COMMENTARY — HE PITO KŌRERO

THE SEXUAL VIOLENCE PILOT COURT

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I INTRODUCTION

The Sexual Violence Pilot Court (the Pilot) was established in December 2016. Its purpose is to improve the experience of complainants within the existing legislative framework. It captures all category-three sexual violence prosecutions in the Auckland and Whangārei District Courts, where the defendant has elected trial by jury.[1]

Three years since its inception, the Pilot is widely regarded as a success. Wait times until trial have reduced drastically; judges and counsel alike are more aware of the tools in place to assist complainants, witnesses and defendants; and those involved in the Pilot are largely positive about its impact. In June 2019, the Ministry of Justice announced that the Pilot will become a permanent fixture in Auckland and Whangārei, and will ultimately be rolled out nationwide.

The Pilot is by no means revolutionary. Complainants are still subject to the most challenging aspects of the trial process, such as cross-examination and, when not provided with an alternative mode of giving evidence such as

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1 The Pilot covers a broad spectrum of sexual offending, including (but not limited to) indecencies, sexual violation, incest, underage or induced prostitution, female genital mutilation, objectionable publications and intimate recordings.

the use of CCTV facilities, facing a jury. The challenge ahead is ensuring that the Pilot operates effectively on a wider scale, that its impact is not diluted, and that we as a profession do not become complacent about the ongoing challenges of prosecuting sexual violence.

II BACKGROUND AND OBJECTIVES

The difficulties that complainants face during sexual violence proceedings have been well canvassed. Complainants routinely experience revictimisation during the prosecutorial process due to its length, a perceived lack of support, the presence of a jury (some of whom inevitably hold misconceptions about sexual offending that cannot be dispelled by judicial directions)[2] and the sense of being "put on trial" under cross-examination.

In December 2015, the Law Commission released a report on the experiences of sexual violence complainants in the criminal justice system.[3] The report made a series of recommendations designed to improve the experience of complainants without compromising defendants' fair trial rights.[4] One key recommendation was the formation of a specialist sexual violence court, first in pilot form, and then to be adopted nationwide. The Law Commission outlined two primary objectives:[5]

> i) to bring specialist judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant; and
>
> ii) to facilitate a coordinated and integrated approach among the various organisations and people who deal with complainants [in sexual violence cases].

Far from requiring legislative change, the proposed special sexual violence court was to operate within the existing legislative framework. Therefore, some of the difficulties complainants faced during sexual violence proceedings were beyond the proposal's grasp. However, in proposing the Pilot, the Law Commission identified the following challenges that can be mitigated without demanding

2 Vanessa E Munro "Judging Juries: The 'Common Sense' Conundrums of Prosecuting Violence Against Women" [2019] NZWLJ 13.

3 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) [Law Commission Report].

4 At iv.

5 At [18].

legislative change: length of time until trial, cross-examination, information and support for complainants, and court facilities and physical environment.[6] This commentary focusses particularly on the first two challenges identified, being length of time until trial and cross-examination.

A Length of time until trial

Prior to the Pilot coming into force, the average time for trial cases to be disposed of from entering the case review stage was 422 days (14 months) in Auckland and 597 days (20 months) in Whangārei.[7] The average time from the filing of charges to disposal of a case in 2014 and 2015 was 480 days (15.7 months).[8] These figures do not factor in the time it takes Police to investigate allegations and lay charges; nor do they include retrials.

Adjournments are commonplace in criminal proceedings, including sexual violence matters. Adjournments are brought about generally by application from either party or due to a lack of judicial resourcing often by virtue of the trial being a "standby fixture". Standby fixture trials only proceed if a firm or priority fixture trial does not proceed, or if additional judicial resource becomes available. The purpose is to prevent court resources going to waste, given the number of trials that resolve at the eleventh hour. While the efficiencies are obvious, so too are the shortcomings. Counsel, witnesses, the defendant and the complainant(s) must prepare for a trial that may not proceed. For complainants, this uncertainty and potential delay may result in additional trauma, and prevent them from moving on with their lives.[9] These issues are heightened for sexual violence complainants, who often know the defendant and may share a family or other close connections with them.[10]

In addition to re-traumatisation, delays can be detrimental to the quality of a complainant's evidence, particularly if they are young or otherwise vulnerable.[11] In a "typical" he-said-she-said sexual violence prosecution, much of it relies on the complainant's recollection, which may be compromised if the trial is significantly

6 At [4.3].

7 Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Pilot Court* (Gravitas Research and Strategy, June 2019) at 36.

