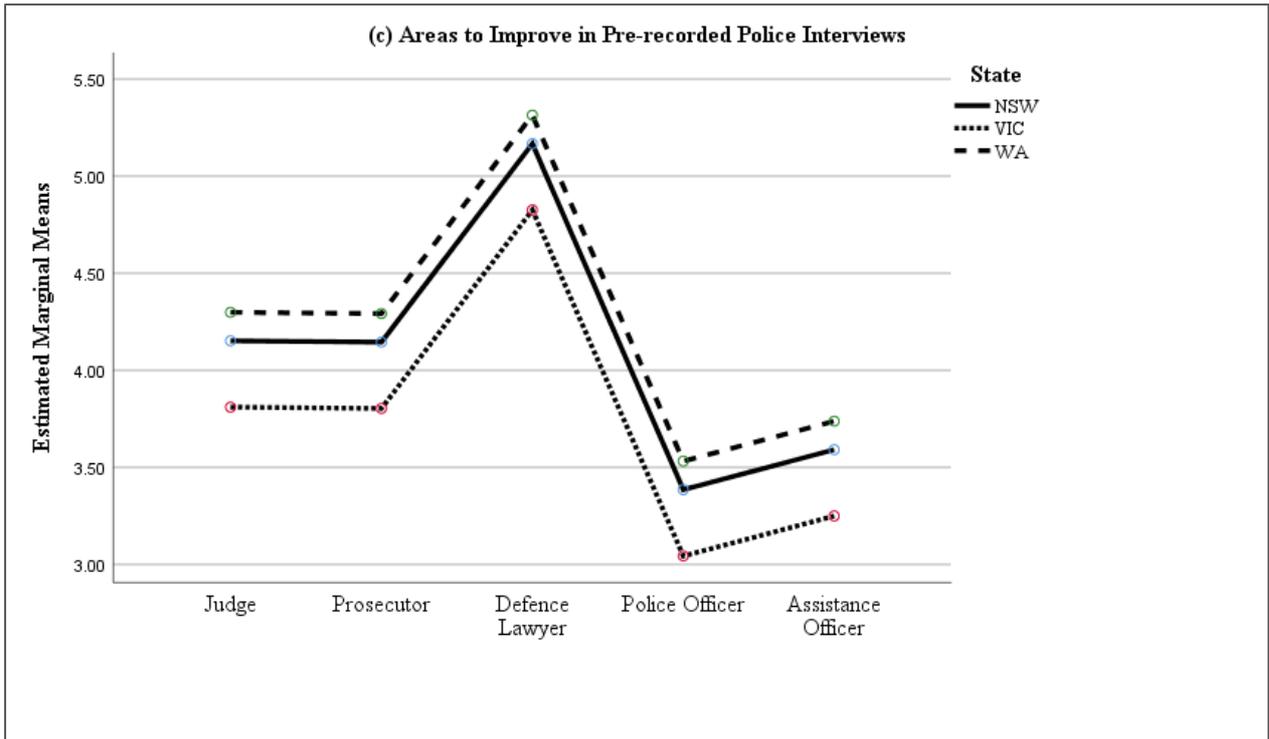


Figure 5. Evaluative Factors for Special Measures in Child Sexual Abuse Trials, by State and Profession

IV DISCUSSION

The present research provided an in-depth picture of a challenging contemporary legal issue: the perceived effectiveness and fairness of special measures to elicit a complainant’s evidence in Australian CSA trials. These findings have theoretical and practical implications for further reforms and improvements in CSA proceedings in Australia and internationally.

A Consensus Among All Jurisdictions and Professional Groups

The results confirmed that special measures are far more routinely and widely used in Australia today than when previously assessed (ie, compared to prior evaluations and reports gathered from CSA complainants 10–15 years ago).⁹⁶ Commonly shared views emerged in the practitioners’ views of special measures uses. Participants from all states, regardless of their profession, agreed unequivocally that special measures were an effective mechanism to reduce the stress on vulnerable complainants who participate as witnesses in often protracted criminal justice proceedings. Although some long-standing technological barriers to successful and efficient use of special measures have not yet been eradicated (such as delays due to unavailability of the limited number of CCTV facilities scheduled for multiple witnesses other than CSA complainants, or due to malfunctioning equipment) strong consensus emerged that the benefits of video technology outweighed these technical hurdles. Since legislation enabling special measures was implemented over two decades ago, it is alarming that faulty, unavailable technology or other logistic difficulties have persisted to the extent that they comprise a prevalent reason for the non-use of special measures for CSA complainants in the past two years. Technical and logistic improvements, court support and upgrades are essential to eliminate the barrier.

