

# YOUNG WITNESSES IN NEW ZEALAND'S SEXUAL VIOLENCE PILOT COURTS

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**May 2020**

**This report was prepared with financial assistance from the New Zealand Law Foundation**



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## **Acknowledgements**

We gratefully acknowledge the New Zealand Law Foundation whose funding of this research made it possible. We thank former Chief District Court Judge Jan-Marie Doogue, and the Administrative Judge for the Sexual Violence Court Pilot, Judge Eddie Paul, who gave their support of the research and permissions to proceed with recruitment of interview participants and access to court transcripts. Access to court transcripts which allowed analysis of children's testimony was received from the Presiding Judge of each of the individual trials concerned. Registry staff were invaluable in identifying and accessing transcripts. Special thanks to Claire Cheeseman for her assistance in this. Victim advisors played a critical role in offering young witnesses and their families to be interviewed. We acknowledge these individuals and organisations for their support of and assistance with this research.

We thank Dr Kirsten Hanna for her support and consultation in the early development of this project.

Most of all, we acknowledge and thank the young people and caregivers who agreed to be interviewed, and who generously shared their experience of the criminal justice system – good and bad – and contributed suggestions for further change.

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## **Abstract**

The present research was initiated in response to the establishment of New Zealand's Sexual Violence Courts Pilot in late 2016. One of the stated intentions of the court was to improve the experience of complainants. This research aims to contribute to innovation in court processes and the further development of the Sexual Violence Court Pilot. It comprised two studies with a focus on young witnesses.

The first study involved interviews with caregivers and young witnesses who had testified in Sexual Violence Pilot Court trials with the aim of identifying sources of stress and support during court involvement. Themes identified were that the period between reporting an alleged offence to police and the trial is far too long and is very stressful; it is difficult to move forward with life until the trial has concluded; cross examination is distressing; the court environment (comfort and safety) matters; safety and distance from the defendant when at court is extremely important; separation of young witnesses from their caregivers during the court appearance is difficult; there is a lack of information throughout the process; and parenting young witnesses through the court process is challenging. The findings indicated that the pilot has yet to have a significant impact on the distress of young witnesses. A multi-agency approach is indicated to improve support and information provision during the period awaiting trial. Within the courts' jurisdiction, reducing pre-trial delay and improving the conduct of trials is indicated if the courts are to achieve their goal of minimising the negative impact of court involvement on these vulnerable young witnesses.

The second study involved a detailed analysis of transcripts of testimony of young witnesses from two pilot courts and two non-pilot courts. Analyses focused on the type of questions asked, complexity of language, the timing and duration of young witnesses' evidence, provision of breaks, and judge intervention. The inclusion of non-pilot courts allowed for a snapshot of practice in Aotearoa New Zealand generally as well as a comparison between pilot and non-pilot courts. The average time between the complaint and trial for the pilot courts was 13.2 months and for the non-pilot courts was 16.3 months. The analysis of children's courtroom testimony revealed that use of complex language likely to be confusing to witnesses was common. There were few differences in use of complex language between pilot and non-pilot courts or between defence lawyers and prosecutors. In terms of question types, leading questions were common. Leading questions are generally regarded as contrary to children's ability to give best evidence. Over a quarter of questions asked during cross examination were

leading (other) and more than one in ten questions were leading tag. Consistent with prior research, defence lawyers were 21.44 times more likely than prosecutors to use leading (tag) questions and were also significantly more likely to use leading (other) questions. Prosecutors were more likely than were defence lawyers to use open questions, facilitators, and option posing questions. Findings indicated that the pilot courts may have had some (although limited) impact on the use of different question types, although question types that are counter to best evidence were prevalent across both pilot and non-pilot courts. Provision of breaks and judge intervention in inappropriate questioning were rare.

Overall there appears to have been little change in the experience of young people and their caregivers in their participation in the courts. Nor has there been significant change in the conduct of lawyers in questioning young witnesses, either in comparison with similar studies over the last two decades, or between pilot and other courts. Proposals for change are presented. These have much in common with those contained in other recent reports, indicating a consensus about further reforms that would likely reduce the stress on young witnesses' experience and facilitate their ability to give best evidence.

## Introduction

*Ahakoā he iti, he pounamu* - Although it is small, it is precious.

The sexual abuse of young people is a pervasive problem in Aotearoa New Zealand (NZ) and elsewhere. In approximately half of all sexual violence offences reported to the police in New Zealand the victim is a child (Ministry of Justice, 2019). Reported incidence of sexual abuse yields a conservative estimate given low rates of victim reporting (London et al., 2005). It is estimated that less than 10% of sexual violence related offences are reported to the police in Aotearoa NZ (Ministry of Justice, 2015). Community surveys however, reveal that large numbers of New Zealanders have been the victims of sexual offending during their childhood and adolescence. In a large community sample of women in Aotearoa NZ, 23.5% of those in Auckland and 28.3% of those in Waikato, retrospectively reported sexual abuse during their childhood (Fanslow et al., 2007). In a national survey of secondary school aged children in Aotearoa NZ, 20% of female students and 9% of male students reported having been touched in a sexual way or having been made to do sexual things that they did not want to (Clark et al., 2012).

It is only since greater community awareness of sexual abuse began in the 1980's that children have appeared in significant numbers as complainants in the criminal courts.<sup>1</sup> Since this time, concern has been expressed about how adequately children can be accommodated in a criminal justice system that is essentially designed for adults. While sexual abuse itself has large potential for harmful effects (Fergusson et al., 2013), participation in the court process may lead to additional psychosocial harm for many children in both the short- and long-term (Goodman et al., 1992; Quas et al., 2005; Quas & Goodman, 2012). Participation is often experienced by young people as stressful and distressing (Eastwood & Patton, 2002; Hayes et al., 2011; Plotnikoff & Woolfson, 2004, 2009). Yet participation of young witnesses is essential in such trials because there are rarely other witnesses. Child abuse prevention efforts more

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<sup>1</sup> In New Zealand a 'child' for the purposes of court proceedings is defined as an individual under the age of 18 (s 4 Evidence Act 2006). Throughout this report the terms 'child witness' and 'young witness' as well as 'child' and 'young person' are used interchangeably to refer to witnesses and people under the age of 18 years.

widely become stifled if children and their families are reluctant to take part due to negative perceptions of the justice process and its effects.

In addition to the risk of harm that involvement with the justice system poses to young complaints, a second concern is that certain elements of the court process are known to impede young people's ability to give their best evidence. Stress associated with the experience of giving evidence in a courtroom context (Nathanson & Saywitz, 2003), and non-supportive interviewing (Quas & Lench, 2007) impact on children's performance. Additionally, leading, developmentally inappropriate and confusing language used by lawyers may have an impact on the accuracy of children's answers (Andrews et al., 2015, 2017; Andrews & Lamb, 2017; Klemfuss et al., 2014; Zajac et al., 2003; Zajac & Cannan, 2009) and thereby the adequacy of decisions of jurors and judges and ultimately, the efficacy of justice processes.

Over the last 30 years an increased awareness of the risks of court involvement to children has been reflected in reforms to our criminal justice system. When a young person reports that they have been the victim of a sexual offence, they are typically forensically interviewed by a specialist interviewer, usually a police officer or a social worker from Oranga Tamariki - Ministry for Children. The recorded interview is used as evidence-in-chief in court and is viewed by the complainant prior to testifying. Changes to the Evidence Act in 1989 saw provision of alternative modes of giving evidence during the trial. More recently, audio-visual link (AVL) has become the default mode of testifying for young witnesses in Aotearoa NZ, allowing a witness to give evidence in real time, but from a separate location (usually a room within the court building). Regardless of the mode of evidence, child witnesses are cross-examined by defence counsel. The judge, irrespective of a witness's age, "may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand" (s 85 Evidence Act 2006). Judges routinely close the courts during children's testimony in sexual violence trials and the child is able to have a support person with them during their testimony. Other reforms include the availability of victim advisors who provide support and education for court in the days leading up to the court appearance.

In accordance with the Evidence Act (2006), communication assistants (or intermediaries) are able to be employed to enhance the communicative competence of young witnesses during testimony. This role is typically filled by a speech language therapist, who aids the court so as to facilitate witnesses' communication during their testimony. The potential



for use of communication assistants in Aotearoa NZ criminal court trials involving young witnesses has been considered in depth (Hanna et al., 2013), and communication assistants have been increasingly employed in the Youth Court and criminal courts over recent years (Howard et al., 2020). However, despite wide support from professionals (Gravitas, 2018), the numbers of available communication assistants remains small.

In 2014 judges at the Whangārei District Court introduced a protocol for young witnesses which aimed to reduce the stress of testifying on young witnesses and improve the quality of their evidence. Under this protocol children watch the evidential video interview a day or so before the trial rather than at the same time as the jury at trial, come to the court immediately prior to giving evidence rather than waiting around at court, meet the judge and counsel before giving evidence, and start their evidence first thing in the morning, stopping by mid-afternoon. In addition, the room from which they give their evidence by audio visual link was redecorated and provisioned to be more child friendly. Emphasis is placed on clear communication with the child witness, in particular avoidance of potentially confusing language such as tag questions. An expectation was set that judges would intervene when questions were considered inappropriate and would manage a witness's fatigue by providing breaks during their testimony. An evaluation of these changes in Whangārei found that the protocol was supported by the large majority of participants including judges, prosecution and defence counsel, police officers and victim advisors (Randell et al., 2016). It was viewed as working well and as a significant shift in a positive and necessary direction.

Recently, the Benchmark initiative, funded by the New Zealand Law Foundation and the IHC Foundation, has produced guidelines to assist legal professionals to recognise and respond to vulnerable groups within the justice system. This includes a guide concerning children and young people (Hanna et al., 2019). The guide provides evidence-based information on children's/young people's communication, identifies some of the communication issues that can make it difficult for children to testify effectively, and provides advice on how to facilitate their best evidence.

Despite such reforms, ongoing concerns about the adequacy of our criminal justice system to protect children's wellbeing and to facilitate children's best evidence remain (e.g., McGregor, 2017; New Zealand Law Commission, 2015; Randell et al., 2018). In a recent publication of the Chief Victims Advisor to Government the authors described ongoing concerns with the timeliness of trials, and the appropriateness of courtroom questioning for

children's comprehension and therefore effective participation. Additionally, inadequacy of court facilities to sufficiently provide basic comforts and protect children from face-to-face contact with the defendant and/or their family members was another area of concern (McGregor, 2017). Such concerns mirrored those of the 2015 Law Commission report.

In response to these concerns, in 2016 the then Chief District Court Judge established the Sexual Violence Court Pilot in Auckland and Whangārei District Courts. This pilot established best practice guidelines for Category 3 sexual violence trials with the objectives being to reduce pre-trial delays and secondary trauma for both child and adult complainants of sexual violence (Chief District Court Judge Doogue, 2016). Best practice guidelines were set for case management, case review hearings and trial call overs, and the trial itself (The District Court of New Zealand, 2016). Cases in the pilot courts are presided over only by designated judges.

The Sexual Violence Court Pilot best practice guidelines also stipulate that “The judge is to ensure flexibility for the evidence of the complainant recognising the complainant’s age and capacity including regular breaks, early/late start and finish times”. Additionally, “The judge must be alert to and intervene if questioning of any witness, particularly complainants, is unacceptable in terms of s85 Evidence Act 2006.” The pilot judges attended a three-day training course which aimed to sensitise them to issues for witnesses, including comprehension difficulties arising from complex language and the use of closed and leading questions, which have been found to be prevalent in Aotearoa NZ courts.

An initial evaluation of the pilot in which various stakeholders were interviewed concluded that procedural changes introduced in the pilot courts were for the most part perceived as working well (Gravitas, 2019). There were some ongoing concerns expressed by some complainants, about the length of time between their complaint and the trial, inadequate physical facilities to provide protection from encountering defendants (Auckland only), and cross-examination. This evaluation covered the impact of the pilot on complainants regardless of age and did not isolate any issues that applied only to children.

The present research was initiated in response to the pilot’s implementation. The research was designed with the intention of contributing knowledge and thus supporting innovation in court processes and the further development of the Sexual Violence Court Pilot as it relates to young people in particular. It comprised two studies with a focus on young witnesses. The first study involved interviews with young witnesses who had testified in Sexual

Violence Pilot Court trials as well as interviews with their caregivers. The aim of this study was to identify sources of stress during court involvement and aspects of the experience that they found supportive to their management of stress and communication. The second study involved a detailed analysis of transcripts of testimony of young witnesses from two pilot courts and two non-pilot courts. Analyses focused on the type of questions asked, complexity of language, the timing and duration of young witnesses' evidence, provision of breaks, and judge intervention. The inclusion of non-pilot courts allowed for a snapshot of practice in Aotearoa NZ generally as well as a comparison between pilot and non-pilot courts.

## **Part I: The Experiences of Young Witnesses and Caregivers in New Zealand's Sexual Violence Court Pilot**

Allegations of sexual abuse are the primary reason for young people appearing as complainants in the Aotearoa NZ justice system (Hanna et al., 2010). As outlined in the introduction to this report, reforms in the criminal justice system have been implemented with the intention of better accommodating child witnesses in the court system. However, significant concerns remain for the wellbeing of young people who participate in trials and justice system-related barriers to their best evidence (Randell, 2017; McGregor 2017). Research has indicated that the time between laying a complaint with the police and sentencing is lengthy (Gravitas, 2018; Hanna et al., 2010; Ministry of Justice, 2019), and that legislative and procedural measures available to assist children who testify are inconsistently implemented (Hanna et al., 2010). Lawyers' questioning of young witnesses, particularly during cross-examination, frequently exceed children's communicative and cognitive capabilities and contradict the type of questioning known to support best evidence (Davies & Seymour, 1998; Hanna et al., 2012; Zajac et al., 2003; Zajac & Cannan, 2009).

Research that reports directly from the accounts of young witnesses and their family members is rare. An exception to this is a recent study by our research group which involved interviews with young complainants and the caregivers of young complainants who had participated as witnesses in sexual violence trials (Randell et al., 2018). These interviews predated the implementation of the pilot courts. Interviewees described the delay period to trial, uncertainty about court processes, fear of seeing the defendant, and cross-examination as particularly distressing. A need for greater information and preparation was highlighted. They identified specialist support staff as a critical source of support. Having an opportunity to have a voice, tell their story and be heard in the judicial process was an important part of the court process for both witnesses and their families. The outcome of the trial, including the sentence, was of importance and contributed to a sense of wellbeing and closure. Alternatively, in the case of an acquittal or short sentences, witnesses reported exacerbated distress for reasons of disappointment and/or fears about future safety. Caregivers of young witnesses spoke about the significant emotional strain they experienced, and a desire for greater support than they had received. In many ways, the findings of this research mirrored that of similar research in

overseas jurisdictions (Back et al., 2011; Eastwood & Patton, 2002; Hayes et al., 2011; Plotnikoff & Woolfson, 2009; Robinson, 2015).

