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The Sexual Violence Pilot Court: A Missed Opportunity for a Tailor-Made Solution.

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Abstract:

The Sexual Violence Pilot Court (SVPC) seeks to lessen complainant retraumatisation by reducing time delay before trial. This paper posits that the SVPC is a missed opportunity for a legislated, well-planned court with an expansive mandate, shaped by public and expert input. Instead, the SVPC is not truly a court, but a limited approach that has been shaped by politics and social pressure. Consequently, it has imported features from overseas that do not match New Zealand's legal context or account for Māori overrepresentation in sexual violence statistics. Further, the SVPC faces practical problems of longevity and rollout to other locations. Finally, no consideration was given to possible lessons from similar failed projects. The SVPC is a reactive, political solution that is mismatched to the issue of sexual violence in New Zealand. Nonetheless, the SVPC achieves some benefits. This paper suggests improvements to the SVPC to bolster benefits and make up the missed opportunity of an effective, robustly designed, legislatively-protected court for all New Zealanders.

Key words: Sexual violence, specialist, specialisation, courts.

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I Introduction:

The Sexual Violence Pilot Court (SVPC) is a new "specialist court" aiming to alleviate sexual violence in New Zealand. Unfortunately, it represents a missed opportunity for a legislated, future-proofed court adapted to New Zealand's context. Failure to properly articulate the complex problem of sexual violence in New Zealand, has resulted in a solution that not well designed to fully ameliorate complainant retraumatisation. The resulting, limited specialist approach faces serious ideological and practical challenges. Political and social pressure fashioned a "court" that purports to solve sexual violence by shifting responsibility to the Judiciary, without giving them with significant powers to decrease retraumatisation. Shifting responsibility for the social problem of sexual violence, from the Executive to the Judiciary, raises concerns about the separation of powers. Further, the SVPC is comprised of approaches imported from jurisdictions that are legally, socio-historically, and culturally disparate to New Zealand. Potential problems of longevity, locations, and judicial succession provoke questions around whether the SVPC will impinge equal access to justice. Finally, the SVPC has not considered similar past approaches that failed to improve retraumatisation. These problems stem from, and result in, a limited mandate that is actually a specialised approach rather than a court. The main features of the SVPC's limited mandate are a listing system that prioritises sexual violence cases, an education programme, and complainant and case management measures. Despite its limitations, the SVPC does produce some benefits. However, to fulfil the SVPC's potential, it must be given legislative protection and the needs of a sexual violence court for New Zealand must be considered. Currently, the SVPC has missed an opportunity for

a well-resourced legislated specialist court which adequately addresses complainant retraumatisation in New Zealand.

This paper will examine the problem of sexual violence in New Zealand and the origins of the SVPC and will demonstrate that the SVPC is not truly a specialist court. This paper suggests that the SVPC has missed the mark, but that its emergent benefits signal the potential of a specialist sexual violence court. Finally, potential avenues of improvement will be explored.

II Sexual Violence in New Zealand and the Inception of the SVPC:

A The Issue of Sexual Violence in New Zealand

Studies of sexual violence in New Zealand are "dated, infrequent or inconsistent in…focus". [1] In 2014, the New Zealand Crime and Safety Survey (NZCASS) estimated 2.1% of the population had experienced sexual violence, but a further 1.9% of participants did not answer questions regarding sexual violence.[2] Many statistics are dated: the last NZCASS was 4 years ago. Prominent studies often focus on sexual violence against partnered women or combine statistics with physical violence.[3] [4] For instance, one study showed 1 in 10 non-partnered women experienced sexual violence and 1 in 3 partnered women experienced physical and/or sexual violence.[5] Underreporting is also

[1] Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) at 2.8.
[2] Ministry of Justice *New Zealand Crime And Safety Survey/Te Rangahau O Aotearoa Mō Te Taihara Me Te Haumarutanga Main Findings Report* (2014) at 50.
[3] At 45.
[4] Janet Fanslow and Elizabeth Robinson "Violence against women in New Zealand: prevalence and health consequences" (2004) 117 NZMJ 1 at 1.
[5] At 9.

significant.[6] Moreover, research into male complainants is sparse.[7] Inadequate local sexual violence data even attracted the UN's attention: they recommended implementing more systematic data collection systems.[8] Nonetheless, research generally demonstrates that sexual violence is prevalent.[9] The New Zealand UN CEDAW report notes that 23.8% of all New Zealand women have experienced sexual violence and "Violence against women…is widespread". [10] UNICEF reports that 20% of girls and 9% of boys reported sexual abuse and 1,982 sexual assaults on children were recorded in 2015.[11] Still, without *clearly* understanding a problem, finding solutions is difficult. Therefore, because the true prevalence and nature of sexual violence remain undefined, developing a specialist court to address it is fraught. This has marked the SVPC's development.

Significantly, New Zealand's indigenous population is overrepresented in sexual violence statistics.[12] Māori women represent 23.4% of female sexual violence victims: [13] a disproportionate number considering Māori women

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[6] Law Commission, above n 1, at 2.24.

[7] Auckland Sexual Abuse HELP Foundation "Preventing Sexual Violence: A Vision for Auckland/Tamaki Makaurau" (paper presented to ACC, April 2002) at 30–31.

[8] *United Nations Report of the Committee on the Elimination of Discrimination against Women* XXXXXVIII A/58/38 (2003) at 415.

[9] Law Commission, above n 1, at iv.

[10] The New Zealand Government *Women in New Zealand: United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Ministry for Women, Eighth Periodic Report, March 2016).

[11] "Child Abuse in New Zealand" UNICEF <www.unicef.org.nz/in-new-zealand/child-abuse>.

[12] Law Commission, above n 1, at 1.51.

[13] Allison Morris, James Reilly, Sheila Berry and Robin Ransom *New Zealand National Survey of Crime Victims 2001* (Ministry of Justice, May 2003) at 6.1.

comprise around 15% of the female population.[14] Māori women are four times more likely to report experiencing sexual violence than non-Māori women.[15] Cultural attitudes towards sex and violence, feelings of shame, and mistrust of the police compound sexual violence issues among different cultural groups.[16] These aspects of sexual violence are *particular* to New Zealand and a crucial part of any solution.

Further, it is well-accepted that the criminal justice system retraumatises complainants.[17] Retraumatisation then decreases reporting of sexual violence, perpetuating sexual violence.[18] In New Zealand, several factors exacerbate retraumatisation, including inappropriate lines of questioning, the unwelcoming physical courtroom environment, and unsuitable scheduling of trials.[19] The most significant factor is time-delay. [20] Cases can take years to come to trial, and trial dates are frequently changed, leaving complainants without closure.[21] The pākehā courtroom can also be especially unwelcoming for Māori, who are

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[14] "2013 Census ethnic group profiles: Māori" Statistics New Zealand <http://archive.stats.govt.nz/Census/2013-census/profile-and-summary-reports/ethnic-profiles.aspx?request_value=24705&parent_id=24704&tabname=#24705>.

[15] Allison Morris "The Prevalence in New Zealand of Violence Against Women by their Current Male Partners" (1998) The Australian and New Zealand Journal of Criminology 267 at 273 as cited in Auckland Sexual Abuse HELP Foundation "Preventing Sexual Violence: A Vision for Auckland/Tamaki Makaurau", above n 7.

[16] Law Commission, above n 1, at 1.63.

[17] At 1.29–1.32.

[18] At 1.31.

[19] Interview with Chief District Court Judge Jan--Marie Doogue (the author, Wellington, 22 May 2018). Summary provided by the author (see appendix).

[20] Law Commission above n 1, at 4.7.

[21] At 4.3.

overrepresented as both sexual violence complainants and defendants.[22] The SVPC was established to ameliorate this multifaceted retraumatisation.

B The Inception of the SVPC

The first Law Commission issues paper identified two key issues: a disempowering trial process and dissatisfactory results from trial.[23] To resolve the lack of procedural justice and poor conviction rates, the Law Commission investigated alternatives to pre-trial and trial processes, assessing the appropriateness of the inquisitorial model versus the adversarial model for sexual violence cases.[24] Their work was heavily inspired by Elisabeth McDonald and Yvette Tinsley's work, and involved in-depth research in other jurisdictions.[25] The issues paper was *much* wider in scope than the final report.[26]

However, in 2012, before the final report was published, then-Minister of Justice, The Honourable Judith Collins MP stopped the project,[27] [28] citing concerns over the consideration given to inquisitorial models and specialist

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[22] Law Commission *Justice: The Experiences of Māori Women* (NZLC R53, 1999) at 175.
[23] Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 7.
[24] At 6.
[25] At 6–7.
[26] Law Commission, above n 1, at 30–31.
[27] At 31.
[28] "No charges laid: Responses to the 'Roast Busters' decision" (11 November 2014) New Zealand Family Violence Clearinghouse <www.nzfvc.org.nz/news/no-charges-laid-responses-roast-busters-decision>.

courts in the issues paper [29] Public reaction was poor, [30] [31] [32] [33] and a year later when the "Roastbusters" sexual assault scandal occurred, Collins' halting of the project was frequently mentioned.[34] Subsequently, as the new Justice Minister, Amy Adams MP reopened the project.[35] The final 2015 report was a culmination of approximately seven years of campaigns and mounting concerns that:[36]

> "The significant under-reporting of sexual violence inhibits the proper operation of the criminal justice system…The mechanisms of the criminal justice system…cannot operate. Perpetrators of sexual violence are not held accountable for it. Victims and their families and whānau do not see any form of justice done."