⁹⁶ Cashmore and Trimboli, above n 20; Eastwood and Patton, above n 6.

Despite the adoption of a series of special measures to minimise secondary traumatisation and disruption to complainants, a common issue identified by participants in all states was that complainants were nonetheless experiencing distress due to lengthy waiting times to give their trial evidence (multiple hours in some states and multiple days in NSW) whether at a pre-trial hearing or via CCTV. These delays undermine the effectiveness of the special measures in achieving their key objective. Further attention needs to be paid to the scheduling of the evidence of vulnerable witnesses to give them priority and to minimise waiting stress, for instance by scheduling their evidence at the start of the day.

1 *Support for Expert Witness Evidence on Children’s Responses to Child Sexual Abuse*

The low reported rate of use in CSA trials of expert witness evidence about the behaviours of sexually abused children (20 per cent of participants reported observing expert evidence in the past two years in their practice) was previously documented by a NSW prosecutor.⁹⁷ This trend is surprising given the statutory exception permitting this measure within the uniform evidence laws.⁹⁸ For example, section 79(2) of the *Evidence Act 1995* (Cth) explicitly authorises expert witness evidence about child development and child behaviour, including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse.

Overall, with the exception of defence lawyers in NSW and Victoria, all professional groups of participants perceived that this expert evidence was helpful to juries. In the absence of much expert evidence on this topic, it is difficult to thoroughly assess its impact. However, research on what NSW jurors know about child sexual abuse demonstrated that many jurors hold misconceptions about children’s responses to sexual abuse and misconstrue common behaviours as indicators that no abuse occurred.⁹⁹

2 *Support for Witness Intermediaries*

Strong consensus emerged among professional groups in all states for the use of witness intermediaries. This finding is compatible with the establishment, since this survey was conducted, in New South Wales, per the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW)* of a pilot program under which specialist District Court judges trained in the management of child sexual assault matters will oversee cases of child sexual abuse. A key component of the pilot program is the appointment of witness intermediaries who are specially trained to help children through the court process, in particular to address their communication needs resulting from the lack of child-friendly language and processes commonly used in court communication, interviews and evidence presentation.

⁹⁷ Kara Shead, ‘Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions’ (2014) 26 *Current Issues in Criminal Justice* 55.

⁹⁸ Anne Cossins and Jane Goodman-Delahunty, ‘The Application of the Uniform Evidence Law to Delay in Child Sexual Assault Trials’ in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 104.

⁹⁹ Jane Goodman-Delahunty, Natalie Martschuk and Annie Cossins, ‘What Australian Jurors Know and Do Not Know about Evidence in Child Sexual Abuse Cases’ (2017) 41 *Criminal Law Journal* 86.

B *The Impact of Special Measures on Complainant Credibility*

The findings of this study confirmed that issues surrounding the credibility of witnesses who appear in-person versus remotely via CCTV or via pre-recorded interviews have not dissipated with the passage of time. Participants held diverse views about the impact of special measures on the credibility of a CSA complainant, depending on whether the complainant was a child or an adult. Most practitioners, except defence lawyers, evaluated CSA child complainants who give evidence-in-chief via pre-trial recordings and CCTV as credible, with scores exceeding the midpoint of the scale. Similar patterns were observed for cross-examination. Nonetheless, participants perceived that the most credible evidence was elicited from a complainant in response to an intervention in the questioning by the trial judge.

