That's a lie

Sexual violence misconceptions, accusations of lying, and other tactics in the cross-examination of child and adolescent sexual violence complainants

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Table of Contents

Summary

This report was completed with the aim of establishing better understandings of cross-examination practices as they pertain to young complainants of sexual violence in Aotearoa, and how these might relate to complainants' reportedly negative experience. The study involved the analysis of 15 transcripts of the cross-examination of young complainants from trials that took place in the Auckland and Whangārei Sexual Violence Pilot Courts in 2017 and 2018. Analysis was focussed on the ways that the evidence of young complainants was challenged during cross-examination, with a particular interest in whether, and in what ways misconceptions about child sexual abuse were present during cross-examination. The intention of this piece of work was to better understand the sources of distress that young complainants report to be associated with cross-examination, so that changes intended to reduce this distress can be effectively targeted.

Key findings include:

- Sexual violence misconceptions were pervasive in the cross-examination of young complainants in sexual violence trials and were typically raised to challenge the plausibility of the complainant's evidence.
- Young complainants were painted during cross-examination as emotional or delinquent, with the implication that their evidence was not credible or that they were unreliable.
- Cross-examination was characterised by a leading style of questioning, facilitating control of the content and narrative by defence counsel.
- Statements were routinely made by defence counsel that complainants were lying, and often made explicitly and in an accusatory manner.

The key issues posed by this style of cross-examination are:

- Heightened distress for complainants
- The perpetuation of victim blaming narratives
- Erroneous assumptions against which evidence is tested
- Damage to the quality of evidence that a young complainant is able to provide.

These findings suggest a pressing need for a shift in the culture of cross-examination towards a best-evidence model, if court participation within the existing adversarial model is to be less distressing for young complainants. This suggestion is not a novel one and the mechanisms by which this might be achieved have been outlined previously in detail. These are summarised and sources of further discussion on the topic are identified. It is notable that the Law Commission has also made a detailed proposal for a restorative justice centric alternative system which may be suitable for some young complainants of sexual violence and would eliminate the role of cross-examination entirely in these cases.

Introduction

Recent research has prioritised the voices of young sexual violence complainants in Aotearoa. In speaking with young complainants directly, this work has illuminated their dissatisfaction with court processes, and with cross-examination in particular (e.g., Randell et al., 2018, 2021). Such trials are closed to the public, preventing public scrutiny and limiting knowledge of cross-examination practices. Outside of quantitative analyses of language used in court, the content and style of the cross-examination of young complainants in Aotearoa is largely unknown, and mostly anecdotal. Research detailing the questioning of adult rape complainants has revealed the pervasiveness of rape myths and other distressing tactics in the challenging of a complainant's evidence (McDonald, 2020; Zydervelt et al., 2016). This has highlighted a lack of similar research with young sexual violence complainants. The current study was born out of a need to attend to this knowledge gap. It aimed to establish better understandings of current cross-examination practices as they pertain to young complainants of sexual violence in Aotearoa, and how this might relate to complainants' reportedly negative experience. Armed with greater knowledge in this area, those in positions of power, if they aspire to do so, will be more able to effect change to reduce the distress that young complainants experience, and improve the quality of the evidence they can provide.

Sexual violence trials in Aotearoa

Victims of sexual violence have specific needs within our justice system due to the unique characteristics of sexual violence and the unique circumstances of sexual violence trials. Concern for the wellbeing of complainants led to a range of reforms to court processes in the 1980s and 1990s (Henderson, 2012). However, these reforms are now widely considered to have not gone far enough (Chief Victims Advisor, 2017). Approximately half of sexual violence offences reported to the police in Aotearoa involve an offence against a child, and a further 15% concern historical childhood victimisations reported as an adult (Ministry of Justice, 2019). Sexual violence is the primary reason for a young person participating in a trial as a complainant (Hanna et al., 2010). Attention to this group is, therefore, imperative when considering the impact of trial participation on complainants, and future reform.

Sexual violence[1] is unique among offences that are tried in criminal courts in Aotearoa. It typically occurs without witnesses other than the victim and perpetrator, there is usually no physical or medical evidence (Berenson et al., 2002; Heger et al., 2002; Johnson, 2004; Kellogg et al., 2004) and there is no typical victim response (Cossins, 2008). Consequently, the primary evidence is the testimony of the complainant. Most perpetrators are well known to their victims (Fanslow et al., 2007), which often complicates disclosure (Goodman-Brown et al., 2003; London et al., 2005) and also complicates the court participation process for victims (Randell et al., 2018). Furthermore, a significant portion of complainants in sexual violence trials are children or adolescents who by virtue of their young age, have unique developmental needs.

[1] Sexual violence is defined by the World Health Organization as 'any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting including but not limited to home and work' (Krug et al., 2002, p. 149). The World Health Organization defines child sexual abuse specifically as 'the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared, or else that violates the laws or social taboos of society. Children can be sexually abused by both adults and other children who are – by virtue of their age or stage of development – in a position of responsibility, trust or power over the victim'(World Health Organization, 2006, p. 10).

Significant reforms have been initiated in recent years. The Whangārei Young Witness Pilot Protocol, established in 2014 sought to improve processes for young complainants via a range of changes to trial processes (Randell et al., 2016). Subsequently, in late 2016, the Sexual Violence Court Pilot was established in the Auckland and Whangārei District Courts with the intention of reducing the distress that complainants experience and improving trial management processes, in part to reduce any pre-trial delay (Chief District Court Judge Doogue, 2016). These courts were made permanent in 2019 following an evaluation (primarily focussed on stakeholders and adult complainants) which indicated that the pilot had been largely successful in achieving its aims (Gravitas Research and Strategy, 2019). Overall, however, the justice system has historically struggled to grapple with the unique challenges that sexual violence cases present, particularly for young complainants.

In 2017, the Chief Victims Advisor commissioned the Child Witnesses Report examining the challenges in the court system for child complainants and witnesses with a focus on delays and courtroom questioning (Chief Victims Advisor, 2017). The report identified two key opportunities for improvements in trial processes as they pertain to child witnesses - pre-recording of a child's entire evidence prior to trial as an opportunity to reduce delays, and the use of communication assistants (also referred to as intermediaries) to improve the quality of courtroom questioning of children. The report also proposed a number of other modifications to pre-trial and trial processes including pre-trial preparation for child witnesses, training and/or accreditation for judges, providing remote video links and improving courthouse design, increasing judicial intervention and judge alone trials.

At the time that this report was being written, the Sexual Violence Legislation Bill was in the process of readings. This Bill was introduced in response to recommendations by the Law Commission in 2015 (New Zealand Law Commission, 2015) and amends the Evidence Act 2006, Victims' Rights Act 2002, and Criminal Procedure Act 2011 with the intention of reducing the re-traumatisation victims of sexual violence may experience when they attend court and give evidence.

Sexual violence misconceptions and criminal court trials

Limited attention has been paid to misconceptions about sexual violence and the role they may play in the questioning of young complainants during criminal court trials in Aotearoa. Many people express significant uncertainty in their knowledge of child sexual abuse and misconceptions (also referred to as myths) about sexual offending against children and adolescents are held to various degrees by the public (Cossins et al., 2009). These misconceptions include (but are not limited to) (Blackwell, 2007; Cossins, 2008; Cossins et al., 2009; Quas et al., 2005):

- Child sexual abuse is rare
- False allegations of sexual abuse are common
- Children will report abuse immediately/delay in disclosure is uncommon
- If a child is asked directly about sexual abuse, they will readily disclose
- Child sexual abuse is usually perpetrated by a stranger
- There is likely to be physical evidence of child sexual abuse
- An abused child will call for help or try to escape
- An abused child will feel negatively towards and attempt to avoid the perpetrator following abuse
- Sexual abuse could not occur with others in close proximity.

Counter to these misconceptions, child sexual abuse is prevalent in Aotearoa, reported to have been experienced by around one in four females and one in ten males (Clark et al., 2012; Fanslow et al., 2007). False complaints are rare (O'Donohue et al., 2018). Delays in disclosure are common with many young people who have experienced abuse not disclosing to anyone during childhood (Hershkowitz et al., 2007; London et al., 2005, 2008).

There is usually no physical evidence of abuse (Berenson et al., 2002; Heger et al., 2002; Johnson, 2004; Kellogg et al., 2004) nor is there a predictable psychological or behavioural response that is indicative of abuse having occurred (Cossins, 2008).

Most sexual abuse is perpetrated by someone well known to the victim such as a family member, family friend, or acquaintance (Fanslow et al., 2007). Rather than a sudden, immediately traumatic occurrence, most sexual abuse involves a gradual "grooming" process in which the perpetrator gains the child's trust and manipulates them into participating (Craven et al., 2006; McAlinden, 2012).

Grooming behaviour, in addition to the power differential between children and adults, may contribute to a child's lack of fear or avoidance of the perpetrator, and initial perceptions of abuse as non-aversive or as reflecting special attention or love (Paine & Hansen, 2002). Physical force is rare, and offenders often seek to make the victim feel as though he or she is a willing participant in sexual activity, or that they caused the offender to act sexually toward them (Craven et al., 2006). As a result, children often have great difficulty distinguishing who is responsible for the abuse and frequently blame themselves. Such dynamics also contribute to children maintaining secrecy about the abuse (Alaggia et al., 2019).

Although rape myths have been found to be heavily relied upon in the cross-examination of adult complainants (MacDonald, 2020), there has been limited investigation into the prevalence of sexual violence misconceptions in trials in Aotearoa involving young complainants for more than 15 years. Earlier research has found that misconceptions were commonly utilised by defence counsel as a means of disputing the credibility of witnesses (Blackwell, 2007; Davies et al., 1997; Davies & Seymour, 1998). In a study of 137 trials in Aotearoa from 2006, it was found that over 90% of defence counsel utilised at least one misconception in trials, most utilising several (Blackwell, 2007). Three quarters of defence counsel used a complainant's apparent affection for, lack of fear of, and continued contact with the defendant to undermine the young witness' credibility, and in over two thirds of trials, a delay in disclosure was used to the same effect. Similarly, a lack of struggle or attempt to escape or stop the abuse was often used by defence counsel as an argument that the abuse did not occur.

Misconceptions surrounding child sexual abuse tend to minimise or exaggerate the harm caused by such abuse, deny the extent of its prevalence, diffuse perpetrator blame (e.g., to the child or a non-offending parent), and create inaccurate perpetrator stereotypes (Cromer & Goldsmith, 2010). Despite a significant body of evidence that contradicts common misconceptions, research has indicated that they are present in the public conscience, including among jurors or samples of the public who are eligible as jury members in Aotearoa (Blackwell, 2007), Australia (Cossins et al., 2009; Goodman-Delahunty et al., 2010) and the United States (Quas et al., 2005). Given that a unanimous verdict is typically required in Aotearoa criminal court jury trials, sexual abuse misconceptions being held by even relatively small proportions of jury eligible populations would likely have a significant impact on trial outcomes.

Since 2008, counterintuitive expert evidence has been admitted in Aotearoa courts with the intention of educating jurors and countering common misconceptions that they may hold. Provided by psychologist expert witnesses, counterintuitive evidence typically attends to matters such as disclosure patterns following sexual abuse, or an abused child's continued contact with or affection for the perpetrator of the abuse, without commenting on the specific case at hand (Seymour et al., 2014). While such evidence may be presented by a psychologist in person, as a witness in the trial, more common in recent times is that an agreed statement is read to the jury by a court official according to the provisions of s 9 Evidence Act 2006. The proportion of trials in which such evidence is given, either in person or read to the court, is not known.