The Law Commission recommended: time-limits to get to trial, alternative modes of evidence, judicial training and a specialist court.[37] [38] [39] They considered that a specialist court could bring together specialised staff

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[29] Judith Collins "Judith Collins: Sex offenders must face up to actions" *The New Zealand Herald* (online ed, Auckland, 12 November 2013).

[30] Coley Tangerina (Tweet, 21 March 2012) Twitter <https://twitter.com/ColeyTangerina/status/182274985052733441>.

[31] Reid Wicks (Tweet, 4 May 2018) Twitter <https://twitter.com/reidwicks/status/992191249460310017>.

[32] Ari Pfeiffenberger (Tweet, 8 December 2013) Twitter <https://twitter.com/APfeiffenberger/status/409411998883909633>.

[33] Julia Whaipooti (Tweet, 12 November 2013) Twitter <https://twitter.com/Jubes11/status/400005867929874432>.

[34] "Roast Busters: Protests today aim to 'bust rape culture'" *The New Zealand Herald* (online ed, Auckland, 16 November 2013).

[35] "Adams to consider sex abuse court" (30 October 2014) Radio New Zealand <www.radionz.co.nz/news/national/258181/adams-to-consider-sex-abuse-court>.

[36] Law Commission, above n 1, at 2.

[37] At R1–4.

[38] At R22–23.

[39] At R17–27.

and techniques to minimise retraumatisation.[40] Importantly, the SVPC began as a judicial initiative, unsupported by the Ministry of Justice.[41] However, the Ministry subsequently became involved through funding and evaluation to test the Law Commission recommendations.[42] [43] In October 2016, the Ministry announced that the SVPC would be piloted in Auckland and Whangarei.[44] [45]

Media coverage was neutral or positive, emphasising the prevalence of sexual violence and that the SVPC would address time-delay between callover and trial.[46] Few articles noted that the SVPC would not be a 'separate court' and details remained vague.[47] Further, media and press releases repeatedly highlighted that no defendants' rights would be infringed, as the SVPC would follow existing laws and procedure. [48] [49] [50]

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[40] Law Commission, above n 1, at 5.70–5.71.

[41] Amy Adams *Approach to the government response to the Law Commission report* (Ministry of Justice, CLW-47-02, 31 March 2016) at 38–39 (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

[42] Aide Memoire *Update on sexual violence courts pilot* (Ministry of Justice, 15 April 2016) at 11 (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

[43] Aide Memoire to Amy Adams *Sexual violence court pilot* (Ministry of Justice, 14 October 2016) at Attachment 1, 1 (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

[44] New Zealand Government "New sexual violence court pilot welcomed" (press release, 21 October 2016).

[45] Chief District Court Judge Jan-Marie Doogue "District Courts to Pilot Sexual Violence Court" (press release, 20 October 2016).

[46] Andrea Vance "NZ to get its first sexual violence court in wake of Roastbusters case" (20 October 2016) TVNZ <www.tvnz.co.nz/one-news/new-zealand/nz-get-its-first-sexual-violence-court-in-wake-roastbusters-case>.

[47] Kelly Dennett "District Court pilot programme aims to speed up sexual violence cases" *Stuff.co.nz* (online ed, Auckland, 20 October 2016).

[48] "Sexual violence courts to be trialled in Auckland and Whangarei" *The New Zealand Herald* (online ed, Auckland 20 October 2016).

[49] Vance, above n 46.

[50] Chief District Court Judge Doogue, above n 45.

The mismatched and limited form of the SVPC was shaped by a paucity of reliable data, political decisions which hindered the Law Commission's project and then the SVPC's inception, mounting public pressure for a solution, and a move from a judicially-initiated to ministry-supported initiative.

III The SPVC is a Specialist Approach Rather Than a Specialist Court:

While the SVPC labels itself a specialist court, a closer examination of this claim is required. There is no universal definition of a specialist court. Therefore, situating the SVPC within the specialist spectrum is necessary.

A The Specialist Spectrum

The SVPC has been loosely termed a court. The Chief District Court Judge defines specialist courts as "not separate courts, but hearings…".[51] The Law Commission indicates that courts can be specialist irrespective of how they are "formally constituted".[52] Amy Adams MP, discussing the SVPC, noted "the idea of a specialist court - you, know I take to mean a lot of things".[53] Nonetheless, the SVPC more closely resembles an approach.

Definitions of what constitutes a specialist court are infrequent and, where given, vary widely.[54] The term is famously 'imprecise' and distinctions between

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[51] Chief District Court Judge Jan-Marie Doogue "Specialist Courts: Their time and place in the District Court" LawTalk (31 March 2017) New Zealand Law Society <www.lawsociety.org.nz/practice-resources/practice-areas/courts/specialist-courts-their-time-and-place-in-the-district-court>.

[52] Law Commission, above n 1, at iv.

[53] "Specialist sexual violence court proposed" (14 December 2015) Radio New Zealand <www.radionz.co.nz/news/national/292105/specialist-sexual-violence-court-proposed>.

[54] Justice Michael Moore "The Role Of Specialist Courts - An Australian Perspective" [2000/2001] LAWASIA Journal 139 at 1.

specialist courts, problem-solving courts, and specialist programmes or approaches are often blurred.[55] Defining specialist courts also raises the question of at what point several specialist approaches become enough to constitute a specialist court:. Further, there are distinctions between separate/dedicated courts and courts within an existing structure, and judicially administered and legislation-based ones.

1 Problem-Solving Courts

Problem-solving courts are one of the most well-defined court models. They are sometimes considered a subset of specialist courts but often conflated with them.[56] [57] [58] Unlike other specialist courts, problem-solving courts seek to solve social issues through processes which diverge from adversarial court proceedings.[59] [60] [61] For example, through innovative sentencing and rehabilitative aims. They are particularly suited for addiction or homelessness issues, but also exist for family violence and familial sexual abuse.[62] The Ministry of Justice refers to them as *Therapeutic Courts* because they are

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[55] Lord Justice Auld *Review of the Criminal Courts of England and Wales* (Her Majesty's Stationary Office, September 2001) at 375.

[56] Francine Patricia Timmins "Therapeutic Jurisprudence, Justice and Problem-Solving" in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 120 at 6.4.2.

[57] Lord Justice Auld, above n 55, at 375.

[58] Jane Donoghue *Transforming Criminal Justice? : Problem-Solving and Court Specialisation* (1st ed, Routledge, London, 2014) at 31–32.

[59] Timmins, above n 56 at 6.3.1.

[60] Law Commission, above n 1, at 5.4.2.

[61] Peggy Fulton Hora (Ret.) "Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits" (2011) 2:1 Chapman Journal of Criminal Justice 7 at 7–8.

[62] Judge David Rottmann "Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?" (2000) 37 The Journal of the American Judges Association: Court Review 1 at 22.

inspired by therapeutic jurisprudence.[63] The Alcohol and Other Drug Court (AODTC) is New Zealand's most notable problem-solving court and the Special Circumstances/New Beginnings Courts (SC/NBC) are another.[64] The former addresses defendants' addiction issues through rehabilitative programme sentences, and the latter deals with chronic homelessness by providing social services.[65] [66]

2 Special Expertise

A common definition (the Auld definition) of specialist courts is that they provide special expertise for social issues or areas of law which require extra knowledge or understanding.[67] Special expertise is frequently is given as a justification for specialist courts: it is argued that special expertise can more capably deal with difficult areas of law.[68] This special expertise is legal or social.

Special legal expertise can require knowledge of specific legislation. For instance, the Resource Management Act 1991 in the Environment Court, or the Employment Relations Act 2000 in the Employment Court.

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[63] Ministry of Justice "Therapeutic Courts" (16 July 2018) justice.govt.nz <www.justice.govt.nz/courts/criminal/therapeutic-courts/>.

[64] Timmins, above n 56, at 6.4.2.

[65] Katey Thom and Stella Black "Ngā Whenu Raranga/Weaving strands: #4. The challenges faced by Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court" (Royal Society of New Zealand Marsden Fund Case Study, University of Auckland, 2017) at 7.

[66] Ministry of Justice, above n 63.

[67] Lord Justice Auld, above n 55, at 375–376.

[68] Trevor Daya-Winterbottom "Specialist Courts and Tribunals" (2004) 12 Waikato L. Rev. 21 at 25.

On the other hand, the AODTC or the SC/NBC require special social expertise from counsellors, therapists and other advisors because they address social issues. A further example are courts which serve particular groups: such as the Youth Court or the Rangatahi courts which deal with youth and young Māori respectively. The social expertise required here might be age-related or cultural expertise such as tikanga. These courts apply social or cultural expertise to rehabilitate addicts, deal with homelessness or ensure justice is administered in an age or culturally appropriate way.

Often, these two areas overlap. The Māori Land Court, as one of New Zealand's oldest specialist courts, is an excellent example. The Court requires legal expertise on specific legislation such as Te Ture Whenua Māori Act 1993, the Land Transfer Act 1952, and the Māori Land Court Rules 2011, and social expertise in understanding te ao Māori. The Family Court is another example, combining understanding of the Family Court Rules 2002, the Property (Relationships) Act 1976, the Care of Children Act 2004, with addressing issues of divorce, child custody and family violence.