In terms of the reliability of evidence from CSA complainants, significant differences between special measures emerged. The endorsement by practitioners of reduced confusion of the complainant when Crown prosecutors prepare the child to give evidence at trial, highlighted the importance of addressing the communication needs of young complainants to improve the reliability of their evidence. Defence lawyers adhered to the view that in-person evidence was the most reliable, despite contemporary research showing that physical proximity of the mode of evidence is unrelated to veracity or truth-telling.¹⁰⁰

Overall, participants viewed special measures such as pre-recorded police interviews and CCTV evidence (from a remote room on the court premises) as most conducive to the credibility of a child complainant, whereas in-person evidence was identified as the best procedure for the credibility of an adult CSA complainant. The latter finding needs to be taken into account if legal professionals are accountable for protecting and empowering vulnerable adult witnesses who are often overwhelmed by detrimental stress and anxiety when required to appear in court in person.¹⁰¹

C *The Impact of Special Measures on Conviction Rates*

The fact that participants were evenly divided as to whether special measures increased conviction rates or had no effect tended to indicate that their responses to other survey questions were not significantly correlated with perceptions of their impact on case outcomes.

D *Distinctive Views of Criminal Defence Lawyers*

The observations, experience and perceptions of special measures by the five groups of criminal justice stakeholders in response to eight questions about these measures showed less consensus across the five professional groups. Their responses yielded three key factors (benefits of expert witness evidence and witness intermediaries; improvement to pre-recorded police interviews; and risks of evidence elicited via CCTV). Responses of criminal defence lawyers stood apart from those of members of other professional groups in regard to all three factors. Compared to responses of members of all other professions, defence lawyers as a group were distinctive as significantly more cynical and negative in their evaluations of special measures. Of the five professional groups polled, defence lawyers were the least supportive of

¹⁰⁰ Kathryn Leader, 'Closed-Circuit Television Testimony: Liveness and Truth-Telling' (2010) 14 *Law Text Culture* xxxvii.

¹⁰¹ Landström and Granhag, above n 22; Caprioli and Crenshaw, above n 4; Szojka et al, above n 5; Steven Penrod, 'The Child Witness, the Courts, and Psychological' in *Memory and Affect in Development: The Minnesota Symposia on Child Psychology* (2014, Psychology Press) 159.

special measures. Defence lawyers were more likely to perceive that special measures diminished the quality of the complainants’ evidence, that special measures varied too much in quality to be effective, and that pre-recorded interviews introduced too much irrelevant information into the court record. Defence lawyers were significantly less likely than members of other professional groups to view special measures as unfavourable to the complainants’ credibility or reliability, irrespective of whether the complainant was a child or an adult. Correspondingly, defence lawyers were twice as likely as members of other professional groups to rate conventional in-person evidence as the best procedure to elicit credible evidence from a child complainant, whereas no other professional group rated in-person evidence as effective with vulnerable witnesses.

Defence lawyers, in particular, will benefit from greater familiarity with empirical research on effective cross-examination of vulnerable witnesses, research on the impact of stress at the time of retrieval on memory, and research on videolink and pre-recorded versus in-person evidence.

E *Professional Training and Education*

Most practitioners in all three states regarded the current practices in their jurisdiction as compliant with legislated policy. However, a small proportion of participants across the states and professional groups did not know whether the current practice was congruent with the enabling legislation. This finding highlights the need for more professional development and training on policies applicable to vulnerable witnesses to aid practitioners in the field.

The key role of judicial discretion in special measure use, with ratings below the midpoint (4 out of 7) is nonetheless alarming as this finding reflects the lack of consideration of special measures previously noted in England.¹⁰² Professional development programs are recommended to acquaint or update judges and lawyers with recent research findings and practice guides to address the needs of CSA complainants and juries. Additional professional training is recommended for police interviewers of child complainants.¹⁰³

V CONCLUSION

To advance the health and wellbeing of child sexual abuse victims and to prevent secondary trauma,¹⁰⁴ empirical assessment of the effectiveness of special measures plays a vital role in determining what is working, what is not, and what additional steps or interventions may be helpful. The present study provided the first detailed snapshot of the day-to-day experiences and views of a large number of criminal justice practitioners on the prevalence and effectiveness of special measures used with CSA complainants in Australian courts. With participants in three states and responses from 335 seasoned criminal justice professionals, the results of this field study built on and extended anecdotal reports and the insights obtained previously from small-scale qualitative interview studies with self-selected participants. The

¹⁰² Fairclough, above n 14.

