



## Child sexual assault trials: A survey of juror perceptions

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*This study explored the perceptions of 277 jurors from 25 juries hearing child sexual assault trials held in four District Courts in Sydney between May 2004 and December 2005. Jurors completed a short, structured questionnaire measuring their reactions to the use of closed-circuit television and pre-recorded evidence in child sexual assault trials, their understanding of the reasons for the use of these special measures, their perceptions of the fairness of the trial process for both the child complainants and the defendants, and their perceptions of various aspects of the child complainants' behaviour in these matters. Jurors indicated that they understood the reasons why special measures were used to present children's evidence, and that they perceived them to be fair to both the child complainant and the defendant. Consistent with previous research, the more confident and consistent children appeared to the jurors, the more convincing or credible their testimony was perceived to be. Also consistent with previous research and with the concerns outlined by a number of inquiries, jurors rated children's treatment by defence lawyers during cross-examination as significantly less fair than children's treatment by either the judges or the crown prosecutors. Children were perceived to have more difficulty understanding the questions asked by defence lawyers and were less confident and more stressed when answering these questions than when answering questions asked by crown prosecutors. Jurors perceived that the court treatment of defendants was fair and respectful. Their concerns about being a juror, and the perceived benefits of serving on a jury and doing their civic duty, were very similar to those reported by jurors in other studies in Australia, New Zealand, the UK and the USA.*

### INTRODUCTION

The Child Sexual Assault Specialist Jurisdiction was established on a trial basis on 24 March 2003 in the Sydney West District Court Registry primarily to improve the court experiences of child sexual assault witnesses. The establishment of the Specialist Jurisdiction was the principal recommendation of the *Report on Child Sexual Assault Prosecutions* (NSW Legislative Council Standing Committee on Law and Justice 2002).

The aims of the Specialist Jurisdiction were to reduce delays, to improve the physical environment of the court, to use

special innovative measures to assist children to give evidence, and to increase the skills of the legal professionals involved in the court process. Part of the evaluation of the Specialist Jurisdiction was a survey of jurors hearing cases in the courts in both the Specialist Jurisdiction and in a comparison registry. The broad aim of the juror survey was to assess how those who have the ultimate responsibility for determining the verdict perceived not only the various special measures, but also the way that both the child complainant and the defendant were treated in court.

Since August 1999, the *Evidence (Children) Act 1997* has provided for

two forms of technology to be used in taking evidence from children in criminal proceedings:

- a) audio-taped or video-taped interviews with children that are conducted as part of the investigation process can be tendered as all or part of the child's evidence-in-chief (s. 11); and
- b) closed-circuit television (CCTV) which allows children to testify from a remote location, away from the actual courtroom (s. 18).

The reaction of actual jurors to these measures and the extent to which these measures may affect their perceptions of the complainant, the defendant and

their decision-making process are critical issues. The value of the reforms made by the Evidence (Children) Act and the measures in the Specialist Jurisdiction might be in question, for example, if jurors have problems seeing or hearing the child's testimony delivered via CCTV or via pre-recorded interviews, or if they perceive children to be less credible when they testify by non-traditional methods because children may appear to be less anxious or distressed. Similarly, the acceptability of the special measures would be in question if there was evidence of bias against the defendant. There is, however, little research to provide guidance in this area and juror views are rarely 'tested' in the evaluation process because of the legal restrictions on conducting research with jurors and the difficulty of doing so.

## ALTERNATIVE METHODS OF RECEIVING CHILDREN'S EVIDENCE

### Juror reactions

Little is known about how actual jurors react to the use of specialised procedures for presenting children's evidence in actual child sexual assault trials. Most studies of juror reactions in relation to the credibility of child witnesses and the impact of technological innovations (such as CCTV and video-taped evidence) have relied on simulated cases with mock jurors (McAuliff & Kovera 2002). In addition, in most of these studies, both the 'in-court' mode of children testifying and the 'video-technology mode' with children testifying via CCTV were presented as a video-taped simulation with under-graduate students (Eaton, Ball & O'Callaghan 2001; Schmidt & Brigham 1996).<sup>1</sup>

In one of the few studies which surveyed actual jurors in child sexual assault trials in Australia (O'Grady 1996), most jurors indicated that they understood and accepted the reasons for using CCTV and removable screens when children were testifying. Most also said that these measures had not made it more difficult to

reach a verdict, although nearly half said CCTV made it difficult to judge the age or size of the child and a minority (16%) said they would like to have seen the witness in the courtroom. Almost all jurors in the study said they could see and hear the child clearly via CCTV but some were critical of the distance of the TV screen from the jury box. Jurors' perceptions of the child complainant/witnesses were, however, not investigated.<sup>2</sup>

### Research evidence to date

The research findings to date have been mixed in relation to the impact of special measures (such as CCTV) on child witness' reliability and credibility, the perceived guilt of the 'defendant', and the verdict, before and after deliberation. Compared with children testifying in the courtroom, children giving evidence via CCTV have been perceived to be less distressed, more consistent in their testimony (Cashmore with de Haas 1992; Davies & Noon 1991; Goodman et al. 1998; Saywitz & Nathanson 1993), and more accurate in their responses (Goodman et al. 1998; Tobey et al. 1995).

However, children giving evidence by CCTV were judged more negatively, at least by mock jurors in simulated cases. In three related studies involving juror-eligible participants reacting to a simulated case with 'live' child witnesses (rather than video-taped portrayals), Goodman and her associates (Goodman et al. 1998; Orcutt et al. 2001; Tobey et al. 1995) found that, before deliberating, mock jurors assessed children who testified by CCTV to be less believable, less attractive, less intelligent, more likely to be making up a story and less likely to be basing their testimony on fact. After deliberating, however, there were no differences in verdict or conviction rate between 'trials' where the child witnesses (aged from 6 to 9 years) had given their evidence by CCTV or in open court.<sup>3</sup>

Importantly for the fairness of the process, the research has found no indication of unfairness to the defendant or presumed guilt or bias associated with the use of

CCTV (Cashmore 2002; Davies 1999; Goodman et al. 1998). As Davies (1999, p. 249) concluded:

Studies based on laboratory research and simulated trials provide little support for those who fear miscarriages of justice as a result of the availability of CCTV. Juries may show a preference for live witnesses but do not appear to allow that preference to influence their decision-making.

However, the principal limitation of these various studies is that they were simulated trials and did not involve 'real' crimes or actual trials.

### AIMS

The main aims of this study were to explore jurors' perceptions of the special measures (CCTV and pre-recorded evidence) involved in the Child Sexual Assault Specialist Jurisdiction, the reasons for their use, the fairness of the trial process for both the child complainants and the defendants, and their perceptions of child complainants in these matters.

## METHOD

### SURVEY PROCEDURE

This study was conducted by means of a short, structured questionnaire completed by jurors at the end of child sexual assault trials heard at four District Courts in Sydney during the period from May 2004 to December 2005. After the jury's verdict had been delivered to the court, the judge presiding over the trial informed jurors about the survey and encouraged their participation. Jurors were given a brochure/letter attached to the survey which outlined the purpose of the study, the fact that it had been approved by the Attorney-General and was therefore in accord with the legislation about disclosure of the jury process.<sup>4</sup> They were informed that their participation would be voluntary and confidential.

The questionnaires were completed in the jury deliberation room in the presence of court officers. Jurors were urged not

to discuss the questions or their answers with each other. In three trials, however, when the verdict was delivered late in the afternoon, jurors were permitted to take the questionnaire away from the courthouse for completion and return via reply-paid mail.

### SURVEY INSTRUMENT

The questionnaire consisted of 53 questions and comprised the following four sections concerned with:

- The juror's reactions to, and understanding of, the reasons why the child complainant gave evidence via closed-circuit television (CCTV) and any difficulties with the equipment used.
- The presentation of the child complainant's evidence via pre-recorded interview (audio-tape or video-tape) and the juror's reactions to this presentation.
- The juror's perception of the child complainant's credibility, stress level, confidence in answering the lawyers' questions, consistency of the child's

testimony; how fairly the child was treated in court by the judge, crown prosecutor and defence lawyer, and the reasons for these perceptions; and how fairly the defendant was treated by the court. Two open-ended questions asked about the positive and negative aspects of being a juror in the case.

- Demographic characteristics, including gender, age, Aboriginality, country of birth, mother's country of birth, father's country of birth, the highest level of education attained, employment status, whether the juror had children and their ages.