The Auld definition emphasises the need for expertise, be that judicial or of all court staff, based on the area of law or social issue.

3 The Specialist Courts/Specialist Approaches Distinction

A complicating distinction is that not every judicial project which incorporates special expertise or features (such as extra case management)

constitutes a court. Some fall short of being considered a fully-fledged "specialist court" and are better defined as "specialist approaches".

This distinction is clearly demonstrated in debate about whether listing systems are specialist approaches or whether they can constitute a specialist court in and of themselves. Listing systems prioritise particular kinds of cases by grouping them together and scheduling them before other cases. The Law Commission considers listing a specialist *approach*.[69] Others state that the purpose of listing can make a difference. For example, administrative prioritisation listing is not specialisation because its only purpose is administrative. This counter-argument is questionable because listing often serves multiple purposes, such as prioritising child sex offences both because of their sensitive nature and to clear a backlog. However, the District Courts consider listing, and even additional hearings, "specialist courts".[70]

A wide definition of "specialist court" that includes limited approaches is problematic because the term "court" in "specialist court" implies a certain threshold, more than a single feature like a listing system. The non-legal public would certainly understand the term "specialist court" to mean a more than just a prioritisation listing system. Further, the idea that a specialist court requires more than one feature is borne out by New Zealand's older, well-established specialist courts. The Māori Land Court,

[69] Law Commission, above n 1, at 4.19.

[70] Chief District Court Judge Jan-Marie Doogue, above n 51.

the Environment Court, the Youth Court, and the Family Court have additional procedures, legislation, and facilities.

This paper maintains specialist approaches are limited groupings of features (like listing systems or extra hearings) whereas specialist courts involve an extra component such as legislation, different processes, or separation from mainstream courts. The distinction between the two is often glossed over, however, it is crucial to understanding the SVPC.

4 The Separated/Mainstream Court Distinction

How courts are administered also matters. Some courts are administered separately while others are administered within mainstream structures, like the District Court.[71] New Zealand has specialist courts administered both within and outside mainstream courts: the AODTC and SC/NBC are administered within the District Court. In contrast, the Employment Court and Family Court are separate courts from the mainstream system and are sometimes located in different buildings. The Youth Court, while a division of the District Court, is separated from the District Court through closed hearings. This distinction aligns with the specialist court's age: older courts such as the Māori Land Court, the Employment Court and the Family Court are more likely to be administered separately, whereas newer courts such as the SC/NBC or AODTC are generally administered within the District Court. The difference between a

[71] Anne Cossins "Prosecuting Child Sexual Assault Cases: To Specialise or Not, That Is the Question" (2006) 18 Current Issues in Criminal Justice 318 at 319.

specialist approach and a specialist court is also strongly linked to whether it is administered within a mainstream court or separated. For instance, the District Court defines specialist courts as including courts within mainstream structures, [72] but this definition is not universally accepted by academics. [73] A small group of features, administered within an existing court, cannot be its *own* specialist court. Separation from a mainstream court adds the extra necessary component to classify a court as a specialist court rather than a specialist approach.

5 The Judicially Administered/Statute-Based Distinction

A final distinction, which is also conflated with the two preceding ones, is that of judicially administered courts as opposed to legislation-based courts.

In New Zealand, older, well-established specialist courts such as the Māori Land Court, and Family Court are established by statute. On the contrary, some specialist courts, such as the AODTC and the SC/NBC are only established by judicial initiative and judicially administered. The Law Commission calls these *dedicated* courts. [74] They are still subject to Ministry approval, evaluation and/or funding but are driven by key members of the Judiciary.[75]

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[72] Chief District Court Judge Jan-Marie Doogue, above n 51.

[73] Antony Altbeker "Justice Through Specialisation? The Case of the Specialised Commercial Crime Court" [2003] Institute for Security Studies Monographs 76 at 31 in Anne Cossins "Prosecuting Child Sexual Assault Cases: To Specialise or Not, That Is the Question", above n 71, at 319.

[74] Law Commission, above n 1, at 5.61.

[75] At 5.63.

The Special Expertise definition and the distinctions between specialist approaches and specialist courts, between separated courts and courts within mainstream structures, and between statute-based or judicially administered courts combine to create a spectrum. This spectrum ranges from ad hoc judicially administered approaches within a mainstream court with only limited mandates, to legislation-based specialist courts with expansive mandates separated from the mainstream courts.[76]

B Situating the SVPC on the Spectrum

The SVPC is not a problem-solving court because does not have the power to give rehabilitative, therapy-based sentences and it maintains the adversarial model. While the Law Commission explored a post-guilty plea problem-solving court in the issues paper, this avenue was no longer viable under the recommendation paper's narrowed scope.[77] [78]

Whether the SVPC is a "specialist court" is more difficult. The SVPC does concern an area of law which calls for special expertise. [79] [80] Judges need to know when to intervene, court staff need sensitivity, cases must be expeditiously heard, and complainants need good case-management and the agency support. The SVPC's education programme clearly seeks to create this specialised judicial expertise. Further, the SVPC has been described in the media and by press releases as a

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[76] Rottmann, above n 62, 22–23.

[77] Law Commission, above n 22, at 46.

[78] Law Commission, above n 1, at 1.72.

[79] At 5.8.

[80] Jeremy Finn "Decision-Making and Decision Makers in Sexual Offence Trials: Options for Specialist Sexual Offence Courts, Tribunals of Fact and the Giving of Reasons" (2011) 17 Canterbury L. Rev. 96 at 101 F.

specialist court. [81] [82] [83] However, as aforementioned, the Judiciary's definition of a specialist court is very wide and captures both non-legislated, judicial initiatives that are administered within a mainstream court, and traditional separated courts with a legislative base.

Although termed a "specialist court", this is likely a simplified categorisation of a difficult-to-define strategy for the non-legal public. Calling an apple an orange does not an orange make. The SVPC is not a specialist court simply because it is called one. The word "court" in "specialist court" implies something *more* than a mere bundle of specialisations: a court requires something additional. Specialisation is insufficient, it must be also a *court*. Common understanding of a "specialist court" is that it is a legislated, separated, *court*, rather than just an approach.

Ultimately, as will be shown below the SVPC is a specialist approach, rather than a court because it is judicially administered within the District Court, is not legislation-based, does not use any different legislation from mainstream criminal courts, and has an extremely limited mandate.[84] This strongly resembles what Cossins describes as a "specialised approach",[85] and is far removed from the traditional Auld report definition. Crucially, the SVPC's limited mandate cements that it is a specialist approach.

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[81] Vance, above n 46.

[82] New Zealand Herald, above n 48.

[83] Chief District Court Judge Doogue, above n 45.

[84] Chief District Court Judge Doogue, above n 19.

[85] Cossins, above n 71, at 319.

1 The SVPC Has a Significantly Limited Mandate

The SVPC's extremely limited mandate supports its classification as an approach. The changes made, while important, are tightly constrained and the SVPC operates within the pre-existing framework. These features seek to reduce the trauma of trials by decreasing wait times, uncertainty, and inappropriate lines of questioning, and by increasing judicial understanding. The SVPC's 4 key features are:

(a) Listing

The SVPC's main feature is a listing system which sets firm dates for trial, only to be changed in an emergency.[86] Rescheduling and delays add to complainant trauma and degrade oral evidence quality.[87] [88] Fixing a date reduces complainant's distress by removing uncertainty and long wait times. Listing prioritises sexual violence cases over other cases.

(b) Complainant management

Complainant management by judges, counsel, and support agencies is another key feature.[89] This includes showing the complainant the room, explaining parking and childcare arrangements, and meeting the judicial officer beforehand (particularly with child complainants).[90] The listing system melds

[86] Chief District Court Judge Doogue, above n 19.
[87] Law Commission, above n 1, at 11.
[88] Law Commission, above n 1, at 4.8–4.10
[89] Chief District Court Judge Doogue, above n 19.
[90] Chief District Court Judge Doogue, above n 19.

with complainant management by scheduling times that are manageable and age-appropriate for complainants.[91] For example, times that work around childcare duties, or a time earlier in the morning for child complainants.[92]

(c) Case management

The SVPC implements greater case management for sexual violence cases.[93] These measures include successive case management conferences in chambers, timely disposition of trials and early identification of pre-trial dates.[94] Case management also seeks to prevent retraumatisation.

(d) Education

The SVPC's education programme aims to educate judges on sexual violence.[95] It covers topics from barriers faced by Māori, disabled or child complainants to international comparative law [96] Reiterating when to intervene under the Evidence Act 2006 and/or the Criminal Procedure Act 2011, for example to stop an inappropriate line of questioning, is also central.[97] Practice scenarios

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[91] Chief District Court Judge Doogue, above n 19.

[92] Chief District Court Judge Doogue, above n 19.

[93] Chief District Court Judge Doogue, above n 19.

[94] Chief District Court Judge Doogue, above n 19.

[95] "Best Practice in Sexual Violence Cases. An education programme for the Sexual Violence Court Pilot" (programme distributed at Education Programme, Auckland, January 2018).

[96] "Best Practice in Sexual Violence Cases…", above n 95.