Young complainants and cross-examination related distress

Much of the existing research regarding young witnesses in Aotearoa courts has centred on quantitative analyses of language used in court and the extent to which this is facilitative of a young person providing best evidence. It is known that cross-examination of young witnesses is characterised by heavy use of leading questions and developmentally inappropriate or ambiguous language (Davies & Seymour, 1998; Hanna et al., 2012; Zajac et al., 2003; Zajac & Cannan, 2009). This remains so, even within the recently introduced Sexual Violence Courts (Randell et al., 2020). Such questioning, while widely accepted as normative in legal spheres, significantly undermines the quality of evidence that a young witness is able to provide. Consistent with the findings of transcript analyses, young witnesses report cross-examination to involve questions that are leading, confusing, repetitive, and age inappropriate (Randell et al., 2018, 2021):

> *The defence lawyer on the other side, he was really vague and used a lot of double negatives and that got under my skin a little bit. [...] He just confused me with the way that he asked his questions, and so I had to sit there and think about it.* (Randell et al., 2018, p. 363).

> *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].* (Randell et al., 2021, p. 9).

> *He was pushy. He'd push you to the answer, he wouldn't wait much longer. He'd ask you a question [and then] say the answer [...] So we had to correct him a lot of times.* (Randell et al., 2018, p. 363).

However, the aspect of testifying that young people and their caregivers report to be the most distressing is aggressive cross-examination: challenges to their credibility including statements that they are lying, negative implications about their character or that of their family, and 'mean' or 'bullying' behaviour by the defence lawyer (Randell et al., 2018, 2021). International research has found similar aspects of trial participation to be especially difficult for young complainants (Back et al., 2011; Cashmore & Trimboli, 2005; Eastwood & Patton, 2002; Plotnikoff & Woolfson, 2004). The following excerpts exemplify the ways in which young complainants in Aotearoa describe their experiences of cross-examination:

> *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?'* (Randell et al., 2021, p. 9).

> *Just being like accused of lying for something, why would I get up in front of everyone and make this big deal over nothing? I just felt really bullied because he's my dad's defence lawyer and I'm just 15 [...] 'I put it to you that you made up this story, blah, blah, blah'. It just really annoyed me because I didn't want anyone not to believe me.* (Randell et al., 2018, p. 364).

> *For a few hours he was just telling me that I'm a liar, telling me that all I wanted was attention. He kept trying to trip me up, he kept trying to trick me. He was like a bulldog with me. It is hard for a 17- year-old to go through that for hours. I was shaking and crying. It was quite traumatising actually, and as a result, to this day I am quite terrified of the court.* (Gravitas Research and Strategy, 2018, p. 79).

Caregivers of young complainants reported similar concerns about the cross-examination of their children.

I mean she does your typical teenage stuff, but she's a good girl otherwise. I guess nothing in the way that the defence tried to make her sound like [...] That's what she shared with me [...] and I also got that when I was on the witness stand. The light that they were trying to put her in was not a positive light. When you're the defence that's your job I guess [...] to try and make the victim look like it's their fault [...] That's where I was telling you she'd come down and felt like she was being picked on. (Randell et al., 2018, p. 364).

They confused him [son]. They confused him on purpose. The lawyer for the defence was telling him that he was wrong, that what he was saying was not true. He was so scared. He said to me afterwards "I didn't know what to say because I just wanted him to stop. I wanted them to stop talking to me and to stop telling me that I'm lying." And with my daughter they were suggesting things to her, saying that she hadn't even been there. It seemed like the case came down to being able to successfully confuse the children enough to get a paedophile off a charge. That part was absolutely traumatising for all of us. I was hysterical for days. I was just a mess. How can a justice system be just if this is the way it treats children? It becomes not about justice, it becomes a game. I don't know why children have to be brutally cross-examined, bringing their credibility into question. (Parent of victim) (Gravitas Research and Strategy, 2018, p. 81)

Given that in sexual violence trials, evidence other than that of the complainant is typically very limited or non-existent, it is the complainant's testimony that must be undermined in order to create reasonable doubt in the minds of the jury. The ways that young complainants and their caregivers speak about cross-examination suggests that the methods by which defence lawyers challenge a young complainant's evidence are largely responsible for cross-examination related distress (Randell et al., 2018, 2021).

Purpose of the current research

The aim of the present research was to provide an analysis of the cross-examination of young complainants in sexual violence trials, to better understand whether methods by which complainants' evidence is challenged are consistent with those that they report to be distressing. Additionally, given that rape myths are frequently used as a means of challenging the plausibility of adult complainant's evidence in rape trials and are experienced as distressing (McDonald, 2020), the current study sought to investigate the use of sexual violence misconceptions in the cross-examination of young complainants.

Method

Transcripts

The trial transcripts used for this research constitute a subsample of those accessed for a New Zealand Law Foundation funded piece of research involving quantitative transcript analysis of question types and language use (Randell et al., 2020). These transcripts were originally accessed with the permission and support of former Chief District Court Judge Jan-Marie Doogue and the Administrative Judge for the Sexual Violence Court Pilot, Judge Eddie Paul. 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. Permission was received from Chief District Court Judge Heemi Taumaunu and Judge Eddie Paul to use the transcript subsample for the purposes of the present research. Ethical approval was obtained from the University of Auckland Human Participants Ethics Committee.

A 'child' for the purposes of court proceedings is defined as an individual under the age of 18 (s 4 Evidence Act 2006). Transcripts that had been requested for the previous research were those from the 10 most recent consecutive sexual violence trials involving child complainants that took place in 2018 (or 2017 where there were fewer than ten transcripts from 2018 that met inclusion criteria) from each of four courts including the Auckland and Whangārei Specialist Sexual Violence Courts. Not all courts were able to provide 10 transcripts due to fewer than 10 trials meeting the inclusion criteria.

The subsample of trial transcripts selected for the current research were those from the Auckland and Whangārei Sexual Violence Pilot Courts. Trials were selected from these courts specifically because they could be assumed to represent best practice concerning sexual violence trials involving young complainants in Aotearoa. One of the aims of the Sexual Violence Court Pilot was to reduce the distress associated with court involvement for complainants via the adoption of best practice guidelines (Chief District Court Judge Doogue, 2016; The District Court of New Zealand, 2016).

A total of 15 trial transcripts of the cross-examination of complainants was used for analysis. Eleven of these trials had taken place in 2018, and three had taken place in 2017.

Demographics

The age of complainants at the time of the trial in the transcripts analysed ranged between 6 and 17 years old (mean = 13.5; median = 15). Other demographic information was not available. In eight of the cases, the defendant was a caregiver or close family member; that is, step-parent, sibling or step-sibling, grandparent, partner or ex-partner of a parent. In a further five trials, the defendant was a family friend, acquaintance, neighbour, someone living in the same house, or teacher. In two cases the defendant was a stranger.

Analysis

The cross-examination transcripts were analysed using thematic analysis. Transcripts were read and re-read in a process of familiarisation. The data were then coded for ways in which a complainant's evidence (particularly credibility, reliability, and plausibility) was challenged. Transcripts and codes were reviewed many times and codes were collated into broader patterns, or themes, in the data concerning strategies of cross-examination. This process was informed by existing literature regarding cross-examination in Aotearoa, young witnesses' experiences of cross-examination, and the nature of sexual violence and child sexual abuse including common misconceptions. Themes were then reviewed and refined and are presented in the findings section of this report.

Ethical issues

This research was conducted with an acute awareness that the discussion and quotation of excerpts from trial transcripts involves the words of real people describing often traumatic events, and at a time when they are potentially distressed and vulnerable. It was not possible to seek consent from those who gave evidence. However, given that such trials are typically closed for the protection of a complainants' privacy, only research such as this allows for scrutiny of the processes that are occurring in Aotearoa courts. Transcripts were redacted prior to the analysis to remove any identifying details. This was carried out by an independent clinical psychologist who was not directly involved with the analysis. In selecting quotes for presentation in this report, great care was then taken to further protect the anonymity of those complainants.

Findings

Challenges to young complainants' evidence in the transcripts analysed included challenging the plausibility of their evidence with reliance on sexual violence misconceptions, challenging their credibility or reliability by making negative implications about their character, and direct or indirect accusations of lying. The style of cross-examination was characterised by heavy use of leading questions; a vehicle by which evidence challenging narratives were controlled and presented by defence counsel. Each of these points is detailed below.

Sexual violence misconceptions to challenge plausibility

Sexual violence misconceptions were leveraged in almost all trials as a means of challenging the plausibility of the complainant's evidence. Most of the questioning that involved misconceptions focused on the behaviour of the complainant before, during and after the alleged offending. However, questioning also focussed on positive characteristics of the defendant or the relationship between the defendant and complainant. The plausibility challenging lines of questioning included:

- The complainant did not disclose the abuse immediately or to expected others.
- There were positive aspects of the relationship between the defendant and complainant including that:
    - The defendant displayed caring qualities towards the complainant.
    - The complainant's behaviour towards the defendant during the course of, or following the offending involved continued contact, affection, or friendliness.
- The complainant did not take steps to prevent or stop the abuse. This included:
    - The complainant acted affectionately towards the defendant.
    - The complainant allowed the defendant into house or room, or entered a space or interaction with the defendant, even though they knew that the abuse may occur
    - The complainant did not alert someone at the time, physically defend themselves or otherwise attempt to stop the abuse.
    - The complainant did not otherwise take greater care to keep themself safe.

These complainant behaviours and defendant characteristics were a focus of cross-examination with the explicit or implicit reasoning that the behaviour was incongruent with the alleged offending having occurred[2]. Such reasoning is heavily reliant on misconceptions about child sexual abuse and sexual violence. The plausibility challenging lines of questioning and associated misconceptions are detailed below with a summary of research regarding the misconceptions and examples of their presence in the trial transcripts.

The complainant did not disclose the abuse

In several trials the complainant's failure to disclose the offending to someone, or to an expected other, immediately or soon after the offending occurred was raised in cross-examination.

[2] This research was purposefully limited in its scope, with a focus on cross-examination. However, it is notable that as other research has shown, this is not the only area of questioning or trial process in which sexual violence misconceptions may be present (McDonald, 2020). There is scope for future research which examines the presence of sexual violence misconceptions in examination-in-chief, closing arguments and jury directions, as well as how young complainants might themselves engage with such misconceptions when testifying.

Misconception

Questions about delayed disclosure to challenge the plausibility of a complainant's evidence are predicated on the misconception that a sexually abused child or adolescent would tell someone that they had been abused, and that delay in disclosure is uncommon. However, there is no reliable pattern of the timing of a sexual abuse disclosure, the person or persons to whom the abuse is reported, or the fullness of a child's disclosure (Jensen et al., 2005; London et al., 2005; Morrison et al., 2018).

Most people who experience sexual abuse during childhood or adolescence do not disclose their abuse immediately, often taking months or years to do so (Hershkowitz et al., 2007; London et al., 2005, 2008). Approximately two thirds of those who experience sexual abuse as a child do not disclose this at all during childhood (London et al., 2005). Although there is some evidence that a majority of sexually abused children will provide details during a forensic interview (London et al., 2008), denying that sexual abuse has occurred even when asked directly, including in formal interviews with child protection or police, is not uncommon (Leander, 2010; Leander et al., 2007; Sjöberg & Lindblad, 2002).