A more recent report commissioned by the Ministry of Justice included interviews or questionnaires with 39 victims of sexual violence who had made a police complaint, 21 of whom had participated in a court trial between 2015 and 2018 (Gravitas, 2018). Most of these participants were adults, however four were younger than 16 years and nine were aged between 16 and 24 years old. Findings included that long timeframes and delays to proceedings were experienced as distressing and that more preparation and information was needed to alleviate anxiety. It was identified that support by a dedicated liaison person throughout the process from initial complaint would be of benefit. Bail conditions were found to be insufficient to allow victims to feel safe in the lead up to the trial. Again, cross-examination was the most distressing aspect of the justice process and a cause of revictimisation. Sentences were frequently disappointing, and victims were under-resourced to cope post-sentencing. This report concluded that victims' needs were not always considered by the justice system and their rights were not always upheld, and ultimately that involvement in the justice process can cause revictimisation and retraumatisation.

In a subsequent report that evaluated the pilot courts, stakeholders, including nine complainants were interviewed. However, it is not clear whether any of the nine witnesses were children (Gravitas, 2019). While the overall conclusions were positive about the changes introduced in the pilot courts, particularly as represented in the comments of staff and professionals involved with court proceedings, quotes from complainant witnesses indicated some ongoing concerns. These included the length of time between their complaint and the trial, inadequate physical facilities to provide protection from encountering defendants, and cross-examination. Positive comments were made about the support provided by people in the courts, engagement with the prosecutor prior to trial commencement, meeting the judge prior to giving their evidence and judge intervention when defence counsel questioning became unacceptable. The report concluded that complainants were generally better prepared for what to expect during the trial as a result of the pilot, and that "the trials were managed in a way that did not cause them to be retraumatised by the process" (p.72).

The present study is the first to specifically investigate the experience of young witnesses in New Zealand's Sexual Violence Courts Pilot. Interviews were conducted with young witnesses who had testified in trials, and caregivers of young witnesses. The study is

predicated on the belief that consultation with young witnesses regarding their experiences of the justice system is essential. An absence of consultation with young people is arguably a violation of their rights to consultation (United Nations Convention on the Rights of the Child, 1990). Without consultation, adults in positions of decision-making power risk making incorrect assumptions young witnesses' needs and effective ways of minimising their distress. There is an ethical responsibility for those who influence court processes to seek and consider the voices of young witnesses and those close to them in their decision-making. Studies concerning the experiences of young witnesses have been conducted elsewhere, including the United Kingdom (Hayes et al., 2011; Plotnikoff & Woolfson, 2004, 2009), Sweden (Back et al., 2011), and Australia (Eastwood & Patton, 2002), and appear to have been an important means of informing positive change regarding young witnesses.

## **Method**

Approval for the study to proceed was provided by the then Chief District Court Judge Jan-Marie Doogue and the Ministry of Justice. Ethics approval was granted by the University of Auckland Human Participants Ethics Committee.

### **Participants**

Participation was offered to young witnesses (under 18 years of age at the time of the trial) who had given evidence in the Sexual Violence Pilot Courts in 2019 (either Auckland or Whangārei) and their supportive caregivers.<sup>2</sup> The final sample included eight young witnesses and nine caregivers. While it had been our intention to interview more participants than this, difficulties with recruitment and a smaller than anticipated number of trials involving young witnesses made this impossible. No participants were excluded from the sample. The age of the young people at the time of the interviews ranged from 9 to 17 years old. Further demographics are not reported in order to protect the anonymity of participants.

### **Interview schedule**

A semi-structured interview schedule invited comments related to each stage of the court process (pre-trial, the trial itself and post-trial). However, participants were encouraged

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<sup>2</sup> 'Caregivers' is a broad term used to describe the range of supportive adults who participated in the research and included parents, legal guardians, caregivers and family members who had acted as support people through the court process.

to identify aspects of their experience that were of importance to them, and accordingly the order in which topics were discussed varied between interviews. Questions invited participants to identify stressful aspects of court involvement, factors that increased and decreased any stress experienced, and the availability and impact of supports. Participants were also asked for advice they had for people who work in the courts to make the process better. Interviews with caregivers covered their perspective on the young witness's experience and their own experience as a family member supporting a young person through the court process.

## **Procedure**

The protection of the welfare of participants is a primary consideration in research such as this. Their rights to be consulted and heard about matters that affect them must be balanced by their rights to be protected from any possible trauma and harm (Mudaly & Goddard, 2009). Accordingly, our procedure for participant recruitment and conduct of interviews prioritised the wellbeing of participants.

Potential participants were initially approached by the courts' victim advisors rather than the initial approach being made by the researchers. The research was explained to the young person and their caregiver. If they were interested in taking part, they signed a Permission to Contact Form indicating their consent for a member of the research team to contact them. Potential participants were then phoned for the purpose of providing further explanation of the research and were asked again whether they would like to participate.

Interviews with participants did not take place until at least six weeks following a not guilty verdict, or in the case of a guilty verdict, six weeks after sentencing, to allow for the normal appeal period to have passed. Māori and Pasifika participants were offered an interviewer of their own ethnicity. None of the participants took up this offer.

Upon meeting with the participants, information about the research and about the Consent Form they would be asked to sign was reviewed with them to check for understanding and provide an opportunity for any further questions to be answered. Guardians' consent was required for children along with the consent given by the child themselves. A further opportunity to withdraw from participation was provided at this point. Participants were also advised that they could withdraw from further participation at any time during the interview.

Although sexual abuse itself was not the topic of the interviews, the court process and sexual victimisation are inextricably linked and potentially emotionally laden. Several

provisions were included in order to mitigate any distress arising during the interview. Participants were offered the option of having a support person of their choice present for the interview. All interviews were conducted by the first author who is a clinical psychologist who works with young people and families. Potential distress was monitored and managed throughout and immediately following the interview. Referrals to appropriate support services could be made if mental health difficulties or other significant needs were identified during the interview. Follow up contact was made with participants (or where more appropriate, with their caregivers) to enquire as to their wellbeing post-interview, to provide any further debriefing or referral to other supports as needed (no referrals were required).

Several steps were taken to protect the privacy of participants. Identifying details were removed from transcripts of interviews. Interview transcripts and digital voice recorder files were password protected and stored on secure, encrypted storage. Careful consideration has been taken with participant quotes in this report so as not to include any information that could be identifying.

### **Data analysis**

Data analysis was guided by methods of thematic analysis as described by Braun and Clarke (2006, 2013). Accordingly, the steps followed included producing written verbatim transcripts of the interviews, then the first author reviewed these transcripts in order to re-familiarise herself with the contents, then derived themes from close analysis of the texts. To reduce the potential impact of bias and increase the “trustworthiness” of data analysis (Morrow, 2005) the analysis was reviewed by a second member of the research team before finalising the reported findings.

## **Findings**

### **Waiting for the trial is stressful**

The period between reporting an alleged offence and the resulting trial was described as a time of immense stress, and one of the aspects of court involvement that had a particularly negative impact on the wellbeing of young witnesses and their families.

Families experienced significant stress due to the psychological and social impact of sexual victimisation, disclosure, and reporting to the police. However, the period awaiting trial was described as adding stress over and above that associated with the offending and as



compounding stressors that had followed disclosure of sexual abuse and making a complaint, including family conflict and distress, community related distress, trauma responses and mental health challenges, and parenting stress.

*I think [the court process] adds so much more uncertainty to an already very aggravated, raw, sad, angry, situation. You're now trying to process and comprehend what is going to happen with court. Court is a whole other ball game. So not only are you just dealing with the fact that this has happened and you're trying to pull your family back together, you now have to go through court. So you're constantly going every day knowing oh my God we have to go to court, this isn't over...this is still a long way from having any kind of closure or real action. - Caregiver*

Some families felt isolated or disconnected from their extended families and communities as a result of conflict, stigma associated with sexual victimisation, and judgement from others. Additionally, in several cases, the defendant remained in the same community during the period prior to the trial which was distressing for many participants. This impacted on the family's ability to continue to engage in wider family and/or community activities such as tangi/funerals, being present in community settings such as marae, and engaging with their place of worship or school. Participants also worried about the safety of other young people in their families and communities during this time.

*Yeah, but it was always a scary thought that, like if I might go to a funeral and he might be there and stuff, and there's nothing I could do about it to stop him from being there. Because he hasn't been charged with anything, but he knows that me and my family have, you know, accused him of this, and God knows what he's going to do. – Caregiver*

*It was incredibly hard, because also they knew all their family were there [at a tangi], and they don't get to see their family much. So, they knew the family was there and they kept saying to me, how come we can't go, how come we can't go, he's the baddy, how come he gets to be there? Yeah, so it was really hard. - Caregiver*

*The big thing was that she was always scared that she was going to see [Defendant] at school. She knew that he wasn't allowed to go near there but I remember nearly every day it was 'I didn't see [Defendant] today' or 'Am I going to see [Defendant] today?' So that was a big thing that affected school. – Caregiver*

Participants spoke about how the impending trial was always on their mind during this period. They experienced anticipatory anxiety in the wait before the trial, which was exacerbated by uncertainty about trial processes and outcomes.

*But yeah, it just meant there was like this big 18 month, or slightly longer uncertainty, which is huge. - Caregiver*

*I constantly used to think like what would the outcome be like? ... when I was free I would sort of think about that because it was coming near to the date. – Young Person*

Some participants regarded the period of waiting as one in which they were restrained in what they could say to others about their situation, thus interfering with relationships. Participants tended to refrain from talking about abuse, the impending trial, and reasons for change in family circumstances (such as relationship separations and relocation) for reasons that included the sensitivity of the topic and/or a belief that they should not discuss them for legal reasons. Whether the restraints were from advice of others or self-imposed, the period leading to their court appearance was made difficult as a result of feeling unable to be open about their circumstances.

*I was pretty nervous. I was scared most of the time. I wasn't getting on with my friends so well...kind of because I couldn't tell them, and they'd been asking questions about why I had been acting so weird and that made me feel frustrated. - Young Person*

Assumed restraints on talking about the complaint also had its impact on family life.

*So, we were doing all this stuff and we couldn't talk about this. We didn't want to talk about it really, you know, as in we didn't want to talk about it because it was a horrible subject. But we wouldn't let them engage about it, we said we don't talk about it in your bedrooms, you know, this is really important... it's really important you guys don't talk about it at all. So, they'd come to us and they'd go oh, can we just? No darling, we can't talk about it. – Caregiver*

For several young people the stress that they experienced during this period interfered with their desire or ability to engage in their schooling. One young person stopped attending school during this period and did not reengage.

*It was hard, because I wanted to stay home all the time. Yeah, but I went to school...It was, like, putting me off task. Like off learning and that. – Young Person*

*I guess I pulled out of school, I stopped going to school for a little bit there. And yeah, it was just, I didn't want to go to school anymore because court was coming up and I didn't know how to process that at the same time as schoolwork. – Young Person*

*She's, she's a scholar, she'll walk through rain, hail and shine just to get to school. She's teacher's pet, you know, and school is her life... So, to see her turn around and say that she doesn't want to go to school, you know something's wrong with her... So, for her in that time to say that she didn't want to go to school, it was really scary for me because it wasn't her anymore. It's like, you've given up. – Caregiver*

### **It is difficult to move forward until the trial has ended**

Until the trial was completed participants (both young people and their caregivers) described being unable to practically and emotionally move forward with their lives. The time between reporting an offence and the conclusion of the trial was described by one participant as one of being 'in limbo'. The difficulty 'moving on' was attributed to anxiety about the trial, ongoing stressors associated with sexual victimisation and making a complaint, and the pressure to retain traumatic memories.

Some young witnesses, as well as some caregivers who knew that they may be called as witnesses, felt pressure to retain clear memories of the offending and/or related events in preparation for testifying. The consequent regular revisiting of traumatic memories was experienced as distressing and as impacting on the mental wellbeing of participants.

*Like it was very difficult trying to like move, I was trying to move on instead of trying to remember that again and again and again. And it's not something I want to remember, and I don't want, like anyone who's going through this, I don't want them to remember what they've been through. And it was, I sometimes felt, I don't even know how to say it. But like you know you feel that way where you, kind of, just want to be left alone, and just want to isolate yourself. – Young Person*

*The memories flash back...we had to remember every single thing, every single day you go to the same thing, which is not a good thing. - Caregiver*

Some participants described the relief of the trial and sentencing being over, and a related sense of closure.

*I guess just hearing he's going away to jail, yeah. That brought like, I guess freedom. Yeah, that's all I thought about, like yes, I'm free from it, yeah. I don't have to worry*

*about it anymore... he's going away, he can't hurt anyone else. You've told your part of the story. - Young Person*

### **The length of time between making a complaint and the trial is far too long**

The length of time between reporting an alleged offence and the trial was consistently described by young people and caregivers as being far too long. When asked what was stressful about going to court, one caregiver replied, *Just the amount of time it fuckin' took.*

*The delay is the major thing, yeah. And from what [we were told] the whole point of this new sexual assault court was supposed to speed it up for everybody. And you're kind of going seriously, 18 months is speeding it up? - Caregiver*

Participants spoke about how the long wait between reporting concerns to police or Oranga Tamariki and going to trial meant that many of the aforementioned causes of distress, such as family and community tension and the offender's presence in the community, were not resolved for a significant period of time. This magnified the impact of these stressors and delayed psychological healing and forward momentum in life.

*It should never take that long because that whole time you can't really carry on with your life, you can't really move forward because you have this big thing coming ... you just have this oh my God, we're going to have to do this, my child is going to have to do this. You just have that on your mind. – Caregiver*

Participants reported unexpected delays arising from adjournments and hung juries leading to retrials as particularly stressful and frustrating. The length of the wait period and additional delays impacted on the motivation of young people to participate in the justice process.