### STATISTICAL ANALYSIS

Descriptive percentages of jurors' ratings on survey questions are presented throughout the report. The primary sampling units in this survey were juries rather than jurors which meant that jurors' observations were not independent of each other. It was therefore necessary to take account of this clustering in the analysis. To accommodate this, adjusted 95 per cent confidence intervals were

calculated for the main outcomes of interest. These, as well as the size of the design effect for each outcome, are provided in Appendix 1.<sup>5</sup> For many analyses (e.g. comparing ratings of the child complainant's confidence when answering questions asked by crown prosecutors versus defence lawyers), the jury rather than the juror was used as the unit of analysis, thereby avoiding this clustering issue. For these analyses, mean jury ratings were compared using a matched-paired t-test and associations between various measures were quantified using Spearman's correlation coefficient. Where the analyses involved juror-level predictor variables (e.g. juror's gender or educational status), special survey regression procedures were used to take account of the clustering.<sup>6</sup>

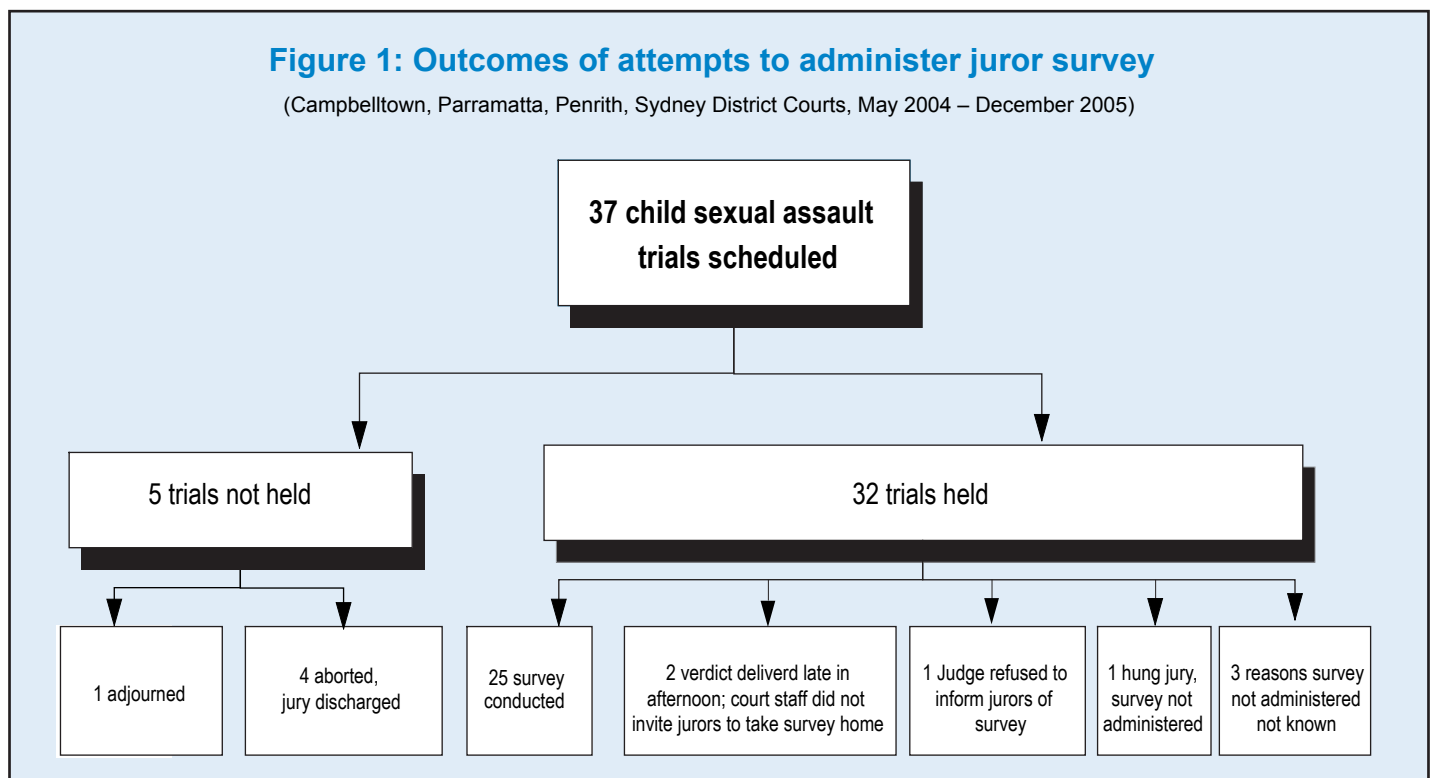
## RESULTS

### SAMPLE

Thirty-seven trials were scheduled at the four courts during the period from May 2004 to December 2005. Only 32

**Figure 1: Outcomes of attempts to administer juror survey**

(Campbelltown, Parramatta, Penrith, Sydney District Courts, May 2004 – December 2005)



of these proceeded; and the survey was administered in 25 of the 32 (78.1%) trials which were held. Figure 1 shows the outcomes of the attempts to administer the juror survey for the 37 trials scheduled over the study period.

## RESPONSE RATE

A total of 277 jurors from 25 juries completed the questionnaire. Since each jury consists of 12 jurors, responses from 277 of the 300 jurors involved in these trials constitutes a response rate of 92.3 per cent. In 16 (64.0%) trials, all 12 jurors completed a questionnaire. In a further four (16.0%) trials, 11 of the 12 jurors completed a questionnaire. In the three (12.0%) trials in which jurors were permitted to take their questionnaires away from the courthouse for completion because of the late finish, between six and eight jurors returned a completed questionnaire.

## CHARACTERISTICS OF SAMPLE

### Jurors

The majority of jurors who participated in the survey were male (137, 54.2%), employed or self-employed (212, 77.9%) and Australian-born (195, 74.4%).

Approximately 17 per cent ( $n = 44$ ) were born in a non-English speaking country, most commonly China, India, Lebanon or the Philippines. Approximately two in five jurors (118, 43.2%) were aged between 35 and 54 years; and 45.4 per cent ( $n = 122$ ) had attained either secondary education or school certificate level as their highest level of education with a further three in ten (88, 32.7%) having a university degree. (See Appendix 2 for a summary of the socio-demographic characteristics of the jurors who participated in this survey.)

More than half of the jurors (160, 58.2%) were parents. While male (56.9%) and female (55.2%) jurors were equally likely to be parents, male jurors with children were significantly more likely to have children under 16 years of age (62.0%) than female jurors with children (25.0%) ( $\chi^2 = 18.76$ ,  $df = 1$ ,  $p < 0.001$ ). This is not

surprising since child care responsibilities are a common reason for women to be excused from jury duty; the consequence, however, is that women with children of comparable age to the child complainants were less likely to be jurors.

### Trials

Fourteen (56.0%) of the 25 trials were held in one of the three courthouses comprising the Child Sexual Assault Specialist Jurisdiction, namely, Campbelltown, Parramatta and Penrith Courts; the remaining eleven trials (44.0%) were held at the comparison registry (Sydney District Court Registry). In all 25 trials, the child complainants were not present in the courtroom, but were located in a separate room and gave evidence and were cross-examined via closed-circuit television (CCTV). Preliminary analyses indicated few differences between the juries in the Specialist Jurisdiction and the comparison registry so the results have been combined.

## Child Complainants

Table 1 shows the characteristics of the child complainants involved in these trials.

As Table 1 shows, most (22, 88.0%) of the child complainants involved in these trials were female. Their average age at the time of the trial was 12.3 years ( $SD = 3.1$ ), and at the time of the offence(s), 10.6 years ( $SD = 3.7$ ). More than half (13, 52.0%) of the child complainants were aged between 11 and 15 years at the time of the trial, and a further 36 per cent were between seven and ten years.

### Defendants

In each of the 25 trials involved in this survey, the defendant was male. All except one of the trials involved one defendant. In the remaining trial, there were two defendants and one child complainant. One defendant was involved in two trials; the defendant was the natural father of the two child complainants involved.

**Table 1: Characteristics of child complainants in trials**

		<b>N</b>	<b>%</b>
<b>Gender of child</b>	Female	22	88.0
	Male	3	22.0
	<b>Total</b>	<b>25</b>	<b>100.0</b>
<b>Age of child at time of trial (years)</b>	7 – 10	9	36.0
	11 – 15	13	52.0
	16 – 17	3	12.0
	<b>Total</b>	<b>25</b>	<b>100.0</b>

**Table 2: Age of defendant at the finalisation of the trial**

<b>Age of defendant (years)</b>	<b>N</b>	<b>%</b>
16 – 19	2	8.0
20 – 29	3	12.0
30 – 39	7	28.0
40 – 49	7	28.0
50 – 59	2	8.0
60+	4	16.0
<b>TOTAL</b>	<b>25<sup>a</sup></b>	<b>100.0</b>

<sup>a</sup> One trial involved two defendants; and two separate trials involved the same defendant.



**Table 3: Relationship of defendant to child complainant**

<i>Relationship of defendant to child complainant</i>	<i>N</i>	<i>% (n = 22)</i>
Natural father	4	18.2
Step-father/former step-father/mother's de facto/ mother's former de facto	7	31.8
Natural or step-grandfather, other relative	3	13.6
Family friend/acquaintance/friend's father	6	27.3
Person in authority	2	9.1
Unknown relationship	4	-
<b>TOTAL</b>	<b>26<sup>a</sup></b>	<b>100.0</b>

*a One trial involved two defendants and, in four cases, the relationship between the defendant and the child complainant was not known.*

Table 2 shows the age of the defendants at the finalisation of the trial.

