

# Evaluation of the Child Sexual Offence Evidence Pilot

## Process evaluation report

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Judy Cashmore, Ilan Katz, Rita Shackel and kylie valentine

**Research Team****Institute of Criminology, University of Sydney**

Judy Cashmore, Rita Shackel

**Social Policy Research Centre**

Ilan Katz and kylie valentine

For further information:

Name +61 2 9385 7800

**Social Policy Research Centre**

UNSW Arts & Social Sciences

UNSW Australia

UNSW Sydney NSW 2052 Australia

T +61 2 9385 7800

F +61 2 9385 7838

E [sprc@unsw.edu.au](mailto:sprc@unsw.edu.au)

W [www.sprc.unsw.edu.au](http://www.sprc.unsw.edu.au)

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# Abbreviations

<b>SPRC</b>	Social Policy Research Centre
<b>IMG</b>	Implementation and Monitoring Group
<b>JIRT</b>	Joint Investigative Response Team
<b>NSWPF</b>	NSW Police Force
<b>SACP</b>	Sexual Assault Communications Privilege

# Executive Summary

This is the first report of the evaluation of the Child Sexual Offence Evidence Pilot (the Pilot) in NSW. It sets out the findings of the process evaluation, which is intended to assess the barriers and facilitators to implementation of the Pilot, and whether the Pilot has been effective in introducing changes to support its objectives.

The Pilot has three major components. It introduces:

- measures to expand the use of pre-recorded evidence given by child victims;
- 'Children's Champions' (Witness Intermediaries), based on the UK Witness Intermediary Scheme; and
- provision for appointment of specialist District Court judges trained in management of child sexual assault matters.

The evaluation will assess the implementation and outcomes of the Pilot, which commenced on the 31<sup>st</sup> of March 2016 in Newcastle and Sydney and will run for three years under the administration of Victims Services (Department of Justice).

The findings for this report come from interviews, focus groups, and written feedback from Pilot stakeholders, including the District Court, NSW Police Force (NSWPF), the Office of the Director of Public Prosecutions, witness intermediaries, Family and Community Services, Legal Aid NSW, NSW Health, the NSW Bar Association, and the NSW Law Society.

The evaluation found that there is unanimous support for the objectives of the Pilot from stakeholders who participated in the process evaluation. Stakeholders also agree that the Pilot is being implemented in a way that is consistent with those objectives.

The role of witness intermediaries has been important in supporting the provision of evidence by child complainants and child witnesses. The skills and expertise of witness intermediaries is highly valued, and in turn witness intermediaries value the support and training they receive, and that they are treated with professional courtesy and respect.

Victims Services has been key to the success of the Pilot, including the support provided to intermediaries and managing the Implementation Monitoring Group (IMG). The IMG has been effective in refining and improving the Pilot from its inception.

Challenges to implementation include the resources required from defence and prosecution counsel, witness intermediaries, and the Courts.

Stakeholders expressed few concerns about the current implementation of the Pilot, but potential risks to its future expansion were identified. These will be a focus of the outcomes evaluation. Given this, we recommend that the outcomes evaluation is brought forward, and deliver its findings mid-2018.

# 1. Introduction

The Child Sexual Offence Evidence Pilot (the Pilot) represents a key initiative by the NSW Government to strengthen the criminal justice response to child sexual abuse. A body of research since the 1980s has consistently pointed to the difficulties child victims (complainants) experience as witnesses in the criminal justice processes and the negative impacts on both their capacity to give evidence and their wellbeing (NSW Ombudsman's Report Responding to Child Sexual Assault in Aboriginal Communities and the 2014 Report of the Joint Select Committee into Sentencing of Child Sexual Assault Offenders). The high rate of attrition of child sexual offence matters is at least partially attributable to processes which are not responsive to the needs of child complainants and which do not adequately support children through all stages of the criminal justice process from investigation through prosecution and trial to final deposition. This includes appropriate support to ensure that children are able to provide the best quality evidence.

The Pilot seeks to introduce measures to reduce the difficulties for child witnesses so as to lessen the stress and duration of court proceedings for the child victim without unfairly impinging upon the defendant's right to a fair trial. The reforms in NSW include the introduction of 'Children's Champions' (Witness Intermediaries), based on the UK Witness Intermediary Scheme, both in the investigative interview and at trial; the appointment of specialist District Court judges trained in management of child sexual assault matters; and expansion of the pre-recording of evidence given by child complainants to include cross-examination as well as the child's evidence-in-chief. *The Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* and its relevant regulations guide implementation of the reforms. The Pilot commenced in Newcastle and Sydney on 31 March 2016 and will run for three years under the administration of Victims Services (Department of Justice).