Recent reviews of both qualitative and quantitative literature have examined facilitators and barriers to disclosure for young people who have experienced sexual abuse (Alaggia et al., 2019; Morrison et al., 2018; Reitsema & Grietens, 2016). Non-disclosure, or delayed disclosure may be due to feelings of shame, responsibility, embarrassment, guilt or self-blame (Alaggia et al., 2019; Morrison et al., 2018). Fear of the offender or conversely a wish to protect the offender may also impede disclosure (Jensen et al., 2005; Morrison et al., 2018). Fears of being blamed, disbelieved, upsetting others, and concern about the consequences for themselves, loved ones or family system may prevent a young person from disclosing abuse or delay their disclosure (Alaggia et al., 2019; Jensen et al., 2005; Morrison et al., 2018).

In order to disclose abuse, young people need to feel confident that they will be believed, and will not be blamed by the person to whom they report (Morrison et al., 2018). Opportunity (such as privacy and appropriate prompts), supportive reactions from others, and situations where a theme of child sexual abuse is present in conversation tend to make disclosure less difficult (Jensen et al., 2005). Motivations to disclose sexual abuse may include to stop the abuse, to prevent others being abused, or a desire for justice (Eastwood & Patton, 2002).

Given that offenders are typically well known to the children they abuse, and that the relationship is often one with emotional closeness and/or characterised by the offender having a 'caregiving,' role, disclosure can be extremely fraught for young victims. The common situation of a family member having perpetrated the abuse increases the likelihood of non-disclosure or delayed disclosure (Alaggia et al., 2019; Goodman-Brown et al., 2003; London et al., 2005). Grooming strategies, which establish trust and compliance in a victim-offender relationship, also tend to inhibit disclosure (Paine & Hansen, 2002).

These research findings indicate that the timing of a young person's disclosure of sexual abuse and to whom they disclose is complex, influenced by several factors, and does not provide an indication of whether they are being truthful or not.

Practice

Non-disclosure to someone immediately or soon after the offending occurred, or to an expected other, was frequently a focus of cross-examination in the analysed transcripts. An example of such questioning occurred in a trial in which a young complainant reported abuse by the defendant on multiple occasions. The complainant was questioned repeatedly about why they didn't tell others about the abuse immediately after its occurrence. The non-disclosure was explicitly linked to the

argument that the child's version of events was not plausible, in the lawyer's assertion that it would have been "easy" to disclose "if it had really happened in the way that you say".

Q. *Wouldn't it have been very easy at that time, given that something sexual had just happened, and Nana's there, she's there in front of you, just to tell her what was going on, if it had really happened the way that you say?*
A. *I was too scared to. I was only little and I (inaudible) I was going to tell someone, I thought in my head that no one would believe me.*

This young complainant was also questioned about why they hid the 'evidence' of the abuse, and again, in response, the young person cited a common reason for non-disclosure – the expectation of disbelief.

Q. *You don't think of going to talk to anyone in the house that night?*
A. *No.*
Q. *Knocking on [Cousin]'s door?*
A. *No I was too scared to.*
…
Q. *Why didn't you want your nana to find out?*
A. *Because she wouldn't believe me. She hasn't believed, she doesn't believe me.*
Q. *But if you had had all this blood on the bed and you'd been violated on the bed, wouldn't this be exactly the type of thing that you could say to Nana effectively, "Look this is real and it's happening"?*
A. *She won't believe me, I'm telling you now.*

Questions about why complainants hadn't disclosed the abuse often focused on the availability of close and trusted others to whom it was implied the abuse could or should have been disclosed.

Q. *Because you were very close [to your sister], weren't you?*
A. *Yes.*
Q. *You used to like to go for walks on the beach, just the two of you?*
A. *Um... I don't know. I can't remember.*
Q. *That's okay, it's not (inaudible 10:49:21). Would you say that she was, out of all your brothers and sisters, that she's the one you were closest to at that time?*
A. *Yes, I've been closest to her ever since we were - ever since we moved in with [Defendant] and [other person] - oh, [Defendant] and [other person].*
Q. *So even though you were that close, you're saying you never talked about what you say [Defendant] did to you?*
A. *No.*

Use of words such as 'Why on earth' in the excerpt below, perpetuate the misconception that to disclose sexual violence to another person is a default response. This style of questioning has a blaming quality, implying that the complainant should have behaved differently.

Q. *How much older is your sister than you?*
A. *18 months.*
Q. *Were you close to her then?*
A. *No.*
Q. *But did you treat her like an older sister?*
A. *Yes, yes.*
Q. *So, if you're worried about her and you say you saw them in the bedroom, why didn't you just ask her, "Was [Defendant] doing anything to you?"*

A. Because I didn't want her to know that he was doing anything to me.
Q. But you didn't have to tell her that, you could have just asked, "Is he doing anything to you," couldn't you?
A It would have led to that question.

…

Q. So why on earth did you not go to your mum then and there, [Complainant], and say, "This man is abusing me"?
A. She wasn't home.
Q. Well why didn't you wait until she was home and go and see her?
A. Because I thought it was my fault.
Q. Well why didn't you discuss it with your mum so you could see, if you thought it was your fault?
A. Because I thought I would get in trouble. Actually, can we take a break?

Again, the complainant's responses speak to a known reason for non-disclosure – a sense of responsibility and self-blame.

In one trial, an adolescent complainant was questioned in such a way that suggests that given the nature of the offence (being raped at age seven), the child would have been injured and these injuries would have been noticed by other adults. This implies a need, or ample opportunity to disclose the sexual abuse.

Q. And you talk about the sex part and I don't want to embarrass you [Complainant], but these are questions I must ask you. You talk about the penetration of his penis being hard and fast, so it was fairly physical, him thrusting his penis, you say, into your vagina, right?
A. Yes.
Q. And could I suggest to you, a grown man's penis, at seven years of age, you would have been very, very sore.
A. Yes I was.
Q. And you would have had difficulty walking could I suggest, at least in the short term, you know the next day or two. What do you say?
A. Yes.
Q. So you've got this mark round your neck and you've been penetrated by an adult male, are you saying that nobody said anything to you afterwards, as to what you looked like with your neck, you talked about the jersey, right. What about did you have any trouble walking or you showed some pain down in your private area?
A. Yeah, my nana asked me why I was walking funny and I just told her that I tripped up. And that my leg was sore.

Later questioning specifically focussed on the complainant's failure to seek medical attention or disclose the abuse:

Q. Now again, a bit like the other two incidents, you had some foreign object inside your vagina, you'd been raped. Again you would have been sore and in discomfort. Do you accept that?
A. Yeah.
Q. Again did you seek any medical attention?
A. No.
Q. So in none of these incidents did you ever go to a doctor?

A. *No.*
Q. *Seek any type of medical attention?*
A. *No.*
Q. *Or tell anyone?*
A. *No.*
Q. *And your explanation for not doing that was because you were scared. Have I got that right?*
A. *Yeah.*

It is well established that patterns of disclosure following the experience of abuse are not consistent and cannot, therefore, provide any indication of whether a disclosure is truthful or not. Despite this, a complainant's failure to disclose abuse promptly or in an 'expected' way such as when injured, asked, or to a trusted other, was frequently a focus of cross-examination. This focus places unfounded importance on the child's disclosure-related behaviour, suggesting that it is of evidential significance and implying that delayed disclosure, or non-disclosure to expected others was incongruent with the alleged abuse having occurred.

There were 'positive' aspects of the relationship between the defendant and complainant

In more than half of trials, sections of cross-examination focussed on the defendant's good character, or positive aspects of the relationship between the complainant and defendant. These included reference to a defendant caring or providing for a complainant in some way, or the complainant expressing warm feelings towards the defendant, having ongoing communication with them, or seeking their support.

Misconceptions

Such avenues of questioning operate on the misconception that there would not be 'caregiving' or otherwise 'positive' aspects the relationship between the offender and the victim if they were also abusive. It also draws on the sexual violence misconception that a victim would avoid the perpetrator, and would not feel affection for, or maintain contact with them. It ignores the familial or other caregiving relationships that often exist between victims and offenders, as well as the role that grooming behaviour frequently plays in the perpetration of child sexual abuse.

Most child sexual abuse is perpetrated by someone known to the victim, typically with whom they are familiar and have a close relationship (Fanslow et al., 2007). Continued contact with an offender following the abuse can occur for a number of reasons. The offender may play an integral caregiving role in the child's life or be a part of their family system. Without disclosure, this is unlikely to change following abuse as young people usually have limited agency in their living and care arrangements. The relationship is often emotionally significant for the child and meets a range of their needs, likely due to familial relationships, caregiving provision by the offender, and/or the relationship being established via grooming behaviours (Paine & Hansen, 2002). A significant proportion of young people who have been sexually abused continue to express affection or love for the perpetrator of the abuse or report ambivalent feelings towards the perpetrator (Berliner & Conte, 1990; Paine & Hansen, 2002).

Grooming behaviour is common, and a significant consideration in understanding the relationships that may exist between victims and perpetrators of child sexual abuse (see Craven et al., 2006 for a review). Grooming behaviour has been defined as "(1) the use of a variety of manipulative and controlling techniques (2) with a vulnerable subject (3) in a range of interpersonal and social settings (4) in order to establish trust or normalise sexually harmful behaviour (5) with the overall aim of facilitating exploitation and or prohibiting exposure" (McAlinden, 2012, p. 11). This deliberate behaviour on the part of the offender to gain a child's trust and compliance often involves providing

emotional support, meeting material needs, or providing gifts, thus fostering loyalty towards and dependence upon the perpetrator (Olson et al., 2007). The child and relationship is typically gradually sexualised and sexual behaviour is progressively normalised (Craven et al., 2006; Olson et al., 2007). The nature of this relationship may isolate the child from safe and supportive adults in their life (Olson et al., 2007).

Because grooming behaviour is often subtle and gradual, and dependent on the victim-offender relationship and the victim's compliance, it can contribute to a victim's feelings of responsibility or self-blame for the offending occurring (Lawson, 2003). Gradual sexualisation of the relationship can lead to difficulty for a child in distinguishing appropriate from inappropriate behaviours. Young people do not always experience sexual abuse as aversive or distressing, particularly when it is in the context of a "special" relationship facilitated by grooming behaviours on the part of the offender. Experiencing sexual abuse as non-aversive, or in some cases enjoyable, can contribute to feelings of shame. The isolation, dependence, feelings of complicity, responsibility, and self-blame that a victim may experience as associated with a defendant's grooming behaviours, act to maintain secrecy even when a defendant has given no explicit instruction for a child to do so.

Practice

Questioning during cross-examination often focussed on caregiving qualities of the defendant's behaviour towards the complainant including the provision of food, clothes, enjoyable activities and emotional support.

Q. And all four of you would go to see your father on Sundays, is that right?
A. Yeah.
Q. And would [Defendant] be there sometimes helping with food and things like that?
A. Yes.
Q. You remember that she would help with food?
A. Yeah.
Q. And would she sometimes play with you, read books, things like that, to you?
A. No.
Q. Do you remember when you or your brothers had a birthday party, would you sometimes go to your father when he was staying with your grandmother?
A. Yes.
Q. And there'd be party food and things like that?
A. Yeah.
Q. And would [Defendant] be there sometimes helping with party food and making sure you had a good time, remember that?
A. Yeah.
Q. Do you remember that one time that [Defendant] took you trick or treating?
A. No.