8 Law Commission Report, above n 3, at [2.38].

9 At [4.3] and [4.8].

10 At [4.3] and [4.13]–[4.14].

11 At [4.3] and [4.9].

delayed.[12] We say "typical", because whilst all sexual violence trials are unique, many share the characteristic of having little, if any, corroborating evidence to support the complainant's account. These concerns are true for defendants too, who no doubt face significant anxiety while awaiting trial and who may well also rely on the veracity of their own testimony.

B Cross-examination

There is a widespread perception that complainants are "put on trial" under cross-examination. The New Zealand Bill of Rights Act 1990 guarantees a defendant's right to cross-examine prosecution witnesses.[13] Defence counsel are obliged to test the evidence and to put their client's case to the complainant. Given the frequency of consent-based defences or denials that the allegations took place at all, complainants' credibility and truthfulness are frequently under fire. There are, however, concerns that some defence counsel overstep this duty. For example, the Law Commission reported instances of disrespectful and inappropriate lines of questioning, alongside eye rolling by counsel.[14]

There are already provisions in the Evidence Act 2006 designed to prevent unfair cross-examination. Section 44 prohibits questioning the complainant's sexual experience with any person other than the defendant, or a complainant's sexual reputation, without judicial consent.[15] Section 85 prevents improper, misleading, repetitive or complicating lines of questioning. This allows the judge to intervene in the event of such questions being asked. However, what is deemed acceptable may vary between judges and counsel. The concern is that such lines of questioning may not be proactively or uniformly prevented.

III THE PILOT — HOW IT FUNCTIONS

As addressed at the outset, the Pilot has not fundamentally reshaped sexual violence prosecutions. Rather, it has enhanced existing mechanisms, maximised case management procedures, and emphasised the judicial role at trial.[16] Pilot

12 At [4.8] and [4.15].

13 New Zealand Bill of Rights Act 1990, s 25(f).

14 Law Commission Report, above n 3, at [4.94].

15 Upon application under s 44, counsel would need to demonstrate to the Court that the evidence in question is of such direct relevance to the facts in issue in the proceedings that it would be contrary to the interests of justice to exclude it.

16 Jan-Marie Doouge "Putting a sexual violence court to the test" (20 October 2016) 899 LawTalk (online ed).

proceedings are shaped by the "Sexual Violence Pilot: Guidelines for Best Practice" (Pilot Guidelines).[17] There are three stated objectives:

i) to improve case and trial management;

ii) to operate entirely within existing jury trial practice; and

iii) to reduce pre-trial delay and ensure flexible and workable trial arrangements.

The Pilot's mechanisms can be grouped into three categories, which we will address in turn: training and specialisation, active case management, and resourcing.

A Training and specialisation

Judges must be designated in order to preside over Pilot proceedings. Designation is authorised by the Chief District Court Judge. At present, there are 13 designated judges in Auckland and three in Whangārei.

All designated judges must undertake specialist sexual violence training, which includes evidence-based content on how complainants experience the prosecutorial process.[18] Stakeholders, including judges and victim advocates, have reported that this training is imperative to the Pilot's success.[19] Crown and defence counsel are not required to undergo specialist training, although some do.[20]

B Active case management

Pre-trial case management is far more rigorous in the Pilot than in ordinary criminal proceedings. Each Pilot matter is allocated a dedicated sexual violence case manager. Although court staff do not receive specialist sexual violence training, counsel and judges alike have attributed much of the Pilot's success to the case managers, who act as a central point of contact for each matter.[21]

The case review hearing plays a pivotal role in Pilot proceedings. Outside

17 "Sexual Violence Pilot: Guidelines for Best Practice" was closely modeled on Judge Harvey's guidelines for dealing with young and vulnerable witnesses.

18 Allison and Boyer, above n 7, at 14.

19 At 14.

20 The Auckland Crown Solicitor's Office, for instance, provides frequent in-house training on sexual violence prosecutions for its staff. Anecdotally, the writers are also aware of some criminal barristers' chambers holding training sessions in house.