*[I was] scared. I pulled out in one part [when awaiting retrial] then I realised that I had to do it for the sake of myself. I guess it was just like we, I think it was our second year doing it and yeah, there was nothing happening, so it was just like there's no use in doing it. Yeah, and I just didn't want to go. - Young Person*

*We had to apologise to [the children who were witnesses] a lot though aye, because they'd be like 'Do we have to keep doing this?' ... We almost lost two of them...they decided 'Nah, we can't do this anymore'. – Caregiver*

Participants regarded the long period of time awaiting trial as having an inevitable impact on their memory of more peripheral details of events, which increased the stress of testifying.

*[If the delay period had been much shorter] I would've remembered every, like every single detail... Like I mean it was two years ago, you can't really expect me to remember what colour [clothing] they were wearing. I don't even remember what clothes I wore, like last week, yeah. – Young Person*

*If the court process was so much sooner it would also benefit the child who is trying to retell their story a year later, having only just seen a video of themselves the day before, from a year before...you just don't remember things the way that you remembered them. When I read my statement I was like 'oh my God that's right, that's right, I forgot those things'. But they were clear as day to me the day after [having made the statement]. - Caregiver*

All participants identified a reduction in the time between making the complaint and the trial as a necessary change in court processes for young witnesses. It was anticipated that a reduction in this time period would significantly reduce the negative impact of court involvement on the wellbeing of young witnesses and their primary support people. Several caregivers stated that an ability for children to have their involvement in the justice system end shortly after their evidential video has been recorded would be ideal.

*If we could get a way that the child doesn't even need to go there in the first place to make that more stressful and more sad when you're already in this vulnerable position. If we could just avoid that completely. It would take so much pressure off the child knowing that they have done everything they have to do at the beginning. - Caregiver*

*You know if we can stop it at the border where our kids just do those [evidential] interviews, fantastic. We've succeeded in stopping the trauma through the progressing. – Caregiver*

### **Cross-examination is distressing**

Participants consistently described cross-examination of young witnesses as one of the most stressful and distressing aspects of court involvement.

*I just didn't want to be here, like, I didn't want to be on earth. – Young Person (when talking about being cross-examined).*

*But it was the grilling [referring to cross-examination] they found really, really hard. – Caregiver*

Some young people described testifying as inherently uncomfortable and embarrassing given that they were speaking in front of unknown adults about details of sexual abuse - *Yeah, it was really embarrassing... I just didn't wanna say it* (Young Person). However, the most distressing part of testifying was the style of questioning by the defence lawyer. Young people described themselves as feeling “*annoyed*”, “*fed-up*”, “*scared*”, “*angry*”, and “*stressed*” during cross-examination. The defence lawyer was described as “*intimidating*”, “*scary*”, “*mean*” and “*manipulative*”.

*It was like sitting in a hot seat, it was really scary. And I try to like, you know, pretend I was not scared, but I was really scared...the offender's lawyer was really scary, like he looked mean, he sounded mean too. – Young Person*

*He was like really nasty. He wasn't giving me any chances, he was just straight on 'Well [Defendant] didn't do this', '[Defendant] didn't do that'. – Young Person*

*I felt like just, just saying nothing, but you couldn't just say nothing... 'Cause I was just scared of talking to the lawyer.... just everything in his eyes were scary. - Young Person*

Comments by young witnesses about defence lawyers' language and line of questioning included that their questions were confusing, that they often asked more than one question in the same sentence or the same question repeatedly, and that they didn't allow young witnesses space to provide answers.

*I was feeling lost 'cause I didn't really know how to answer it. – Young Person*

*When she asked me the same question over and over again, and I thought that the world was going backwards and forwards, backwards and forwards. And I didn't like that, so when I went back to the judge, I said can I have a break, and then I stopped. – Young Person*

Some questioning was frustrating for young people, who felt that words were being put in their mouths and that it was difficult for them to answer questions.

*The thing is he didn't only ask questions, he was telling me the answers to the questions. He would be like 'Oh, isn't it right that this happened, and this happened, and he was there, and you weren't'. Like, let us answer for ourselves, we were there, we experienced [it]. – Young Person*

*When I was getting questioned, I noticed that the offender's lawyer was questioning me the same question multiple times. And I know it's his job, but I've said my answer once and he's asking me in another way, the same question, and in another way, and another way. And I feel like over all that stress you're just getting even more fed up, and you've just kind of like had enough of it. But then again you don't want to sound rude, so at one stage I was just like 'You weren't there, so you don't know, I was there, so yeah'. And I was really fed up and I feel like that should kind of be taken into account, that maybe over questioning is not good. Just minimise it to like what's necessary. – Young Person*

Particularly distressing for young people was the defence lawyer undermining their credibility or making implications about their integrity or that of their friends or family members. For many young witnesses, credibility challenging questioning during cross-examination in which lack of belief in their testimony was indicated, was experienced as particularly distressing.

*She wouldn't believe me... And she'll say, 'No, you're wrong'... and I was just, like, you weren't there... I tried to explain again, and she was like, 'If you can't remember what end of the room it is, then you're lying'. – Young Person*

*Because that's how they explain the questions, 'I don't believe you, you have to give more evidence'. And I was like, how can I remember when it was, like, ages ago? But I didn't say 'How could I remember?' – Young Person*

*Well it was only [Defence Lawyer] that didn't believe me, and he made me cry. – Young Person*

*She feels like he didn't believe her...he was asking her questions that made it seem like she was lying and stuff. And she took it to heart. - Caregiver*

The manner in which young people are questioned was described as disregarding their vulnerability due to their age and/or the sexual victimisation that they had experienced.

*I mean they're still kids at the end of the day. I feel like, you know, people need to remember that you're still dealing with children and stuff, and she was quite traumatised about what happened to her. – Caregiver*

Caregivers also spoke about cross-examination having an ongoing negative impact on their child's wellbeing after the trial had concluded.

*The way that the lawyer made her feel, 'cause she said for even weeks after, she was like, oh, and that bitch lawyer, you know, didn't believe me. But I just kept on saying 'That's her job, it's just her job to do that'. But she still didn't like her, yeah. And how she made her feel, 'cause [Defence Lawyer] said, 'Nah, don't believe you'. And, course that's going to be soul destroying for a 10, 12, you know, 11-year-old kid. Eh? It's like, shit, they don't fuckin' believe me and I'm in this big scary place with all these adults and they're talking about jail and she don't believe me. – Caregiver*

*She got so upset... It's so damaging. – Caregiver*

Both young witnesses and caregivers spoke about how young people may be reluctant to correct a lawyer given their age and status. Additionally, they voiced that children may experience self-doubt when faced with leading or credibility challenging questioning. Caregivers talked about how a family expectation or value of respect for elders may contribute to a young person's reluctance to contradict a lawyer in the court context.

*Actually there was something the littlest girl said that made me think, 'cause she said [Defence Lawyer] was saying 'That's not correct' or something to that effect, and she was like she didn't want to correct him because he was a man she said, like an older man. So, he's saying 'Is that correct?', 'That's not correct', or whatever. And she didn't want to say, 'cause he'd said the wrong thing, or she didn't want to say, 'No, that's not what happened'. – Caregiver*

*I remember her saying to us that the way she was questioned, she had a moment where she started to believe what he was saying... where she thought 'Okay he's right, he's the adult, he's the lawyer, obviously he must know what he's talking about, maybe I did want those things'... I remember her telling us that 'he started to make me believe what he was saying' and she said 'I remember feeling very confused because he would say these things and I would say 'That's not true' and he would say it again in a different way and try and twist it round and try to get her to say things in a way that she would doubt her own story. - Caregiver*

One caregiver talked about how it was distressing for another family member who was the young person's support person to witness the way that the young person was questioned during cross-examination.



*It was just being present and seeing a small family member being treated like that in front of him and not being able to do anything... He had to sit there and listen to his [Young Witness] explain what happened to her, watch her get badgered from [Defence Lawyer]... But I mean he still talks about it now, about having to sit in with her and just, it's one of the most traumatic things he's ever had to do. - Caregiver*

Some caregivers and young people spoke about it being the 'job' of the defence lawyer to be aggressive in their questioning style. However, this was a difficult concept for younger witnesses to comprehend and for older witnesses who expressed this impression, it did not mitigate the distress associated with being cross-examined.

*I would say that I know their job is hard, and I know you have to be the evil person sometimes... He didn't smile at all, and that kind of stresses me out more. – Young Person*

*But I couldn't explain to her that that was his job, to ask her questions like that, because she wouldn't have understood it... Yeah I mean, you know, 'It's his job to pick on you', how do you tell that to a kid? – Caregiver*

Intervention by judges or communication assistants in lawyers' questioning was appreciated when it occurred.

*I liked the judge. If he didn't think the defendant lawyer was staying on track, he'd say something and pull him back into line, so he just stays on track. - Young Person*

*Yeah, [Communication Assistant] definitely interjected twice, which I think was really useful. Because if she hadn't been there, I wasn't allowed to say anything, yet I was sitting there when [Defence Lawyer] asked this question... And I thought if I can't as an adult understand what he's asking, how the hell does a six-year-old understand it? – Caregiver*

However, intervention was not always perceived as sufficient:

*At what point does the judge step in? At what point is not okay to have these questions asked?... There should be some law somewhere in there which is when the lawyer is trying, and you can tell, everyone in the court can frickin' see it, when he's twisting it and it is so much easier to twist things with a child... It's so much harder to not fall into the answer that they want to hear. – Caregiver*

When asked about aspects of the court process that they would like to change, the manner in which children are cross-examined was a priority for all participants. Confusing, and aggressive, credibility-challenging cross-examination practices were cited as detrimental to the psychological safety of young people as well as the quality of evidence that they are able to provide.

*When it was time for her to go into court and give her side of the story and stuff I feel like, you know, she needed to be treated like a kid. – Caregiver*

*'Cause I think that a fantastic outcome would be kids feel safe, secure, they can speak their minds, and the truth. And the biggest thing is not to be intimidated by lawyers, 'cause you'll get so much more out of them. – Caregiver*

*Because I'm scared, just from what our kids said I'm scared that kids will just clam up, and then you don't have a case and he gets to walk, you know. – Caregiver*

For one family, the manner in which the young witness was cross-examined, and the distress that this caused for the witness and her caregivers alike, was a major factor in their decision not to participate in a proposed retrial.

*What was the point, why did we bother, if someone can talk to her like that? Which is why we didn't go for the retrial...we're not putting her through that again, there is just no way. – Caregiver*

### **The court environment matters**

Feeling comfortable and supported when at court was identified by participants as integral to coping through the trial. Key aspects included warmth from those who were guiding them at court and safe and comfortable spaces to be in when at court. However, these elements of support were not consistently provided. When they were, this was experienced as supportive, when they were not this was experienced very negatively by participants.

Court was described as an inherently intimidating environment.

*But they had this concept that that's where the baddies go, the baddies go to court and go in the clinker. And so for them to go in, you know, they were seeing all this stuff, they said it was really, they didn't use the word intimidating but they were intimidated. Scary they said. – Caregiver*

*I know the court is a very, very serious place, like I understand that, but from the moment you walk in the doors that's all you're getting, very cold, you're in a bad place, you've frickin' walked into court, you don't want to be here, the whole thing is just not inviting. – Caregiver*

When victim advisors were experienced as warm and comforting, this was a critical source of support for families and played a key role in fostering a sense of comfort and safety at court.

*[Victim Advisor] was fantastic. And I think it all comes back to that, the staff you've got. She's just amazing, but she knows exactly what's happening, she understands the system, and she made a big difference. Having her there was, you know, it's a buffer. It just makes it far more gentle. But I understand people are so busy, and she was a blessing. If she hadn't have been there, because they had the room, you know, the nice, friendlier room, the child room, that was great, but if she hadn't have been there to kind of introduce us to that and explain where things were it would've been really hard. – Caregiver*

Participants identified the qualities of victim advisors that made them an integral support were 'the love', having the best interest of the young witness at heart and connecting well with the witnesses. One victim advisor was described as "a box of diamonds". However, this was not a consistent experience and some families perceived victim advisors as preoccupied or inattentive.

Victim advisors were not the only source of emotional support at court. Where there had been a communication assistant involved in the trial, their ability to connect with a child was hugely appreciated by one family. For one family a victim support staff member who had been supporting them long term attended court with them and provided invaluable support.

The AVL room was, for young people, the main space where they spent time at court. Factors that contributed to this space being safe and comfortable for young witnesses were having toys and activities available, having support people who they felt comfortable with in the room with them, and the availability of food and drink and appropriate activities.

*I guess just being in the room with [Victim Advisor], yeah, 'cause it was like nice and colourful, colourful couches. Just made me feel at home basically. - Young Person*

*Oh, being told she could take whatever she wanted too. So she has these bunnies that she always takes to bed and takes everywhere, so she could take bunny if she wanted*

*to...[Communication Assistant] had lots of different coloured pens and things there on the day...Having stuff like that that's age appropriate, that means there's something to do. – Caregiver*

When asked what the most important things in the AVL room are, one young witness replied: *The toys and the cookies and Milo.*

However, young people thought that there was room for improvement - one Auckland AVL room was described as “*boring*” and as needing to be “*a bit more colourful*” by one young person. Another young person spoke about how “*the temperature would all of a sudden drop and then rise*”.

The provision of food was an important part of making court a positive experience, and those who provided food were viewed positively. Children appreciated provision of biscuits and Milo, and frequently cited these as the only good things about going to court.

*It was cool [referring to the video link room]... Cos if they, like, said they're gonna pause and stuff, we would like draw and eat. Just eat cookies and that. – Young Person*

However, for one family, a limited supply of food, and a lack of personal resources to get this made days at court challenging.

*And, like, it was two days in a row. And on the first day, we bring heaps of food and then they cancelled it and we ate all that food in that area, cos there was, like, I think there was about four people. And we ate all our food and, like, we had no more food and money left. And on the second day, they didn't and we just left to like kind of starve. – Young Person*

Factors that helped with familiarity and comfort in the court environment included familiarisation through the Education for Court programme and meeting the judge and lawyer(s) prior to testifying. However, for one young person, meeting the defence lawyer prior to the trial created added distress and confusion as his demeanour was so different during this meeting to his demeanour during cross-examination.

*She had just met this really nice lawyer who was kind and friendly to her and then turns into this a-hole of a guy. And that was confusing, because I remember her saying to me at the end of it 'He seemed pretty nice'... How confusing is that? ...Why even let her meet that person who is there to do a job which is convince other people that everything*

*you are saying is not true essentially, or that you wanted it or whatever. So that in itself I think is very confusing. - Caregiver*

### **Safety and distance from the defendant when at court is extremely important**

Fears of seeing the defendant when at court was a major source of anxiety for young witnesses and their primary caregivers alike. This included the knowledge that the defendant was in the court building, and in some cases an awareness of the defendant was present in the courtroom when the child was giving evidence.