[97] Chief District Court Judge Doogue, above n 19.

are used.[98] The programme also includes information about counter-intuitive evidence, as well as communication assistance.[99] [100]

All of these features are easily implementable within a mainstream existing structure: no legislation is required, they are flexible and use pre-existing law. They do not deviate strongly from normal court practice. Furthermore, listing— the SVPC's *central* feature— is conventionally considered a form of specialisation, not a fully-fledged court. The simplicity and chiefly administrative nature of these features, combined with the fact that the SVPC is judicially administered within the District Court, indicates that this is a specialist approach. While it is *specialist*, its mandate and composition are insufficient to constitute a *court.* Popular understanding of the notion of "specialist court" supports this. Further, that most of New Zealand's well-established specialist courts (like the Māori Land Court and Employment Court) do not resemble the SVPC also supports that it is an approach.

IV Critiques of the SVPC Demonstrate How it is Mismatched to the Problem:

Despite being an approach, the SVPC is vulnerable to similar critiques as those directed at specialist courts. The SVPC gives the appearance of solving the entire problem of sexual violence. In fact, the SVPC merely shifts responsibility for the problem from the Executive to the Judiciary. The political momentum could have been used to construct a court suited for New Zealand rather than importing overseas models. Serious concerns about equal access to justice, that stem from longevity and judicial burnout problems and limited

[98] Chief District Court Judge Doogue, above n 19.

[99] Chief District Court Judge Doogue, above n 19.

[100] "Best Practice in Sexual Violence Cases…", above n 95.

locations, could have been anticipated. Further, the SVPC could have learned from similar historical initiatives that failed. This would have lead to a well-planned and effective specialist court for all complainants. Instead the SVPC is a limited specialist approach that is mismatched to the problem of sexual violence retraumatisation and is a missed opportunity for an expansive, legislated, well-planned court.

A The SVPC is Left to Deal with Issues Unresolved by the Executive

1 Separation of Powers, Politics, and Shifting Responsibility

It has been argued that specialist approaches result from the Executive inappropriately passing responsibility for social issues to the Judiciary. [101] [102] [103] [104] Under the separation of powers doctrine, the Executive makes policies surrounding social issues and the courts apply law.[105] Increasingly however, the Judiciary is taking on the role of solving social issues. [106] [107] [108] [109] A more nuanced argument is that chronic underfunding of key sectors leads to insurmountable social issues which the Judiciary, by necessity, deals with.[110]

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[101] A G Christean "Therapeutic Jurisprudence: Embracing a Tainted Ideal" (Sutherland Institute, 2002) as cited in Valmaine Toki "Will Therapeutic Jurisprudence Provide A Path Forward For Maori?" (2005) 17 Wai L Rev 169 at 177–179.

[102] Sian Elias, Chief Justice of New Zealand "Managing Criminal Justice" (Address to The Criminal Bar Association Conference, Auckland, 5 August 2017).

[103] Donoghue, above n 58, at 136.

[104] Chief District Court Judge Doogue, above n 19.

[105] Moore, above n 54, at 139-140.

[106] Donoghue, above n 58, at 136-137.

[107] Chief District Court Judge Doogue, above n 19.

[108] Chief Justice Sian Elias, above n 102.

[109] Sian Elias, Chief Justice of New Zealand "Blameless Babes" (Shirley Smith Address Shirley Smith Address, Wellington, 9 July 2009).

[110] Chief District Court Judge Doogue, above n 19.

The Executive can avoid the responsibility of handling delicate social issues and are not required to support specialist programmes, especially judicially administered ones. The responsibility is shifted to the Judiciary, a new court is created and the problem, ostensibly, solved. [111] The Judiciary is the ambulance at the bottom of the cliff, while the Executive is the fence at the top with a gaping hole.[112] Controversy erupted when this phenomenon was noted by members of the Judiciary itself.[113] [114] The AODTC provides a prime example: when a defendant comes to court they are in crisis and the court *must* intervene.[115] The SC/NBC is similar: the court coordinates social services to manage defendants' chronic homelessness.[116] This is inappropriate because under the doctrine of separation of powers this is the Executive's role, not the courts'.

An alternative argument is that specialist approaches which are created or supported by the Executive are too reliant on the Executive. For instance, their funding is subject to Executive approval, their make-up is dictated by Executive legislation and when leadership changes, they may be abolished or

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[111] Laurence Street "Proliferation and fragmentation in the Australian court system" (1978) 52 Australian Law Journal 594 at 595 as cited in Michael Moore "The Role Of Specialist Courts - An Australian Perspective", above n 54.

[112] Chief Justice Sian Elias, above n 109.

[113] Rachel Tiffen "Irate Power tells Chief Justice to butt out of policy" *The New Zealand Herald* (online ed, Auckland, 17 July 2009).

[114] Grahame Armstrong "Lawyers rally behind chief justice" *Stuff.co.nz* (online ed, Auckland, 24 July 2009).

[115] Katey Thom and Stella Black "Ngā Whenu Raranga/Weaving strands: #2. The processes of Te Whare Whakapiki Wairua/ The Alcohol and Other Drug Treatment Court" (Royal Society of New Zealand Marsden Fund Case Study, University of Auckland, 2017) at 11.

[116] Chief District Court Judge Doogue, above n 19.

overhauled.[117] These alternative arguments are reconcilable. The Executive can visibly shift responsibility to the Judiciary, allowing them discretion to handle social issues with what powers they have, while the Executive retains final decisions of continuation and funding. This becomes political football, where the Executive can be seen to 'solve the social issue' but the Judiciary takes responsibility for solving it in practice, without extra powers to so do, and with the looming threat of the Executive ending the specialist court.

2 Application to the SVPC

The SVPC is highly vulnerable to this critique. Through endorsing the SVPC, the Executive shifted responsibility for the issue of sexual violence to the Judiciary. Following the Roastbusters case and ensuing protests, there was heightened public awareness and social pressure to solve sexual violence.[118] Previous government decisions not to act on the Law Commission's recommendations were under fire.[119] Announcing a specialist court to address the issue soothed public frustration. However, the SVPC was not introduced by the Executive, despite the Law Commission's recommendations. It was a judicial initiative.[120] Therefore, politicians received credit by announcing a solution, while the responsibility for

[117] Moore, above n 54, at 143.

[118] Phil Pennington "'Roast Busters' drives calls for sexual violence court" (15 April 2016) Radio New Zealand <https://www.radionz.co.nz/news/national/301532/'roast-busters'-drives-calls-for-sexual-violence-court>.

[119] New Zealand Herald, above n 34.

[120] NZ Police and Ministry of Justice *Justice Sector Fund May/June 2016 Initiative Proposal. Interventions to Reduce Family Violence and Sexual Violence*. (NZ Police and Ministry of Justice, 8 June 2016) at 5 (Obtained under Official Information Act 1982 Request to the Ministry of Justice).

administering and creating the SVPC lay with the Judiciary. Sexual violence was ostensible solved once passed to the courts. This is demonstrated by the labelling of the SVPC as a "specialist court": it implies the more expansive solution of traditional, separated specialist courts and reaps greater political benefits.

The crisis point that sexual violence reached in New Zealand is comparable to the drug crises that catalysed the original American Drug Courts. Both the drug crisis and the sexual violence crisis were preventable through better funding to the health, education, and employment sectors. Instead, the Executive underfunded these services, and the Judiciary is then tasked with fixing sexual violence where the Executive should have taken preventative measures. Simple case management and listing systems were steps immediately available under current law for the Judiciary to solve the crisis. The SVPC has no extra powers, yet they still bear the responsibility both to the public and the Executive (during evaluation) for solving the problem of sexual vioelnce. Ideologically, the Judiciary stepping into a social role violates the separation of powers: handling social issues is the role of the Executive, handling legal ones is the role of the Judiciary. The Judiciary is not meant or equipped to respond to social issues.

Moreover, while operational responsibility was shifted to the Judiciary, key decisions of SVPC rollout and funding still lie with the Executive. They have a high degree of control over the existence of the SVPC and could end it at a whim. This risk is particularly pronounced with

a change of government. Nonetheless, responsibility for improved outcomes and all operational decisions lie with the Judiciary.

The SVPC is a reactive approach that inappropriately shifts social responsibility from the Executive to the Judiciary. The crisis leading to the SVPC was preventable through Executive funding in other sectors. Political pressure forged a specialist approach where the Government was *seen* to act but was not required to support the Judiciary, despite retaining the ability to end the programme. This pressure meant that an opportunity for a well-planned specialist court with carefully considered divisions of powers was missed.

B Importation Without Adapting for Local Context.

A common critique of specialist courts is that they are imported from other jurisdictions with different legal systems and/or different sociocultural and historical backgrounds. [121] If adapted to local circumstances or imported from similar jurisdictions this may be tolerable. However, wholesale importation of foreign specialist features into vastly different legal and social contexts raises significant concerns: success cannot be guaranteed, legislation to support the copycat system may be lacking, and the socio-cultural background of one court may be a poor fit for local people.[122]

[121] Donoghue, above n 58, at 89–91.

[122] Donoghue, above n 58, at 90.