21 Allison and Boyer, above n 7, at 19–20.

of the Pilot, case review hearings are routinely administrative and often referred to as box-ticking exercises. Pre-trial matters are often not addressed until a much later stage, which can result in unnecessary trial adjournments. By comparison, Pilot case reviews are proactive. Judges are expected to make enquiries as to the appropriate mode of evidence, the need for communication assistance, and any potential pre-trial issues. The Pilot Guidelines dictate that the trial date must be set down at first callover. However, in practice, trial dates are being set earlier at case review hearing.[22] This is, again, in contrast to non-Pilot proceedings, where trial dates often are not set until the second or even third callover, once all pre-trial issues have been resolved.[23] The practical effect of these measures is that issues are identified and resolved earlier, with the pressure of a trial date from early on. As a result, adjournments are infrequent and routinely declined in the event an application is made. Since most issues are front-footed at the case review, trial callover hearings play a lesser role. The callover hearing is presided over by the trial judge.[24] In Auckland, callover hearings are held by teleconference, which is seen as a more efficient alternative to arranging for the trial judge and both counsel to be in a courtroom together.[25] In Whangārei, on the other hand, given the proximity of most counsel to the District Court, teleconferencing is considered unnecessary.

The Pilot Guidelines also specify that judges must be prepared to engage their power to make costs orders for procedural failings.[26] This recognises that inefficient case management at the outset risks adjournment down the track. As outlined above, adjournments can be detrimental for complainants and defendants alike. In practice, costs orders are not commonplace, but the threat of such orders may well contribute to the efficiencies seen in the Pilot.

Active judicial engagement continues once the trial commences. The Pilot Guidelines require judges to be alert to and interventionist with unacceptable lines of questioning.[27] This judicial function is already contained in ss 44 and 85 of the Evidence Act, but by including it in the Pilot Guidelines, the Pilot has placed a greater emphasis on this role. The Pilot Guidelines also require judges

22 At 29.

23 At 29.

24 At 32.

25 At 32–33.

26 "Sexual Violence Pilot: Guidelines for Best Practice" at [11].

27 At [23].

to be proactive in ensuring that complainants' needs are met when giving evidence, with particular regard to their age and capacity, including for example regular rest breaks, and earlier/later start or finish times.[28] In Whangārei, this has manifested in almost all complainants giving their evidence in chief by pre-recorded video interview. In Auckland, pre-recorded video interviews are typically played in cases involving child complainants, but less frequently with adult witnesses. The Pilot in Auckland has a standard practice that a young complainant is brought in for questioning on the second day of trial, in order to avoid the young person starting their evidence in the afternoon of the first day, when they are tired and less able to focus.

C Resourcing

The Pilot benefits from significant court resourcing, which accounts for the considerably reduced disposition timeframes. In Auckland, there are three courtrooms dedicated to Pilot matters, and one dedicated courtroom in Whangārei.[29] This means Pilot cases do not need to compete with other matters for trial dates. Even with these measures in place, in late 2018, a number of Pilot matters were set down in standard courtrooms due to the high volume of cases.[30]

One of the Pilot's most significant changes is that all trials are set down as firm fixtures only. This allows all involved to meaningfully prepare for trial, and reduces the emotional toll for complainants (and defendants) of preparing for a trial which does not go ahead, and then having to repeat the process a few months later.

IV ASSESSING THE IMPACT OF THE PILOT ON THE TRIAL PROCESS AND COMPLAINANTS

The Pilot has not yet been extensively evaluated. The District Court undertook a preliminary evaluation in 2017.[31] In 2019, the Ministry of Justice partnered with Sue Allison and Tania Boyer from Gravitas Research and Strategy Limited to undertake an evaluative study of the Pilot.[32] The study combined Ministry

28 At [21].

29 Allison and Boyer, above n 7, at 28.

30 At 28.

31 Ministry of Justice *Preliminary Evaluation: Sexual Violence Pilot Courts* (2017).

32 Allison and Boyer, above n 7.

of Justice quantitative data with the results from face-to-face interviews and focus groups with 41 stakeholders.