As of 31<sup>st</sup> March 2017, there had been 639 referrals to the Pilot from the NSW Police Force (NSWPF), of which 89% had been matched to witness intermediaries, and 61 Pilot matters in the Court, of which 99% had been matched. The breakdown of police referrals are indicated in Table 1.

**Table 1: Police referrals, by location**

Location	Total
Bankstown Child Abuse Squad	130
Chatswood CAS	93
Kogarah CAS	125
Newcastle CAS	290
Other Location	1
<b>Total CAS Referrals</b>	<b>639</b>
Total Matched	569
Total Unmatched	70
<b>Total Percentage Matched</b>	<b>89%</b>

Source: Victims Services data

A total of 59 pre-recorded evidence hearings took place between March 2016 and March 2017 (Table 2).

**Table 2: Court matters, by location**

<b>Downing Centre</b>	<b>Number</b>
DC Total matters	30
PRH completed (per complainant/witness)	27
Complainants	47
Witnesses	13
<b>Newcastle</b>	<b>Number</b>
NC Total matters	31
PRH completed (per complainant/witness)	32
Complainants	41
Witnesses	22

Source: Victims Services data

**Table 3: Trials completed and likely to be completed, by location**

<b>Downing Centre</b>	<b>Number</b>
Trials complete	13
Trials listed for 2017	14
Trials listed Jan-Mar 2018	12
<b>Newcastle</b>	<b>Number</b>
Trials complete	14
Trials listed for 2017	14
Trials listed Jan-Mar 2018	5

Source: Victims Services data

Across the NSWPF and Court matters, in the first 12 months of the pilot, there were a total of 762 complainants, of whom 91 were Aboriginal and/or Torres Strait Islander, and 66 from a culturally and linguistically diverse background.

The Social Policy Research Centre at UNSW Sydney, together with Professor Judy Cashmore and Associate Professor Rita Shackel from the University of Sydney Faculty of Law were commissioned to undertake a rigorous evaluation of the Pilot.

The evaluation of the Pilot has two components:

- A process evaluation, to assess the barriers and facilitating factors to successful implementation of the Pilot, and the implementation of different aspects including referral processes, legislative and regulatory instruments, procedural guidance, training and recruitment, and technology and facilities.
- An outcomes evaluation, which will assess the effectiveness of the Pilot in reducing the difficulties experienced by child victims in criminal proceedings. In particular the evaluation seeks to measure the Pilot's effectiveness in terms of: (i) minimising the duration of children's engagement with the court process; and (ii) facilitating the communication with child victims, and ensuring that the use of language by police officers during interviews and during examination-in-chief, cross-examination and re-examination processes at court is appropriate to the child's developmental stage and communication needs. The aim of reducing the stress for child witnesses and facilitating communication with them is to ensure the provision of the

child's best and most reliable evidence and to minimise the potential re-victimisation of the child.

This is the report of the process evaluation, intended to inform further implementation, and identify any refinements needed to the Pilot.

## 2. Methodology

The research design for the process evaluation involved focus group and interview consultations with staff from organisations responsible for implementing the Pilot, and those whose work is affected by the Pilot. Focus groups were held with members of the Pilot Implementation and Monitoring Group (IMG), representing:

- Victims Services (Department of Justice)
- District Court NSW
- Family and Community Services (FACS)
- Justice Strategy and Policy (Department of Justice)
- Legal Aid NSW
- NSW Courts and Tribunal Services
- NSW Health
- NSW Police Force (NSWPF)
- NSW Office of the Director of Public Prosecutions (ODPP)
- Office of Attorney-General
- Office for Police
- Public Defenders
- The NSW Bar Association
- The NSW Law Society

Three focus groups were held on 10<sup>th</sup> April, 2017, with a total of 19 participants. Follow-up phone interviews with stakeholders unable to attend the focus groups took place in April. Witness intermediaries and other stakeholders provided written feedback on the evaluation questions.

Topics discussed included different aspects of the program's design and implementation, including:

- Referral and communication processes
- Legislative and Regulatory instruments
- Procedural guidance
- Stakeholder involvement
- Witness Intermediary training and recruitment
- Stakeholder training
- Technology, facilities, and resources
- Services for Aboriginal and Torres Strait Islander witnesses

All participants were given an information statement and asked to provide signed consent. Focus groups and interviews were audio recorded with the consent of participants. The audio files were transcribed verbatim.