These lines of questioning inaccurately suggest that contrary to evidence-based knowledge of victim-offender relationships, there would not be "supportive", "trusting" or "caregiving" aspects of such a relationship.

Q. But after the time that the relationship stopped, and even after he got married; [Defendant] still kept in touch with your mum, didn't he?
A. Yeah.
Q. And he still kept in touch with you, didn't he?
A. Yes because he helped raise me.
Q. And it's fair to say that the relationship between you and him was a fairly close one?

A. *Yeah, like a daughter and a father.*
Q. *And you would often talk to him in confidence about things that you wanted to talk about?*
A. *Depending on what they were.*
Q. *But you would often talk to him, wouldn't you?*
A. *Sometimes.*
Q. *And in fact you would often talk to him in preference to talking to your mother, is that a fair thing to say?*
A. *With some things.*
Q. *And he was usually available to come and talk to you, assist you, wasn't he?*
A. *I guess so.*
Q. *And he was also available to help your mother?*
A. *Yeah.*

The feelings or behaviour of the complainant towards the defendant was a common line of questioning and a means of challenging the plausibility of their allegations. This included questioning around a young person feeling positively towards a defendant, continuing to have contact, or wanting to maintain a relationship with them. In one trial a complainant is questioned about a birthday card that they wrote to the defendant saying that they missed him. The focus of this questioning suggests that the complainant's behaviour is of evidential importance and that the complainant writing that they missed the defendant is incongruent with offending having occurred.

Q. *We're just handing those out to the jury, [Complainant]. So this seems to say, "I miss you so much, [Defendant], I hope you have a good birthday." Do you remember a time when [Defendant] went away, moved away for a while? Sorry, I should –*
A. *Mmm.*
…
Q. *Yes. So do you think this might be when you wrote this, when he went away?*
A. *Maybe. I can't remember.*
Q. *Okay. So it says, "I miss you so much, [Defendant]". That's a pretty nice thing to say to him, isn't it?*
A. *Yeah.*
Q. *Do you think you were missing him at this time?*
A. *I can't remember.*
Q. *But you wrote it down, so you probably were, weren't you?*
A. *Maybe.*

In another trial, questioning highlights both the caregiving role that a defendant played in the complainant's life, as well as the complainant's 'love' for the defendant which is framed by defence counsel as 'obsession':

Q. *But were you a bit obsessed with [Defendant]?*
A. *I felt like I was in love at the time.*
Q. *Because she looked after you didn't she?*
A. *Well she told me she felt the same way.*
Q. *She gave you food, didn't she?*
A. *Yes.*
Q. *Gave you money?*
A. *Yes.*
Q. *Kept you safe from your mum?*
A. *Yes.*

These questions fail to acknowledge the role of grooming behaviour in the establishment of a relationship between a victim and offender. They overlook the power differential that exists between children and adults, and the fact that offenders are often a family member and/or in a caregiving role such as grandparent, parent or stepparent, supporter, and provider. The following excerpt exemplifies the ambivalence that a complainant might feel towards the defendant. That the complainant reported feeling scared and also maintained contact with the defendant (who played a parenting role in her life) is framed by defence counsel as contradictory:

Q. *I mean, I've listened very carefully to your EVI and we have been provided with a transcript of it, which I've also been through. Now it seems to me that you've used the word, "scared," very many times in that. I lost count when we got to about 50.*
A. *Well that was after the first.*
Q. *Was it?*
A. *Yes.*
Q. *But you still kept in touch with [Defendant] didn't you?*
A. *I mean he was like a dad to me.*
Q. *But you were still communicating with him regularly?*
A *Not regularly, and if it was regularly it wasn't in depth.*
Q. *You were still texting him?*
A. *I can't remember.*
Q. *Well I' m going to suggest you must be able to remember, because you texted him a large number of times?*

These lines of questioning place undue importance on a victim's feelings towards and behaviour in relation to an offender, implying and perpetuating the misconceptions that a victim would feel negatively towards, cease all contact with, and avoid a perpetrator of sexual violence.

The complainant did not take steps to stop the abuse

Focus was placed in several transcripts on aspects of the complainant's behaviour prior to, or at the time of the alleged offending in several of the trials. Complainants were frequently questioned about whether they took actions to 'prevent' or stop the alleged offending from occurring, and if not, why not. This line of questioning was particularly evident in instances where the abuse occurred on multiple occasions.

Misconceptions

As with the previously discussed misconception-reliant narratives, misconceptions that a sexually abused child or adolescent would try to escape, would seek help, and would avoid the abuser were evident in cross-examination questioning about a complainant's failure to prevent or stop the abuse occurring. Again, such questioning fails to recognise that the role of grooming behaviours and the relationship between a victim and offender can impact a young person's behaviour in response to the offending and increase the likelihood of compliance (Craven et al., 2006). Moreover, when experiencing sexual abuse, it is common for victims not to resist for fear that this will worsen the abuse or put them in danger of increased harm.

A focus of cross-examination on not preventing or 'allowing' the offending ascribes some blame or responsibility for the alleged offending to the child's behaviour. It has been found that young people who experience multiple abuse events are perceived to be more responsible for the abuse versus those who have experienced a single abuse event (Theimer & Hansen, 2020). This is likely due to the belief that a victim could or should have done something to prevent the abuse from occurring after the first incident (Theimer & Hansen, 2020).

Practice

The focus of questioning regarding a complainant's failure to stop or prevent the abuse occurring centred on several complainant behaviours, or certain inaction. These included questioning why the complainant acted affectionately towards the defendant, allowed a defendant into a house or room, entered a space or interaction with the defendant even though they knew that the abuse may occur, did not seek help or alert someone when the abuse was occurring, did not physically defend themself, and/or did not take greater care to keep themself safe from the abuse occurring.

In one trial a young person was questioned about her reference to herself as 'flirty'. This seems to imply either that she was a willing participant, or that her behaviour was incongruent with the offending having occurred. Such questioning places blame on the young person, perpetuating the victim blaming misconception that a victim who has been affectionate or flirtatious holds some responsibility for the offending.

Q. So what do you mean when you're talking about, "My flirty self, I was very flirty"? Just explain what you're trying to get across there.
A. When I was younger I was especially, I don't know, I wanted to get guys' attention a lot when I was about 12 to 13, which is how my personality is. So I'm just naturally very a bubbly and flirtatious personally.
Q. But what do you mean by being flirty?
A. Like being smiley and stuff.
Q. So are you meaning you were flirty towards [Defendant]?
A. Yes, at this time I was.
Q. So how did you show that?
A. When we were talking so you lean in closer and I was smiling and stuff, yeah.
Q. Were you deliberately doing that?
A. Yes

Several complainants were questioned about whether they sought help at the time the abuse was occurring and if not, why not. An example of this is a trial in which a young person reported having been abused in their home. They were questioned about not attempting to alert others in the home at the time of the abuse. Counter to evidence to the contrary, the phrasing of these questions suggests that "screaming out" would have been a typical and expected response.

Q. Wouldn't you have been screaming out?
A. No I was telling him not to do it.
Q. Right, were you doing that loudly?
A. Not loud, but I was telling him.
Q. You didn't try and attract the attention of your sister in the other room?
A. No.

A complainant's physical ability to leave or otherwise avoid the situation was also raised in cross-examination:

Q. [Complainant], you were free to leave at any point during that interaction weren't you?
A. I was but I knew what was best for me to do and in this small period of time I had to think quickly whilst under a lot of emotional pressure so it´s harder to think when you're in an emotional state.

The words “you were free to leave at any point” simplify the interaction between a perpetrator and victim of sexual violence and disregard the complex interplay of power, fear, gender, age, and social expectation and how these make a wide range of responses to sexual violence as it occurs ‘normative’. That the complainant’s physical ability to leave or otherwise avoid the situation is raised in cross-examination implies the importance of this in determining whether the offending occurred and incorrectly assumes that victims will typically exit or defend themselves in a situation where they felt in danger or under threat.

In a trial involving a young complainant who reported abuse by a person staying in her home, such questioning was pervasive. Over 60 questions were asked on the topic of why she would have opened the bathroom door to him if she had experienced sexual abuse from him in the past. The word ‘deliberately’, used several times throughout, places emphasis on the complainant’s actions.

Q. *So, you were quite comfortable going and having a shower just with this man at home who's abusing you were you?*
A. *No, I wasn't comfortable.*
…
Q. *So, what do you do?*
A. *I unlock the door.*
Q. *Why?*
A. *Because he was telling me to open the door.*
Q. *But this is a man you're saying had been abusing you for some time, isn't it, on your account [Complainant]?*
A. *Yes.*
Q. *Well, don't you say in your EVI that when he knocks on the door and said he wanted to come in you say, "I don't want you to come in," or to use your exact words, "I really, really don't want you to come in."*
A. *Yeah but he was very determined to come in.*
Q. *Well, was he whacking on the door?*
A. *Yes, he was banging on the door.*
Q. *Was he making any threats against you?*
A. *Not then, no.*
…
Q. *So, did you want him to come in [Complainant]?*
A. *No.*
…
Q. *Well, when he knocked on that door did you unlock the door?*
A. *Yes, eventually, yes.*
Q. *Deliberately to let him in, yes?*
A. *Yes.*
Q. *And when you did that did you think he would be abusing you again?*
A. *No.*
Q. *Well, coming into the shower –*
A. *I thought he might have wanted something.*
Q. *Well, did you ask him through the door, "What do you want?"*
A. *No.*
…
Q. *So, you've unlocked the door to this man whose, on your story, been sexually abusing you, yes?*
A. *Mhm.*
Q. *And you let him in deliberately, yes.*
A. *Yes.*

Q. While you were dressed in, what? Just a towel around you?
A. Yes.
Q. And then he says, "I want to have a shower with you," is that how it goes?
A. Yes.
Q. Do you get into the shower?
A. Yes.
Q. Are you naked when you get into the shower?
A. Yes.
Q. So you deliberately removed your towel before you get in?
A. Yes.
Q. Did you use your self-defence tactics on him then?
A. No.
Q. Why not?
A. Because my abuse had been going on for a while and so by then saying "no" had kind of not become an option anymore.
Q. Well if that's your answer, [Complainant], why would you unlock the door in the first place?
A. Because he told me to. He might have needed something or something might have been wrong.

Also in this trial, the complainant is questioned at length about why she would go into the defendant's bedroom, and again why she did not physically defend herself by using her "self-defence moves".

Q. And you say there he would undress you. What do you mean by that?
A. He would unbutton my pyjamas.
Q. And take them off?
A. Yep, take them off and my bra and underwear.
Q. So take everything off?
A. Everything off.
Q. While you were standing there?
A. Yes.
Q. Were you doing your self-defence moves then?
A. No.
Q. Well when that was happening what did you think would happen?
A. I knew what was going to happen.
Q. Would you say anything when you've been undressed like that?
A. No.
Q. Why not?
A. Because I don't know. I just didn't.

…
Q. So what did you think would happen when you're going into this man's bedroom at night like that?
A. I knew what was going to happen.
Q. And what did you know what was going to happen, [Complainant]?
A. I knew that he would abuse me and do things to my body. I knew that. But as I've said before, it's got to that point where saying "no" isn't so much an option because of how threatened I would feel.