¹⁰³ David La Rooy et al, ‘The NICHD Protocol: A Review of an Internationally-Used Evidence-Based Tool for Training Child Forensic Interviewers’ (2015) 1(2) *Journal of Criminological Research, Policy and Practice* 76; Mairi S Benson and Martine B Powell, ‘Evaluation of a Comprehensive Interactive Training System for Investigative Interviewers of Children.’ (2015) 21(3) *Psychology, Public Policy, and Law* 309; Elizabeth Stokoe et al, ‘When Police Interview Victims of Sexual Assault: Comparing Written Guidance to Interactional Practice’ (University of Chicago Press, 2018).

¹⁰⁴ Dianna T Kenny, *Children, Sexuality, and Child Sexual Abuse* (Routledge, 2018); Dale Tolliday, Jo Spangaro and Lesley Laing, *Therapy with Harming Fathers, Victimized Children and Their Mothers after Parental Child Sexual Assault: Forging Enduring Safety* (Taylor & Francis, 2018).

inclusion of responses from 189 trial judges, prosecutors and criminal defence lawyers – three groups of busy legal professionals – is a notable accomplishment, as securing the participation of these professionals in research is a well-recognised challenge. Limitations of the study sample may potentially be improved by more rigorous random sampling of the practitioner groups in future studies.

The present findings confirmed that evidence is elicited from most child complainants in Australian courts by means of special measures that are more developmentally and psychologically appropriate than conventional in-person evidence, as was contemplated by the legislation enacted for this purpose. Broad professional consensus emerged in support of special measures to elicit evidence from complainants, and for further reforms and initiatives to complement the use of special measures with expert witness evidence and witness intermediaries. Where the study identified a few gaps between the enabling legislation and day-to-day practice, recommendations were made on steps to implement to close these gaps.

Appendix 1. Online Survey for Criminal Justice Professionals

- What is your current role in the criminal justice system? (*dropdown menu*)
 - a. Judge
 - b. Magistrate
 - c. Prosecutor
 - d. Defence lawyer
 - e. Police Officer
 - f. Witness assistance service
 - g. Court support worker
 - h. Other
 - i. Prosecutor and defence lawyer

- In which state do you primarily work? (*dropdown menu*)
 - a. NSW
 - b. VIC
 - c. WA
 - d. Other

- Where do you work? _____

- How many years’ experience do you have with child sexual abuse cases in your current role?
_____ years.

- Approximately how many child sexual abuse cases have you worked on?
_____ cases.

- Of this group, how many were historical cases, i.e. cases where the alleged offences occurred five or more years prior to the report.
_____ cases.

- What is your gender?
 - a. Male b. Female

- Have you had training to work with child sexual abuse cases?
 - a. No
 - b. Yes, please describe
 - i. Approximate total number of hours _____
 - ii. Briefly describe the training _____
 - iii. Date of last training _____
 - iv. How useful was your training for your practice?
1 (not useful) - 7 (very useful)
 - v. What additional training would be useful?

- The most frequent current practice in my jurisdiction for **child complainants** of sexual abuse is:

(*dropdown menu*)

- a. Pre-recorded investigative interview, other evidence via CCTV (remote or in courthouse)
 - b. Pre-recorded investigative interview, other evidence at a preliminary hearing
 - c. All evidence via CCTV (remote or in courthouse)
 - d. All evidence at a preliminary hearing
 - e. All evidence live in court from behind screen
 - f. All evidence live in court
 - g. Don't know
- This practice is the same as current policy in my jurisdiction.
 - a. Yes
 - b. No
 - c. Don't know
 - The most frequent current practice in my jurisdiction for **adult complainants** of childhood sexual abuse is:

(dropdown menu)