Feedback in respect of the Pilot from the judiciary, prosecutors, defence counsel, victim advisors, court staff and importantly, complainants, has been largely positive. In the 2019 Ministry of Justice study, the 41 stakeholders who were interviewed reported that the Pilot trial process is more efficient,[33] that complainants are better prepared and that the quality of their evidence has improved,[34] that matters are resolving earlier and more frequently,[35] and that judges are increasingly alive to unacceptable questioning and intervening more frequently.[36] This feedback aligns with our own experiences working as Crown Prosecutors in the Auckland Pilot Court.

A Time to trial

The 2019 study also revealed some concerns from Pilot participants. There are anecdotal reports that trial wait times have been increasing in 2019, prompting calls for increased judicial resources.[37] This perception does not align with the latest data from June 2019, which indicates the disposition period has stayed low in the Pilot.[38] Disposition times have reduced drastically under the Pilot. In Auckland, the average length of time from entry into the Pilot (at case review) until disposal is now 308 days: a 27 per cent decrease. Whangārei has seen a 38 per cent decrease, to 368 days.[39]

On 1 July 2019, Crown Law published the *Solicitor-General's Guidelines for Prosecuting Sexual Violence*. Although these guidelines do not specifically address the Pilot, a number of its recommendations mirror those implemented in the Pilot, signalling its success. For instance, these guidelines note:[40]

> Delays before trial can cause serious stress for complainants and other witnesses in sexual cases, where finality of the prosecution is a high priority.

33 At 17.

34 At 44.

35 At 76.

36 At 44.

37 At 31.

38 Chief District Court Judge "Sexual Violence Court reduces lead-up times and trauma" (press release, 14 August 2019).

39 Allison and Boyer, above n 7, at 36.

40 Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (July 2019) at [8.1].

> Avoiding delay is therefore particularly important in these cases, not only because it may improve the quality of a witness's evidence and participation in the trial, but also to achieve finality for complainants, which may in turn assist with their recovery.

Further, these guidelines emphasise the need for early case management and proactive identification of the particular vulnerabilities of the witnesses involved, including the mode by which the complainant should give evidence and the potential need for communication assistance, the need for any other pre-trial applications or enquiries, and evidential and disclosure concerns.[41]

In our view despite the reduction in time to trial, the case management process could be further refined. Pre-trial hearings are frequently scheduled at callover stage rather than at case review, leaving less time for them to be heard. Further, strained judicial resourcing often means pre-trials are adjourned and ultimately not heard until the lead up to trial which can lead to delays in the trial due to appeals being lodged or further pre-trial issues coming to light. One area of particular concern is in relation to non-party disclosure applications.[42] Such applications are commonplace in the Pilot and yet disclosure of (sometimes significant) volumes of material from agencies such as Accident Compensation Corporation or Oranga Tamariki is often made in close proximity to the trial date, which has the potential to jeopardise the fixture. In saying that, delays causing trials to be adjourned are still relatively uncommon in the Pilot.

Some defence counsel expressed concerns that the reduced wait until trial may jeopardise their preparation time, although this view is by no means unanimous.[43] Whilst it is accepted that the short duration between charge and trial does require efficient and focussed preparation, in our view, generally speaking, the times to trial still allow ample time for preparation. One concern noted by some defence counsel is that the limited timeframes do not allow for the engagement of expert witnesses to respond to, for example, forensic evidence from the ESR.[44] Helpfully, the ESR has been proactive in ensuring all Pilot cases are given priority in the analysis and reporting of forensic testing.

41 At [8.2].

42 Sections 24–29 of the Criminal Disclosure Act 2008 deals with such applications. Commonly these applications seek disclosure from government agencies such as Oranga Tamariki, Accident Compensation Corporation, the Department of Corrections and the District Health Boards.

43 Allison and Boyer, above n 7, at 39 and 42.

44 Environmental Science and Research Laboratory.

Recently, the ESR reported to Pilot stakeholders that the median time frame between submission of items to their laboratories and analysis of the items has been reduced to 23 days. This means forensic analysis is being completed relatively quickly in Pilot cases and therefore the results are disclosed to defence counsel allowing sufficient time for any defence expert evidence to be sought before trial.