As Table 2 shows, more than half of the defendants (14, 56.0%) were aged between 30 and 49 years at the time of the outcome of the charge(s). Two (8.0%) defendants were less than 20 years old (16-19 years) and four (16.0%) were aged 60 years or more, the eldest defendant was 73 years of age. Their average age was 42.2 years (SD = 14.2).

Table 3 shows the relationship of the defendant to the child complainants.

As Table 3 shows, in half (11, 50.0%) of the trials for which the relationship was known, the defendant was the child's father figure – either the child's natural father, step-father or former step-father. In a further three (13.6%) cases, the defendant was another relative.

### Trial Outcomes

In 14 (56.0%) of the 25 trials, the defendant was found not guilty either by the jury or by direction of the presiding judge. For the remaining 11 (44.0%) trials, the defendant was found guilty by the jury on all or some of the charges; one of these trials included the two defendants, both of whom were found guilty. With the exception of one defendant who received a two-year bond, each of the remaining 11 defendants who were found guilty were sentenced to imprisonment; the prison sentence ranged from 18 months to seven years and six months, with two defendants receiving a six year prison

sentence and four defendants receiving a five year term.

### JURORS' PERCEPTIONS OF THE TECHNOLOGY

Legislative and procedural changes have allowed child complainants' evidence to be given via CCTV and for audio-taped or video-taped interviews conducted as part of the investigation process to be tendered as all or part of the child's evidence-in-chief. However, little information is available about the way jurors construe these procedures and how they react to their use. In this study, therefore, jurors were asked about their understanding of the reasons for using these special measures, and also how well they worked in the trial they heard. They were also asked how well they could see and hear the child's evidence, and whether there were any problems with the equipment.

### Use of pre-recorded statements in evidence-in-chief

In 22 of the 25 trials, a pre-recorded interview conducted with the child by officers of the Joint Investigative Response Teams<sup>7</sup> was played to the court as part of the children's evidence-in-chief. In most cases in which the pre-recorded interview was played, it comprised most of the evidence-in-chief.<sup>8</sup> Most jurors (181, 79.4%) indicated that the pre-recorded tape was about the 'right' length, being neither too short nor too long. Nearly one in five jurors (41, 18.0%), from ten different trials, said the tape was too long;

this included all participating jurors in one trial where the video-taped interview with a nine-year-old girl was 100 minutes long. Only six jurors, from four trials, said that the tape was too short.

Most jurors (194, 84.0%) stated that the pre-recorded tape of the child's evidence-in-chief helped either 'a lot' (103, 44.6%) or 'quite a bit' (91, 39.4%) in understanding the child's evidence. Only two jurors said the tape did not help at all. The most frequent reasons that jurors gave for the tape being helpful were that it gave them the opportunity to observe the child's body language, demeanour and tone of voice (27.9%) and to assess the child's credibility (10.2%), it presented a 'first-hand' account of the events by the child in her/his own words (24.5%), closer to the time when the alleged offences occurred (10.9%). Examples of some of the comments made by jurors include:

- The first tape we could see how they were acting, their body language etc. The second tape they were distracted drawing which, while not giving them the ability to think about the answer so much, also made the answers sound a bit hesitant or unfeeling at times because the child was distracted.
- Because you could actually see the child's reactions and body language and understand more if the child understood the question in the first place and then whether the answer was evasive or not.
- It was in his own words and you could hear how he felt about the offence.
- It was then fresh in her mind, whereas in the court it was 11 months old.
- Could see the way the child spoke about the incident which was a lot more informative than simply reading a document.

One in ten (10.2%) jurors stated that the pre-recorded tape was the main source of evidence in the trial and jurors in at least seven trials indicated that the tape was played several times during their deliberations and helped them to go over the evidence to clarify issues.

- It was the most concise, clear evidence we had.
- It helped because when we were deliberating we could watch the tape as many times as we thought necessary.

Some jurors were, however, critical of the quality of the questioning:

- It was a shame the interviewer had to spend so much time writing down the answers which stopped the flow for the child. It would have made sense to just have her asking questions to keep the child talking about a particular event than all the stopping.
- The interviewing officer did not thoroughly question the child and was just happy to take an account.
- The detective interviewing the child on video-tape was hopeless. He did not ask the right questions or when he did, he did not ask enough questions. He also was a useless witness in the witness box.
- Felt at some points she was led on by the interviewer.

### Use of CCTV

Each child complainant in this study gave evidence via CCTV. Nine in ten jurors (253, 93.4%) stated that the presiding judge explained to them why the child was giving evidence via CCTV rather than from the witness box in the courtroom. The vast majority of jurors saw this as either 'quite fair' or 'very fair' both to the child complainants (250, 90.3%) and to the defendants (243, 88.0%). More than three-quarters (77.0%)<sup>9</sup> indicated that they believed the reason the child complainant gave evidence via CCTV was to reduce the stress for the child of either seeing the defendant or being in the courtroom. The next most frequent comments referred to the child's age (36.6%), the nature of the alleged offence (4.3%) and to the relationship between the child and the defendant (3.7%); 15.5 per cent also commented that it provided 'a safe environment' that was 'less threatening / for child's protection'.

### Problems with the technology

Jurors were asked whether they could see and hear the child complainant clearly when the child's pre-recorded statement was played to the court and when the child was giving evidence live via CCTV. Jurors were also asked whether there were any problems with the equipment.

Jurors reported more difficulties with seeing and/or hearing the video-taped pre-recorded statement than seeing and/or hearing the child via CCTV. Nearly a third (32.0% overall) said they had problems in seeing (17.2%) or hearing (23.4%) the pre-recorded statement because of poor quality sound or visuals. Overall, at least one person on 18 of the juries in this study had some difficulty either seeing and/or hearing the child on tape. In 13 juries, this was the case for at least three jurors; eight of these matters were heard at the comparison registry. In two of these juries, ten out of the 12 jurors reported that they had difficulty hearing the child on the tape.

Some examples of the comments made by the jurors include:

- Couldn't see or hear. Get Digital TV!
- The quality of the audio-tape was very, very poor and the child could hardly be heard.
- Closer shot would have been nice to see expressions better.
- In the video evidence, it was quite hard to make out clearly what the child said without the transcript. The quality of the police recording should be better.

Fewer, but still a sizeable minority (40, 14.5%) of jurors from 14 juries reported problems with the image and/or sound in relation to the live CCTV transfer of the child's evidence. Six jurors on one trial, and at least two jurors on six other juries (five of whom heard trials at the comparison registry) noted problems with the sound, the camera placement, the lighting in the witness room, image distortion or with the screen in the courtroom being too far from the jury box.

In addition, when asked whether they had noticed any problems with the equipment, a number of jurors (n = 28) indicated problems with the microphones, including feedback, echoes, high-pitched sounds, poor or 'muffled' sound. A further eight jurors reported that the child complainant had been unable to see or hear those in the courtroom. A very small minority of jurors reported problems such as the accidental erasure of parts of the tape, tapes which were incompatible with

the video playback equipment in the courtroom, poorly positioned cameras, or 'fuzzy' visual images. Overall, according to the jurors, only two trials had no problems at all with the sound, picture or technical equipment; an additional three had minor problems that were short-lived or affected few jurors. More than half of these jurors (54.0%), however, stated that these equipment problems were distracting because continuity was lost, they lost concentration or time was wasted because of equipment failures or difficulties.

### JURORS' PERCEPTIONS OF THE CHILD COMPLAINANTS

Jurors were asked several questions about their perceptions of the child complainant: how well the child understood the questions asked by the crown prosecutor and the defence lawyer, the child's confidence in answering the lawyers' questions, the consistency of the child's testimony, and how convincing the child's testimony was. They were also asked to rate how stressed they thought the child appeared to be during their testimony.

#### Child complainants' understanding and confidence in answering questions

Table 4 shows the jurors' perceptions of how the child complainants responded to the questioning by the crown prosecutor and the defence lawyer. As outlined earlier, a pre-recorded video or audio statement was played to the court as part of the children's evidence-in-chief in 22 of the 25 trials, but crown prosecutors generally ask complainants some additional questions via CCTV both after the tape is presented and during re-examination. The number of questions asked by the crown prosecutor is generally less than that asked by the defence lawyer during cross-examination.

As Table 4 shows, the majority of jurors perceived that the child complainants in these trials understood the questions asked of them by both the prosecution

**Table 4: Jurors' perceptions of child complainants' understanding of questions asked by the crown prosecutor and the defence lawyer**

<i>Child's understanding of questions asked</i>	<i>Crown Prosecutor</i>		<i>Defence lawyer</i>	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
Did not understand questions at all	3	1.1	9	3.3
Understood questions a bit	36	13.1	73	26.6
Understood questions fairly well	187	68.0	170	62.0
Understood questions extremely well	49	17.8	22	8.0
<b>Total</b>	<b>275</b>	<b>100.0</b>	<b>274</b>	<b>100.0</b>
Jury level mean rating (SD)	3.02 (0.35)		2.74 (0.43)	

Note: Totals do not add to 277 because some jurors did not answer the question.