1 Application to the SVPC

Wholesale importation in the SVPC is concerning. The SVPC is directly inspired by both the Western Australian (WA) and UK systems and is not adapted to New Zealand's context. The SVPC imports the UK's emphasis on judicial education and WA's on reducing time delay.[123] However, the UK and WA have particular legal backgrounds to these features. The UK's system of education stems from their magistrate system where judges are 'ticketed' to adjudicate sexual offences after completing the education programme.[124] [125] [126] The WA emphasis on time-delay reduction is due to their legislative requirement that sexual offence trials must start 3 months from filing of the case.[127] [128] However, New Zealand has neither a legislative time requirement, nor a magistrate ticketing system. Why these features were adopted, without the legislation or systems to give them force is unclear. Perhaps such adoption results from the Executive's shift of responsibility to the Judiciary without providing the support of legislative change or resourcing a ticketing system. These features could also be imported without accompanying legal requirements because they are assumed effective in and of themselves, isolated from their home jurisdiction. However, the legal landscape in WA and the UK is what gives these features teeth— hard requirements, clear certifications —

[123] Chief District Court Judge Doogue, above n 19.
[124] Donoghue, above n 58, at 92.
[125] Finn, above n 80, at D.
[126] Law Commission, above n 1, at 5.25.
[127] Criminal Procedure Act 2009 (Vic), s 212.
[128] Law Commission, above n 1, at 4.25–4.26.

without which, they may not be effective. Therefore, wholesale importation without considering the foreign jurisdiction's background, triggers questions concerning the appropriateness and effectiveness of these features when excised from their context.

A counter-argument is that New Zealand's legal system prolifically draws on Australia and the UK as comparable jurisdictions with common law and Westminster democracies. Therefore, drawing inspiration from these jurisdictions can be appropriate. However, inspiration is not in issue: wholesale importation is. New Zealand *does* adopt law from the UK and Australia, but laws and systems must be adapted for local conditions. This has not occurred in the SVPC.

2 Disproportionate Effect on the Māori Population

New Zealand has sociocultural aspects to consider: we have an indigenous population, deeply affected by sexual violence. This is where the mismatch between the issue of sexual violence and the SVPC as a solution is apparent. The SVPC does not account for the disproportionate number of Māori complainants and defendants. There are no differences from the mainstream courts [129] to account for Māori complainants. The only minor consideration given to Māori overrepresentation is through SVPC's education programme which covers the barriers faced by Māori complainants.[130] However, one seminar session for judges is unlikely to be sufficient. By

[129] Such as mainstream courts' use of te reo Māori, and judicial discretion to allow karakia.
[130] "Best Practice in Sexual Violence Cases…", above n 95.

importing systems from other jurisdictions we obfuscate Māori overrepresentation, which *should* be a central consideration for a specialist sexual violence court in New Zealand.[131] Wholesale importation assumes our context is the same as WA or the UK but sexual violence in New Zealand cannot be whitewashed: a solution that ignores the disproportionate number of tangata whenua affected by sexual violence is inadequate. This failure to take Māoridom into account means that the SVPC is failing to serve all the people of Aotearoa. This is one of the strongest criticisms against the SVPC.

C Equal Access to Justice: Longevity and Limited Locations.

A pragmatic problem that plagues specialist approaches is equal access to justice. This is strongly tied to a court's longevity and its geographical locations.[132] [133]

Rollout of specialist courts is often stymied and inconsistent. Failure to rollout a specialist court *nationwide* triggers issues of equal access because parties in one region receive different treatment than those in another. Many courts never extend past their original pilot locations in urban centres with resident judges. For instance, the AODTC is limited to Waitakere and Auckland and the SC/NBC to Wellington and Auckland.

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[131] New Zealand Family Violence Clearinghouse "New sexual violence court process to be piloted in Whangarei and Auckland" (9 November 2016) New Zealand Family Violence Clearinghouse <nzfvc.org.nz/news/new-sexual-violence-court-process-be-piloted-whangarei-and-auckland>.

[132] Donoghue, above n 58, at 135–136.

[133] Rottman, above n 62, at 24.

Moreover, a court's longevity means that complainants could receive different treatment depending on when their case goes to trial (a factor outside their control). Longevity varies with previous specialist programmes, such as the child witnesses' programme of 1992 which died a quiet death, superseded by reforms. [134] [135]

Longevity and locations both lead to unequal access to justice and are often interconnected. For instance, Family Violence Courts have been running for almost a decade, however are limited to only Auckland.[136] A specialist programme's locations and longevity are deeply affected by their legislative protections, resourcing and evaluation of the programme, and judicial succession.

(a) Legislative protections

The longevity of a specialist approach is often protected by legislation. Specialist courts' continuation is subject to policies, which can change depending on the government. [137] Still, a court that is legislated, is more difficult to abolish, because repeal or reform requires the Legislature to act and therefore requires political consensus and public consultation. Non-legislated courts lack even this extra layer of protection. Their lifespan can be quickly ended, based on Executive or Judiciary policy decisions. This creates

[134] Finn, above n 80, at 99.

[135] Law Commission, above n 1, at 4.22.

[136] Elesha Edmonds "An inside look at Auckland's specialised Family Violence Court" *Stuff.co.nz* (online ed, Auckland, 22 February 2016).

[137] Moore, above n 54, at 143.

unequal access to justice— parties who might access a specialist court designed to improve their experience one month, cannot the next.

(b) Resourcing

Poor resourcing harms longevity and rollout to other locations. [138] [139] [140] [141] [142] Resourcing can range from allocation of courtroom space/buildings to money for extra administrative staff and education programmes. Without pre-allocating resources for future implementation, across different administrations, specialist courts remain limited to certain locations or are abolished, thus minimising any positive impact.[143]

(c) Evaluation

Specialist courts and approaches are also difficult to assess. Consequently, because of inconclusive of incomplete evaluation results, the Executive is reluctant to fund further rollout, resulting in limited locations or a shortened court lifespan. [144] [145] Useful evaluations require longitudinal study; therefore, the court needs to have been founded several years ago, a catch-22 given poor

[138] Chief District Court Judge Jan-Marie Doogue, above n 45.
[139] Donoghue, above n 58, at 136–137.
[140] Cossins, above n 71 at 322.
[141] At 324.
[142] Finn, above n 80, at 102.
[143] Donoghue, above n 58, at 91.
[144] At 135.
[145] Cossins, above n 71, at 322.

evaluations hamper longevity. Alternatively, good evaluation requires statistics on comparable factors pre-specialisation. This is problematic in the criminal law context because it is difficult and often unethical to gather sensitive data on complainants' and defendants' experiences with the criminal system.[146] Further, in New Zealand, evaluations of specialist courts depend on Ministry funding— the amount of funding affects the scope, and thus quality, of evaluation. [147] Inadequate evaluations result in misleading conclusions, lack of rollout and consequently, limited locations and longevity which hinders equal access to justice.

(d) Judicial succession

Finally, judicial succession affects longevity and location. [148] Key groups of dedicated judges often drive specialisation efforts and once they leave, uptake by other judges tends to diminish.[149] Moreover, these judges implement specialist programmes in their location and can struggle to convince judges elsewhere to adopt them. Judicial burnout also causes poor succession, especially in specialist criminal courts where traumatising cases take a

[146] Law Commission, above n 1, at 2.9.

[147] Chief District Court Judge Doogue, above n 19.

[148] Rottmann, above n 62, at 24.

[149] At 24.

psychological toll.[150] [151] [152] [153] Burnout dissuades other judges from participating in the specialist programme, thus leading to larger workloads and stress for judges who *do* participate. It therefore becomes a circular issue.

These four factors affect longevity and location, and therefore access to justice, but are neither exhaustive nor separate. For instance, evaluations require resourcing and, because a common solution for succession issues is monetary incentives, judicial succession is also tied to resourcing.

1 Application to the SVPC

Equal access to justice is a concern for the SVPC. The SVPC's longevity and locations are subject to a lack of legislative protection, poor resourcing, inadequate evaluation, and potential judicial succession issues. The lack of foresight to anticipate longevity and location issues and resulting unequal access to justice, demonstrates how the SVPC has missed the mark: by lacking a long-term plan and by not considering how New Zealand's size will affect rollout and longevity.

The SVPC has no legislative protection. It is judicially administered, and the programme could be stopped without law change. Therefore, its continued existence is contingent on Judicial and Executive support.

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[150] Cossins, above n 71, at 328.

[151] Finn, above n 80, at 101.

[152] Law Commission, above n 1, at 5.62.

[153] Chief District Court Judge Doogue, above n 19.

Furthermore, SVPC rollout to smaller regional areas will be particularly difficult because of the resourcing and infrastructure needed to handle the volume of sexual violence cases. Already, limited access to judges in smaller centres and a high percentage of sexual violence cases pose problems.[154] For example, courts with one judge are more at risk for burnout because running the SVPC and the accompanying psychological toll lies with just one judge. [155] SVPC rollout to courts without a resident judge appears improbable. The extra administrative staff required will also take a toll on smaller courts. Difficulties of extra resourcing have posed problems overseas but are more pronounced in New Zealand given our small population. Another rollout problem is the ratio of sexual violence cases to other cases. When the ratio of sexual violence cases is high, prioritising them can delay other cases, and prioritising *between* them becomes difficult. The SVPC encountered ratio issues during the design period: Manukau was originally a potential location, but the proportion of sexual violence cases there was so high that other cases would have been significantly delayed.[156] Consequently, the governance board chose Whangarei to test a smaller centre's ability to handle SVPC requirements.[157] Administering the SVPC in smaller centres is a crucial issue, seemingly unplanned. This has serious ramifications for access to justice, because

[154] Chief District Court Judge Doogue, above n 19.
[155] Law Commission, above n 1, at 5.66.
[156] Chief District Court Judge Doogue, above n 19.
[157] Chief District Court Judge Doogue, above n 19.

complainants in urban centres will have access to an expeditious, less traumatic court while those in rural areas may not.