*Yeah, so why is it that the lawyers can't just be there? Because that's, you know, the kids are aware that he's in the room, right. So automatically that's trauma. – Caregiver*

*To be honest I didn't really feel that safe. I know there was people around me who were safe and stuff but I still felt like I might see him which was pretty scary. - Young Person*

*Because we knew that we'd be in the same building as the guy who did this, that actually scared her quite a lot...She was really intimidated by the fact that he was in the same building as us. – Caregiver*

Protection from contact with the defendant was important to families and when this was not adequately provided for, stress was heightened. Some families described a sense that they could 'bump into' the defendant at any time.

*And one part there the Police Officer, we were in one room and we were escorting out the building, and she told me to stand somewhere and just stay there. And then she'd go out in the corridors, have a look if anyone was there, and then be like 'Come on, come on', like that sort of thing. Yeah, I was scared that maybe we might have bumped into him and how would I have reacted. - Young Person*

*When we were getting ready to leave the courthouse the head detective guy who was helping us kind of told us we needed to hurry because the defendant was coming out the front door. So, and that was quite funny to think like he can walk out at any minute and then, like are we going to start fighting on the street, like what are we going to do? But yeah, that was the only sort of protection thing was that the cop told us like we need to move along before he comes out. So there was nothing really... – Caregiver*

Caregivers were sometimes unable to avoid encounters with the defendant, such as when giving evidence or at sentencing. Those interviewed described this as significantly distressing and as adding another layer of anxiety to the court process for caregivers.

*I don't want to use those words because I know I'm not the victim as such, but it's re-traumatising. It's taking you back to a place that you don't really want to re-visit. You know it's the right thing to do but yeah, I mean I don't know why it couldn't be done, even in the court video room with [Young Witness] that she sat in. – Caregiver*

*It really messed me up having to see [the defendant]... There is this person who has done these things right there and it is very distracting, and it is raw emotion, and you're trying to give evidence and you're trying to listen to the lawyer but all you can think about is this fucking person right there. - Caregiver*

This caregiver had given evidence in the trial and said that she was not offered a screen. They stated that had they been offered the option, they would have chosen to have a screen.

Processes to strictly ensure that no contact with the defendant would occur were highlighted as necessary. This provision would allow for young witnesses and their families to feel confident that they would be protected from encounters with the defendant.

*Yeah, yeah, the process. There just needs to be, it needs to be tightened. Like, you know, you don't have a perpetrator coming down and the actual victims going through in the same space. You have to separate the two because it's just, it's a no go. – Caregiver*

Several participants spoke about how young people would feel much safer if they did not have to enter the court room at all and were able to give their evidence via video link from another building entirely.

*Maybe, I don't know, have different buildings, like not in the same buildings. Yeah, so you don't have to walk through, because we like walked through a lot of doors just to get to this one small room. Yeah, and I reckon if there's another building and then the courthouse is over here and they're doing their thing, and we're in another building we'd feel more safer. - Young Person*

*So with her giving evidence the way she did, I feel like she needed to be somewhere else, not in the same building. Because she was really scared of this man... knowing*

*that she was in the same building as this man just really, yeah, freaked her out –  
Caregiver*

### **Separation of young witnesses from their caregivers during the court appearance is difficult**

The ability of young witnesses to access their primary supportive caregiver during their time at court was identified by some participants as very important.

*What was helpful going to Mum was that, 'cause she's the best, so it made me feel better. – Young Person*

*When she gave her evidence, she had to ask for a break. The defendant, the defence lawyer actually gave her a bit of a hard time, and she asked the judge for a break. She got a break and stuff and she took off and came looking for me, because I wasn't with her. – Caregiver*

However, caregivers are often unable to be the support person for their child while their child was giving evidence as the caregiver was themselves a witness. This was distressing for caregivers and children alike.

*When we found out that I was being called as a witness that just rocked our boat entirely because it meant that I couldn't be with her so I could no longer be that support person. And we were advised that [Witness' Father] shouldn't either...It was very difficult for us to come to terms with the fact that we could not be the people with her...that's your child. - Caregiver*

*That just made me feel, it made me feel child abuse. You're taking the mother away from the child who's in court testifying to send her father to jail, and you're telling me to leave. You're taking away that support person for my child. – Caregiver*

One caregiver described surprise at the expectation that her child would not be able to see her after giving evidence:

*She's just been through a traumatic frickin' thing. And the first thing she wants to see is her mum. – Caregiver*

## **There is a lack of information throughout the process**

A lack of information about the court process heightened the stress and uncertainty associated with a system that is 'so foreign'. Young people and caregivers were often uncertain about trial procedures and these uncertainties created significant anxiety.

*A lot of stuff actually wasn't explained, like I didn't realise he would still be walking round like a regular person in court while we were there. I actually thought, you know, he'd be sitting in a cell and only brought out for the hearing and stuff, but no, that wasn't the case. Yeah, so it would've been helpful if somebody had have told me that.*  
– Caregiver

Young people reported having almost no knowledge about court until just prior to the trial. In the absence of this knowledge young people made incorrect assumptions, most notably that they would have to be in a room with, or speak with the defendant, which was a distressing thought. Some young people did not realise that they would not have to give evidence in the same room as the defendant until they attended court for the Education for Court programme just prior to trial. Consequently they experienced significant unnecessary stress and anxiety for many months prior to the trial.

*I honestly thought that would have to see [Defendant], I thought that that I would be in the same room as him and we would have to talk to each other about it. - Young Person*

The following excerpt from an interview with one young witness illustrates how challenging comprehending the meaning of 'going to court' can be for a child:

*The first time when I was going to court I didn't know what court was.*

***What did you think it would be like?***

*Like something, like there's a court and you play on it.*

***Oh, like that kind of court, like a netball court or a tennis court?***

*Yeah, and that they would make you feel better.*

***And was it like that?***

*No.*

Caregivers were the key source of information about the court process for young witnesses, but often lacked information themselves. This included information about court processes and



procedures, but also how to access needed supports such as counselling. It appeared that there were limited contact people available to families to provide guidance in these areas.

*But we'd get questions [from the children], and a lot of the questions we couldn't answer, you know. – Caregiver*

*You kind of get drip fed information as you go and what I think you really need is a big thing at the beginning. Here's a big pamphlet, here's some links to some videos, whatever it is, and you can take your time to go through this stuff...But just like little tiny bits at a time is very confusing because I feel like we had to constantly chase people for answers that we should have already known. Someone should be getting in touch with us to tell us about it. – Caregiver*

Police staff tended to be the main contact people for parents seeking information and were perceived as helpful in providing the information and answering questions that fell within their scope. However, police staff were not always available, and often caregivers had so little understanding of the court process that they did not know what information would be important to seek from police staff. Furthermore, seeking this information and supports required persistence at a time when emotional and practical resources were low.

*I felt like I was doing a lot of the chasing people and trying to find the information. Who do we go to for support for this how do we do this, how do we do that, who is the person to talk to about this...and if that had just been a priority in the very beginning...within your first flippin week, when you have gone and reported something that is so damaging, that you have a team that goes we are coming to see you, we are coming to acknowledge that this had happened in your family, we've got information, especially in the beginning because that is the most vulnerable, honestly, because you've just found this out and you're trying to figure out what the hell do we do now. That is when you need the biggest amount of straight away support. Because we just felt we had no support. - Caregiver*

### **Parenting young witnesses through the court process is challenging**

Caregivers are the primary source of support, and a critical one, for young witnesses through the court process, but caregivers reported they were ill-equipped for this given the limited supports available to them.

*Like for the first couple of months, maybe two or three months, I would constantly wake up. So she would be there with me making sure... she would be there with me making sure that nothing happens. – Young Person*

Caregivers spoke of being distraught upon hearing their child's accounts of the offending and their own emotional distress following the disclosure.

*I think it's hard because you want to believe, and you don't want to believe. I mean you want to believe but you don't want to believe it happened. You don't want to believe it. Well you want to believe your daughter's words, and you want to take these things very seriously, but you'd love to believe it didn't happen. – Caregiver*

*Like, have you seen people when they get bad news and then they just want to be physically ill? ... It's actually a real thing that I felt like I was giving birth out my throat. It was that, and it just felt like the death of a child. And it still feels like the death of a child. – Caregiver*

The court process, and particularly the time waiting until the trial, presented challenges to parenting, and the toll that this took on their own wellbeing during the trial process was evident in descriptions of their experience. Caregivers described the experience of parenting through the court process as 'terrible', 'hard', 'exhausting' and 'damaging'.

*So it was in the period of about six months where I was a headless chicken, I didn't know whether I was coming or going. And having to pick up the pieces and put their lives back together for what he had done to them. – Caregiver*

*Yes, it's all stressful and straining and I can cry myself to sleep every night. But as long as my baby was okay, she's got me through it, you know? – Caregiver*

Some caregivers talked about the sense of isolation that comes with parenting in the circumstances of sexual abuse disclosures and the investigation and prosecution that follows. Often caregivers were not able to share openly or seek support from their social network due to the sensitive nature of the offending, and for social or assumed legal reasons. One caregiver described wishing that she had more access to others who had the shared experience of being the parent of a child going through the court process.

The experiences of children and their caregivers are interconnected. However, despite their essential role and the multifaceted challenges and emotional strain that they faced, most caregivers identified that there was little support for them within the broader court system. This

included the period leading to the trial when family relationships were strained, and when distress related to the investigation and the impending court trial was intense.

*And you have to remember that families are victims too, you know. We go through the same. It's a hīkoi we do together. – Caregiver*

*Total lack of support. It didn't need to be that hard. And I just hate the idea that some other families are about to go through what we have been through with that lack of support and with that lack of knowledge. – Caregiver*

Caregivers also talked about the limited supports for them once at court.

*Well I think the reality is, nobody is really serving the mother's needs in this situation because you're almost invisible. – Caregiver*

*But the, my biggest challenge with the court I think, is that as a parent of the victim, you are no part of it in a way... the Crown is representing the Police and [Defendant] has his own lawyer, so you're kind of like, you don't feature almost. You feel slightly excluded, yet I understand the reasons why you don't necessarily meet and get to know the lawyer. – Caregiver*

When caregivers did feel well supported, this was typically by extended family, workplaces or community, and for one caregiver through a victim support worker who was engaged with the family throughout their entire involvement with the justice system.

*I'm very lucky, I have an amazing family, so I have great family support. And I've also got some really good friends, and my work are amazing. So I felt quite supported in that way. - Caregiver*

The need for increased formal support was identified by all caregivers.

*What do they [caregivers] need? Well they need their own psychologist, in my opinion. And I also think it would be so awesome if you could get assigned a navigator who can navigate you through Oranga Tamariki, Police and Court. They are so siloed and so disconnected, and their churn rate of staff is unreal. And I understand, I can understand why. But there was not a single person that could answer a question for the whole spectrum... You just need somebody to go, I don't know, to give you a bit of hope... just a person you can call.*

*[It was] my worst nightmare because of why we were there... parents need a support person like a proper support person, you know. – Caregiver*

The caregiver who had a victim support staff member through the duration of the trial process described this as invaluable in both practical and emotional terms. This caregiver said that this consistency and availability of support should be provided for all families.

*Yeah, she's always there for us, no matter what. And, yeah, it's really just having that support person... make sure that that support person is actually involved in the family and embracing them. And being there from day one till day none. Right through, not having one today, one tomorrow, who's on next week?*

### **Discussion**

The Sexual Violence Court Pilot represents a commitment to improvement in practice and offers an important opportunity to create meaningful change for victims and for the efficacy of New Zealand's justice system. In establishing the pilot courts, a stated intention was to "improve the court experience by reducing delay and uncertainty for all those involved, especially child and vulnerable witnesses" (Chief District Court Judge Doogue, 2016). However, the young people and caregivers who were interviewed in this research described experiences to the contrary. These experiences ranged from challenging to extremely distressing and retraumatising. The overall impression was that participation in sexual violence trials continues to be negative in its impact on young witnesses.

*There is so much within the justice system that we question having gone through this experience. – Caregiver*

Concerns expressed by participants in the current study are very similar to those raised by young witnesses and caregivers in our previous study that predated the pilot courts (Randell et al., 2018). That is, long waits to trial, limited information about trial processes and supports, difficulties with cross-examination, insufficient supports for caregivers, and the need for consistent safety and comfort at court were concerns for those interviewed in both studies. It cannot of course be assumed that the sample in the present study is representative of the entire population of young witnesses and caregivers within the pilot courts and there may be those whose experiences were less or more negative. However, the consistency between these reports suggests widespread concern. Their views provide an insight into the experiences of arguably some of the most vulnerable of witnesses who are involved in our justice system. The reports

from the 17 people interviewed suggest that despite good intentions, the pilot courts are not effectively addressing the primary areas of stress for young witnesses.

Some participants questioned whether their participation had been worth the stress that they had endured. One family withdrew from a proposed re-trial. The consequences of a high level of distress for young witnesses and their caregivers has implications that extend beyond concerns about individual wellbeing. Attending to these areas of distress will increase willingness to participate in court processes. Additionally, reducing distress improves a young person's ability to provide good evidence thus enhancing the efficacy of justice processes. One parent summarised the cumulative impact of insufficient attention to the needs of young witnesses and their caregivers as counterproductive to the purposes of our justice system. In this case, there was a retrial and thus an additional delay of approximately another year during which the offender remained in the community.

*I mean I understand you've got this system, it's a hugely, you know, it's a costly system. But if you don't get it right the first time he gets to walk, and that what's happened. This guy sexually assaulted I hate to think how many people. - Caregiver*

The concerns raised most consistently by participants - long periods of time awaiting trial and the ways in which young people are cross-examined - are matters that belong within the scope of the pilot courts' objectives. The pilot sought to improve case management thus decreasing the delay to trial, and set an expectation of judicial management of the examination of witnesses. However, from the reports of participants in the current study, pilot court procedures have not made significant progress to the extent that a positive impact on young witnesses is felt.