Such questions place blame on a victim – implying that they could or should have engaged in certain behaviours to prevent the abuse occurring. These narratives, and the pervasiveness of them in society

generally play into the shame and self-blame that victims of sexual violence may feel. Additionally, such lines of questioning minimise how threatened a victim may feel by a perpetrator.

However, feeling threatened by a perpetrator is also not a default response to an experience of abuse. A complainant's continued contact with a defendant after alleged abuse had occurred was raised in challenge to their plausibility, with no regard for the ambivalence or affection that a victim may feel towards an offender. It disregards the aforementioned complexities of relationships that may exist between perpetrators of sexual abuse and child or adolescent victims. The following excerpt exemplifies how a complainant's experience of a defendant as both a source of practical and emotional support as well as a 'scary' perpetrator of abuse, and her continued interaction with the defendant, was used to challenge the plausibility of her allegations.

Q. Did he come at your invitation?
A. Probably. I'm not sure. He is the one who put it forth, proposed the idea.
Q. So you don't recall if you invited him to come round that day or not?
A. He asked me and I said okay.
Q. If you were so scared of him, and you even used the word "terrified" in your evidence; why did you agree he should come?
A. Because he was like a dad to me and, no matter what, I still trusted him a little. And I kept trying to tell my mind that it wasn't like that or it was just a one-time thing.
Q. Well is it fair to say then that your description of all this in your evidence, that you were scared – and you used that word many, many times – and terrified, were an exaggeration?
A. No. They weren't. If they were, I wouldn't be like this today.
Q. Perhaps you can explain to us then that if you were that scared; why you allowed him to come or why you agreed that he should come around?
A. I just said he was like a dad to me.
Q. But your mother wasn't present at that time, was she?
A. No.
Q. You knew that, if he came around, you'd be with him by yourself?
A. Yes. But he had drank something, the other day, and I just thought it would, you know, not happen again. Thought that he just wasn't thinking straight.

Similarly, in the following excerpt a six-year-old complainant is asked why she continued to return to the bach of her offending grandfather if she did not like the regular abuse that he inflicted.

Q. Did you like Poppa putting his finger in your [vagina]?
A. No.
THE COURT ADDRESSES [DEFENCE]- QUESTION NOT ALLOWED
CROSS-EXAMINATION CONTINUES: [DEFENCE]
Q. If you did not like Poppa putting his finger in your [vagina] in the bach why did you keep going back to the bach?
A. 'Cos he buys lollies and chewing gum and noodles.

This questioning may overestimate a child's power, agency, and understanding in the context of abuse, and discounts the likely impact of grooming and the perpetrator being in a caregiving relationship on a child victim's behaviour.

Other tactics of cross-examination

Challenges to a complainant's character: The emotional, irrational, or delinquent adolescent

Challenges to a complainant's credibility via questions insinuating negative personal traits has been found to be a tactic of cross-examination in Aotearoa-based sexual violence trials with adult complainants (McDonald, 2020; Zydervelt et al., 2016). Adolescent complainants in the current study were frequently characterised through cross-examination questioning as emotional and/or delinquent.

Q. And you in fact had come up from [City] smoking cigarettes, is that right?
A. Yes.
Q. That was one of the reasons that [Stepfather] and [Mother] decided to leave, because they didn't like the way things were going with the family in [City], is that right?
A. Yes.

Complainants were often described as having fraught relationships with caregivers, including defendants.

Q. Just dealing with issues in your house, you've told the police that you would get angry sometimes?
A. Yes.
Q. Now you had a lot of arguments with your mother, is that right?
A. Yes.
Q. And with your brothers?
A. Yes.
Q. And you would regularly smash things up in the house, wouldn't you?
A. Yes.
Q. Do you recall a time where [Defendant] would stick up for your mum?
A. Yes.
Q. When you were asking your mum for money and hassling your mother? Did that ever happen?
A. Um, most probably but I don't remember it.
….
Q. Did you smash the fence on one occasion, when you were really angry?
A. Yes.
Q. You did, okay.
A. Yes.
Q. Now you talked about smashing up [Defendant]'s car, yeah, you accept you did that?
A. Yes.

Their 'emotionality' or 'delinquency' was linked via cross-examination questions to the suggestion that the young person misread the abusive behaviours, had a motive for lying about the alleged abuse or was generally untrustworthy, not credible or unreliable.

Q. [Complainant], would you describe yourself as a person who reacts emotionally and perhaps irrationally –
A. No.
Q. – when serious events happen?
A. No.
Q. You talked before about since this event you've been self-harming by cutting yourself?
A. Yes.

Q. In your EVI interview you mentioned, towards the end there, that you were discussing with somebody events that could, "trigger cutting." I presume you were talking about self-harm then?
A. I can't remember.
Q. You were seeing the school counsellor well before this incident, weren't you, about exactly the same thing?
A. No, it wasn't about exactly the same thing.
Q. About cutting yourself?
A. It was about cutting but it had nothing to do with this.
Q. And you wouldn't call that an emotional and irrational reaction?
A. No.
Q. [Complainant] you strike me as being a very intelligent young woman.
A. Yes.
Q. Would you agree that you're a troubled young woman?
A. No. I have problems but I don't make things up.

Such questioning not only minimises the significant emotional distress that may be associated with experiencing sexual abuse but weaponises that against the credibility of the complainant. In the following example, emotionality, including in this case feeling 'jealous', was used to suggest a motive for lying about the alleged abuse. Despite the complainant disputing that she felt jealous of her half-siblings, defence counsel later suggests directly to the client that she made up the allegations because she was jealous.

Q. [Child 1] and [Child 2] are the actual biological children of [Defendant]?
A. Yes.
Q. Did you sometimes feel left out because you were only a half-sister?
A. No I didn't.
…

Q. And would they all sometimes watch television together in that room where they all slept?
A. Yes.
Q. Did that make you feel left out?
A. No.
Q. Did you feel like your brothers got all the attention?
A. No.
Q. I think you said in your video, in the video we watched that [half-sibling] is used to getting all the attention?
A. Yes but I did not intend it in that way.
Q. In what way did you intend it?
A. Well not in a way that I was implying that I was jealous of him.
Q. Did you feel that [Defendant] treated your brothers a bit differently from how he treated you?
A. No.
Q. Didn't he sometimes take them out to eat, for example, and not take you?
A. I had some studies to look at so I wasn't really that concerned about him taking the boys out.
A. If [Defendant] was in charge of disciplining you did you feel like he treated you differently to the boys?
A. No.

In one trial a complainant's intoxication was conflated with her description of posttraumatic stress symptoms. Defence counsel appeared to challenge the reliability of the complainant on the basis of gaps in memory of the offending, attributed to alcohol intoxication, as well as her credibility on the basis of 'selective memory'. The defence lawyer displayed scant and incorrect knowledge and/or dismissal of such symptoms, and the responsibility fell on the adolescent to provide an explanation of how posttraumatic stress symptoms present.

Q. When you say you, "Blanked out," you mean you became unconscious, or…
A. No.
Q. Your mind just went blank?
A. It's a psychological thing that your mind does.
Q. Is it?
A. Yeah.
Q. Tell me what happened to your mind, then, when it blanked out.
A. I haven't studied psychology. I wouldn't be able to explain it to you.
Q. Well I'm not asking you to explain it to me. I'm just trying to get you to tell me what happened to you.
A. What happened is what I remember and then there's parts that I don't remember.
Q. So your mind, "Blanked out"?
A. I guess.
Q. Then several other times you say you, "Can't remember," and then you've talked about an incident where I think you were on the couch and you say the next thing you remember you were, "On the bed." Do you remember saying that?
A. Yeah.
Q. And you don't remember events in between or what happened?
A. No, that's what I'm saying. I could only remember bits of it.
Q. Is it fair to say you were having some sort of panic attack?
A. No.
Q. Are you sure?
A. A panic attack is very different.
Q. Is it?
A. Yeah.
Q. Do you know about panic attacks, do you?
A. I mean I've had them since this has happened, so I think I would be…
Q. And when you were talking about the alcohol, you were saying things like you were drunk but you called your best friend?
A. Yeah.
Q. "I was just throwing up."
A. Yeah.
Q. "I threw up." "I fell a lot."
A. Yeah.
Q. And then you made the comment, "The next day, I pretended nothing happened. I just wanted Burger King."
A. Yes, and?
Q. Who did you go with to get the Burger King?
A. My mum.
Q. I mean there's probably no point in walking you through all these statements you made but you made many other statements about things like, "Parts of it are blank," "My memory's all muddled." At one stage you said, "I totally broke down." What did you mean by that?
A. It depends which time you're talking about.

Q. My notes recorded, for the record, on page 17 of the transcript, right at the bottom of the page and I think [Complainant] you were talking about you could, "Smell the alcohol," and, "It smelt like perfume," and you, "Totally broke down."
A. This was after the events had happened.
Q. Yes.
A. This was the aftermath in – of a sort. Do you know what I mean? I had a flashback to it. Which is normal.
Q. Is it? Who told you it's normal?
A. I saw a therapist.
Q. You also made comments that you, "Don't recall order of events." Do you remember saying that?
A. Yeah I know what happened but I can't remember in which order some things did.
Q. Is that because your memory's faulty, is it?
A. No. Like I said, your mind pushes things away when they get too dramatic.
Q. How do you know that?
A. Like I said, I saw a therapist.
Q. And your therapist is telling you all these things, is she or he?
A. I mean they've studied psychology. It's normal after a traumatic event.
Q. Have you studied psychology, have you?
A. I've studied parts of it.
Q. And is your study of psychology leading you to form views about this matter?
A. No. I'm just telling you what happened.
Q. You made reference to having, "Flashback of memories," do you remember saying that?
A. Yeah, I still do have flashbacks.
Q. Everything's, "Spinning," and, "Blurry."
A. (no audible answer 11:44:12).
Q. I'm going to suggest to you [Complainant] that you really had got into a condition, that day, where you weren't really in a condition to remember anything accurately, were you?
A. I was able to remember things, which is why we're here today aren't we?
Q. Well your memory's, I'd suggest, fairly selective though, isn't it?
A. I mean there's things you remember and things you don't. You can't choose what you don't remember.
Q. Are you sure you weren't getting into your mother's vodka?
A. No, I wasn't. They were all given away as Christmas presents.

Leading questions

Questions during cross-examination were frequently leading in nature, often posed in the form of declarative statements or tagged questions. This use of leading questions during cross-examination acted as a means of counsel controlling the content of evidence during cross-examination, which often read as counsel telling a story or creating a narrative in such a way that the complainant's responses were almost irrelevant. These findings are unsurprising given wide documentation that this is a common and an accepted culture of practice in Aotearoa (Davies & Seymour, 1998; Hanna et al., 2012; Randell et al., 2020; Zajac et al., 2003; Zajac & Cannan, 2009), founded on legal texts that explicitly highlight the importance of maintaining control of witness responses (e.g., Salhany, 2006).