**Table 5: Jurors' perceptions of child complainants' confidence in answering questions asked by the crown prosecutor and the defence lawyer**

<i>Child's confidence in answering questions asked</i>	<i>Crown Prosecutor</i>		<i>Defence lawyer</i>	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
Not at all confident	17	6.2	40	14.6
Fairly confident	128	46.6	146	53.5
Very confident	106	38.5	80	29.3
Extremely confident	24	8.7	7	2.6
<b>Total</b>	<b>275</b>	<b>100.0</b>	<b>273</b>	<b>100.0</b>
Jury level mean rating (SD)	2.49 (0.39)		2.19 (0.46)	

Note: Totals do not add to 277 because some jurors did not answer the question.

and defence lawyers. Male and female jurors did not differ in their ratings. Mean juror ratings of the child's understanding of the questions asked were also significantly correlated with the child's age: the older the child complainant, the better their perceived level of understanding of the prosecutors' questions ( $r = 0.51$ ,  $n = 25$ ,  $p = 0.01$ ) but not the defence lawyers' questions ( $r = 0.28$ ,  $n = 25$ ,  $p = 0.18$ ).

Jurors also perceived the questions asked by defence lawyers to be less well understood by the child complainants than those asked by crown prosecutors. As Table 4 shows, at least seven in ten jurors perceived that the child complainants understood either 'fairly well' or 'extremely well' the questions asked by both the crown prosecutors (236, 85.8%) and the defence lawyers (192, 70.1%). However, twice as many

jurors believed that the child had difficulty with the questions asked by the defence lawyer. Three in ten (82, 29.9%) jurors rated the child's understanding of the defence lawyers' questions as poor ('understood the questions a bit' or 'did not understand the questions at all') compared with only 14.2 per cent for prosecutors. The significance of these differences were confirmed by analyses of their mean ratings at the jury level ( $t = 5.8$ ,  $df = 24$ ,  $p < 0.001$ ). This is consistent with the observation of the trials in the related evaluation study<sup>10</sup> (Cashmore & Trimboli 2005) and with the findings from a number of other studies (Brennan & Brennan 1988; Cashmore with de Haas 1992; Sas et al. 1991; Saywitz & Nathanson 1993).

Jurors' comments also highlighted the different questioning styles of the prosecutors and defence lawyers. Only

15 jurors, from eight trials, commented that the defence lawyers asked age-appropriate questions. In response to the question about how fairly the prosecutors and the defence lawyers treated the child complainants (see page 10), 35 jurors in just over half the trials (15, 60.0%) made specific comments about the inappropriateness of the questions asked by the defence lawyers. They referred to the questions being ambiguous, repetitive, confusing (intentionally so, in some cases), and too difficult for children of that age or mental ability; only two jurors, from the same jury, made similar comments about the prosecutors' questions.

Table 5 shows the jurors' perceptions of the degree of confidence with which child complainants answered the questions asked by both the prosecution and defence lawyers.

As Table 5 shows, most jurors perceived that the child complainants were either 'fairly confident', 'very confident' or 'extremely confident' in answering the

#### **Jurors' positive and negative comments regarding the questions that defence lawyers asked child complainants**

- [The defence lawyer was] very good at talking to the child at her own level. Questioning technique was sound and appropriate.
- Same as for the prosecutor; she [defence lawyer] was conscious of the child's age and structured their questions to help understanding. Gave time for answers.
- Defence lawyer was unprepared to deal with the child's intellectual problems and therefore questions were too hard and confusing.
- Treated her like an adult, was obviously trying to confuse her.
- Questions were too long; involved double negatives, so when the child answered 'yes', the next question from the defence was 'well was that "yes" to "this" or "that"?'.

questions asked by both the crown prosecutors (258, 93.8%) and by the defence lawyers (233, 85.3%). However, the children were rated as being significantly more confident with the prosecutors' questions than with the defence lawyers' questions ( $t = 4.5$ ,  $df = 24$ ,  $p < 0.001$ ).<sup>11</sup> This is consistent with the jurors' perceptions of how well the child complainants understood the questions asked by the prosecutors and the defence lawyers. Not surprisingly, children were perceived to be more confident in answering questions when they were rated as understanding them

better. The correlations between the mean jury ratings of how well children understood the questions and how confidently they answered them were significant for both prosecutors' questions ( $r = 0.72$ ,  $n = 25$ ,  $p < 0.001$ ) and for defence lawyers' questions ( $r = 0.55$ ,  $n = 25$ ,  $p = 0.005$ ). It should be noted, however, that children's pre-recorded audio or video statements were played in 22 trials so, at least in these trials, prosecutors may have asked fewer questions than defence lawyers asked during cross-examination. There were no differences in the ratings of children's

perceived confidence associated with the jurors' gender or whether they had children under 16 years of age. However, compared with jurors with lower educational qualifications, jurors with more qualifications rated children as having understood the prosecutors' questions better ( $p = 0.04$ ) and as having more confidence in answering them ( $p = 0.04$ ).

Table 6 shows the jurors' perceptions of the child complainants' stress level while being questioned by the crown prosecutor and the defence lawyer.

As Table 6 shows, half of the jurors (139, 50.7%) perceived that the children were 'not at all stressed' during questioning by the crown prosecutor compared with fewer than one in three (81, 29.6%) in relation to cross-examination.

Further analyses indicated that the mean jury ratings of children's perceived stress were significantly higher during cross-examination than during questioning by the prosecutor ( $t = -5.4$ ,  $df = 24$ ,  $p < 0.001$ ). About half the jurors (53.5%) indicated that the child complainants were less stressed than they expected them to be. However, there was no association between the age of the child and how stressed the jurors perceived them to be compared with their expectations.

### Consistency and credibility of child complainants

Jurors were asked two general questions about the perceived consistency and credibility of the child complainants. Their ratings are presented in Table 7.

As Table 7 shows, about a third of the jurors perceived that the children's testimony was either 'very' or 'extremely' consistent (85, 31.0%) and 'very' or 'extremely' convincing (94, 34.8%). More than 40 per cent of jurors thought that the children's testimony was 'fairly' consistent (130, 47.4%) and 'fairly' convincing (115, 42.6%). One in five jurors indicated that, in their view, the child's testimony was 'not at all consistent' (59, 21.5%) and 'not at all convincing' (61, 22.6%).

**Table 6: Jurors' perceptions of child complainants' stress level while being questioned by the crown prosecutor and the defence lawyer**

Child's stress level during questioning	Crown Prosecutor		Defence lawyer	
	N	%	N	%
Not at all stressed	139	50.7	81	29.6
Fairly stressed	116	42.3	133	48.5
Very stressed	17	6.2	50	18.3
Extremely stressed	2	0.7	10	3.6
<b>Total</b>	<b>274</b>	<b>100.0</b>	<b>274</b>	<b>100.0</b>
Jury level mean rating (SD)	1.56 (0.35)		1.96 (0.49)	

Note: Totals do not add to 277 because some jurors did not answer the question.

**Table 7: Jurors' perception of the consistency and credibility of child complainants' testimony**

How consistent was child's testimony	N	%
Not at all consistent	59	21.5
Fairly consistent	130	47.4
Very consistent	73	26.6
Extremely consistent	12	4.4
<b>Total</b>	<b>274</b>	<b>100.0</b>
Jury level mean rating (SD)	2.12 (0.58)	
How convincing was child's testimony	N	%
Not at all convincing	61	22.6
Fairly convincing	115	42.6
Very convincing	72	26.7
Extremely convincing	22	8.1
<b>Total</b>	<b>270</b>	<b>100.0</b>
Jury level mean rating (SD)	2.19 (0.69)	

Note: Totals do not add to 277 because some jurors did not answer the question.



Few characteristics of the jurors or the child complainants were associated with the child's perceived consistency or credibility. After taking into account the non-independence of the ratings at the juror level, there was no significant association between either the child's perceived consistency or credibility and the jurors' age, gender, educational level or whether they had children under the age of 16 years. Also there were no significant correlations or associations between either the child's perceived consistency or credibility and the child's age at the time of the trial or at the time of the offence.

Mean jury ratings of the consistency and credibility of the child's testimony were highly correlated ( $r = 0.92$ ,  $n = 25$ ,  $p < 0.001$ ). Thus, the more consistent children's testimony were seen to be by the jurors, the more credible their testimony was perceived to be. Credibility was also strongly correlated with the child's perceived confidence in answering both the crown prosecutor's questions ( $r = 0.54$ ,  $n = 25$ ,  $p = 0.005$ ) and the defence lawyer's questions ( $r = 0.83$ ,  $n = 25$ ,  $p < 0.01$ ) using the jury-level mean ratings. There was, however, little relationship between children's perceived stress either during evidence-in-chief or cross-examination and their perceived credibility or consistency. Weaker, though significant, associations were found between the jurors' perception of the children's stress level (compared to the jurors' expectation of that stress level) and how consistent ( $r = 0.42$ ,  $n = 25$ ,  $p = 0.04$ ) and how convincing ( $r = 0.40$ ,  $n = 25$ ,  $p = 0.05$ ) the children's testimony was.