Some concerns raised by the present and prior research were not specifically addressed by pilot court initiatives and it is therefore unsurprising that they remain a concern. This includes the provision of information to young witnesses and their caregivers, support of young witness and their families during the period leading to the trial, the physical environment of the court, and sensitive management of a young person's access to their caregiver's when at court. The needs of vulnerable witnesses are broad. To mitigate the negative effects of court involvement for young witnesses there needs to be broader provision of support and information. The pilot courts provide an opportunity to test innovations in the areas of additional supports for families pre-, during and post-trial such as more timely and extensive information provision and preparative support. Additionally, improved protections and

comforts for young witnesses when at court, including the possibility of young witnesses giving their evidence from outside the court building itself are suggested.

An additional consideration that lies outside the direct purview of the pilot courts was the needs of young witnesses' caregivers. These interviews revealed just how inextricable the experiences of young witnesses and their primary supportive caregivers are and that the support of caregivers is integral to the wellbeing of young complainants. From a psychological perspective this is entirely unsurprising – a young person is a part of an emotionally interconnected family system. However, our present criminal justice system tends to treat young witnesses as individuals, often regarding family members as potential witnesses, but neglecting the importance of family members as providers of support. Consistent with our findings in the earlier study (Randell et al., 2018), caregivers in the current study faced challenges around their own emotional response, how to support and respond to their child, and how to access information and support. The stress that caregivers are under during the court process, and the limited supports that families have available to them were evident in their descriptions of their experience. If the justice system is committed to reducing the negative impact of court involvement on young witnesses, it must better attend to the needs of family/whanau. Practical ways of achieving this would include providing comprehensive information in the early stages, and consistent and adequate support during a trial.

This research and its predecessor are testament to the significant difficulties in recruiting young people and caregivers to take part in such research. Other research involving interviews with young witnesses has experienced similar difficulties (Eastwood & Patton, 2002; Hayes et al., 2011; Plotnikoff & Woolfson, 2009). Explanations for difficulties recruiting participants in the current study include that there may have been fewer cases involving young complainants in the pilot courts during the recruitment period than expected, thereby the pool of potential participants was small. Secondly, although those who did participate in the research said that they experienced the interview process as helpful, given how stressful the court process had been it is understandable that participation in an interview about the very process they found stressful might be unattractive to young witnesses and their caregivers. One caregiver spoke about how they had been reluctant to participate because the court process had been so upsetting and they had been worried about 'reopening the wound'. Thirdly, direct recruitment by researchers was not possible for ethical reasons. Recruitment was then reliant on victim advisors for whom this was an added responsibility in what is an already demanding role. Although our recruitment procedures, which were developed in consultation with victim

advisors, determined that potential participants would be offered participation at the time they were at court, this rarely happened. As a result recruitment demanded victim advisors phone the families following the trial completion. Finally, victim advisors did not approach some young people as they deemed them to be particularly vulnerable at the time of their meeting with them. It is therefore possible that those whom had the most difficult time participating in the judicial process are not captured here.

Qualitative research is rarely a straightforward process in ethically complex and sensitive areas such as sexual violence. However, it is essential for both ethical and practical reasons. To make strides in creating a justice system that no longer inflicts additional trauma on the families whose participation it relies upon, then we must prioritise their voices. Finding effective and sensitive solutions to participant recruitment remains a challenge.

## **Part II: The Questioning of Young Witnesses in New Zealand Courts**

Child sexual abuse allegations present unique challenges in the justice system in comparison with other forms of child maltreatment. There are rarely witnesses to the event, corroborative evidence in the form of abnormal genital findings is rare (Heger et al., 2002; Kellogg et al., 2004) and there is no distinct cluster of sexual abuse symptoms or outcomes (Kendall-Tackett et al., 1993; Putnam, 2003). Consequently, the evidence provided by young witnesses is significantly important in sexual violence trials.

Historically children's testimony was considered unreliable. However, the last four decades have seen a proliferation of research on children's ability to report events they have experienced. It is now generally acknowledged that when appropriately questioned, even young children and those with developmental disabilities, can provide accurate and detailed testimony (Brown & Lamb, 2015; Goodman et al., 2017).

Communicative competence in the legal context requires adults to ask questions in such a way that children can respond appropriately. Over the last three decades practitioners have worked closely with researchers and focused on the development of interview protocols which, in day to day practice maximise the ability of children to provide full and accurate accounts of alleged abuse events. Notable amongst this group are Michael Lamb and colleagues who developed the National Institute of Child Health and Human Development (NICHD) Protocol (Lamb et al., 2007). This has been used in several countries and has been the basis for Aotearoa NZ's evidential interviewing processes for many years.

Consensus among researchers and practitioners has emerged in relation to a number of factors that contribute to the accuracy of children's reports (Brown & Lamb, 2015; Goodman et al., 2017). With respect to courtroom examination of children, studies involving transcript analysis of courtroom testimony show that the nature of lawyer questioning predicts children's response productivity. Open-ended questions and prompts are associated with greater accuracy, greater volume of information and fewer inconsistencies. Closed and leading questions yield limited and unelaborated answers and increase self-contradictions (Andrews et al., 2015, 2017; Andrews & Lamb, 2017; Klemfuss et al., 2014; Zajac et al., 2003; Zajac & Cannan, 2009). In response to complex, and grammatically defective or ambiguous questions, children rarely request clarification, are likely to comply with leading questions, or attempt an (often poor)



answer (Waterman et al., 2004; Zajac et al., 2003). Under inappropriate questioning conditions, the majority of children change some aspect of their testimony (Zajac et al., 2003).

Additionally, the distress associated with the courtroom setting can have a negative effect on children's reports and communication ability and increases vulnerability to suggestion (Nathanson & Saywitz, 2003; Quas & Lench, 2007). When compared with children questioned in a small, private room, children being questioned in a mock courtroom showed greater heart rate variability, an indication of stress (Nathanson & Saywitz, 2003). The children also exhibited impaired memory performance, greater acquiescence to misleading questions and increased errors. This suggests that the courtroom setting itself may contribute to inaccurate recall performance which indicates that a reduction in the stress experienced by young witnesses is a necessary component for achieving best evidence.

Despite a growing body of research evidence regarding best practice for questioning children, both internationally and in Aotearoa NZ there appears to have been little or no change to the manner in which examination proceeds in the courtroom. Standards of forensic evidential interviewing by police and social workers in Aotearoa NZ have been found to be generally high (Davies & Seymour, 1998; Hanna et al., 2012) albeit with room for improvement (Wolfman et al., 2016). In contrast to this, research involving analysis of court transcripts in Aotearoa NZ indicates that the style of questioning and language used in court, particularly during cross-examination, is often developmentally inappropriate, complex, and therefore potentially damaging to the accuracy of a young witness's evidence (Davies & Seymour, 1998; Hanna et al., 2012; Zajac et al., 2003; Zajac & Cannan, 2009). Questioning, particularly during cross-examination has been found to include complex language including double negatives, passive voice, multiple subordinate clauses, complex relational concepts (such as those relating to time) and complex legalese jargon all of which may incite unnecessary confusion in children leading to a potential for an unfair trial (Davies & Seymour, 1998; Hanna et al., 2012; Zajac et al., 2003; Zajac & Cannan, 2009). Defence lawyers typically used more leading and closed questions than prosecutors and forensic interviewers; question forms that are associated with lower productivity and inaccuracy in answers (Davies & Seymour, 1998; Hanna et al., 2012).

This body of research suggests that questioning during cross-examination is antithetical to questioning praxis known to support accurate reports from children. Inappropriate questioning may be, in part at least, reflective of limitations in lawyer expertise concerning both what constitutes developmentally appropriate language for young people, and how to

adjust their own language to accommodate young people (Henderson, 2003). Additionally, rather than being a process of open enquiry, cross-examination is typically conducted with the intention of controlling witness responses and/or causing confusion in order to undermine their credibility (Davies et al., 1997; Henderson, 2001). Texts which guide legal practitioners in cross-examination (e.g., Eichelbaum, 1989; Salhany, 2006), promote the use of precisely the language that hinders young witness's accuracy, as a means of controlling the dialogue between lawyer and witness. The intervention of judges in inappropriate questioning by lawyers appears to have increased over past decades (Davies & Seymour, 1998; Hanna et al., 2010) but remains limited and unlikely to adequately moderate inappropriate and unsafe questioning (Hanna et al., 2010).

The current research was driven by a need for an in-depth examination of current practice around questioning of young witnesses in Aotearoa NZ. Recent efforts to improve court processes including the Benchmark initiative (see <https://www.benchmark.org.nz/>), the establishment of the Sexual Violence Courts Pilot, and a number of related trainings for judges and lawyers gave rise to the need for re-examination. This study sought to provide a snapshot of current practice in Aotearoa NZ courts in terms of the language and question types employed by lawyers in the questioning of young complainants in sexual violence trials. It aimed to compare the nature and type of questions used by defence lawyers with those used by prosecutors, as well as the nature and type of questions used in pilot courts with those in non-pilot courts. Also of interest, given the objectives of the pilot courts were the delay to trial, number of judge interventions, and provision of breaks.

## **Method**

Approval and support for the research was also provided by the then Chief District Court Judge Jan-Marie Doogue. The release of transcripts was authorised by the Ministry of Justice and administrated at the court registry level with permission of the Presiding Judge in each case. Ethics approval was obtained from the University of Auckland Human Participants Ethics Committee.

## **Transcripts**

Court transcripts were requested from the two Sexual Violence Pilot Courts and two geographically and demographically similar non-pilot District Courts, with the aim of including ten transcripts from each court. Transcripts that met the inclusion criteria were those from sexual violence trials involving complainants under the age of 18 at the time of the trial. More specifically, the transcripts sought were the ten most recent consecutive trials that met inclusion criteria and took place in 2018 (but could include trials from 2017 where there were fewer than ten transcripts from 2018 that met criteria). The section of the transcript that was requested was the testimony of the young witness as well as the transcript of the evidential interview where one had taken place.

Not all courts were able to provide a total of ten trials for this time period. This was because fewer than ten trials met the inclusion criteria or because of an unexplained inability to access further transcripts despite repeated requests. The final sample included 26 transcripts, 16 from the pilot courts and 10 from the non-pilot courts.

## **Procedure**

Transcripts were independently redacted by a member of the research team who did not participate in the subsequent coding and analysis. In the process of redaction, all identifying details were removed. References to named people were replaced (where necessary) with the nature of the relationship, for example [father], [teacher], [friend]. References to named places were replaced (where necessary) with the type of place, for example [school], [beach house].

A coding scheme was developed by the researchers that was consistent with current best practice guidelines in New Zealand such as the Benchmark initiative's guidelines for questioning children (Hanna et al., 2019), as well as existing literature concerning language use in forensic examinations of vulnerable witnesses (e.g., Davies & Seymour, 1998; Hanna et al., 2012). The coding scheme is shown in Table 1. The redacted transcripts were then coded by members of the research team who were blind to details of the court of origin for each transcript as well as to trial outcome. The evidential interview (where available) was read thoroughly prior to and during coding to understand the context of each question's place in the greater whole.

Each question that was asked of the child during the trial was coded according to the questioner: judge, prosecutor or defence lawyer. A "question" has been used to refer to

utterances that demanded the attention of a witness, most of which were phrased as questions, but some of which were statements functioning as a question (e.g., “So that happened at Nan’s house?”). They were then coded according to mutually exclusive question *types* (see Table 1). The question types included ‘Open’ questions, ‘Facilitator’, ‘Uncategorised’, ‘Option posing with unrestricted alternatives’, ‘Option posing with Yes/No or forced choice alternatives’, ‘Option posing – Unrestricted alternatives’, ‘Leading – tag’, and ‘Leading – other’.

Table 1. Question types, descriptions and examples

Question type	Description	Example
Open	Open ended utterances/questions that invite free recall responses	Tell me more about that. What happened next?
Facilitator	Utterances with little or no lexical content, including: A non-suggestive audible filler/minimal encourager	Okay or Hmm
	Statements that orient the witness.	Can you just look at the last paragraph on page 2?
	Recap/echo. Recaps whereby the questioner faithfully repeats child’s words	Child: On the floor. Adult: Okay, you were on the floor.
	Provides clarification	Lawyer: How old were you then? Witness: When I was in Year 8? Lawyer: Yes, in Year 8.
Option posing – Yes/No or Forced choice	Closed questions that do not imply the expected response. Including: Yes/No questions and restricted alternative (forced choice)	Were your clothes on when this happened?
Option posing – Unrestricted alternatives	Questions that provide unrestricted alternative response options	Was that in 2013 or 2014 or some other time?
Leading – Tag	A (short) question tagged to a declarative	He didn’t touch you, did he?
Leading - Other	A question that leads the witness to respond with a particular answer This includes a question that: Makes an assumption about something or uses information not previously mentioned by the witness Ignores an earlier contradicting response that deems the question invalid Summarises or quotes the child incorrectly Refers to prior knowledge about the investigated incident not disclosed by the witness	Whether you agree with it or not, at some point three kids joined the class and one of those kids was [name of classmate]? (when no other classmates had been mentioned)
Uncategorised	Questions that were inaudible, partially inaudible, unfinished, or interrupted	

Given the small number of questions in some categories, there was a process of post-coding simplification. Option posing questions with unrestricted alternatives were very rare so

it was decided that all option posing questions would be collapsed into one category for analysis. Facilitator questions were also all collapsed into one category for the purposes of analysis, as each sub-category functioned to orient, clarify or support the respondent.

Each question was also coded for features of language likely to impede a young witness’s ability to comprehend and respond to the question. These categories were not mutually exclusive – any given utterance could contain more than one of the coded language features. Complex language features included ‘Multiple Questions’, ‘Indirect questions’, ‘Complex non-legal vocabulary’, ‘Legal terms or expressions’, and ‘Complex grammar’. These codes (along with examples) have shown in Table 2.

Table 2. Complex language features, descriptions and examples

Complex language feature	Description	Example
Multiple questions	More than one question within an utterance which requests more than one piece of information	Was he wearing shorts and a t-shirt?
Indirect questions	Asking an embedded question where it is not clear how it should be answered.	Do you remember if he was at the bach? Ambiguity arises with the response. “No” may mean I do not remember but may be interpreted as he was not at the bach. Likewise, “Yes” may mean, I do remember, but may be interpreted as he was at the bach
Complex non-legal vocabulary	Any of the following: <ul style="list-style-type: none"> <li>• A high register word for which a lower register word is available</li> <li>• Metaphor, idioms, non-literal words or expressions</li> <li>• Ambiguous words that have more than one meaning</li> <li>• Context-dependent words where the referent (usually a pronoun) is dependent on the context</li> </ul>	Siblings (instead of brothers and sisters) Do you swear to tell the truth? Can I jog your memory? He/his when there are several males that could be being referred to
Legal terms or expressions	Common legal expressions	I suggest to you that ... Please tell the Court ....
Complex grammar	Any of the following: <ul style="list-style-type: none"> <li>• Passive voice</li> <li>• Subordinate clauses</li> <li>• Negation</li> <li>• Conditional</li> <li>• Multiple clauses including two or more verbs)</li> </ul>	Was the last day that you were ever taught by [Defendant]? Did your Nan go to work if [Defendant] was at home? Would, could, should... And photograph 5 underneath, is that what you see behind you if you are standing in front of [Defendant]’s, door to go into his room?