The SVPC's evaluation in 2018/2019 is integral to its longevity and therefore equal access to justice. Evaluation is funded by the Ministry of Justice.[158] However, because of their budget restrictions, the *only* measure that the SVPC will be evaluated on is reduction of time from callover to hearing.[159] Although reduction of time-delay minimises complainant trauma, this evaluation excludes other qualitative benefits. [160] These benefits include improved judicial understanding of the barriers complainants face, more appropriate interventions by judges, better evidence-giving due to a reduction in inappropriate questioning, and increased sensitivity of court staff. [161] [162] [163] These benefits also create a culture-shift that is as important, if not more important, than time-delay reduction.[164] Nonetheless, Executive reluctance to fund a more expansive evaluation means that these crucial improvements will not be captured in the evaluation. They will remain merely anecdotal. Such an evaluation's incomplete results may contribute to a failure to roll out the SVPC nationwide, further threatening equal access to justice.

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[158] Chief District Court Judge Doogue, above n 19.

[159] Chief District Court Judge Doogue, above n 19.

[160] Chief District Court Judge Doogue, above n 45.

[161] Chief District Court Judge Jan-Marie Doogue "Milestone for Sexual Violence Court Pilot" (press release, May 23, 2017).

[162] Chief District Court Judge Jan-Marie Doogue "Sexual Violence Court Pilot at 12-month milestone" (press release, 15 December 2017).

[163] Chief District Court Judge Doogue, above n 19.

[164] Chief District Court Judge Doogue, above n 19.

Judicial succession is also key for the SPVC. A governance board consisting of Chief Judge Doogue, the National Jury Judge, Judge Geoff Rea, Judge Nevin Dawson, Judge Bruce Davidson, the Justice Ministry's Wayne Newall , and a project manager, oversees the SVPC.[165] It is unclear how the board will ensure other judges continue the SVPC when they retire. The District Court already suffers from a severe paucity of judges,[166] [167] let alone enough to participate in the SVPC. The succession problem may be mitigated through retaining the SVPC within the District Court, so that participation is encouraged by word of mouth. However, judicial burnout further weakens succession. Sexual violence cases are traumatic and presiding over too many, as well as fulfilling the SVPC's extra requirements like meeting complainants beforehand and attending the education programme, can quickly lead to burnout. The governance board hopes to create a judicial workload stress programme.[168] In the meantime however, judicial stress will perpetuate succession issues, which remain unanticipated. Succession problems then threaten the longevity of SVPC.

Longevity and succession problems, limited resources in smaller population centres and evaluation difficulties all threaten the SVPC. They may even prevent nationwide rollout. If the SVPC is not rolled out

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[165] Chief District Court Judge Doogue, above n 19.

[166] Shane Cowlishaw "Chief Judge: 'Robbing Peter to pay Paul'" *Newsroom* (online ed, Auckland, 28 May 2018).

[167] "Judge shortage pushing courts to crisis point, New Zealand Bar Association says" *The New Zealand Herald* (online ed, Auckland, 28 May 2018).

[168] Chief District Court Judge Doogue, above n 19.

nationally, unequal access to justice will be perpetuated: complainants in Auckland and Whangarei have more accessible and less traumatising trials, while complainants elsewhere will suffer under the mainstream system. If the SVPC is discontinued, the impact on sexual violence in New Zealand will be only transient.

D Listing Systems Delaying Trial:

Further, past examples have shown that when particular cases are prioritised through listing systems, this prioritisation has the opposite intended effect.[169] This occurred with a 1992 listing system aimed at prioritising cases concerning child witnesses, particularly child sexual violence complainants.[170] In practice, these cases were neglected, rather than prioritised. [171] The reason for this is unclear. It is possible that judges avoided these cases due to their difficult nature and because adjudicating them led to judicial burnout. Another possibility is that the judicial culture change necessary to encourage prioritisation did not occur.

1 Application to the SVPC

The SVPC is at high risk for experiencing a similar failure because its primary feature is also a listing system. The 1992 failure remains unaddressed in the best practice guidelines and plans. The Law Commission was ambivalent towards a listing system because of this historical failure and the extra

[169] Law Commission, above n 1, at 4.22.

[170] Finn, above n 80, at C.

[171] Law Commission, above n 1, at 4.22.

administrative burden listing imposes.[172] One counter-argument is that the education system will help the Judiciary understand why prioritising sexual violence cases is important and thus may prevent a similar failure. However, this past failed listing system, aimed at similar issues, should have been considered in designing the SVPC. By overlooking past similar attempts, the SVPC cannot understand why they failed or how to prevent similar failures. There is an opportunity to learn from prior mistakes, one that has been missed by the SVPC's current model, where the primary fixture is again a listing system.

V Benefits of the SVPC:

Although the SVPC's current form misses the mark, it does acheive some benefits, including reduced wait times, more appropriate interventions, improved evidence-giving and a culture shift in the judiciary. These improvements do contribute to alleviating complainant retraumatisation but, importantly, highlight the potential of a specialist sexual violence court which could be bolstered by improving the SVPC.

A Reduced Wait Times, Appropriate Interventions, Improved Evidence Giving:

The chief benefit reported by the District Court is a *minor* reduction in time delay.[173] [174] As noted, the long wait before trial and uncertainty of trial dates is a significant source of distress for complainants.[175] Reducing wait times lessens

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[172] Law Commission, above n 1, at 4.21.

[173] Chief District Court Judge Doogue, above n 162.

[174] Wayne Newall and Letitia Parker "Preliminary Evaluation: Sexual Violence Pilot Courts" (The District Courts of New Zealand, November 2017) at 9.

[175] Law Commission, above n 1 at 4.3.

complainant retraumatisation, removes uncertainty about trial-dates, and reduces the difficulties of giving evidence long after-the-fact. A side effect of reduced wait times is that, because of the listing system's efficacy, extra time has been freed for backlogged pre-SVPC sexual violence cases.[176] However, as noted above, listing systems have historically delayed cases going to trial. Therefore, these preliminary results need to be viewed with caution. Further, in South Africa, initially successful sexual violence courts decreased in efficacy following reduced resourcing.[177] Therefore, despite promising initial results, the SVPC needs continued resources and support to maintain efficacy.

Another benefit is improved judicial understanding of the barriers complainants face. Judges also feel more empowered to intervene and stop inappropriate lines of questioning.[178] [179] Increased interventions and understanding are attributed to the education programme. Further, because inappropriate questioning is prevented and wait times are reduced, complainants and witnesses give improved evidence. [180] Although the qualitative benefits are anecdotal and remain unassessed, they are incredibly valuable because they have the same result as reduced time-delay: minimising complainant re-traumatisation. Over time, as the Law Commission indicated,[181] this may increase reporting of sexual violence and willingness to go to trial.

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[176] Chief District Court Judge Doogue, above n 19.
[177] Cossins, above n 71, at 322.
[178] Chief District Court Judge Doogue, above n 19.
[179] Chief District Court Judge Doogue, above n 149.
[180] Chief District Court Judge Doogue, above n 162.
[181] Law Commission, above n 1, at 4.18.

B Protection of Defendants and Flexibility for Victims

The District Court is clear that there is no infringement on defendants' rights in the SVPC.[182] This is repeated in media reports and aligns strongly Law Commissions second scope (in the recommendations paper).[183] [184] Erosion of defendant rights is a recurrent concern surrounding specialist courts. It is commonly argued that specialist courts eschew impartiality and fail to protect defendants from the state's immense power.[185] [186] Under this argument, because the Crown has resources and power unmatched by the average defendant, ensuring defendants' rights are well-protected is crucial.[187] The SVPC escapes this argument because its features are so limited that any impact on defendant's rights is non-existent. [188] For example, arranging a trial date to suit a complainant's childcare commitments has no impact on defendant's fair trial rights. The changes simply improve court processes to meet complainants' rights, without diminishing defendants' rights.[189] This is due to the SVPC's limited mandate: in a more expansive court with a different jurisdiction and processes, preserving defendants' fair trial rights may be more difficult. The SVPC's status as a specialist *approach* enables it to strike a balance between parties' rights. Changes to the SVPC's limited mandate, though they may be necessary, should therefore be carefully considered.

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[182] Chief District Court Judge Doogue, above n 45.
[183] New Zealand Herald, above n 48.
[184] Vance, above n 46.
[185] Rottman, above n 62, at 24.
[186] Law Commission, above n 1, at 5.16.
[187] Donoghue, above n 58, at 41–42.
[188] Chief District Court Judge Doogue, above n 19.
[189] Chief District Court Judge Doogue, above n 19.