Jurors' comments explaining why they thought the child's testimony was or was not convincing also highlighted the importance of perceived consistency. More than half (92, 56.4%) of the 163 jurors who answered this question referred to the perceived consistency or inconsistency of the child's testimony. The following comments are typical of the references to consistency and detail:

- Internally consistent evidence with a degree of detail that rang very true. Words and actions highly credible.

- One week after the crime he made the accusation, and this remained consistent up until now, almost 18 months later. He did not change the core of the allegation.
- She remained consistent on the key issues though there was some variation on other issues which could be explained by the time lapse between the initial evidence and later examination.
- The way she described certain events right throughout are consistent, even certain experiences and feelings that only a person could have experienced, not something she could have heard.

Several exceptions to this pattern stood out where jurors indicated they expected some inconsistency in a child's account, especially in relation to the detail. For example:

- The testimony was inconsistent in detail but convincing in generality – perhaps what you might expect of a child.

In contrast, the following comments made by jurors to explain their rating of the child's testimony as 'not at all convincing' focussed on inconsistency and lack of detail, referring to clothing, times and dates:

- There was a lot of inconsistencies between initial interview and evidence provided in court. She seemed convincing to some extent but fell down on the inconsistencies of fact.
- The child made inconsistent statements and was extremely vague.
- It was all over the place. Other witnesses claimed completely the opposite to what she alleged.
- She could not remember a lot of things – dates, clothing.

Other jurors focussed more on the child's demeanour and body language

and the child's perceived honesty and truthfulness, or their motive to lie:

- Honesty, body language, reliability; she came across quite well and truthful.
- Her voice volume, hand gestures, body language all helped greatly in deciding whether her testimony is to be trusted or not.
- It was apparent that he had been taught/instructed on what to say by a family member. Some answers were spontaneous, others weren't.
- I believe that the child was lying 100 per cent through the interview. Too many holes in her testimony.

Some also commented that the child was not as upset as they would have expected or that it is difficult to believe a child. For example:

- The incident facts were convincing but it is difficult to believe a child.

### Factors associated with the verdict

Table 8 shows the mean ratings of the jury for the consistency of the children's testimony and the degree to which it was convincing or credible, by verdict.

As Table 8 shows, both the perceived consistency and credibility of the child complainant were significantly associated with the verdict. Juries which returned a guilty verdict on some or all charges rated the child complainant as significantly more consistent and more credible than those which acquitted the defendant.

There was no significant association between the verdict and the perceived stress level of the child complainants during questioning by either lawyer.

**Table 8: Mean jury ratings for consistency and credibility of child complainants' testimony by verdict**

Verdict	Consistency		Credibility	
	Mean	SD	Mean	SD
Guilty on all charges ( $n = 5$ )	2.80	0.40	3.14	0.14
Guilty on some charges ( $n = 6$ )	2.49	0.42	2.55	0.61
Not guilty on all charges ( $n = 14$ )	1.72	0.31	1.70	0.28
$F(2, 22)$	21.0	$p < 0.001$	32.0	$p < 0.001$

Note: Ratings were on two separate scales from 1 ('not at all consistent / convincing') to 4 ('extremely consistent / convincing').

**Table 9: Jurors' perception of how fairly child complainants were treated by the judge, crown prosecutor and defence lawyer**

How fairly complainant was treated	Judge		Crown Prosecutor		Defence Lawyer	
	N	%	N	%	N	%
Very unfairly	2	0.7	1	0.4	4	1.5
Quite unfairly	—	—	5	1.8	31	11.4
Quite fairly	39	14.1	109	39.8	144	53.1
Very fairly	235	85.1	159	58.0	92	33.9
<b>Total</b>	<b>276</b>	<b>100.0</b>	<b>274</b>	<b>100.0</b>	<b>271</b>	<b>100.0</b>
Jury level mean rating (SD)	3.84 (0.15)		3.55 (0.21)		3.20 (0.27)	

Note: Totals do not add to 277 because some jurors did not answer the question.

#### How fairly do you think the child was treated by the judge?

- The judge explained everything that was going on, spoke gently and was patient.
- The judge seemed very fair, he stopped the defence lawyers when they were being confusing or too hard on the victim.
- Judge took the time to explain the law to the child and the purpose of the process.
- Judge allowed child to have breaks whenever required and explained the action/question in easy-to-understand language and terms.

#### How fairly do you think the child was treated by the crown prosecutor?

- The prosecutor's demeanour was caring and considerate. He spoke gently and explained his reasons for asking certain questions.
- He was very patient with her. He spoke clearly, and did not interrupt her train of thought until it was clear that she had lost that train of thought and then he re-directed her to think through the question.
- Prosecutor was gentle and her tone of voice was very appropriate, as was her language.
- His questions were clear, she could understand everything. He didn't go on and on about matters that she couldn't remember.

### FAIRNESS OF THE COURT'S TREATMENT OF CHILD COMPLAINANTS

Table 9 shows jurors' perceptions of how fairly the child complainants were treated by the judge, the crown prosecutor and the defence lawyer.

As Table 9 shows, the vast majority of jurors perceived that the child complainants were treated fairly by the judges and the prosecution and defence lawyers. However, judges were seen as 'very fair' (235, 85.1%) more frequently than either crown prosecutors (159, 58.0%) or defence lawyers (92, 33.9%). At the jury level, judges were perceived as significantly fairer than both prosecutors ( $t = 7.2$ ,  $df = 24$ ,  $p < 0.001$ ) and defence lawyers ( $t = 11.0$ ,  $df = 24$ ,  $p < 0.001$ ). Prosecutors were also perceived as significantly fairer than defence lawyers ( $t = 8.0$ ,  $df = 24$ ,  $p < 0.001$ ). The overall mean ratings by jury for the perceived fairness of these three main courtroom players did not differ by verdict; the age of the child complainant; or by the jurors' gender, highest educational level or having a child under 16 years of age.

The main reason jurors gave for saying that the judge treated the child complainant fairly was that he<sup>12</sup> was 'supportive', 'considerate', 'polite', 'patient', or 'sensitive' to the child's needs. One of these descriptors was

given by 67.5 per cent of the 160 jurors who answered this question. The other reasons cited were that the judge was sensitive to the child in terms of rewording or clarifying the questions or explaining the procedures in 'plain English' (53.8%) and giving the child breaks (20.0%). The jurors referred to the crown prosecutors in similar terms (e.g. 'patient' and 'considerate'), as using plain English or age-appropriate language (23.4%) and explaining the procedures and clarifying the questions (17.1%). Some jurors also noted that both the judge and the prosecutor gave the child time to answer the questions, and that the judge stopped the defence lawyer from harassing or upsetting the child. A few jurors (5, 1.8%) including two from one jury, however, believed that some prosecutors treated the children unfairly, stating that they asked complicated questions or did not have good rapport with the child.

As Table 9 shows, the majority of jurors (236, 87.1%) also perceived that the defence lawyers treated the child complainants either 'very fairly' (92, 33.9%) or 'quite fairly' (144, 53.1%). But fewer jurors ( $n = 25$ ) used terms such as 'patient', 'respectful' or 'sensitive' to describe the defence lawyers compared with their comments regarding judges ( $n = 108$ ) and prosecuting lawyers ( $n = 79$ ). Those who made positive comments regarding defence lawyers referred to the 'appropriateness' of their behaviour (57.1% of the 133 jurors who answered this question) and the fact they were doing their job (4.5%), asking the 'difficult questions' firmly but not unfairly. As with judges and prosecuting lawyers, some jurors also commented positively, but less frequently, on defence lawyers who used age-appropriate language (11.3%), reworded or clarified their questions or explained procedures to the child (8.3%), or gave the child time to answer questions (4.5%).

While only 12.9 per cent of jurors rated defence lawyers as either 'very unfair' (4, 1.5%) or 'quite unfair' (31, 11.4%) in their treatment of child complainants,

### How fairly do you think the child was treated by the defence lawyer?

- I believe the defence was fair, asked relevant questions, was patient and allowed plenty of time for answers.
- The lawyer was never aggressive or sarcastic; he showed a lot of patience with the audio problems. He used a moderate tone of voice.
- The defence has a right to thoroughly test the child's evidence, so at times it might have seemed unfair to speak to a child forcefully – but the defence was careful not to push her too hard.
- The defence lawyer was tough but he had to be. A hard part of the defence lawyer's job.
- The defence lawyer tried to confuse the child at times, but this was always in line with his defence strategy; this was not unexpected.
- Very onerous examination. While understanding the defence lawyer is protecting his client, the process used was very close to entrapment which is not suitable for a young child. Further, the examination was too long.
- Made me think she was the guilty one.
- The defence lawyer was fairly accusatory and fierce.
- She was accused of lying more than once.
- He intentionally harassed her.

one in five (54, 40.6% of those who gave reasons) commented that the defence lawyers were inappropriate in either their language or their behaviour towards the child complainants, although this was expected by some jurors. Their language was seen as inappropriate because it was confusing, ambiguous, repetitive, or not appropriate to the child's age or intellectual capacity.<sup>13</sup> Their behaviour was judged to be inappropriate or unfair because they were seen to be 'aggressive', 'rude', 'gruff' or 'intimidating' towards the child, or because they badgered or upset the child or accused the child of lying.