Leading questions are known to be damaging to the quality of evidence provided by young witnesses (Andrews et al., 2015; Andrews & Lamb, 2017; Klemfuss et al., 2014; Zajac et al., 2003; Zajac & Cannan, 2009). Recent efforts to improve legal practice and thus the quality of evidence by young people has shone a light on heavy use of leading questions during court processes. The Whangārei Young Witness

Pilot Protocol, addressed leading questions in its procedural documents (Randell et al., 2016). The protocol outlined that judges would be alert to the use of questions which suggest the answer, including tagged questions such as "Your father didn't touch her, did he?" and would intervene where appropriate. Recently, the Benchmark initiative has produced evidence-based 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 which identifies the issues that leading questions pose to the ability for children to testify effectively and provide quality evidence (Hanna et al., 2019). However, despite these efforts, the use of leading questions, including those which are tagged, persists, and could be considered a rigid cultural norm in legal questioning (Randell et al., 2020).

In the current research it was evident that leading questions were used to control a narrative in order to challenge a young person's reliability and credibility or the plausibility of their evidence.

Q. *And didn't he say to you that he wanted you to just tell the truth, that he had touched you over – that he had touched you when you were watching the movie and he'd done it accidentally? Sorry, too many propositions. When did you – did [Defendant] say to you over those few days before he left the house that he wanted you to tell the truth?*
A. *No, he never said that.*
Q. *And didn't he say to you that he had touched you and it had been an accident?*
A. *No, it wasn't an accident.*

Leading styles of questioning appeared in many forms in the current research. These included the use of declarative statements and tagged leading questions:

Q. *You and [Sister] are very close, aren't you?*
A. *Yes.*
Q. *You're very close to your big sister?*
A. *Yes.*
Q. *Yes. You're a bit more easy-going than her, would you agree, you're a lot more relaxed than [Sister]?*
A. *Yes.*
Q. *Okay. So she can sometimes be a bit bossy with you, would you agree?*
A. *Ah, maybe.*
Q. *She tries, doesn't she?*
A. *Yep.*
Q. *Tries to boss you around?*
A. *Yes.*

In many of the trials, analysed questions by the defence were leading in that they introduced information that the complainant had not previously raised in their evidential interview, evidence in chief, or cross-examination, and asked them whether they recalled this event or detail. These typically involved a declarative statement implying that the statement by the lawyer is fact and the question at hand is whether or not the complainant remembers it occurring.

Q. *And I just want to ask you about a couple of other incidents between you and [Defendant] at home around that period. So first of all do you remember having an argument with [Defendant] in the driveway around that time?*
A. *No.*
Q. *Do you remember you were meant to be looking after [Sibling]?*
A. *Yeah.*
Q. *And you were actually under the stairs in front of the house when [Defendant] got home?*

A. *Um –*
A. *If you don't remember then –*
Q. *No I don't.*
A. *– that's fine. Do you remember that you were babysitting [Sibling] and you hid from [Sibling], do you remember a time you did that?*
Q. *No.*

This style of questioning makes it difficult for jurors to discern whether the complainant's responses indicate that the incidents raised by defence counsel did not happen, or whether the complainant simply cannot recall it.

Q. *And your dad was at the house too, wasn't he?*
A. *I can't remember.*
Q. *Remember he was in the house, at the house but in a different room and he got [Other Person A] to talk to you? Is that what happened?*
A. *I don't know.*
Q. *But you remember [Other Person B] being there?*
A. *Yeah, she was in the lounge.*
Q. *[Other Person A] was asking you things like, and saying to you, "Be honest with me, is he touching you in places you don't want to be touched, do you remember her asking that?*
A. *No.*
Q. *But could she have said something like that?*
A. *Yeah.*
Q. *And you said, "No," to her, that wasn't happening?*
A. *Yes.*

Questioning during cross-examination was also leading in that defence counsel would disregard the complainant's response, continuing to ask leading questions on a topic regardless of a complainant's response:

Q. *Okay. Do you remember when at one stage [Defendant] had a bad accident and she was quite badly injured?*
A. *Nope.*
Q. *And she couldn't really move very well, could she?*

This style of questioning illustrates use by defence counsel of cross-examination as a speech-making exercise.

Q. *Let me just go back a little bit. You and your mum were having arguments as well, weren't you?*
A. *I think so.*
Q. *And your mum got so bad with you at some stage that she hit you, didn't she?*
A. *I don't think so.*
Q. *The police were called, do you remember that?*
A. *No.*
Q. *Well do you remember her grabbing you by the hair and dragging you across the room and slapping your face?*
A. *No.*
Q. *But anyway, you were also having problems with your dad, too weren't you?*
A. *Um, yes.*

These questions allow very little room for complainant responses, result in answers that are often ambiguous and allow the narrative of events to be shaped by the defence lawyer rather than the complainant.

The complainant is lying

In 13 out of the 15 trial transcripts analysed in the current study, cross-examination included a statement or statements by the defence lawyer that the complainant was lying, or a question or questions to that effect. In two of these cases, it was suggested that the complainant was told what to say by a mother or grandmother. Accusations of lying were made by defence lawyers in relation to the content of complainants' evidence both directly related to the sexual abuse as well as other matters. Bringing a young complainant's evidence into question by suggesting the witness is lying (or has been influenced by others to do so) has previously been found to be common in sexual violence trials in Aotearoa (Blackwell, 2007; Hanna et al., 2012).

Given that the primary evidence at hand in sexual violence trials is typically that of the complainant, the defence case tends to centre on this evidence being not credible, implausible, or unreliable. In the trials analysed, the defence case was, for the most part, that the complainant's allegations were false. However, allegations of lying may increase distress, impede concentration, interfere with participation in questioning, and risk a young complainant becoming erroneously compliant and suggestible (Henderson et al., 2018). Although counsel may have a duty to address lying with the complainant, if indeed that is the defence case, the extent to which accusations of lying are made by defence counsel has been suggested to be unnecessary (Chief Victims Advisor, 2017).

In some cases, the complainant was asked a yes/no question as to whether their allegations were truthful; for example, "Did you make that up?" However, far more commonly, the defence lawyer explicitly stated that the complainant was lying through declarative statements ("You made that up"; "That's a lie") and tagged leading questions ("That's not true, is it?").

Q. I'm going to suggest to you, [Complainant], that it was when you were speaking to your mum that you made up that it was under your clothing.
A. No, I didn't make it up. He actually touched me under my clothing.
Q. And that is because of the way that your mum was questioning you.
A. I don't know.

Tagged leading questions such as "That's a lie isn't it?", "No rude stuff ever happened in the shower did it?" and "You've made the story up haven't you?" were the most common way in which allegations of lying were raised by defence counsel. This perhaps reflects the prevalence of tagged questions generally as a style of questioning during cross examination.

Q. [Complainant] I've just got one more thing to do and it's to talk to you about the allegations that you've made, these things that you said that [Defendant] did to you?
A. Yes.
Q. So you know how you said that he made you, "Wank him in the caravan," when you were, "Six or seven"?
A. Yes.
Q. That's not true is it, [Complainant]?
A. (no audible answer 10:44:13).
Q. That's a lie.
A. No it is true.
Q. And then you said that close to that time, he put his penis in your mouth, "For about 30 seconds." That's not true either, is it [Complainant]?

A. *Yes it is true.*
Q. *You said that when you were around eight you were downstairs and everyone was upstairs and he made you wank him, and that's not true either, is it [Complainant]?*
A. *Yes, it is true.*
Q. *And you said that you think when you were around nine, Mum had passed away and he made you suck his penis but that's not true either, is it?*
A. *It is. It is true.*
…
Q. *And that act of putting your penis into his anus, that never happened at any time, did it?*
A. *Yes it did.*

In addition to direct statements that a complainant was lying ("You've made it up to get attention and to get your mum back"), statements were also made by the defence lawyer that directly contradicted the young complainant's evidence ("He's never touched your vagina"), implying that the complainant's evidence was untrue:

Q. *[Complainant] did you make up all this stuff about your stepdad touching your breasts and touching your vagina?*
A. *All the allegations I made toward him are true.*
Q. *He's never touched you inappropriately has he?*
A. *He has.*
Q. *He's never touched your breasts?*
A. *He has.*
Q. *He's never touched your vagina?*
A. *He has.*
Q. *You've made it up to get attention and to get your mum back?*
A. *No I didn't.*
Q. *After you made this allegation you've not seen him since, have you, after you went to the police?*
A. *No I haven't.*
Q. *Now it's just you and your mum and your brothers that live together?*
A. *Yes.*
Q. *And I think we heard on the video you describing your birthday that year. I think you said you enjoyed it because you had your mum and your brothers there without your dad?*
A. *Yeah, I did say that.*
Q. *Is that what you wanted all along?*
A. *No, I was just happy that the abuse has stopped.*

In some trials a declarative statement proposing that the allegations are fabricated was made and the complainant was then asked to respond – "The true position is that [Defendant] never touched you inappropriately. Do you agree with that or disagree with that?"

Q. *Now there's one thing more I've got to put to you, [Complainant], and you just answer this in any way you feel fit, all right.*
A. *Mhm.*
Q. *I'm saying to you, [Complainant], that [Defendant] hasn't done in any shape or form any sexual stuff to you. What do you say to that?*
A. *Um, I'd say that that is not true and he definitely, definitely has.*

Direct or indirect suggestion that a complainant was lying was framed by some defence lawyers as their obligation to 'put the case' to the complainant.

Q. *[Complainant], it's a question that I must put to you, because I'm required to, but [Defendant]'s going to give evidence after you in this trial and he's going to tell the jury that that incident that you're talking about, the sleepover night, that there was never any sexual contact between you and [Defendant] at all in that washhouse?*

A. *There was.*

Q. *He's going to also say that there was never any choking, pulling of hair, anything like that, in that washhouse that night when you say you were seven years old, what do you say?*

A. *There was.*

Where this is highlighted as an obligation and the complainant is instructed to respond as they wish, the statement seems to be less accusatory in manner, however without access to audio this is difficult to accurately discern.

Issues with cross-examination

This study is rare in its effort to look beyond the counting of particular question types and language use in sexual violence trial transcripts to further clarify the ways in which evidence is challenged during cross-examination. In analysing transcripts, it was evident that reliability, credibility and plausibility were challenged by defence counsel in cross-examination through reliance on sexual violence misconceptions and narratives which attack the character of the complainant. The crux of the defence was typically that the complainant was lying, frequently put to the complainant in an accusatory manner. Heavy use of leading questions facilitated defence counsel's control of cross-examination and was the primary vehicle by which misconception-laden dialogue was woven, credibility challenging narratives were constructed and allegations of lying were asserted. Such questions – and the statements embedded in questions – are experienced by complainants as adding significantly to the stress of participation in the judicial process

These findings raise a number of questions and considerations for a justice system that has recently voiced concerns about the negative impact of court proceedings on the wellbeing of complainants and quality of evidence, and a vision for this to be lessened (e.g., Chief District Court Judge Doogue, 2016).

Young complainant distress

The distress which young complainants experience in Aotearoa has been a longstanding concern in academic literature but has also, more recently, been raised as a concern and consideration by leaders within the justice system (Chief District Court Judge Doogue, 2016; Randell et al., 2016). Young complainants report the experience of being cross-examined to be highly distressing (Randell et al., 2018, 2021) and given the findings of this study it is evident why this would be. When young witnesses and their caregivers speak about their experiences, they identify many of the qualities of cross-examination evident in the current research to be sources of cross-examination related distress (Randell et al., 2018, 2021). Although young people (perhaps expectedly so) have not spoken explicitly about the use of sexual violence misconceptions in relation to their experiences, it is likely that the leveraging of such misconceptions, with their unfounded plausibility challenging and victim blaming qualities, contribute to complainants' expressed feelings of being bullied, blamed, and disbelieved.