C The SVPC Improves the Judiciary Generally

Another benefit of the SVPC is reform and growth across the Judiciary generally. A culture shift has taken place, with greater judicial understanding of the difficulties of sexual violence cases and the importance of handling them expeditiously. [190] A common critique of specialist courts is that, because issues are shuffled away to specialist courts, an opportunity for reform and growth of mainstream courts is lost.[191] The SVPC functions the opposite way. Since it is administered within the District Court, by the same judges who adjudicate other cases, additional knowledge and expertise is shared throughout the Judiciary. Further, the education programme is open to all judges whether within the SVPC or not. The inclusion of SVPC cases within the mainstream court, and the education system, allows for reform within a mainstream structure, changing the District Court culture. This benefit is possible because of the SVPC's status as a specialist approached rather than a separated specialist court. Therefore, as above, any potential changes to the SVPC should be weighed against retaining this benefit.

VI Potential Improvements to the SVPC:

The initial benefits of the SVPC indicate that a specialist court for sexual violence can meaningfully reduce retraumatisation. However, to fulfil the SVPC's potential for improving sexual violence cases several measures must be taken. These measures should: readjust the SVPC to avoid political football, modify overseas importation to match New Zealand's legal and social context, ensure equal access to justice through safeguarding

[190] Chief District Court Judge Doogue, above n 19.

[191] Moore, above n 54, at 2.3.

longevity and nationwide rollout, and learn from past failures. The proposed measures have the added benefit of allowing public input.

A Legislative Base

A strong measure to avoid further political football and ensure the longevity of the SVPC is to give it a legislative base. Although legislation can be repealed, a legislative base would give the SVPC more protection than it currently has. It could tide the SVPC through successive governments, ensuring longevity. Legislation can thus create separation between the SVPC's continued existence and the Executive.

The SVPC began as a reactive political approach to an insurmountable social problem. Responsibility for the issue was passed to the Judiciary, without the accompanying powers to address the issue. Legislation gives the Executive an avenue to solve the issue of sexual violence, *in conjunction with* the Judiciary. The SVPC's mandate could be expanded to give the Judiciary some meaningful powers while retaining a level of strictly-controlled discretion in the hands of the Executive.

Further, legislation can be part of a larger scheme of reform to back up imported overseas features with matching legislative changes. This would include a legislative time requirement and an official ticketing system, rather than soft targets and discretionary appointments. Legislation can provide mechanisms to ensure succession of leadership, such as monetary incentivisation for judges to join the programme and can secure funding over several years. Moreover, legislation can detail locations for the SVPC, thus mitigating unequal access to justice. A legislative base would allow the SVPC to continue benefitting complainants, while strengthening it against potential problems.

Enacting legislation also allows public and stakeholder input into the SVPC. This can ensure that the SVPC's new iteration does not miss the mark in the way the current iteration has. Consultation may also shed light on how to adapt the SVPC to consider the overwhelming number of Māori complainants.

B Consideration of Te Ao Māori

A crucial consideration for any New Zealand specialist sexual violence court is Māori overrepresentation. As aforementioned, because of its limited mandate the SVPC does not and cannot take Māori overrepresentation into account. There are efforts to put in place restorative justice alternatives for Māori complainants,[192] but this is insufficient. It creates a double-bind for complainants: they can go through a western system which *may* hold their assailant responsible, albeit in a culturally dissonant way, or choose restorative justice which, while perhaps more culturally appropriate, does not hold the accused criminally responsible at all. The alternative of incorporating tikanga into criminal court processes has been attempted in the AODTC, but support for the use of tikanga in mainstream courts is not widespread.[193] The Law Commission had insufficient time to carry out full consultation with Māori before the recommendation paper,[194] but consultation with Māori is an effective way to ameliorate overrepresentation. Following consultation, any suggested changes could be legislatively adopted.

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[192] Ministry of Justice *Restorative justice standards for sexual offending cases* (Ministry of Justice, June 2013)

[193] Māori and Indigenous Analysis Ltd *Te Puāwaitanga o te Kākano A Background Paper* (Te Puni Kōkiri, 2009) at 99–101.

[194] Law Commission, above n 1, at 1.62.

Another potential solution from the Law Commission is a Sexual Violence Commissioner for Māori.[195] Regardless of the solution, this issue cannot be ignored.

VII Conclusion:

The SVPC was born in a politically controversial frenzy, and as a result inappropriately shifts responsibility for solving sexual violence to the Judiciary while not empowering it to fully address the problem. The SVPC responds to sexual violence with features borrowed from overseas, excised from their local context, and placed into the New Zealand context. These limitations mean that the SVPC misses *key* aspects of addressing sexual violence in New Zealand, such as the disproportionate number of Māori complainants. Moreover, an opportunity has been missed to design the SVPC for rollout elsewhere, such as to rural areas, and for a steady supply of judges. Finally, past failures to prioritise cases seem to have been ignored. All of this indicates that the SVPC began as a judicial initiative which was then endorsed by the Executive, without a full understanding of the problem of sexual violence in New Zealand. A far better model could have been adopted, following the Law Commission's recommendations.

Despite these shortcomings, the SVPC shows some promising results in reducing wait times and fostering a culture change within the justice system. A specialist sexual violence court for New Zealand has incredible potential. Although the SVPC is currently affecting change, it could do so far more successfully with a legislative base. Providing for the SVPC in statute would solve many of the critiques it currently faces, allow public input, and ensure the programme has a lasting impact. Further, additional consultation with Māori

[195] Law Commission, above n 1, at 12.16.

must take place for the SVPC to be meaningful for everyone in Aotearoa. Only then will the SVPC deliver actual change for New Zealanders.

W*ord count*

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7967 words.

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Appendices:

Appendix 1, Interview Summary:

Principles, programme design and process:

- *What are the principles underpinning the pilot study?*

The principles underpinning the study are the early provision of files to the judge, successive case management conferences in chambers, timely disposition of trials, and early identification of dates for firm trial dates. This contrasts with very little pre-trial case management and selecting these trials as backups.

The principle of complainant management is also crucial: this can range from arranging creches and carparks, to showing complainants the room beforehand. There's an emphasis on an elevation of complainant needs. For instance, a greater understanding of age: ensuring questioning is age appropriate for a child, or the converse, setting dates that complainants can attend if they have childcare duties. Meeting the judicial officer before trial falls into this category and it is demonstrated (through research possibly in the Family Court) that this is appreciated particularly by children.

It is really a system of greater intervention through education involving an awareness of linguistics (such as leading questions or tags), of the availability of communications assistance and the explanation of counterintuitive evidence.

The primary fixture is a listing system, where a firm date is set for complainants to go to trial. This firm date will only be moved in exceptional circumstances. This is because time-delay, while a resourcing issue, is also one of the most traumatic factors for complainants. There are other aspects to the pilot such as education, and other manners of complainant management.

- *Can you describe generally, how the best practice guidelines were created or decided upon? Was there any research done into best practice guidelines from overseas?*

The best practice guidelines are set in accordance with the Chief District Court Judge's duties under s 24(3) of the District Courts Act 2016. There is a governance board which sets the best practice guidelines and the scope of the pilot: this consists of Chief Judge Doogue, the National Jury Judge (under s 24(3)) Geoff Rea J, Nevin Dawson J, Bruce Davidson J, Wayne Newall and a project manager. These Judges were selected for their expertise and experience in the law.

The pilot was also very much informed by Kiernan J who had 10 years of interest and experience and a background in both the English and Western Australian system. Her interest was particularly directed towards alternative modes of evidence: however, in the wake of the M v R [2011] NZCA decision, this is area is somewhat restricted. Judge

Duncan Harvey was also an influence. Both Kiernan J and Duncan J had travelled to the UK, seen what measures were used in their systems and were keen to implement similar measures, where legally permissible, in New Zealand.

The governance board has also met with the Court of Appeal, and some Supreme Court and High Court judges.

- *What is involved in the education programme for judges wanting to preside over cases in the pilot?*

Document provided. One of the most powerful elements is getting judges to practice acting both as a prosecutor following an improper line of questioning and as a complainant. This allows judges to see, in practice, the implications of incorrect ways of questioning complainants.

- *What's the process for designating judges to the pilot?*

This is mostly answered by the documents provided.

- *There's some discussion of the role of expert witnesses and juries in the media releases and best practice guidelines. In the pilot, what is the role of expert witnesses for the jury? Is there an effort made to educate juries about common misconceptions in this area?*

This is mostly answered by the documents provided and discussion of counterintuitive evidence.

- *How does the pilot programme take into account the disproportionate amount of Māori affected by sexual violence? Are there have specific spokespeople or procedures like the AODTC? Is there any incorporation of tikanga principles into the court process or is this permitted (eg. Karakia)? If not, why?*

No, it's not a specific aim of the pilot programme. There is however, some work being done around sentencing. S25-27 of the Sentencing Act are being used more often. There is also a seminar in the education programme around barriers for Māori claimants bringing their case.

- *In many of the media releases, there is a clear emphasis on the Bill of Rights Act, and the pilot remaining within the bounds of current legal processes and principles. What do you make of the arguments about ensuring defendants are protected from power imbalances that could arise when they're being prosecuted by the state?*

The programme is equally focused on a fair trial for defendants. The programme's primary measure of improvement is time-delay: reducing time delay can enhance the programme for *both* defendants and complainants.

Further, there is a misconception about what occurs when judges intervene: they do so when the same information can be elicited in another manner. This isn't an erosion of the defendant's rights. They still have the right to make their case, but it must be done fairly.

- Could you briefly explain any discretionary elements of the programme (eg. Appointing judges to the programme, which cases are included) and in what way(s) discretion relates to some of the power imbalance/BORA concerns noted above?