### How fairly do you think the defendant was treated in court?

- He was treated with respect. Same as everyone else in court.
- He was innocent until proven guilty. He was treated with the utmost respect by both attorneys and the judge.
- The judge took every opportunity to stress that the burden of proof was solely the Crown's. The judge went to some length to outline irrelevant relationship evidence.
- Questions that may influence/lead to a guilty verdict were rejected by the judge. The judge was constantly reminding [us of the] rules, rights of accused.

## FAIRNESS OF COURT'S TREATMENT OF DEFENDANTS

Nearly all the jurors (267, 97.4%) perceived that the defendants were treated either 'very fairly' (164, 59.9%) or 'quite fairly' (103, 37.6%) in court. The most frequent reason was the view that the defendants were treated with respect and courtesy, in line with the presumption that they were 'innocent until proven guilty'. This reason was given by 78.0 per cent of the 82 jurors who gave reasons for their perception of the defendants' treatment in court. A number of jurors commented on the importance which the judge placed on the rights of the defendant to a fair trial, including the right to silence and the presumption of innocence. Neither the gender, the age nor the educational level of the jurors was associated with any differences in their perceptions of how fairly the defendants were treated in court.

## JURY WARNINGS

Jurors were asked which warnings the judge had given them and whether those warnings had assisted them in their deliberations. Three warnings were most commonly recalled:

- 1) that the decision should be based only on the evidence presented in court and discussed in the jury room;

- 2) that prejudice and emotion (sympathy) should be put aside, with the decision being based on the accuracy and consistency of the evidence and the reliability of the witnesses; and,
- 3) that the accused is innocent until proven guilty 'beyond reasonable doubt'.

Some examples of the warnings recalled by jurors include:

- The judge told us to consider all the evidence carefully, look for consistency, details and plausibility.
- To decide our verdict on evidence only and ignore feelings and emotions which may influence our decision.

Some jurors indicated some confusion about these warnings and seemed to have misinterpreted some warnings. For example:

- That we have to prove beyond reasonable doubt that the decisions we made are based on the evidence alone that the accused is guilty or not.

Other warnings that were recalled by some jurors and that are more specific to child sexual assault matters included the need to carefully scrutinise the evidence of a child, and the danger of convicting on the evidence of a single witness or where there was considerable delay in the matter being reported and coming before the court. The following comments were typical:

- He warned extensively against the child's testimony – too much so I thought it was clear that he didn't think that the accused was guilty. [Not guilty verdict]
- It is dangerous to convict on the complainant's testimony alone. [Not guilty verdict]
- How long it took for trial to come to court. The age of the child. [Not guilty verdict]
- About the lack of specific dates for the accused to defend. [Not guilty verdict]
- It is dangerous to decide based on recollection, but it can be done. [Guilty verdict]

These types of warnings were reported by jurors in 12 separate trials, ten of which resulted in not guilty verdicts.



Most jurors (87.4%) said the warnings had assisted them, but several were critical of the summing up by one judge for being 'way, way too long' and taking most of the day.

### JURORS' UNDERSTANDING OF TRIAL OUTCOME

The first question the jurors were asked in the survey, immediately after the verdict had been delivered, was, 'What was the verdict in this case?'<sup>14</sup> It is possible that, in answering this question, jurors were expressing their own private views about what they believed that the verdict should have been. However, it seems that some jurors were confused, unclear or uncertain about the verdict. In only six (24.0%) trials did all the participating jurors report the same verdict – and one which was correct, based on the outcome recorded on the Case Tracking System, the records management system used by the District Court and maintained by the NSW Attorney-General's Department.

In six (24.0%) trials, at least one juror (and in one of these trials, four jurors), indicated that the accused had been found guilty on all or at least one charge whereas the actual outcome (according to the Case Tracking System) was 'not guilty' on all charges. In one (4.0%) trial, the ten participating jurors reported three different versions of the verdict: seven indicated that it was a hung jury, one reported that it was 'not guilty on some charges, could not agree on others', one that it was 'guilty on some charges, not guilty on others' and the tenth juror did not respond to the question; the actual verdict in this case (according to the Case Tracking System database) was 'not guilty on each charge'. A juror in each of two trials reported that the accused was found 'guilty on some charges and not guilty on others' whereas the actual verdict was that the accused was found guilty on each charge.

In a further ten (40.0%) trials, at least one juror (and in four of these trials, between two and four jurors) indicated that the outcome was 'not guilty by direction of

the judge' when the actual outcome was 'not guilty' by jury verdict. In a number of these trials, the jurors recalled warnings from the judge in terms of the 'dangers of inference and supposition', and 'the need to set aside their emotions and sympathy for the complainant'. In one case, a juror commented on the 'extensive warning' by the judge 'against the child's testimony'. The outcome for the accused in these trials was the same – not guilty. However, the discrepant views of some jurors as to the process by which the outcome was reached, together with some jurors' comments about judicial warnings, suggest that warnings such as it is 'dangerous to convict' may be interpreted by some jurors as a direction by the judge to acquit. As Justice Wood CJ at CL noted in *R v BWT* (2002):

... any direction, framed in terms of it being 'dangerous or unsafe' to convict, risks being perceived as a not too subtle encouragement by the trial judge to acquit, whereas what in truth the jury is being asked to do is to scrutinize the evidence with great care.<sup>15</sup>

### POSITIVE AND NEGATIVE ASPECTS OF BEING A JUROR ON THIS CASE

Jurors were asked about the positive and negative aspects of being a juror on the sexual assault trial. These were open-ended questions and jurors could make as many comments as they wished. Of the 277 jurors who participated in the survey, 177 (63.9%) made favourable comments about their experience (a further 13, 4.7%, said there were no positive aspects); and 180 (65.0%) jurors made negative comments (a further 15, 5.4%, reported that there were no negative aspects).<sup>16</sup> Their positive comments referred to learning how the legal system operates (33.3% of those making favourable comments), seeing justice done and 'making the right decision' (19.2%), and 'making a positive contribution/doing a community service' (18.1%). The interpersonal and interactive process involved in reaching a verdict was also seen positively by a number of

jurors (20.3%). Some of the comments made by jurors include the following:

- To see how court and jury work. To be a member of a jury – good mix of people where everyone contributed, without which I could not have come to my decision.
- Working with people of different backgrounds, feeling we contributed positively in the community.
- This two-week trial was a great strain but I am glad to have seen 12 people work so well to reach a fair verdict.
- Working through a difficult and sometimes uneasy process to deliver a verdict that we unanimously believe to be the right result.

The responsibility for making a decision based on uncertain evidence and the stressful, unpleasant or emotional nature of the subject matter were the issues jurors mentioned most frequently as negative aspects of their experience (57.2% of jurors reporting unfavourable aspects). Other jurors referred to their general frustration with the legal and decision-making processes, including criticism of inadequate prosecution evidence or a poor Crown case (22.2%), the 'completeness' of the evidence they were allowed to hear, and questioning of the need for a unanimous decision (15.6%). Some jurors were also critical of the facilities and conditions (11.7%); the disruption to their daily life, time away from work or studies and loss of wages (10.6%); and the amount of time that was wasted (14.4%). The latter included 'judges' summations that were far too long', 'too many short breaks', 'waiting around' (e.g. waiting when legal points were being debated or the proper equipment was not available) and 'late starting and early finishing times'.

Examples of the comments made by jurors include the following:

- The type of case, to talk freely with 11 perfect strangers with different methods of reaching conclusions. And such sordid and colourful language. That life's own experiences could not equip you on how to approach and understand such charges and deal with these.
- The stress of the trial due to the subject matter, disruption to daily life, work and family commitments, and all the waiting.



The fact that it was a day-to-day process therefore difficult to plan ahead.

- Not being able to ask very important questions that could eliminate the reasonable doubt, which the Crown had not asked, to nail the case.
- Not enough evidence, felt we needed more evidence. All jurors were not satisfied of total innocence of defendant, but not enough evidence to prove guilt.
- Not understanding the way to use inference with evidence – what was not evident and therefore open to negative inference. The doubts – not being able to satisfy some questions, due to law.

## SUMMARY AND CONCLUSIONS

### REACTIONS TO THE TECHNOLOGY

Like the jurors in a Western Australian study (O'Grady 1996), in general, the jurors in this study understood and accepted the reasons why the children's evidence was presented via CCTV and via video-taped interviews recorded with the child during the investigation of the matter. Most jurors said the use of CCTV was fair to both the child complainant and the defendant, and that the taped interview was helpful in giving them the opportunity to observe the child, providing a 'first-hand account' closer to the time the alleged offence(s) occurred. Problems with the technology, however, were distracting and hindered the capacity of nearly a third of the jurors to see and/or hear the child on the pre-recorded statement. Fewer but still a sizeable minority of jurors involved in over half the juries also reported problems with the image and/or sound for CCTV. This is consistent with the findings of the earlier report on the evaluation (Cashmore & Trimboli 2005) in which the researchers observed a number of trials, including 12 of those involved in this study.