B Cross-examination of complainants

Judges are increasingly alive to unacceptable questioning and intervening more frequently.[45] During the case management phase of the trial process, judges frequently remind counsel of their obligations under s 85 of the Evidence Act 2006 and confirm that strict adherence to that section is expected, to ensure no unacceptable questions are asked of complainants. During the trial, Judges are often more proactive in interrupting counsel in the event a question is phrased in an unfair way. Child witnesses, in particular, are not to be asked particularly leading, confusing or complex questions. Once a question is asked and answered, counsel are directed to move on rather than needlessly repeat that line of cross-examination.

The Crown Law Prosecution Guidelines also call on prosecutors to actively intervene when a witness is being cross-examined, if questions are "asked in an intimidating, hectoring or aggressively dismissive manner, or questions that are designed to humiliate the witness".[46] This again mirrors the Pilot Guidelines.

Cross-examination is widely recognised as one of the most traumatic parts of the prosecution process for complainants. For this very reason, it is commonly a part of the evidence in which a complainant demonstrates heightened emotion. It should not be overlooked that the prosecution of sexual violence remains an adversarial process in which both parties are seeking to persuade the fact finder, usually a jury, of their respective position. The often visceral, emotional reaction brought about in the cross-examination of a complainant is commonly a powerful part of the prosecution case. This is despite the important directions given to a jury on the limitations of assessing credibility on demeanour alone.

As long as sexual violence prosecutions remain adversarial, cross-

45 Allison and Boyer, above n 7, at 44.

46 *Solicitor-General's Guidelines for Prosecuting Sexual Violence*, above n 40, at [12.2].

examination will often also be key component of the defendant's case. Fair trial rights will require robust cross-examination of complainants in most circumstances. What is necessary is that any such cross-examination is also fair. The Court should continue to closely monitor strict adherence to s 85 of the Evidence Act to ensure complainants are asked only fair and reasonable questions.

Importantly, one of the objectives of the Law Commission's report was to bring specialist judges and counsel together in a venue that enables robust fact-finding without re-traumatising the complainant.[47] Meeting this objective would require not only specialised training for judges but also for counsel. We therefore consider further resourcing is necessary to upskill counsel on what inappropriate questions might look like and the impact such questioning typically has on a complainant. The rules around unacceptable questioning must be consistently enforced across all sexual violence trials in order to meaningfully address the trauma associated with cross-examination of complainants.

V LOOKING FORWARD

By most measures, the Pilot has been a success. Wait times until trial are shorter, and judges, practitioners and support staff alike are increasingly cognisant of the challenges that sexual violence complainants experience in the courtroom, and the available means for mitigation.

Looking ahead to its nationwide expansion, the focus must be on ensuring that the Pilot continues to make positive strides, and that its impact is not diluted as it transitions from pilot to permanent fixture. This will require continued input and resource from judges, the Ministry of Justice, and counsel. There are concerns that the transition from pilot to permanent fixture may mean sexual violence trials are not as well-resourced as they are in the Pilot, and may not benefit from the same level of Crown, defence and judicial input, which would erode its impact.[48] Much of the Pilot's success can be attributed to the support and enthusiasm of counsel, court staff and the judiciary. There is a risk that when the Pilot rolls out nationwide, it may lose its novelty and participants may not keep up the momentum. In order to maintain shortened disposition

47 Law Commission Report, above n 3, at 12, R17–R27.

48 Allison and Boyer, above n 7, at 104.

times, the Ministry of Justice will need to ensure that sexual violence trials continue to have dedicated schedules, courtrooms and staff.

There is no question that more can be done, both within the Pilot and beyond its terms of reference. The case management process could be further refined. Specialist sexual violence training could be made compulsory for all counsel appearing in the Pilot, and all involved court staff. Increasing awareness about the challenges that sexual violence complainants face during trial will act as impetus for further improvement.

Ultimately, the biggest barrier to improvement is complacency. The Pilot is not, and was never intended to be, a cure-all for the challenges of sexual violence trials. It has not eliminated the many barriers to reporting sexual violence, nor has it alleviated all the challenges that complainants face. Many of these challenges are inherent to New Zealand's adversarial jury trial model, including cross-examination, being reduced to a mere witness in the proceedings, and facing a jury. We, as a profession, must not be complacent. We should strive for continued improvement while upholding fair trial rights within the current — and evolving — framework.