## **Interrater reliability**

In order to establish interrater reliability, two coders simultaneously coded a randomly selected 20% of the sample. A Cohen's Kappa coefficient was computed to assess the reliability of this coding by computing question by question across the pair of coders. For coding of questioner, the Cohen's  $\kappa$  coefficient was 0.95 for defence lawyer, 0.94 for prosecutor, and 0.61 for judge. For coding of question types, the Cohen's  $\kappa$  coefficient was 0.91 for Open, 0.84 for Facilitator, 0.79 for Option-Posing, 0.65 for Leading (Other), and 0.80 for Leading Tag questions. For coding of complex language features, the Cohen's  $\kappa$  coefficient was 0.81 for Complex Grammar, 0.78 for Complex Non-Legal Vocabulary, 0.83 for Legal Terms and Expressions, 0.60 for Indirect Question, and 0.56 for Multiple Question. Weekly meetings were held and all disparities in coding were resolved by consensus discussion. Further sweeps of the data were performed to rectify agreed upon coding changes.

## **Analysis**

To compare the occurrence of each type of question, and each complex language feature within trials, a logistic regression model was used with the questioner (defence or prosecution) and court (pilot or non-pilot) as independent variables. For each dependent variable (including the question types and the complex language features) a moderation (or interaction) effect was also examined.

A description of the transcript sample is provided first which summarises the ages of the witnesses and the outcomes of the trials. This is followed by descriptive analyses of the time between the initial complaint to police and trial, the duration of giving evidence, the number of breaks while giving evidence and any judge interventions. The logistic regression analyses are then provided.

## **Results**

### **Transcript sample**

A total of 26 transcripts were provided for analysis: 16 from the pilot courts and 10 from the non-pilot courts. The age range of the witnesses at the time of the trial was 5 years to 18 years ( $M = 13.6$  years,  $SD = 3.6$ ). The average age of witnesses in the pilot courts was 14.7 years, and the non-pilot courts, 13.4 years.

The verdicts in the pilot courts were guilty in 11 of the trials, not guilty in four trials and there was a hung jury in one trial. In the non-pilot trials the verdict was guilty in all but one trial which was a hung jury.

### **Delay to trial**

Delay to trial was calculated as the time between when the young person had their complaint recorded by police in the form of an evidential interview or by signed statement (for two witnesses), and the date of the trial. The average time between complaint and trial across all transcripts was 14.4 months ( $SD = 6.6$ ) and the range was 3 months to 26 months. The average time between the complaint and trial for the pilot courts was 13.2 months ( $SD = 6.9$ ) with a range of 3 months to 26 months. The average time between evidential interview and trial for the non-pilot courts was 16.3 months ( $SD = 5.9$ ) and the range was 7 months to 24 months. There was no statistically significant difference between the two court types (Mann Whitney  $U = 103.0, p = .241$ ).

### **Duration of giving evidence**

The average duration of the child's testimony (which may have included watching the evidential video interview) was 131 minutes ( $SD = 75$  minutes, range = 19 to 333 minutes). A Mann Whitney U test was used to compare the duration of the children's testimony in the non-pilot and pilot courts. This indicated that the duration of the trials was significantly shorter for the pilot courts ( $Mdn = 88$  minutes) than the non-pilot courts ( $Mdn = 169.5$  minutes,  $U = 141.50, p = .001$ ). This was largely because all witnesses in the pilot courts watched their evidential interview preceding the trial and commenced giving evidence in the morning after their evidential interview was played to the jury whereas all witnesses in the non-pilot courts observed the playing of their evidential interview in court at the same time the recording was played to the jury and commenced their evidence straight after this. In the non-pilot courts the average time from being sworn in as a witness and completion of their evidence was 3 hours 9 minutes, with 1 hour 27 minutes spent answering questions. As a result of not being required to be present during the playing of their evidential interview, the period in court during the trial in the pilot courts was 1 hour 35 minutes. That is, the average time spent answering questions was similar for pilot and non-pilot courts.

There was a total of 10482 questions coded across all 26 transcripts. The average number of questions asked of each witness was 403 questions (range = 77-1316;  $SD = 276$ ).

## **Breaks in giving evidence**

Throughout the duration of the 26 trials there were a total of 45 breaks, (overall  $M = 1.73$ ,  $SD = 1.2$ ), with four trials not recording any breaks and six trials recording three or more. When considered separately, the pilot courts documented 23 breaks across the 16 trials ( $M = 1.4$ ) and the non-pilot courts documented 22 breaks across ten trials ( $M = 2.2$ ). There was no statistically significant difference between the two court types (Mann Whitney  $U = 108.5$ ,  $p = .121$ ). Of interest was the number of breaks initiated by the witness themselves (11 of the total 45 breaks). Breaks to relieve the witness were rarely requested or initiated by the judge during testimony, with the average of these being 0.4 per trial in the pilot courts and 0.6 in the non-pilot courts. Other breaks were a combination of technical difficulties with the AVL relay, meal breaks or legal discussions initiated by the judge or counsel.

## **Judge interventions with lawyers' questioning**

The average number of occasions the judge interrupted either the prosecutor or defence lawyer during their questioning of the witness was 2.4 per trial in the pilot courts and 1.6 in the non-pilot courts. Interventions were in most cases to ask the lawyer to rephrase their question to improve clarity, but also included directing a lawyer to ask singular questions, to allow the witness to complete their answer, or to stop repeated questions.

## **Question type**

Of the total number of questions asked of a young witness, on average approximately a third were Option posing ( $M = 33.6\%$ ,  $SD = 12.1\%$ ,  $n = 52$ , .95% CI [30.2%-36.9%]). The second largest proportion were Facilitators, accounting for just under a quarter of questions asked of a witness on average ( $M = 23.7\%$ ,  $SD = 11.1\%$ ,  $n = 52$ , 95% CI [20.6%-26.8%]). Open questions accounted for just over 17% of questions asked ( $M = 17.3\%$ ,  $SD = 12.1\%$ ,  $n = 52$ , 95% CI [13.9%-20.6%]). Approximately one in ten questions on average were Leading ( $M = 11.2\%$ ,  $SD = 12.1\%$ ,  $n = 104$ , 95% CI [8.8%-13.6%]). When the leading questions were considered separately as Leading - tag and Leading - other questions, the proportion of Leading - other questions was  $M = 15.8\%$ ,  $SD = 13.4\%$ ,  $n = 52$ , 95% CI [12.1%-19.5%] and the proportion of Leading - tag questions overall was  $M = 6.6\%$ ,  $SD = 8.62\%$ ,  $n = 52$ , 95% CI [4.2%-9.0%]. The proportion of Uncategorised questions overall was  $M = 2.5\%$ ,  $SD = 3.3\%$ ,  $n = 52$ , 95% CI [1.5%-3.4%]. This is shown in Figure 2.



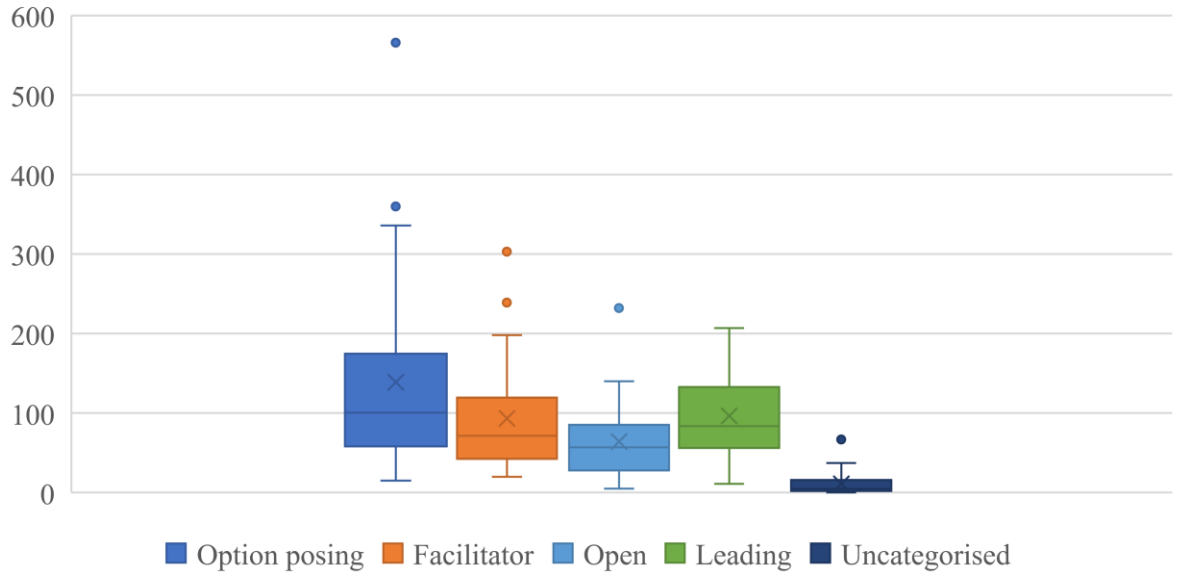


Figure 2. Number of questions asked by question type

This can be further broken down into an analysis of the proportion of questions asked by type (Option posing, Facilitator, Open, Leading, Uncategorised) by questioner (judge, prosecution, defence) as shown in Figure 3 below.

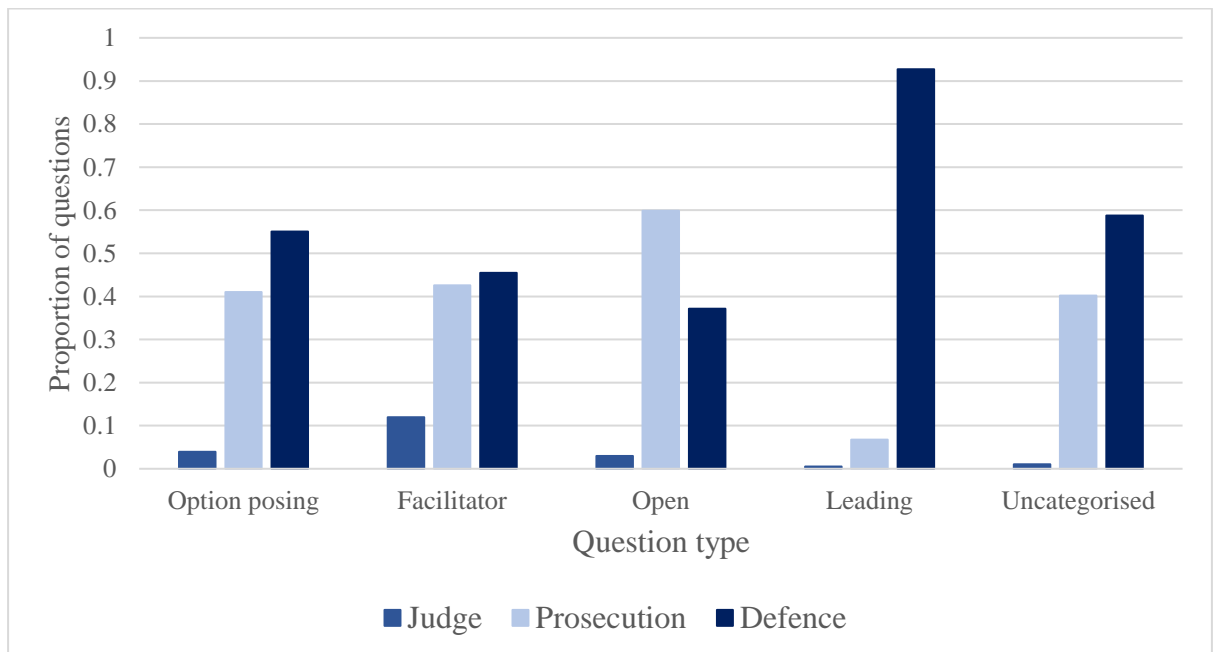


Figure 3. Proportion of questions asked (by question type and by questioner)

## **Complex language use**

Of the total number of questions asked of young witnesses, on average 78.6% contained complex grammar (SD = 10.8%, n =52, .95% CI [75.6%-81.6%]), 39.2% contained complex non legal vocabulary (SD = 15.2%, n =52, .95% CI [35.0%-43.5%]), 11.6% involved multiple questions (SD = 6.4%, n =52, .95% CI [9.8%-13.4%]), 9.9% contained legal terms and expressions (SD = 8.6%, n =52, .95% CI [7.5%-12.3%]) and 6.6% were indirect questions (SD = 4.8%, n =52, .95% CI [5.2%-7.9%]).

## **Pilot versus non-pilot courts**

To compare the occurrence of each type of question and each complex language feature within trials, a logistic regression model was used with the questioner (defence or prosecution) and court (pilot or non-pilot) as independent variables. For each dependent variable, a moderation (or interaction) effect between the questioner and court was also examined. The results of the logistic regression analyses are reported below and in Tables 4 and 6. Given the relatively small number of Uncategorised questions (2.7% of the total), these were not considered any further in the analysis.

Complex grammar, complex non legal vocabulary and multiple questions were used more frequently in the pilot than the non-pilot courts (1.34 times more, 1.12 times more and 1.15 times more respectively). There was no significant difference between pilot and non-pilot courts in the use of indirect question and legal terms and expressions.

Option posing questions were 1.23 times more likely to be asked in the pilot than the non-pilot courts. Leading (other) questions were 1.14 times more likely to be asked in non-pilot than pilot courts. However, facilitators were 1.19 times more likely to be used in the non-pilot than the pilot courts, and there was no significant difference in the use of leading tag or open questions.

## **Prosecution and defence lawyers' use of question types**

The mean percentage of each question type by prosecutors and defence lawyers in pilot and non-pilot courts is shown in Table 3.

Table 3. Mean percentage of question types used by each questioner and in each type of court.