It was not possible to compare the perceptions of jurors in trials where child complainants did and did not use CCTV. This is because all children in the study trials testified via CCTV; if it is available, CCTV is now the presumed means by

which children testify. Also, for most of the child complainants, a pre-recorded investigatory interview comprised much of their evidence-in-chief.

### FACTORS ASSOCIATED WITH WITNESS CREDIBILITY AND THE OUTCOME

A key issue in research involving child complainants is the extent to which they are seen by the fact-finder (in this case, the jurors) as reliable and credible witnesses. The findings of the present study concerning jurors' perceptions of the child complainants were consistent with the findings of other studies in terms of a number of factors that predict witness credibility and the trial outcome. However, the current findings also differed in some crucial ways from previous findings.

The first set of factors predicting witness credibility relates to various demographic characteristics of the jurors. One of the most consistent findings in the existing research is that female jurors hearing sexual assault and child sexual assault trials are more likely than male jurors to see the complainant as a credible witness. Male jurors are more sceptical and more inclined to believe some of the 'myths' associated with sexual assault (Bottoms & Goodman 1994; Golding, Sanchez & Sego 1999; McCauley & Parker 2001; Morison & Greene 1992; Orcutt et al. 2001; Quas et al. 2002; Quas, Thompson & Clarke-Stewart 2005; Ross et al. 1994; Schutte & Hosch 1997; Taylor & Joudo 2005). In this study, however, there were no significant differences between male and female jurors in their perceptions of the child's confidence, consistency or credibility. It is not clear why these results are different from those of other studies in this respect. In addition, in this study, there were no differences between male and female jurors in their views about how the child or the accused was treated in court, or in their perception of the child's level of understanding of the questions asked by the lawyers.

The second set of factors predicting witness credibility or the outcome of the

case includes various characteristics of the child complainant, including their age, gender, perceived confidence, stress and consistency. A number of studies have found that the age of the child complainant is a significant factor in juror perceptions of witness credibility but the findings have been mixed. Some studies have found that younger children are more credible than older children and adults (Bottoms & Goodman 1992; Duggan et al. 1989; Goodman et al. 1989; Nightingale 1993). Other studies, mostly earlier studies with mock trial transcripts or scenarios, have reported the reverse – that older children are more credible than younger children (Goodman et al. 1984; Goodman et al. 1987; Leippe & Romanczyk 1987, 1989; Ross, Miller & Moran 1987). Still other studies have reported no association between the child's age and the jurors' perception of credibility (McCauley & Parker 2001), and this was also the case in the current study although some jurors made comments indicating that they believed that young children would not have been able to describe their feelings and the related events in their own words without having experienced them. For example, one juror's reason for indicating that the child was very credible was that: 'being six years old, there were things he said that would have been impossible to believe if he had not experienced them'. Younger children were also perceived to be less able to understand the questions asked by prosecutors.

Other jurors in this study focussed on children's ability or inability to cite times and dates and other details as evidence of the extent to which they were convincing. However, research indicates that children's inability to remember specific details of events does not indicate that their testimony is unreliable. A body of research on children's memory indicates that children are more likely to be able to recall and recount central or distinctive aspects of stressful events rather than the peripheral details. This is particularly the case when these events are repeated over time, and when

children are required to recount them in stressful circumstances (Brady et al. 1999; Peterson & Bell 1996; Powell et al. 1999). Aspects of events which children notice and remember may, however, be different from what adult questioners and fact-finders define as necessary or important details (Brady et al. 1999). Hence, it seems that children may be both 'under-believed' and 'over-believed' (Leippe, Manion & Romanczyk 1993; Quas et al. 2005). But it is important to note that, in this study, the verdict did not vary with the age of the children.

Two further characteristics that have consistently been found to predict witness credibility – their perceived confidence level and consistency – were also significant predictors of the credibility of child complainants in the current study (Berman, Narby & Cutler 1995; Brewer & Burke 2002; Goodman et al. 1998). The more confident and consistent children appeared to the jurors, the more convincing or credible the jurors perceived their testimony to be. Consistency and credibility were very strongly correlated, and jurors' comments highlighted the importance of consistency in their perceptions about credibility. There was also a clear relationship between both consistency and credibility and the verdict; juries which delivered a guilty verdict on all or some charges rated the child complainant as significantly more consistent and as more convincing than those that delivered a not guilty verdict. Again, this is consistent with the findings of a number of other studies (Goodman et al. 1987; Taylor & Joudo 2005; Tobey et al. 1995). However, the empirical research evidence on children's memory and narratives indicates that the emphasis on consistency may be misplaced. A body of research has found that children's memory for the 'gist' of events, but not the details, tends to be long-standing and reliable. As Quas, Thompson and Clarke-Stewart (2005, p. 443) point out, 'children's true reports often contain inconsistencies' and inconsistencies in children's accounts of sexual abuse do not indicate that their

claims are false (Fivush & Schwarzmüller 1995; Fivush, Peterson & Schwarzmüller 2002). There is, however, a widespread belief among legal professionals, and among potential and actual jurors, that consistency is an important indicator of accuracy or reliability (Devine et al. 2000; Spencer & Flin 1993). This underlines defence strategies to discredit the credibility of witnesses by highlighting both the inconsistencies in their testimony and their inability to remember particular details of events that may have occurred some years before and been repeated over long periods of time (Brewer & Burke 2002; Conte et al. 1991).

In the current study, no association was found between the verdict and the perceived stress level of child complainants during questioning by either the prosecutor or the defence lawyer. This is encouraging given that some of the main aims of using CCTV and implementing the procedures in the Specialist Jurisdiction are to reduce the child complainants' anxiety and distress, and to increase the reliability of their evidence. Furthermore, there is some empirical evidence (Davies 1999; McAuliff & Kovera 2002; Goodman et al. 1998) that CCTV does in fact reduce the children's stress level and increases the reliability of their evidence.

#### PERCEIVED FAIRNESS OF THE PROCESS

Like child complainants themselves in the related evaluation study (Cashmore & Trimboli 2005) and in a number of other studies (Cashmore 1995; Eastwood & Patton 2002; O'Grady 1996; Sas et al. 1991; Saywitz & Nathanson 1993), jurors rated children's treatment by defence lawyers as significantly less fair than their treatment by either the judges or the prosecutors. Some defence lawyers were seen as using inappropriate and confusing language and as behaving in an aggressive, rude or intimidating manner. Jurors perceived that children had more difficulty with the questions asked by the defence lawyers during cross-examination

and were less confident and more stressed when answering these questions than with the prosecutors' questions. These results are consistent with the findings of the court observation study in the related evaluation (Cashmore & Trimboli 2005) and more broadly with the findings and persistent concerns expressed by a number of studies and inquiries about the effect of cross-examination on children's evidence (Carter, Bottoms & Levine 1996; Davies, Henderson & Seymour 1997; NSW Legislative Council Standing Committee on Law and Justice 2002; Queensland Law Reform Commission 1998, 2000; Victorian Law Reform Commission 2004; Walker 1993, 1999).

The court's treatment of the defendant was overwhelmingly perceived by jurors to be fair and respectful, and in line with the presumption of innocence until proven guilty.

#### LIMITATIONS OF THIS STUDY

The current study provides some insights into jurors' perceptions of both child complainants and on the use of CCTV and pre-recorded interviews in actual child sexual assault trials. About half the trials were also observed as part of the overall evaluation. This provided both a check on a number of the measures in the juror survey and a greater understanding of these particular trials and the processes involved. However, the variability in some of the jurors' responses was surprising, with some jurors on the same trial having quite disparate views on various measures, including the consistency and credibility of the child complainant's testimony, and even the verdict. An interview study would have allowed some of these issues to be explored in greater depth and a larger sample of trials would have provided more statistical power, particularly for the jury-level analyses. Nonetheless, a brief questionnaire completed immediately after the verdict was returned and with the encouragement of judicial officers yielded a high response rate over

most of the 25 trials. It appears from their responses, that these jurors took seriously not only their role as jurors, but also their participation in this study. Their concerns about being a juror, and the perceived benefits of serving on a jury and doing their civic duty, were very similar to those reported by jurors in other studies in Australia (Chesterman, Chan & Hampton 2001; Findlay 1994), New Zealand (New Zealand Law Commission 2001; Tinsley 2001), the UK (Matthews, Hancock & Briggs 2005) and the USA (Bornstein et al. 2005).<sup>17</sup>

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## NOTES

- 1) As Schmidt and Brigham (1996) point out, under-graduate students in US universities may not be representative of the jury-eligible population and their responses may or may not be similar to those of jurors in actual cases in Australia.

Although Bornstein (1999) concluded, on the basis of his review of the research using mock jurors and different modes of trial presentation, that there were few differences between students and other mock jurors, there is little research with actual jurors.