The evaluation data (interview transcripts and written feedback) were analysed using a coding frame based on the focus group topics and emergent themes, including the scope of the Pilot scheme. All transcripts were de-identified. A small number of verbatim quotes from the transcripts and written feedback are included in the findings as illustrative examples.

The evaluation has ethics approval from the UNSW Human Research Ethics Committee (HC16990).

## 3. Findings

### 3.1 Pilot objectives and overall implementation

The objectives of the Pilot are to lessen the stress and duration of Court proceedings for child witnesses without unfairly impacting the defendant's right to a fair trial. Overall, there is unanimous support for the objectives of the Pilot from stakeholders who participated in the process evaluation. Stakeholders also agree that the Pilot is being implemented in a way that is consistent with those objectives.

The key themes identified by stakeholders as important to the implementation of the Pilot are that:

- Witness intermediaries are fulfilling their intended role of acting in the interests of the court, not as advocates or experts.
- Witness intermediaries value the support and training they receive, and that they are treated with professional courtesy and respect.
- The contribution of Victims Services has been critical to the success of the Pilot: supporting intermediaries, coordinating referrals, facilitating improvements to the running of the Pilot, and managing the Implementation Monitoring Group (IMG).
- Witness intermediaries are highly skilled.
- Some stakeholders were initially hesitant about the Pilot, but these hesitations have largely been overcome.
- All aspects of the Pilot design and implementation were described by participants as effective and valuable. The capacity of the IMG to amend legislative and procedural aspects of the Pilot has allowed the Pilot to be refined and improved as it has been implemented.

The barriers to implementation relate largely to resource constraints which are beyond the control of those implementing the Pilot. These constraints primarily affect the pre-recording of evidence, and are described in Section 3.2.1 and 3.2.2. There also appear to be different views about how quickly the number of intermediaries should be increased to allow access for people not in the Pilot, and on the potential risks of scaling up the role of witness intermediaries. These are described in Section 3.2.3 below.

In summary, findings for the specific aspects of the Pilot that were the focus of this first phase of the evaluation are:

- *Referral processes:* Participants are very satisfied with referral processes, although they described challenges in balancing the need for assessments and pre-recordings to take place as soon as possible, with the need for all parties to have time to prepare. Witness intermediaries said that they would benefit from more time for the first interview/assessment and referred to the dangers of being rushed. Witness intermediaries also suggested that their allocation to cases could be smoother if this could be done directly by NSWPF contacting intermediaries, rather than mediated by Victims Services. This would presumably have

resource implications for NSWPF and could give rise to perceived conflicts of interest. No other groups of stakeholders advocated this change.

- *The ground rules hearing* is an important component of the Pilot that is working well and making a practical difference to children's experience of the process.
- *Legislative and regulatory instruments:* As noted, the IMG is an effective body for amending these instruments and these are valued. The only significant concern with the legislation was the designation of witness intermediaries as 'children's champions', as this suggests advocacy on the part of the intermediary, rather than reinforcing their role as a neutral facilitator in communication and assistant to the court. It is seen to be a misleading term that raises unrealistic and inappropriate expectations.
- *Procedural guidance and stakeholder training.* The Downing Centre issued a Practice Note for the Pilot in 2015. However, training was described as more helpful than this guidance, especially that delivered by Professor Penny Cooper and Dr Michelle Mattison in February and March 2016. The importance of ongoing training was emphasised by participants from different stakeholder groups, some of whom said that insufficient training had been offered at the Newcastle site. The Procedural Guidance Manual produced by Victims Services has been useful for intermediaries, although it was also suggested that this could be improved if it was a 'living document' to which lessons learnt about witnesses with complex support needs could be added.
- *Stakeholder involvement:* participants described the engagement of all stakeholders as effective, although there are concerns about the impact of the Pilot on the JIRT partnership among some stakeholders (Section 3.2.4)
- *Witness Intermediary training and recruitment:* intermediaries are strikingly positive about the Pilot, their role in it, and the training and support they receive. Concerns were expressed only about how the current levels of support and mentorship can be maintained when the program is expanded.
- *Technology and facilities:* the quality of technology and facilities available for the pre-recording are varied and in some cases sub-optimal. In terms of their effect on the quality of evidence produced (Section 3.2.2).
- *Services for Aboriginal and Torres Strait Islander witnesses:* the outcomes evaluation will include analysis of the impact of the Pilot on Aboriginal and Torres Strait Islander witnesses. No Aboriginal or Torres Strait Islander witness intermediaries have been recruited to date, and this has been identified as a priority by the IMG. While some strategies for recruiting Aboriginal intermediaries have already been explored in the Pilot locations (including amending the legislation to enable people with teaching qualifications to be appointed as intermediaries), the IMG agreed in April 2016 to give further consideration to this. In this respect, it will be important to explore the type of appropriate qualification pathways that could be put in place for Aboriginal applicants. Participants in this process evaluation emphasised the perceived benefits of the Pilot for Aboriginal and Torres Strait Islander people and vulnerable groups.