Question type	Prosecution % (SD)	Prosecution Pilot Court % (SD)	Prosecution Non-Pilot Court % (SD)	Defence % (SD)	Defence Pilot Court % (SD)	Defence Non Pilot Court % (SD)
Open	25.51 (11.50)	23.98 (11.21)	28.39 (12.17)	9.02 (5.21)	9.39 (5.26)	8.33 (5.33)
Option posing	36.77 (12.98)	39.71 (11.38)	31.23 (14.64)	30.37 (10.37)	31.21 (10.94)	28.80 (9.60)
Leading (Other)	5.26 (5.86)	3.97 (4.63)	7.70 (7.37)	26.33 (9.98)	26.49 (10.63)	26.04 (9.24)
Leading tag	0.83 (1.24)	0.98 (1.43)	0.53 (0.75)	12.40 (8.97)	13.25 (9.13)	10.80 (8.95)
Facilitator	28.71 (10.71)	27.54 (9.38)	30.94 (13.29)	18.77 (9.27)	16.98 (10.00)	22.15 (6.99)
Uncategorised	2.07 (3.53)	2.67 (4.17)	0.92 (1.37)	2.88 (3.16)	2.30 (19.94)	3.97 (4.65)

Results of the logistic regression analyses for question type (see Table 4) indicated that in non-pilot courts, prosecutors were 5.1 times more likely to use open questions than were defence lawyers (28% and 8% of questions respectively). In pilot courts prosecutors were also more likely to ask open questions than were defence lawyers, however, this difference was less pronounced (24% and 9% of questions respectively). In pilot courts prosecutors were 2.6 times as likely to ask open questions. This appears to be due to an increased use of open questions by defence lawyers, and decreased use of open questions by prosecutors in the pilot courts.

In non-pilot courts, prosecutors were 1.2 times more likely to use facilitators than were defence lawyers (30% and 22% of questions respectively). In pilot courts prosecutors were also more likely to use facilitators than were defence lawyers but this difference was more pronounced (28% and 17% of questions respectively). That is, in pilot courts prosecutors were twice as likely than defence lawyers to ask facilitator questions.

Across all trials, prosecutors were 1.4 times more likely to use option posing questions than were defence lawyers (37% and 30% of questions respectively) with no interaction effect (that is, there was no evidence that this difference changed between court type).

In non-pilot courts, defence lawyers were 6.14 times more likely to use leading questions than were prosecutors (26% and 8% of questions respectively), and in pilot courts this difference was even more marked. Defence lawyers were 17.73 times more likely than prosecutors to use leading questions (26% and 4% of questions respectively) in the pilot courts. This finding may be the result of fewer leading questions being asked by prosecutors in the pilot courts. Defence lawyers were 21.44 times more likely than prosecutors to use leading (tag) questions (12% and 1% of questions respectively) across both pilot and non-pilot courts.

There was no evidence of any difference in lawyer behaviour in the use of leading tag questions between the pilot and the non-pilot courts.

Table 4. Logistic regression analyses of question type

Question type	Estimate	Standard error	Z value	P value	OR	95% CI of OR	
						Lower	Upper
<b><u>Facilitator</u></b>							
(Intercept)	-1.415	0.049	-28.581	<0.001		-1.512	-1.318
Prosecution	0.540	0.049	10.904	<0.001	1.716	0.443	0.637
Pilot	-0.176	0.053	-3.336	0.001	0.838	-0.280	-0.0729
(Intercept)	-1.264	0.057	-21.995	<0.001		-1.378	-1.153
Prosecution	0.209	0.087	2.386	0.017	1.232	0.0369	0.380
Pilot	-0.398	0.071	-5.633	<0.001	0.671	-0.536	-0.259
Prosecution x Pilot	0.489	0.106	4.602	<0.001	2.008	0.281	0.697
<b><u>Open</u></b>							
(Intercept)	-2.118	0.059	-35.642	<0.001		-2.235	-2.002
Prosecution	1.163	0.056	20.702	<0.001	3.199	1.053	1.273
Pilot	-0.109	0.060	-1.817	0.069		-0.225	0.009
(Intercept)	-2.404	0.086	-27.820	<0.001		-2.578	-2.239
Prosecution	1.622	0.106	15.237	<0.001	5.064	1.416	1.833
Pilot	0.284	0.099	2.868	0.004	1.329	0.093	0.482
Prosecution x Pilot	-0.655	0.126	-5.211	<0.001	2.630	-0.903	-0.410
<b><u>Option Posing</u></b>							
(Intercept)	-0.907	0.044	-20.691	<0.001		-0.993	-0.821
Prosecution	0.309	0.043	7.155	<0.001	1.362	0.224	0.393
Pilot	0.206	0.047	4.382	<0.001	1.228	0.114	0.298
(Intercept)	-0.904	0.052	-17.181	<0.001		-1.007	-0.801
Prosecution	0.302	0.080	3.767	<0.001	1.352	0.145	0.458
Pilot	0.201	0.062	3.271	0.001	1.223	0.081	0.322
Prosecution x Pilot	0.010	0.095	0.106	0.916		-0.176	0.196
<b><u>Leading other</u></b>							
(Intercept)	-1.002	0.052	-19.427	<0.001		-1.103	-0.901
Prosecution	-2.142	0.090	-23.820	<0.001	0.117	-2.323	-1.970
Pilot	-0.132	0.060	-2.189	0.029	0.876	-0.250	-0.013
(Intercept)	-1.046	0.054	-19.263	<0.001		-1.154	-0.941
Prosecution	-1.815	0.139	-13.090	<0.001	0.163	-2.094	-1.550
Pilot	-0.069	-0.069	-1.063	0.288		-0.195	0.058
Prosecution x Pilot	-0.531	-0.530	-2.898	0.004	0.096	-0.888	-0.170
<b><u>Leading tag</u></b>							
(Intercept)	-2.056	0.074	-27.755	<0.001		-2.204	-1.914
Prosecution	-3.065	0.204	-15.002	<0.001	0.047	-3.492	-2.688
Pilot	0.151	0.086	1.768	0.077		-0.015	0.322
(Intercept)	-2.061	0.075	-27.384	<0.001		-2.211	-1.916
Prosecution	-2.943	0.363	-8.118	<0.001	0.053	-3.741	-2.300
Pilot	0.158	0.088	1.809	0.071		-0.011	0.332
Prosecution x Pilot	-0.173	0.439	-0.396	0.692		-1.006	0.740

## Prosecution and defence lawyers' use of language

The mean percentage of complex language features used by prosecutors and defence lawyers in pilot and non-pilot courts is shown in Table 5.

Table 5. Mean percentage of complex language features used by each questioner and in each court.

Complex language features	Prosecution % (SD)	Prosecution Pilot Court % (SD)	Prosecution Non-Pilot Court % (SD)	Defence % (SD)	Defence Pilot Court % (SD)	Defence Non Pilot Court % (SD)
Complex grammar	76.49 (11.91)	75.87 (13.84)	77.65 (7.63)	80.72 (9.40)	81.08 (11.56)	80.03 (2.83)
Complex non legal vocabulary	38.47 (15.30)	37.00 (16.74)	41.24 (12.58)	40.02 (15.32)	38.61(18.10)	42.68 (8.13)
Legal terms and expressions	10.76 (11.16)	12.08 (12.46)	8.27 (8.24)	8.96 (4.98)	8.79 (5.81)	9.29 (3.16)
Indirect question	7.46 (4.08)	8.99 (3.72)	4.57 (3.17)	5.67 (5.38)	5.71 (4.66)	5.58 (6.85)
Multiple questions	12.65 (6.07)	12.83 (3.12)	12.29 (9.77)	10.60 (6.74)	11.59 (7.61)	8.72 (4.48)

Results of the logistic regression analyses for language complexity features (see Table 6) indicated that defence lawyers were 1.2 times more likely than prosecutors to use complex grammar (81% and 76% of questions respectively), and lawyer behaviour did not differ between pilot and non-pilot courts.

In non-pilot courts defence lawyers were 1.42 times as likely to ask indirect questions as prosecutors (6% and 5% of questions respectively). In pilot courts however, prosecutors were 1.67 times more likely to ask indirect questions than were defence lawyers (9% and 6% of questions respectively). This appears to be due to an increased use of indirect questions by prosecutors in the pilot courts.

In non-pilot courts defence lawyers were 1.42 times more likely to use legal terms and expressions than were prosecutors (9% of questions and 8% of questions respectively). In the pilot courts however, (due to a cross-over effect), prosecutors were 1.04 times more likely to use legal terms and expressions than were defence counsel (12% and 9% of questions respectively).

There was no difference between defence lawyers and prosecution in terms of the use of complex non legal vocabulary used (40% and 38% of questions respectively), and the multiple questions used (10% and 13% of questions respectively). Similarly, there were no differences in lawyer behaviour for these variables between the pilot and non-pilot courts.

Table 6. Logistic regression analyses of complex language features

Complex language feature	Estimate	Standard error	Z value	P value	OR	95% CI of OR	
						Lower	Upper
<b><u>Complex Grammar</u></b>							
(Intercept)	1.373	0.050	27.339	<0.001		1.276	1.472
Prosecution	-0.182	0.053	-3.443	<0.001	0.834	-0.286	-0.078
Pilot	0.293	0.055	5.322	<0.001	1.340	0.185	0.400
(Intercept)	1.374	0.059	23.151	<0.001		-1.259	1.491
Prosecution	-0.183	0.090	-2.023	0.043	0.833	-0.360	-0.005
Pilot	0.202	0.072	4.049	<0.001	1.224	0.150	0.433
Prosecution x Pilot	0.001	0.111	0.011	0.993		-0.217	0.220
<b><u>Complex non-legal vocabulary</u></b>							
(Intercept)	-0.372	0.041	-9.066	<0.001		-0.452	-0.292
Prosecution	0.027	0.041	0.640	0.522		-0.055	0.108
Pilot	0.114	0.044	2.571	0.010	1.121	0.027	0.202
(Intercept)	-0.388	0.049	-8.002	<0.001		-0.484	-0.294
Prosecution	0.068	0.076	0.891	0.373		-0.081	0.217
Pilot	0.138	0.057	2.402	0.016	1.147	0.025	0.250
Prosecution x Pilot	-0.059	0.091	-0.645	0.519		-0.237	0.120
<b><u>Indirect question</u></b>							
(Intercept)	-2.863	0.087	-33.091	<0.001		-3.037	-2.697
Prosecution	0.261	0.085	3.075	0.002	1.299	0.094	0.427
Pilot	0.014	0.092	0.148	0.882		-0.165	0.197
(Intercept)	-2.616	0.095	-27.666	<0.001		-2.807	-2.436
Prosecution	-0.365	0.164	-2.218	0.027	0.694	-0.693	-0.047
Pilot	-0.348	0.117	-2.963	0.003	0.706	-0.576	-0.115
Prosecution x Pilot	0.879	0.192	4.561	<0.001	1.673	0.505	1.262
<b><u>Legal terms and expressions</u></b>							
(Intercept)	-2.380	0.072	-32.829	<0.001		-2.525	-2.241
Prosecution	-0.065	0.072	-0.897	0.370		-0.208	0.076
Pilot	0.136	0.078	1.738	0.082		-0.0159	0.291
(Intercept)	-2.277	0.081	-27.765	<0.001		-2.441	-2.119
Prosecution	-0.350	0.141	-2.477	0.013	0.705	-0.631	-0.076
Pilot	-0.007	0.097	-0.071	0.943		-0.195	0.185
Prosecution x Pilot	0.392	0.165	2.380	0.0173	1.043	0.071	0.717
<b><u>Multiple questions</u></b>							
(Intercept)	-2.404	0.071	-33.732	<0.001		-2.546	-2.267
Prosecution	0.090	0.066	1.365	0.172		-0.040	0.218
Pilot	0.377	0.075	4.990	<0.001	1.456	-0.230	0.524
(Intercept)	-2.389	0.086	-27.819	<0.001		-2.562	-2.225
Prosecution	0.055	0.133	0.407	0.684		-0.209	0.314
Pilot	0.357	0.098	3.639	<0.001	1.428	0.167	0.551
Prosecution x Pilot	0.047	0.153	0.306	0.759		-0.252	0.348

## Discussion

Over the past decade several research reports and discussion papers (Hanna et al., 2010; Ministry of Justice, 2010; New Zealand Law Commission, 2015; Randell et al., 2018; Zajac et al., 2012) have advocated for improvements in the courts' management of young witnesses in the criminal justice system. In particular these reports have highlighted courtroom communication with young witnesses and delay to trial as particular areas of concern. The establishment of the Sexual Violence Court Pilot is a significant step towards change in the courts for young (as well as adult) witnesses in sexual violence trials. The current study provided an examination of current practice through analysis of 16 transcripts of children's testimony within the two pilot courts and 10 transcripts from two non-pilot courts. This provided a snapshot of current practice in terms of language and question types employed by lawyers in the questioning of young complainants in sexual violence trials, as well as a comparison between the pilot courts and non-pilot courts. Other aspects of the trial process were also examined including delay to trial, judge interventions in lawyers' questioning, and provision of breaks for witnesses. The findings suggest that change is yet to be consistently observed either in respect of the pilot courts relative to non-pilot courts, or with respect to practice observed in studies a decade or more ago.

Delays to trial from the time of the witnesses' complaint being recorded by police and the trial was 14.4 months across all courts, and 13.2 months in pilot courts. This represents somewhat of an improvement since 2008 when the average delay was 19 months (Hanna et al., 2010). However, this waiting period remains over a year long on average. Long delays are of concern because of the impact on the ability to recall detail of a reported incident with confidence and accuracy and considerable negative implications for the wellbeing of young witnesses and their families.

In the Whangārei protocol for young witnesses it is recommended that, where possible, the witnesses observe their evidential interview on the day preceding the trial, with one of the advantages being that this would reduce the time they were required to be active during the trial. Consistent with this recommendation, all witnesses in the pilot courts watched their evidential interview preceding the trial and commenced giving evidence in the morning after their evidential interview was played to the jury. All witnesses in the non-pilot courts observed the playing of their evidential interview in court at the same time the recording was played to the jury and commenced their evidence straight after this.

The analysis of children's courtroom testimony revealed that problematic language use remains prevalent in both pilot and non-pilot courts. These problematic courtroom praxis norms remain stable despite the pilot court best practice guidelines stipulating that judges must intervene in questions that are expressed "in language that is too complicated for the witness to understand". However, judge intervention was infrequent with judges typically intervening only once or twice during a child's testimony.