- a. Pre-recorded investigative interview, other evidence via CCTV (remote or in courthouse)
 - b. Pre-recorded investigative interview, other evidence at a preliminary hearing
 - c. All evidence via CCTV (remote or in courthouse)
 - d. All evidence at a preliminary hearing
 - e. All evidence live in court from behind screen
 - f. All evidence live in court
 - g. Don't know
- This practice is the same as current policy in my jurisdiction.
 - a. Yes
 - b. No
 - c. Don't know
 - Reasons alternative measures may not be used:
(1=strongly disagree; 7=strongly agree; 8=don't know)
 - a. Logistic difficulties
 - b. Space not available
 - c. Financially infeasible
 - d. Short of staff
 - e. Faulty or missing technology
 - f. Negative impact on witness credibility
 - g. Avoid appeal on basis of jury access to pre-recorded evidence in deliberation
 - h. Prejudicial to the accused
 - i. Judicial discretion
 - j. Other reasons *(fill in)*

Rate the impact of the following procedures on the veracity of a child

complainant's evidence-in-chief: 1=least credible; 7=most credible; 8=don't know

- CCTV from a remote room on the court premises
- CCTV from a remote room off the court premises
- Pre-recorded investigative interview

- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Rate the impact of the following procedures on the veracity of a child complainant's cross-examination: 1=least credible; 7=most credible; 8=don't know

- CCTV from a remote room on the court premises
- CCTV from a remote room off the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Best procedure for the veracity of a child complainant (*dropdown menu*)

- CCTV from a remote room on the court premises
- CCTV from a remote room off the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Best procedure for the veracity of an adult complainant: (*dropdown menu*)

- CCTV from a remote room **on** the court premises
- CCTV from a remote room **off** the court premises
- Pre-recorded investigative interview
- Pre-recorded evidence conducted at a preliminary hearing
- Live from behind a screen
- Live with the assistance of an intermediary
- Live with courtroom modifications (e.g. one-way glass, alternative seating arrangements, removal of wigs and gowns, clearing of the public gallery)
- Questions by counsel with intervention by the judge as needed
- Live in the conventional way

Indicate your agreement with the following statements (even if not available in your jurisdiction): (1=strongly disagree; 7=strongly agree; 8=don't know)

- Preparation by the Crown of the complainant for trial confuses the complainant.
- Evidence via CCTV is less traumatic for the complainant than in-person evidence.
- Evidence via CCTV decreases the quality of evidence.
- Pre-recorded police interviews vary too much in quality to be effective.
- Pre-recorded police interviews contain too much irrelevant information.
- Benefits of video technology outweigh technical difficulties.
- Questioning via intermediary is fair to the complainant.
- Questioning via intermediary facilitates jury understanding of the evidence
- Juries perceive evidence via CCTV or video as less credible.
- Juries perceive evidence via CCTV or video as unfair to the accused.
- Expert evidence on children's counterintuitive behaviour is effective.
- Waiting time to testify at trial is stressful for a complainant.

The complainants' **reliability** at trial is **strongest** via (*dropdown menu*)

- a. Via CCTV from a remote room **on** court premises.
- b. Via CCTV from a remote room **off** court premises.
- c. Video-recorded police interview.
- d. Video-recording at preliminary hearing.
- e. In person behind a screen.
- f. In person with an intermediary
- g. In person, no alternative measures.

weakest via (*dropdown menu*).

- a. Via CCTV from a remote room **on** court premises.
- b. Via CCTV from a remote room **off** court premises.
- c. Video-recorded police interview.
- d. Video-recording at preliminary hearing.
- e. In person behind a screen.
- f. In person with an intermediary
- g. In person, no alternative measures.

- Do you think that the use of alternative measures has changed the conviction rate?
 - a. No
 - b. Yes, it increased.
 - c. Yes, it decreased.
- In the past year the average waiting time for a complainant before testifying at court was
 - a. Under 2 hours.
 - b. 2 to 5 hours
 - c. Over 5 hours.
 - d. more than a day
- Have you observed expert evidence on children's behaviour in child sexual abuse cases in past two years?
 - a. No
 - b. Yes
 - How many times? (*open-ended*)
 - In your opinion, was it helpful to the jury?
 - c. No
 - d. Yes