## 3.2 Challenges to implementation

Although stakeholders who participated in the evaluation did not identify any substantive barriers to implementation of the Pilot, they raised concerns about potential risks when the initiative is expanded. Stakeholders also discussed ongoing concerns with resources and technology which, while broader than the Pilot, affect its implementation.

### 3.2.1 Resources

The pre-recorded evidence hearing requires both defence and prosecution to be prepared for trial much quicker than usual, and for continuity of counsel, wherever possible, between the pre-recording and the balance of the trial. This has resource implications for both parties: time to prepare for the pre-recording, and then to prepare for the balance of the trial months later. This in effect duplicates the work required. Another reported consequence of the pre-recording is that trial dates are set with less flexibility than usual. One assumption behind the Pilot is that the pre-recording of evidence should reduce trial time and thus offset the increased time spent prior to trial; the outcomes evaluation will test this.

### 3.2.2 Technology

The quality of the image and clarity of the sound in the pre-recording of the child's evidence are very important to the capacity of the fact-finder to assess the reliability and credibility of that evidence. This applies to the recording of the child's investigative interview (which constitutes their evidence-in-chief) as well as the recording of the cross-examination. Pre-recordings are affected by variations between locations in video camera type and location. Good quality equipment to record and playback the recording is therefore critical. If younger children are to give evidence, there also needs to be some capacity to be able to record them as they move about the room in the investigative interview. Fixed cameras in the upper corner of an interview room are not optimal for recording video interviews with children, especially young children. While juries in a 2006 study of child sexual assault trials accepted the need for special provisions for child witnesses such as the use of closed-circuit TV and pre-recorded investigative interviews, the common complaint and concern was the poor quality of a distant image of the child and the unreliability of the equipment (Cashmore & Trimboli, 2006)<sup>1</sup>.

### 3.2.3 Role of witness intermediaries

Strong support was expressed for the effectiveness of witness intermediaries in supporting children to provide the best evidence, and there appear to be no concerns that the intermediaries are acting as advocates or expert witnesses.

I guess the main feedback I get from all of my staff is that the intermediaries are assisting people to give much better evidence, or to give evidence when they wouldn't have previously been able to give any evidence. (focus group)

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<sup>1</sup> Cashmore, J. & Trimboli, L. (2006), 'Child sexual assault trials: A survey of juror perceptions', BOCSAR NSW Crime and Justice Bulletin, 102, 1-20.

Witnesses that prior to this we would have never got their evidence – it would have just been too hard – have just given amazing evidence. (focus group)

Currently, intermediaries may be involved in the Pilot in different ways:

- Present at the investigative interviews (police referrals) (n=639 as at 31<sup>st</sup> March 2017)
- Present in court but not at the investigative interview (n=55 as at 31<sup>st</sup> March 2017)
- Present at both the investigative interviews and in court (n=6 as at 31<sup>st</sup> March 2017)

Outside the Pilot, intermediaries may be present at the investigative interview, if the officer in charge identifies that a child could benefit from an intermediary due to communication needs. Intermediaries may also, outside the Pilot, make a written assessment of a child's communication needs and recommendations for the language used during cross-examination. There are differing views among stakeholders about whether the use of witness intermediaries should be changed, such as expanding the role of intermediaries to act for other vulnerable groups, including child and adult defendants, and using witness intermediaries as expert witnesses.

Different views were expressed by stakeholders on when and how the use of witness intermediaries should be expanded. One view is that the use of intermediaries should be limited until the impact of the Pilot is known.

We would prefer the Pilot be expanded by legislation following the outcomes evaluation after 3 years. This would enable proper consideration to be given to the best means of expansion, whether that occur by geographical expansion of existing measures or expansion of the eligible cohort group (or both) (written feedback).

Another view is that the benefits of the intermediaries are evident and they should be used more widely now:

I see it working so well, even though we're only 12 months down, is that--and with great respect to Justice because of their resourcing in that--if it's working so well in these areas and we are getting this evidence and information from the children, it's almost a bit unfair for the other areas. Not just the other areas, for the victims. Why haven't they also got that resource as well? I might have a child at Liverpool today, now they haven't got that access to these intermediaries where if you're working in Kogarah [they do] (interview).