When we speak about young complainants, research would suggest that we are speaking for the most part about children and adolescents who have experienced sexual violence; and mostly by an adult well known to them. False complaints are rare (O'Donohue et al., 2018), and only a third of cases proceed beyond the police investigation process (Ministry of Justice, 2019), suggesting that most of those that reach trial have a reasonable evidence base. In sexual violence trials, a young complainant's evidence is typically the primary evidence, and it is therefore their version of events that must be undermined in order to create reasonable doubt in the minds of the fact-finder. Young complainants are being questioned by a person in a significant position of power about their actions in relation to sexual abuse perpetrated against them. It does not take an expert to draw a logical connection between questioning that places responsibility on the victim, challenges their credibility, dismisses their responses and overtly accuses them of lying and the experiences of cross-examination by young people as humiliating, stressful, deeply upsetting. The way that young witnesses are being cross-examined fundamentally clashes with psychological understandings of what is known to be helpful to them following the experience of sexual violence. Being believed and heard are factors that can mediate the harm of experiencing sexual trauma whereas disbelief and other negative responses upon disclosure has been found to exacerbate the harm (Elliott & Carnes, 2001; Jacques-Tiura et al., 2010).

The perpetuation of victim blaming narratives

The analysis of these transcripts from the Sexual Violence Courts suggests that the courts are a context in which sexual violence misconceptions are perpetuated and victim blaming narratives are condoned. The liberal use of sexual violence misconceptions in the cross-examination of young complainants is not entirely surprising given similar findings in recent research regarding adults (McDonald, 2020; Zydervelt et al., 2016). The complainant's behaviour before, during and after the alleged offence was a focus of cross-examination in the majority of trials in the current research. In part this questioning suggests (unduly) that the behaviour was inconsistent with the offending having occurred. It also implies that if the offending had occurred, a reasonable person would not or should not have behaved as the complainant did, thus placing some responsibility or blame for the offending on their behaviour. Adult complainants of sexual violence have reported feeling that they were on trial, and have described the process as re-traumatising (Gravitas Research and Strategy, 2018).

Sexual violence trials are unique in this sense:

> *In no other type of criminal case does the focus of the trial shift from the conduct of the accused person to the conduct of the victim by highlighting the victim's misbehaviours, her delay in complaint, possible reasons for a false complaint and whether she resisted or screamed for help. If she is an adolescent, that focus may also, perversely, highlight her flirtatious behaviours at the time of the alleged assault and her sexual fantasies (Cossins & Goodman-Delahunty, 2013, p. 172).*

Victim blaming upon disclosure of sexual abuse is common in wider society. Current cross-examination practices in Aotearoa courts could be considered to constitute an institutional undermining and silencing of victims' accounts of their abuse experiences. The use of sexual violence mythology and narratives that place blame on a victim is not only disrespectful, but at its worst is an additional perpetration of violence, in which the justice system becomes positioned as the aggressor, and the complainant, once again, as victim. The power differentials that often exist between defence counsel and complainants on the basis of status, age, gender and at times race likely heighten the impact of harmful defence lawyer behaviours.

Being blamed by others for abuse experienced has been found to increase the likelihood of victims attributing blame to themselves (Hazzard et al., 1995) which is in turn associated with poorer mental health outcomes and risk of future victimisation (Feiring et al., 2002). In a society where those who have experienced sexual violence can expect to have responsibility for this attributed to their actions, even within the justice system, it is unlikely that rates of sexual abuse disclosures will increase. Among adults, it is known that fear of not being believed, and fear and distrust of the legal system are reasons cited for not reporting sexual violence to the police (Kingi & Jordan, 2009). The same may apply to young people. Thus, the very mechanism on which we rely for the justice system to operate as intended – victims reporting crimes – remains stifled by the system itself.

Erroneous assumptions against which evidence is tested

The extent to which sexual violence misconceptions were woven into questioning during cross-examination, with almost no judicial intervention, presents problems for accurate testing of evidence. The heavy utilisation of misconceptions evident in the current study indicates that little has changed over the past 15 years or so since Blackwell's (2007) research. Misconceptions about child sexual abuse are known to exist in the general population from which jurors are drawn (Blackwell, 2007; Cossins et al., 2009), and to have an impact on juror perceptions of a complainant's credibility, which in turn has an impact on the trial outcome (Cossins & Goodman-Delahunty, 2013; Goodman-Delahunty et al., 2011). Given that jurors are intended to be fact finders and to make judgements

based on the evidence laid before them, sexual violence narratives based on misconceptions within cross-examination create an erroneous measure against which evidence is tested.

Damage to quality of evidence a young person is able to provide

It is easy for the lay person, or indeed the non-legal professional working in the field, to incorrectly assume that best evidence and a search for the "truth" forms the foundation of our justice system. However, the culture of cross-examination in Aotearoa has long been in conflict with a 'best evidence' approach for young witnesses. Leading, confusing and credibility challenging styles of questioning are known to be counter to best evidence (Andrews et al., 2015; Andrews & Lamb, 2017; Klemfuss et al., 2014; Zajac et al., 2003; Zajac & Cannan, 2009). The Benchmark initiative's evidence-based guidelines stress young sexual assault complainants may find accusations of lying distressing thus leading to loss of concentration, difficulty continuing with testimony and becoming erroneously compliant and suggestible (Henderson et al., 2018).

However, trials as they currently stand are less about best evidence and more about advocacy and challenging evidence, using whatever means counsel have available that fall within the bounds of what is deemed as acceptable. As legal academics have explained,

> *It is wrong to equate thorough testing with the sort of cross-examination to which we are accustomed. We have no proof that our current tactics do in fact force the truth from the deceitful. All we know is that they most probably often cause accurate people to become unreliable. Do we really make the jury's job harder by ensuring, at the very least, that the accurate have some chance of staying accurate?* (Henderson, 2015, p. 96).

Research suggests defence counsel struggle to reliably identify developmentally inappropriate language and questioning styles which may account for their use of them in cross-examination (Hanna, In Preparation). However, they also identify one of their reasons for use of declaratives and tagged questions as a means of advocacy. That is, it allows them to make a statement that is formed as a 'question', allowing more control of the answer and or deeming the complainant's response largely irrelevant (Hanna, In Preparation).

Opportunities for change

Calls for further reform to trial processes have been voiced over recent years by practitioners and academics from various disciplines. However, despite some laudable initiatives, including some led by the judiciary, many of the problems identified in the 1990s, 2000s and 2010s remain, with change being slow and incremental. The Law Commission, in their 2015 review, deemed incremental change insufficient to bringing about the desired result of recognising and supporting the needs of complainants of sexual violence (New Zealand Law Commission, 2015).

It is apparent from this study as well as those which have preceded it, that change in the distress that young complainants experience within our adversarial system requires change to current cross-examination practices. The objective of reducing distress, and improving evidence seems to have support from leaders within the courts, however recent innovations such as the implementation of the Sexual Violence Courts do not yet appear to have achieved meaningful change in the area of cross-examination (Randell et al., 2021).

Outlined below are the primary opportunities for change, with a focus on those that are likely to mitigate the potential harm that cross-examination poses to young complainants.

Changing the culture of cross-examination – prioritisation of best evidence

If the wellbeing of complainants of sexual violence is something which the justice system intends to prioritise and enact, it must be considered whether an adversarial system can operate, and cross-examination occur, in a way that is not harmful. The failure of cross-examination practices to elicit best evidence has been widely discussed, and a best evidence approach deemed likely to be far less harmful to young witness wellbeing. However, "conventional practice is supported, first, by widespread ignorance of children's language development and safe questioning practice and, second, by strong traditions which validate manipulative and suggestive questioning as part of proper advocacy and the right to a fair trial" (Chief Victims Advisor, 2017, p. 14).

Is the vision of a justice system free of leading, confusing, misconception-laden questions and accusations of lying during cross-examination realistic? Is a less harmful best evidence focussed approach inevitably at odds with an adversarial justice system?

Current practice is certainly at odds with a best evidence approach to cross-examination. However, common law rules in the United Kingdom indicate that this need not be the case (Henderson, 2016), and recent changes to trial procedure in the United Kingdom suggest that changes to practice in Aotearoa could be achieved within the parameters of an adversarial justice system. A series of decisions in the United Kingdom, seen as a ground-breaking shift in focus towards best evidence in the cross-examination of vulnerable witnesses, was found to be consistent with early case law on cross-examination which "is based on three fundamental principles, all of which have their foundation in concern for the completeness and accuracy of the evidence: First, the examination must be confined to relevant and admissible facts in the witness's knowledge and not used for other purposes. Second, the evidence elicited must be voluntary and uncontaminated. Third and finally, the examination must provide an opportunity for the investigation of all relevant aspects of the case" (Henderson, 2016, p. 185).

Some have argued that the abilities of the system, and judges in particular, to curtail harmful styles of questioning are not being utilised to the extent that they could within the parameters of existing legislation. There is significant scope for a less harmful process. There is also some indication that defence counsel would be open to such change, if supported to do so (Hanna, In Preparation; Randell et al., 2016). A shift in cross-examination practice to reduce the distress of this process and improve

the quality of evidence would see less reliance placed on sexual violence misconceptions, and a reduction in leading, confusing, and distressing questions. There are several mechanisms which could support change to the way young people are questioned in court and have been described in detail and with thorough consideration elsewhere. They are briefly flagged below with the intention of steering the reader to the cited sources of further information:

- *Judicial intervention with "unacceptable" questions*

  There is significant scope for judges to take a leadership role in shifting the culture of courtroom questioning by intervening when questioning is unacceptable (including being needlessly distressing or humiliating) as per section 85 of the Evidence Act 2006 (McDonald, 2020; Chief Victims Advisor, 2017).

  The Sexual Violence Court Pilot guidelines state that "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 District Court of New Zealand, 2016). That is, "any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand" (Evidence Act 2006, s85). However, given the palpable lack of judicial intervention in the current study and others, despite an abundance of seemingly confusing, leading and distressing questions (e.g., Randell et al., 2020), it is evident that judges are applying a narrow definition of "unacceptable". It has been recommended that section 85 Evidence Act be amended to impose a duty to disallow unacceptable question (Chief Victims Advisor, 2017; New Zealand Law Commission, 2015). The proposed Sexual Violence Legislation Bill, on recommendation from the Law Commission, strengthens this legislation to impose a duty to intervene rather than making this discretionary. What constitutes "unacceptable" remains vague however, and there is a need for this to be established.

  There is also greater scope for judicial intervention regarding misconceptions that arise in sexual violence cases. Section 127 of the Evidence Act 2006 already allows judges to correct misconceptions regarding delayed disclosure. If, "in a sexual case tried before a jury, evidence is given or a question is asked or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence" then "the Judge may tell the jury that there can be good reasons for the victim of an offence of that kind to delay making or fail to make a complaint in respect of the offence". The proposed Sexual Violence Legislation Bill amends the Evidence Act 2006 to allow for greater scope for judicial directions regarding sexual violence misconceptions, adding "in a sexual case tried before a jury, the Judge must give the jury any direction the Judge considers necessary or desirable to address any relevant misconception relating to sexual cases".