- 2) The sample size in this study was quite small (109 jurors on 13 trials where CCTV was used and 29 on 4 trials where removable screens were used).
- 3) Several earlier studies also found no significant differences in the verdict (as well as no differences in perceived credibility) associated with the type of presentation of the child witness's evidence (CCTV, in open court, or by video). However, these studies had the disadvantage of presenting all three presentation types via video to the mock jurors (Miller 1976; Ross et al. 1994; Swim, Borgida & McCoy 1993).
- 4) The NSW Attorney-General authorised the conduct of the juror survey, as required under s. 68A of the *Jury Act 1977*. Ethics approval for the evaluation, including the juror survey, was granted by the Human Research Ethics Committee of the University of NSW.

### **s. 68A Soliciting information from or harassing jurors or former jurors**

- (1) A person must not solicit information from, or harass, a juror or former juror for the purpose of obtaining information about:
  - (a) the deliberations of a jury, or
  - (b) how a juror, or the jury, formed any opinion or conclusion in relation to an issue arising in a trial or coronial inquest.
 Maximum penalty on indictment: imprisonment for 7 years.
- (2) The deliberations of a jury include statements made, opinions expressed, arguments advanced or votes cast by members of the jury in the course of their deliberations.
- (3) Subsection (1) does not prohibit a person from soliciting information from a juror or former juror in accordance

with an authority granted by the Attorney General for the conduct of a research project into matters relating to juries or jury service.

- 5) A potential problem with clustered data such as these, is that the "effective sample size" is smaller in magnitude than the actual sample size. This is due to individuals within each cluster (i.e. jury) giving similar responses to the outcomes of interest compared to those from other clusters. The degree to which the effective sample size is smaller than the actual sample size is referred to as the "design effect" (DEFF). As an example, a DEFF of 2.0 would mean that the effective sample size is only half the actual sample size, while a DEFF of 5.0 would mean the effective sample size is five times smaller. This has important implications for statistical significance testing and confidence interval estimation. Special statistical procedures therefore need to be applied. The table in Appendix 1 provides the DEFF for each outcome of interest. It also provides an adjusted 95 per cent confidence interval which incorporates each DEFF (using the STATA software package). These confidence intervals estimate the range of the point estimates (i.e. the percentage with the outcome of interest) which would arise on 95 per cent of occasions were the survey actually repeated a very large number of times.
- 6) Using the survey procedures in the STATA software package.
- 7) Joint Investigative Response Teams (JIRT) officers are specially trained Police Officers (NSW Police Service) and Child Protection Caseworkers (Department of Community Services). They investigate reports of child sexual abuse, physical abuse or neglect of a child or young person when there is a possibility that the abuse/neglect constitutes a criminal offence. They undertake interviews



with the relevant children. These interviews are recorded either by video-recording, audio-recording or as a written statement in the Joint Investigation Recording Book.

- 8) On average, in the 12 trials in this study which were observed by the researchers, the tape constituted about 75 per cent of the overall length of evidence-in-chief and ranged in length from 27 to 162 minutes (average length of 71 minutes).
- 9) Of the 161 jurors who answered this question.
- 10) Twelve trials in this study were observed by the researchers in the overall evaluation study.
- 11) Significance test was conducted at the jury level.
- 12) All the judges hearing the cases in this study were male.
- 13) See Text Box page 7 for quotes from jurors about the confusing nature of defence lawyers' questions.
- 14) Jurors were given the following options from which to select: guilty on all charges; guilty on some charges; not guilty on other charges; not guilty on each charge; not guilty on some charges, by direction from Judge; not guilty on all charges, by direction from Judge; other (please specify).
- 15) Justice Wood CJ at CL in *R v BWT* (2002) 54 NSWLR 241, 251.
- 16) Of the 277 jurors in this study, 87 (31.4%) did not answer the question regarding the positive aspects of being a juror on the sexual assault case and 82 (29.6%) did not answer the question regarding the negative aspects of being juror on the case. There were no significant differences associated with the juror's age, gender or whether they had children, and if so, the age of their children, on their likelihood of reporting positive or negative aspects of being a juror on the sexual assault trial.

- 17) Bornstein et al. (2005, pp. 335 – 336), for example, concluded that:

The greatest amounts of stress resulted from elements of the decision-making task itself (e.g. knowing what the verdict could mean for the parties involved — ... the “burden of justice”), trial complexity (e.g. comprehension difficulties), and disruption to jurors' daily routine.

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## APPENDIX 1

## 95 per cent confidence intervals for key outcome measures, taking account of the survey design effects

<i>Variable</i>	<i>Point Estimate</i>	<i>95% Confidence Interval</i>	<i>Design Effect (DEFF)</i>
<b>Use of pre-recorded statements in evidence-in-chief</b>			
% perceived tape was 'right length'	79.4	69.3 – 89.5	3.3
% stated tape helped 'a lot/quite a bit' in understanding evidence	84.0	78.1 – 89.9	1.4
<b>Use of CCTV</b>			
% stated judge explained why child gave evidence via CCTV	93.4	89.3 – 97.5	1.7
% perceived use of CCTV as 'quite fair/very fair' to child	90.3	86.1 – 94.4	1.2
% perceived use of CCTV by child as 'quite fair/very fair' to accused	88.0	83.8 – 92.3	1.1
<b>Jurors' perceptions of child's understanding of lawyers' questions</b>			
% perceived child understood prosecutors' questions 'a bit/not at all'	14.2	6.0 – 22.4	3.6
% perceived child understood defence lawyers' questions 'a bit/not at all'	29.9	17.6 – 42.2	4.6
<b>Jurors' perceptions of child's confidence in answering lawyers' questions</b>			
% perceived child 'fairly/very/extremely confident' in answering prosecutors' questions	93.8	88.9 – 98.7	2.6
% perceived child 'fairly/very/extremely confident' in answering defence lawyers' questions	85.3	76.3 – 94.4	4.2
<b>Jurors' perceptions of child's stress level during questioning</b>			
% perceived child 'not at all stressed' during evidence-in-chief	50.7	40.7 – 60.8	2.6
% perceived child 'not at all stressed' during cross-examination	29.6	19.8 – 39.4	2.9
<b>Jurors' perception of child's testimony</b>			
% perceived testimony 'very/extremely' consistent	31.0	17.4 – 44.7	5.6
% perceived testimony 'very/extremely' convincing	34.8	18.6 – 51.0	7.3
<b>Fairness of court's treatment of child complainants</b>			
% perceived judges as 'very fair'	85.1	79.9 – 90.3	1.4
% perceived crown prosecutors as 'very fair'	58.0	51.3 – 64.7	1.2
% perceived defence lawyers perceived as 'very fair'	33.9	26.7 – 41.1	1.5
<b>Fairness of court's treatment of defendants</b>			
% perceived defendant treated 'very/quite fairly'	97.4	95.4 – 99.5	1.1

## APPENDIX 2

## Socio-demographic characteristics of jurors

<b>Juror's Socio-Demographic Characteristic</b>		<b>N</b>	<b>%</b>
<b>Gender</b>	Male	137	54.2
	Female	116	45.8
	Total	253	100.0
<b>Age</b>	18 – 24	46	16.8
	25 – 34	51	18.7
	35 – 44	60	22.0
	45 – 54	58	21.2
	55 – 64	46	16.8
	65+	12	4.4
	Total	273	100.0
<b>Aboriginal or Torres Strait Islander</b>	Yes	1	0.4
	No	270	99.6
	Total	271	100.0
<b>Juror's Country of Birth</b>	Australia	195	74.4
	United Kingdom	19	7.3
	Other English-speaking countries	4	1.5
	Non-English speaking countries	44	16.8
	Total	262	100.0
<b>Country of birth of juror's mother</b>	Australia	155	62.5
	United Kingdom	30	12.1
	Other English-speaking countries	3	1.2
	Non-English speaking countries	60	24.2
	Total	248	100.0
<b>Country of birth of juror's father</b>	Australia	162	64.8
	United Kingdom	22	8.8
	Other English-speaking countries	5	2.0
	Non-English speaking countries	61	24.4
	Total	250	100.0
<b>Highest level of education attained</b>	Post-graduate degree	29	10.8
	Graduate diploma/certificate	22	8.2
	Bachelor degree	59	21.9
	Advanced diploma/certificate	35	13.0
	Certificate level	60	22.3
	Secondary education	62	23.0
	Pre-primary/primary education	2	0.8
	Total	269	100.0
<b>Current employment status</b>	Employed or self-employed	212	77.9
	Unemployed and seeking work	8	2.9
	Unemployed and not seeking work	4	1.5
	Retired	27	9.9
	Student	14	5.1
	Home duties	7	2.6
	Total	272	100.0
<b>Does juror have children?</b>	Yes	160	58.2
	No	115	41.8
	Total	275	100.0
	Children aged <5 years	23	14.4
	Children aged 6 – 10 years	29	18.1
	Children aged 11 – 15 years	44	27.5
	Children aged 16 – 17 years	17	10.6
	Children aged 18+ years	93	58.1 <sup>a</sup>

Note: Totals may not add to 277 because some jurors did not answer the question.

a Jurors may have children in one or more age categories, thus percentages do not add to 100.0 and are based on the 160 jurors who reported having children.