If the role of witness intermediaries is not well understood by all parties, including children and families, and the witness intermediaries themselves, this could pose risks to the future expansion of the Pilot. Training and information has been highly valued by those who have received it, and clear and widely available information on the role of intermediaries is important.

### 3.2.4 External influences on the Pilot

Implementation of the Pilot is influenced by, and may influence, other procedures and legislation. The three identified by stakeholders as most important are:

1. Sexual assault communications privilege (SACP): poor understanding of SACP may mean that the child may have to be recalled to give evidence and this has the potential to undermine pre-recording of the complainant's evidence.
2. Impact of the witness intermediaries in the different scenarios described in Section 3.2.3
3. The impact of the Pilot on the operations of the Joint Investigation Response Team (JIRT) interagency partnership, specifically the role of FACS and NSW Health during investigative interviews. The partnership is being reviewed by the NSW Ombudsman.

### 3.3 Priorities for the outcomes evaluation

Several priorities for the outcomes evaluation have been identified through concerns raised by stakeholders in the process evaluation, in addition to the evaluation objectives listed in Section 1. These include:

1. The impact of external influences, noted above, on the effectiveness and outcomes of the Pilot.
2. The impact of the pre-recording on the defendant's right to a fair trial:
  - a. Concerns by some defence lawyers that the short timeframes available for the pre-recording may make it difficult for the accused to know the full case before cross-examination of the main witness i.e. the child complainant
  - b. There is the potential for new evidence to be sought after the pre-recording, which could result in the accused not knowing the entirety of the evidence prior to the balance of the trial. Legal Aid NSW has identified two matters in-house where further evidence was obtained by NSWPF as a result of matters raised during pre-recording cross examination. In one of these cases the child complainant was recalled, in the other the indictment was amended before the balance of the trial. The question of additional relevant material to the pre-recording is set out in Section 87 of the *Criminal Procedure Act 1986* - Schedule 2 and the outcomes evaluation will review the outcomes of further instances of new evidence arising.
3. The impact of witness intermediaries on the investigative interviews, especially any impact on Health and FACS assessments that occur based on those interviews.
4. Risks to maintaining the high levels of skills and expertise in witness intermediaries if the Pilot is taken to scale and more intermediaries need to be recruited.
5. Sustainability of the support provided to witness intermediaries and other stakeholders if the Pilot is taken to scale. The support provided by Victims Services is highly valued and it may be difficult to maintain this level of support as the initiative is expanded.

## 4. Conclusion

Overall, stakeholders expressed overwhelming support for the objectives of the Pilot and their experience of its implementation. Concerns were expressed about the potential risks of the Pilot, and to the scaling up of the initiative. These potential risks will be a focus of the outcomes evaluation.

Key findings are:

- The Pilot is being implemented well: in particular, the strengths and skills of witness intermediaries are highly valued, the ground rules hearing is an important component of the Pilot that is working well, and the IMG is an effective body
- The designation of witness intermediaries as ‘children’s champions’ is problematic as it is misleading and suggests an advocacy role
- Training has been valuable but the need for more training at the Newcastle site was identified
- Stakeholders are experiencing challenges in balancing the need for assessments and pre-recordings to take place as soon as possible, with the need for all parties to have time to prepare
- The support provided to witness intermediaries is valuable and the role of Victims Services in the Pilot is key
- Technology and facilities available for the pre-recording vary in quality and in some cases are sub-optimal
- No Aboriginal or Torres Strait Islander witness intermediaries have been recruited to date, and this has been identified as a priority by the IMG.

The Pilot is also affected by resource constraints and challenges which affect the courts more broadly, and so affect the experience of vulnerable children and their families. These constraints are not the responsibility of the Pilot but may affect its outcomes, and this will also be considered in the next phase of the evaluation.

This process evaluation was intended to assess the barriers and facilitating factors to successful implementation of the Pilot. No significant barriers were identified; however concerns were expressed about the impact of the Pilot on child complainants and witnesses, on resources, and on the defendant’s right to a fair trial. As these are the focus of the outcomes evaluation, and decisions about the expansion of the Pilot will be informed by the outcomes evaluation, we recommend that the timeframe for the outcomes evaluation be brought forward. The evaluation is due to report its findings in March 2019, we recommend that the findings be delivered earlier, in mid-2018.