It was the norm for each child to be asked hundreds of questions, with one child being asked over 1,300 questions. It is likely that children could become fatigued over the course of the trial, even if all of the question types and lines of questioning were within their capacity to respond to. Young witnesses on average spent about one and a half hours answering questions. There were naturally occurring breaks for some witnesses for lunch or tea breaks and breaks that occurred as a result of legal discussions during the witnesses' testimony. The best practice guidelines state that "the judge is to ensure flexibility for the evidence of the complainant recognising the complainant's age and capacity, including regular breaks, early/late start and finish times". However, breaks were rarely initiated or requested during testimony either in the pilot or non-pilot trials.

### **Type of questions**

That option posing questions were more likely to be asked in the pilot than the non-pilot courts and leading (other) questions were less likely to be asked in pilot than non-pilot courts suggests that the pilot courts may have some (limited) effect on the appropriateness of question use. However, facilitators were less likely to be asked in pilot than non-pilot courts and there was no significant difference in the use of leading tag or open questions.

Open questions are associated with greater productivity and accuracy of answers. Unsurprisingly prosecutors were significantly more likely to use open questions than were defence lawyers, consistent with their role of putting the case to be considered by the jury. That only 9% of questions asked by defence were open was consistent with previous Aotearoa NZ research where between 5 and 12 % of defence lawyers' questions were open (Davies & Seymour, 1998, Hanna et al., 2012; Zajac & Cannan, 2009). Despite open questions being the recommended question type to promote best evidence from a child, these were only asked once in every four questions by prosecutors (26%) in the current study. This is lower than rates of open question use by prosecutors in previous Aotearoa NZ research which was between 31 and 41% of questions. This finding may however reflect that the current study used a broader



definition of ‘facilitator’ than previous studies and that a significant proportion of questions therefore fell within this category. Facilitators were used slightly more by prosecutors than by defence lawyers.

Both defence lawyers and prosecutors used option posing questions more frequently than any other question type. Prosecutors were 1.4 times more likely to use option posing questions than were defence lawyers (37% and 30% of questions respectively). There was no difference between court types. There are advantages and disadvantages in using option posing questions. They can be problematic when the number of options is restricted to two (e.g., “Was his t-shirt blue or red?”), especially when the correct answer is not provided as one of the options. A preferable version of an option posing question is when the addressee is given more than two options (e.g., “Was his t-shirt blue, red or another colour?”). As outlined in the Benchmark guidelines (Benchmark, 2020), the options provided must be mutually exclusive and cover all possibilities to avoid error. Preferably, an open question should be asked (e.g., “What colour was his t-shirt?”).

Given the negative impact that leading questions are known to have on the quality of the evidence of young witnesses the finding that almost 16% of questions asked of young witnesses were leading (other) and almost 7% were leading tag is of significant concern. As with previous Aotearoa NZ research these questions were used far more by defence lawyers than they were by prosecutors. The most problematic of all question types – leading tag questions - were used in 12% of defence lawyer questions on average which was 21 times more frequently than by prosecutors. It does appear however that the use of leading questions in the current study - 5% and 1% by prosecutors for leading (other) and leading tag respectively and 26% and 12% by defence for leading (other) and leading tag respectively - may represent somewhat of a decline in reliance on this question type. Previous studies using transcripts from courts in Aotearoa NZ identified proportions of questions by prosecutors to be between 6 and 13% and by defence to be between 46% and 68%. However, given the known implications of leading questions for the quality of evidence able to be provided by young people, the results of the current study are of concern.

Leading tag questions were clearly identified by the Whangārei Young Witness Pilot Protocol as a question type that necessitated judge intervention. Leading questions (both tagged and other) appear to be ‘misleading’ for the purposes of the 2006 Evidence Act and thus Sexual Violence Court Pilot best practice guidelines, because children may comply with leading

questions (Waterman et al., 2004; Zajac et al., 2003; Zajac & Hayne, 2006) and thereby impair the accuracy of their reports. However, given the prevalence of leading questions in the transcripts analysed, such questions are either still being considered acceptable by judges or there are unknown other barriers to their intervening.

### **Use of complex language**

Complex language use was prevalent in the transcripts analysed and no consistent differences were evident between defence lawyers and prosecutors. The vast majority of questions asked of young witnesses involved complex grammar, over a third contained complex vocabulary, approximately one in ten contained legal terms or expressions. Approximately one in ten questions were multiple in nature, requiring the young person to comprehend and respond to more than one piece of information in the same utterance. One in 20 questions were indirect in nature. Indirect questions such as ‘Do you remember whether he was home?’ not only create ambiguity for a young person as to which part of the question they are expected to answer - ‘Do you remember?’ or ‘Was he home?’ but also create ambiguity for the interpretation of a child’s response – a jury may be unable to ascertain whether a ‘No’ response refers to not remembering, or not being home.

Complex grammar, complex non legal vocabulary and multiple questions were used more frequently in the pilot than the non-pilot courts and there was no significant difference between pilot and non-pilot courts in terms of the use of indirect questions and legal terms and expressions. This suggests the pilot courts are not representative of improved practice by lawyers in terms of language use. The prevalence of complex language use in the current study is concerning. Although a direct comparison is not possible to make, the present study’s findings indicate there has not been any significant change over the prior two decades (e.g., Davies & Seymour, 1998; Hanna et al., 2012; Zajac & Cannan, 2009).

### **Implications**

The findings indicate that the style of questioning used in court, particularly during cross-examination continues to be developmentally inappropriate, complex, and potentially damaging to the quality of a young witness’ evidence. This is likely to be in part at least due to limitations in lawyer (both defence and prosecution) knowledge of language that is developmentally appropriate for young people, and a lack of ability to appropriately adjust their language when questioning young people (Hanna & Henderson, 2018). Education and

upskilling lawyers in their ability to use accessible language is recommended. Similarly, training judges so as to prepare them to be better able to identify and intervene in unacceptable language is indicated. In addition to such efforts to address problematic language use in courts greater use could be made of communication assistants in trials with young witnesses. A recent evaluation of the use of communication assistants in the Aotearoa NZ youth justice system (Howard et al., 2019) revealed an overwhelming appreciation of this role and its benefits. Significant gains to progress could be made by utilising communication assistants more readily.

The evident use of questioning practices that are counterproductive to best evidence may be attributed to not only a lack of expertise but ingrained cultural norms in court practice. It appears that these cultural norms are difficult to shift, particularly as they relate to cross-examination. The widely accepted aim of cross-examination is not to elucidate full and accurate accounts or uncover the “truth”, but rather to present a defence argument through discrediting and obfuscating a witness’ testimony (Henderson, 2001). This is achieved through accusations of poor eyewitness ability, accusations of dishonesty, suggestive and leading questions, and questioning that may be deliberately linguistically complex (Davies et al., 1997; Zajac et al., 2012). Rather than a process of open enquiry, cross-examination is typically conducted with the intention of controlling witness responses (Henderson, 2001). A reason that has been theorised in the psycho-legal literature for high rates of leading questions in cross-examination is that lawyers see high witness response productivity as limiting control over what is said by a witness, and therefore as a risk to the defence argument. This approach may “pay off” for defence - the use of suggestive questioning by defence lawyers has been found in one USA study to be associated with higher rates of acquittals (Klemfuss et al., 2014).

One of the key concerns raised in any discussion of change to cross-examination is the requirement for the defence to “put their case,” as well as to allow the defendant a fair trial. However, “putting the case” and asking questions of the witness that they are able to understand and answer need not be mutually exclusive (Henderson, 2015). A process that allows for a more accurate assessment of evidence is unlikely to be a threat to the right of a defendant to a fair trial.

## Conclusions

The conclusions presented in this section are drawn from the two studies that comprise this report - the first, an analysis of interviews with young witnesses and caregivers involved in trials in New Zealand's Sexual Violence Court Pilot, and the second, an analysis of transcripts of young complainants' courtroom testimony from the two pilot courts and two non-pilot courts.

The implementation of the Sexual Violence Courts Pilot represents a commitment to reducing the negative impact on complainants, adults and young witnesses alike. These efforts may have had an impact on adult witnesses' participation in the justice system. This is indicated in the recent evaluation commissioned by the Ministry of Justice which considered impacts on complainants across the age range, without distinguishing any particular impacts on children (Gravitas, 2019). However, the current research indicates that significant change has yet to take place in relation to young witnesses.

The analysis of children's courtroom testimony revealed that problematic language use remains prevalent in both pilot and non-pilot courts and that there are few meaningful differences between the two court types. A large proportion of questions asked of young witnesses in the transcripts analysed contained complex language. In addition, given the negative impact that leading questions are known to have on the quality of the evidence of young witnesses, it is significantly concerning that on average over a quarter of questions asked during cross examination were leading (other) and more than one in ten questions were leading tag. Interviews with young witnesses and caregivers revealed that cross examination remains one of the most distressing aspects of court involvement for young people. Lawyers' communication and line of questioning was described as difficult, although of greatest concern to participants was having their credibility challenged in ways that were perceived as aggressive and involving explicit accusations of lying.

These findings demonstrate that lawyers continue to ask young witnesses questions in a manner that is developmentally inappropriate, difficult to comprehend, and likely to be distressing for a young witness and thereby damaging to the quality of evidence that they provide. Many lawyers apparently lack knowledge regarding questioning practices that elicit best evidence, and how to question young people in a way that is developmentally appropriate. Furthermore, many judges may not yet be adept at or may be reluctant to intervene too often

when questions are confusing or inappropriate. This is indicated in the analysis of transcripts which revealed little more than one intervention by judges per trial. These findings indicate the need for comprehensive and regular training for judges and lawyers if they are to effect change for young people. Early trainings for judges associated with the pilot concerning such issues were well received (Gravitas, 2019). Lawyers have also previously indicated that any expectation in changes to questioning practices need to be accompanied by education as to how to do so (Randell et al., 2016). In addition to training, greater use of communication assistants in trials involving young people would ensure accurate assessment of communication needs and that these are attended to in trial proceedings.

A manner of questioning that exploits the developmental ability and subordinates the power of a child when testifying, thwarts the discovery of truth, whether used intentionally or not (Hanna & Henderson, 2018). While accepted norms remain about the acceptability of leading questions in cross-examination best evidence from young witnesses will continue to be undermined. Achieving best evidence from young people testifying in Aotearoa NZ courts requires lawyers to ask questions in a manner that better approximates known best practice for attaining best evidence. Given the fundamental clash between the practice of evidential interviewing and the narrative-controlling tactics of cross-examination, achieving best evidence requires that judges and lawyers reconsider the practice of cross-examination as having the primary purpose of discrediting the witness in order to present a defence case. It behoves them to prioritise a focus on the accuracy and productivity of children's evidence. This would in turn significantly reduce the extent to which cross examination is retraumatising for complainants. The Sexual Violence Court Pilot is a possible vehicle for the initiation of such a paradigm shift within Aotearoa NZ.

The present efforts within the court system provide an opportunity to consider broader practices as well that would better meet the needs of young witnesses and reduce the harm of court involvement. Concerningly, length of time between engaging in an evidential interview or making a statement to police and testifying in court remains over a year despite this being a focus of the pilot. Methods of decreasing the delay to trial instigated by the pilot include more effective case management of trials schedules. Judges were quoted in the recent evaluation of the Specialist Sexual Violence Court Pilot as saying, "one of our aims is to reduce the time between charges and trial. The gold standard is six months" (Gravitas, 2019, p.13), and "people shouldn't have to wait 18 months to get tried, complainants shouldn't have to wait 18 months from the time the person is arrested. It's just unacceptable" (p.13). These long delays may have

considerable negative implications for the wellbeing of young witnesses and their families and the quality of their evidence at trial. Those interviewed in the present research stated the period awaiting trial was a major source of distress, and highlighted minimising the delay to trial as a necessary change.

Given that better case management of trials appears to have made an insufficient difference in delay to trial, and considering the distress that this delay continues to have on young witnesses, consideration should be given to prerecording of a young witness's entire evidence as discussed most recently in a recent report for the Chief Victim Advisor (McGregor, 2017). A reduction in the period awaiting trial will minimise the stress of this period for young witnesses and ensure that their memory of relevant events is fresher, thus also improving the quality of the evidence that they are able to provide. Pre-recording of a young witness's entire evidence is undoubtedly the single change that would have the most significant impact on young person wellbeing and quality of evidence. It would address many of the concerns raised by those interviewed.

It is recognised that the focus of the pilot courts is on procedural changes specific to the conduct of the trial and not on wider matters such as early information provision regarding court processes and the availability of increased supports for young people and their families. It is therefore unsurprising that many of these concerns of young witnesses remain. A more comprehensive response to the needs of young witnesses will require attention to the entire span of time from making a complaint to trial completion, and where relevant, sentencing. Innovation in this area would likely require a multi-agency response.

The provision of a single case manager or 'navigator', available to support the family for the duration of the investigation, trial, post-trial period and sentencing would meet many of the needs raised by families. This would ensure comprehensive information provision, support with referral to counselling and other required services. This navigator could act as a single point of contact for families and could provide liaison with other relevant parties such as police and court staff. They could also attend to the individual needs of a witness and their whānau when at court such as transport, safety, and provision of food, ensuring that these needs are met.

There is a need for better written and online information that is readily accessible to young witnesses and family members. Better provision of information and support at an early stage would strengthen the ability of caregivers to provide reassurance and accurate

information to their child during the wait period and reduce the anxiety induced by uncertainty and lack of accurate knowledge.

As expressed by the former Chief District Court Judge in her establishment of the Sexual Violence Courts Pilot, the pilot provides an opportunity to test the efficacy of the guidelines in reducing the negative impact on witnesses, and indicate whether other measures are needed to achieve this (Chief District Court Judge Doogue, 2016). It appears that, at least where young witnesses are concerned, the pilot is not yet significantly reducing the negative impact on witnesses and there is need for alternative and/or additional solutions. The establishment of the pilot, with its explicit stated intention to reduce the harm for complainants is a decisive and meaningful step for a justice system which (with some exceptions) has inadequately responded to repeated calls for reform to protect vulnerable witnesses. Although the findings of this research suggest that more change is needed, the pilot provides fertile ground within which to sow the seeds of meaningful change. The actions needed have been clearly outlined by practitioners, researchers and the young people and families for whom they are needed. It now for the Ministry of Justice and the Judiciary to enact this change.

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