  Changes in the interests of child wellbeing and best evidence must include the way children are confronted with allegations of lying. Unlike adult rape cases, where the issue at hand is typically one of consent, with an acceptance that some sexual contact did take place (McDonald, 2020), in trials with young people who were under the legal age of consent at the time of the alleged offence, the defence is typically that the event never occurred, and therefore (most commonly) that the child is lying. If this is the defence case, then this must be addressed with the witness. However, as has been argued elsewhere, doing so "need not involve what has been described as sustained or aggressive attacks on the witness' honesty (Chief Victims Advisor, 2017). The Benchmark initiative's evidence-based guidelines for legal professionals working with vulnerable witnesses state that putting the case, when this involves allegations of lying, is not required by law given section 92(1) Evidence Act 2006. These guidelines outline court rulings that suggest questions putting the case where the risk of becoming overwhelmed or erroneously compliant,

and putting the case via questions which function as comment are improper and unnecessary (Henderson et al., 2018).

It is worth noting that there may be other barriers to judicial intervention, including the fear of appeal on the grounds that the judge unfairly restricted the defence counsel's ability to put questions to the witness. This issue was raised as a concern in response to an expectation of increased judicial intervention during the implementation of the Whangārei Young Witness Pilot Protocol (Randell et al., 2016) and may persist as a barrier to a shift in judge behaviour.

- *Specialist judges and/or national rollout of specialist sexual violence courts*

  A change in culture of cross-examination via increased judicial intervention is reliant on the expertise of judges (with support from communication assistants and expert witnesses) regarding issues such as language appropriate for questioning children, and sexual violence misconceptions. It has been suggested that sexual violence trials be limited to specialist judges who have significant knowledge and training in the area of sexual violence and are attuned to the specific issues of concern (Chief Victims Advisor, 2017; New Zealand Law Commission, 2015). This would involve specialist training. The training that accompanied the establishment of the Sexual Violence Court Pilot was well received by judges and lawyers alike (Gravitas Research and Strategy, 2019), although it appears to have had minimal impact on judicial intervention (Randell et al., 2020).

  The evaluation of the Specialist Sexual Violence Court Pilot suggested unanimous support among stakeholders for the pilot model to be rolled out nationally (Gravitas Research and Strategy, 2019). Although the current model does not appear to yet be sufficient in addressing its goal of reducing re-traumatisation for young complainants (Randell et al., 2021), this would provide significant opportunity to continue to develop processes in sexual violence trials to minimise the distress that they cause.

- *Communication assistance*

  Communication assistants are neutral, independent officers of the Court with specialist skills in assessment and intervention for communication difficulties. They are employed to enhance the communicative competence of young witnesses during testimony. Although communication assistants have been increasingly employed in the Youth Court and criminal courts over recent years and have wide support from professionals (Howard et al., 2020), the number of available communication assistants remains small. Guidelines around communication assistance have been outlined by the Benchmark initiative (Bonetti & Henderson, 2018). The Law Commission recommended that the definition of 'communication assistance' in s 4 Evidence Act 2006 should be amended to include assistance for witnesses who do not have a communication disability but who may struggle to comprehend questions (e.g., because of age). Greater availability of communication assistants and a broader engagement of such specialists in trials involving young complainants would ensure accurate assessment of communication needs and ensure that these are attended to in trial proceedings. Judges, who are not expert in the area, can use the guidance of communication assistants to accurately identify developmentally inappropriate language or styles of questioning that are likely to be damaging to evidence, and manage evidence-damaging questioning accordingly. This would likely have significant positive effects on the quality of questioning and a reduction in complainant distress.

- *Counterintuitive evidence*

  Counterintuitive expert evidence is intended to educate jurors regarding common misconceptions pertaining to sexual abuse and to, therefore, counteract biases and misconceptions that they may hold (see Seymour et al., 2014 for a review). The education of the jury in this manner is intended to reduce the likelihood that jurors make erroneous assumptions about the evidence they are assessing due to misconceptions about sexual violence and victim behaviour and has been shown to be effective in doing so (Goodman-Delahunty et al., 2010, 2011). As articulated by the Law Commission (1999, p. 87) "The purpose of such evidence is to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance". The proportion of trials in which such evidence is given, either presented by a psychologist in person, or via an agreed statement read to the jury by a court official, is unknown.

  More research is needed to establish the extent to which counterintuitive evidence maintains its efficacy in the face of sexual violence misconceptions being leveraged as a primary means of challenging the plausibility of a young complainant's evidence and building a defence case. It is also unknown to what extent provision of counterintuitive evidence acts as a disincentive to their use by defence counsel. If the use of misconceptions during cross-examination were to persist despite wider use of counterintuitive evidence, there would likely be little positive change in the potential negative impact on complainant distress or quality of evidence.

- *Judge only trials*

  The Law Commission suggested that sexual violence trials are not well suited to fact finding by jury, one of the reasons for which being that sexual violence is an area often subject to misunderstandings or misconceptions (New Zealand Law Commission, 2015). The consideration of judge only trials in cases of sexual violence has often been recommended to address the limitations of jurors as fact finders in sexual violence trials (Chief Victims Advisor, 2017; New Zealand Law Commission, 2015). The implementation of judge alone trials and ensuring that judges have appropriate specialist knowledge regarding sexual violence, would likely minimise the impact of sexual violence misconceptions in fact finding and disincentivise their use by lawyers.

Other measures that would support a decrease in complainant distress or improvement in quality of evidence

- *Pre-recording of a young complainant's entire evidence*

  Pre-recording of a young complainant's entire evidence including cross-examination has frequently been recommended as a means of improving court experiences for young people (Chief Victims Advisor, 2017; Randell et al., 2021). Pre-recorded evidence is used at the trial at a later date, which the complainant need not attend, thus expediting the young person's involvement in the court process. This would likely decrease pre-trial delay related distress which is known to be a significant stressor associated with trial participation for young people (Randell et al., 2018). Adopting pre-recording of all evidence for young witnesses has been found elsewhere to eliminate the need for young people to attend court in the vast majority of cases (see Hanna et al., 2010; Chief Victims Advisor, 2017 for reviews). In Aotearoa, provisions for pre-recording of evidence already exist under section 105(1)(b) of the Evidence Act 2006, and pre-recording of young witnesses' entire evidence used in a number of trials in 2010 and 2011 with positive feedback from lawyers and court victim advisors (Davies & Hanna, 2013). However, two appeals in relation to pre-recording of cross-examination in 2011 M v R (CA

335/2011) and R v E (CA 339/2011)), determined that pre-recording should be restricted to special, and by implication, rare circumstances.

Subsequently, the Law Commission's 2015 report recommended that the "Evidence Act 2006 should include a provision to the effect that complainant witnesses in sexual violence cases may pre-record their cross-examination evidence in a hearing prior to trial, unless a judge makes an order to the contrary" (New Zealand Law Commission, 2015, p. 11). The Sexual Violence Legislation Bill proposes several changes to the Evidence Act 2006 to entitle sexual violence complainants to access pre-recorded evidence including cross-examination with guidance around judicial directions pertaining to this to protect the interests of justice.

Pre-recording a child's evidence is a significant step towards prioritising best evidence and expediting the court process to address the distresses that is experienced in relation to pre-trial delay. The impact that this would have specifically on the culture of cross-examination is unknown and it may be that this measure sits within a wider shift towards the prioritisation of best evidence.

- *Court support and preparation*

  Recently, the Ministry of Social Development commissioned a review of best practice court support models for survivors of sexual violence, highlighting holistic and wrap-around services (Slade, 2020). Services designed for children were outside the scope of this review. However, the provision of a single support person or 'navigator' has been recommended elsewhere as a means of improving the support of young complainants and whānau and providing individualised and consistent support (Randell et al., 2018; 2020).

  A component of such support that would better prepare young complainants for cross-examination would be the extension of current education for court to include increased preparation for testifying. Teaching children to say when they don't understand a question or know an answer, has been found to mitigate the impact of questioning on accuracy (Waterman et al., 2004). There is some evidence that a brief intervention involving practice and feedback with cross-examination questions can lead to an increase in accuracy of witness reporting (Righarts et al., 2013). Adult complainants have also reported that preparation for cross-examination and an awareness of likely approaches to questioning, helped them to cope with cross-examination and remain calm (Gravitas Research and Strategy, 2018). However, while this may support young witnesses to provide better evidence in the face of confusing or leading questioning, it is unclear whether, or to what extent this would ameliorate feelings of being blamed and bullied. However, it seems likely that when witnesses are prepared for aggressive questioning and accusations of lying from the defence lawyer, and understand this to be common practice (if it is to remain so), the impact of this may be somewhat lessened (Randell et al., 2018).

Alternative justice processes

The Law Commission has stated that in adversarial systems "the very nature of the model encourages aggressive and adversarial behaviour and that may damage the interests of justice rather than promote them" (New Zealand Law Commission, 2015, p. 48) and have argued that this may be especially true in trials of sexual violence. Accordingly, they considered an inquisitorial model for sexual violence whereby the judge conducts the examination of witnesses (p. 94). This model is common in several European jurisdictions but would require significant legislative change within the Aotearoa context and so was not recommended by the Law Commission as a priority for innovation within the court.

Instead, the Law Commission proposed an alternative justice process which operates outside of court oversight and would involve a variety of programmes that could meet the diverse needs of victims. Based on a restorative justice model, which aims at repairing harm and includes all relevant stake holders as participants, this would require some legislative reform (see p. 153). It would involve a voluntary process and involve a comprehensive risk and suitability assessment process in each case for risk to community safety or public interest, and suitability to proceed through the alternative process. It was proposed that these programmes would need to prioritise the safety of victim and others, reflect in depth understandings of sexual violence, and be delivered by specialists in this area, be victim driven and address the justice needs of the victim, be flexible to the needs of those involved, involve whānau and support networks or communities for the purposes of accountability and support. It would involve preparation with the victim and when involved the perpetrator, a meeting component, an outcome agreement to specify redress (in cases where victim and perpetrator are both participating in the process), monitoring of the agreement and completion or non-completion of the process. Upon non-completion "the victim would have the option to make a complaint to police about the incident of violence".

The Law Commission recommended that criteria for participation would include that the victim has consented to participate in the alternative process, and is 16 years or older, or the victim is aged over 12 years but under 16 years and has been assessed by the provider as nonetheless eligible to participate. They emphasise that young people aged between 12 and 16 should be able to participate if the young person's suitability is assessed based on his or her competence and maturity to participate, the young person is consenting freely to participate and without coercion, it is likely that the young person will benefit from the alternative process, and they have sufficient and appropriate support.

Although there is opportunity for alternative justice processes, these will not always be possible or suitable and it is therefore essential that even if these were to develop, that the adversarial system as we know it must also evolve.

Conclusion

The way in which young complainants of sexual violence are questioned during cross-examination is characterised by use of sexual violence misconceptions, questioning the character of the complainant and/or their family, accusations of lying and leading styles of questioning. Young complainants report cross-examination to be highly distressing and this distress is likely to be largely due to the tactics of cross-examination highlighted in this paper. This distress seems in many cases to be needless and avoidable, and certainly not conducive to quality of evidence. There have been longstanding concerns with the way in which Aotearoa's court system fails to accommodate the needs of young complainants, particularly in sexual violence trials. However, tangible change has been slow. The findings of this study highlight a pressing need for action if Aotearoa's justice system no longer wishes to be an additional source of harm to young victims of sexual abuse.

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