The best practice guidelines are completely even-handed. If a judge follows them, there cannot be any breach of the defendant's rights to a fair trial. The governance board was very clear that no boundaries would be pushed, no judicial activism would be used. The aim was to take what the law allows judges to do and to do it better.

Outcomes:

- You've spoken about the reduction of wait times as one of the benefits of the programme so far. Are there any other outcomes you've noted from the programme?

More lateral thinking about the use of communication assistance. A greater awareness of the number of people who despite not having a recognised disability or disorder but for some reason (age, education, being new to New Zealand) need communication assistance. It has been a very little used provision previously but there is exciting potential for communication assistance to alleviate some of the unfairness within the criminal law system.

- Another outcome, noted in a media release, is witnesses giving improved evidence. Could you please explain how the pilot process has facilitated that?

This is mostly answered by the documents provided.

Evaluation:

- How will the pilot programme be evaluated at the end of its time?

The Ministry of Justice will evaluate the programme primarily based on the quantitative measure of time from callover to trial. This is because of Ministry budget constraints. There were efforts to have it qualitatively evaluated but without funding this was not possible. There are others (Elizabeth McDonald, and possibly Fred Seymour) who are conducting more qualitative research but probably not in the same timeframe.

- You've also anecdotally noted increased respect for complainants by various parties. How will non-quantitative outcomes of the programme be measured? What role do outcomes like this have in the evaluation and overall success of the programme?

Yes, the quality of the education has had a profound effect on the judges who have attended. The education was also opened to the head of continuing legal education of the New Zealand Law Society, and different members of the legal community (such as criminal bar associations and more). The education is culture-changing, and judges hadn't been given that education previously.

Resourcing:

- Bar funding and approval, what would be currently be the most challenging aspects of rollout for the programme nationwide?

Rollout of the programme would likely not be an issue in large to medium-size metropolitan and town-based courts. Rollout may be difficult in smaller, rural areas where there are fewer judges. One key issue is that larger courts have more judges to roster on/off, whereas smaller courts may have to introduce a rotational system to do so. There is also the issue of such a programme relying on an individual judge, the local bar, the local crown prosecutors all adhering to the principles.

Implications for judicial practice:

- There has been research showing that judicial prioritisation of particular types of cases can have the opposite impact of adversely affecting trial wait times etc. This is often due to burnout. How do you see this impacting potential rollout of the pilot?

- In a similar vein, some people have noted the issue of attracting judges to preside in these specialist programmes, and particularly attracting enough judges to continue a programme's survival. What are your thoughts on this issue and how it might affect the programme's potential rollout?

In answering both:

The governance board wants to eventually resource and implement a judicial workload stress programme along the lines of the one used in the country courts in Victoria. The District Courts board brought Judge Frank Gucciardo J to share his court's experiences with them. Vicarious trauma through over-exposure can impact judgment and desensitise judges to the issues. One of the measures used in Western Australia is recognition in the roster you cannot do this work to the exclusion of all else. This is already in place in New Zealand, judges are rostered time off jury trials. The direction of the programme is towards the introduction of 'professional supervision' in a similar vein to that found in the medical profession: judges debriefing with a professional as to how they're handling the pressure and stress of their workload and its subject-matter.

Whangarei was initially chosen because there was a real willingness to try the programme there and a tight-knit team who could do so. In the event of future rollout, the challenge will be how judges country-wide are encouraged to adopt the programme, but Whangarei was chosen to gauge what exactly this programme requires of a court in a smaller centre.

In terms of judicial willingness to adopt the programme, the Chief District Court Judge's administration has simply made it a priority, although this can sometimes come at the expense of other work. There was a genuine desire to try the pilot and demonstrate that things *can* be done better but that comes with resourcing implications. A national rollout would not be possible without additional resources.

General:

- How would you respond to criticism based on equal access to justice ie. that currently there might be different processes for different people?

This is a genuine issue both with access to the Sexual Violence Pilot Programme and access to Jury trials more generally. An example of this was that originally the Pilot was intended to be set up at Manukau but the proportion of sexual violence cases was such that if it was set up there, anyone who wanted a jury trial for another crime would have to go elsewhere. Overarching -this is that one of the Chief District Court Judge's duties (under s 24) is the equal administration of justice. It is also one of the key principles of Judge Doogue's administration to ensure that nationwide all defendants and complainants receive the same treatment as much as is humanly possible.

- One criticism from academics (Donoghue, 2014) is that increasingly social issues are being passed from the executive to the judiciary to deal with, for example substance abuse with the AODTC. How do you view the judiciary's role within the wider context of improving sexual violence issue in New Zealand?

In the Judge's view, there has been insufficient investment in other sectors (health, education) so that now the court is left inappropriately dealing with and being innovative around social issues. For example, the special circumstances court: there it ought not to be the court's primary focus to collect volunteers who will work with homelessness. Behind this issue is the concept of the court as the fulcrum for interagency collaboration after those same social agencies have failed the person appearing before the court. This is the same for alcohol, special circumstances, Māori and Pasifika (because of the high disproportion of Māori and Pasifika within the criminal justice system).

Extra points of discussion:

Another issue is when does intervention by judges, in this specialist subject with vulnerable witnesses, be complained about as bullying behaviour by counsel? This is a difficult grey area, particularly where transcripts are involved, as higher courts evaluating the case may use only the transcript in examining an instance of intervention. There is a vulnerability for judges when intervening, that their interventions may be complained about, especially in such a charged environment.

Appendix 2, Consent Form:

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

LAWS489 Research Dissertation

CONSENT TO INTERVIEW

This consent form will be held for 2 years.

Researcher: Madeline Ash, Faculty of Law, Victoria University of Wellington.

- I have read the Information Sheet and the project has been explained to me. My questions have been answered to my satisfaction. I understand that I can ask further questions at any time.
- I agree to take part in an audio recorded interview.

I understand that:

- I may withdraw from this study at any point before June 30th, and any information that I have provided will be returned to me or destroyed.
- The identifiable information I have provided will be destroyed on March 30th, 2019.
- Any information I provide will be kept confidential to the researcher and the supervisor.
- I understand that the results will be used for an Honours dissertation.

•	I consent to information or opinions which I have given being attributed to me/my organisation in any reports on this research and have the authority to agree to this on behalf of the organisation:	Yes ☑	No ☐
•	I would like a copy of the recording of my interview:	Yes ☑	No ☐
•	I would like a copy of the summary of my interview:	Yes ☑	No ☐
•	I would like to receive a copy of the final report and have added my email address below.	Yes ☑	No ☐

Signature of participant: _____

Name of participant: CHIEF JUDGE JAN-MARIE DOOGUE

Date: 22/5/18.

Contact details: Mobile 021 - 892 212.

Appendix 3, Information Sheet:

LAWS489 Research Dissertation

INFORMATION SHEET FOR PARTICIPANTS

You are invited to take part in this research. Please read this information before deciding whether to take part. If you decide to participate, thank you. If you decide not to participate, thank you for considering this request.

Who am I?

My name is Madeline Ash and I am an Honours student in the Faculty of Law at Victoria University of Wellington. This research project is work towards my dissertation.

What is the aim of the project?

This project is looking at the role of the Pilot Sexual Violence Courts in Auckland and Whangarei to understand the role of specialist courts in New Zealand's judicature. It is exploring whether specialist courts ameliorate the issues they aim to, and if there are any principled objections to the increasing specialisation of New Zealand's criminal courts. This research has been approved by the Victoria University of Wellington Human Ethics Committee (0000026052).

How can you help?

You have been invited to participate because of your role as both Chief District Court Judge and having initiated and overseen the Sexual Violence Court Pilot. If you agree to take part, I will interview you at your office. I will ask you questions about the Sexual Violence Court Pilot. The interview will take up to 45 minutes. I will audio record the interview with your permission and write it up later. You can choose to not answer any question or stop the interview at any time, without giving a reason. You can withdraw from the study by contacting me at any time before June 30th, 2018. If you withdraw, the information you provided will be destroyed or returned to you.

What will happen to the information you give?

The research is not confidential, and you will be named in the final report.

Only my supervisors and I will read the notes or transcript of the interview. The interview transcripts, summaries and any recordings will be kept securely and destroyed on March 30th, 2019.

What will the project produce?

The information from my research will be used in my Honours dissertation.

If you accept this invitation, what are your rights as a research participant?

You do not have to accept this invitation if you don't want to. If you do decide to participate, you have the right to:

- choose not to answer any question;
- ask for the recorder to be turned off at any time during the interview;
- withdraw from the study before June 30th, 2018;
- ask any questions about the study at any time;
- receive a copy of your interview recording;
- read over and comment on a written summary of your interview;
- be able to read any reports of this research by emailing the researcher to request a copy.

If you have any questions or problems, who can you contact?

If you have any questions, either now or in the future, please feel free to contact either:

Student:

Name: Madeline Ash

University email address: ashmade@vuw.ac.nz

Supervisor:

Name: Māmari Stephens

Role: Senior Lecturer

School: Faculty of Law

Phone: 04 4636319

Email: *mamari.stephens@vuw.ac.nz*

Human Ethics Committee information

If you have any concerns about the ethical conduct of the research you may contact the Victoria University HEC Convenor: Associate Professor Susan Corbett. Email hec@vuw.ac.nz or telephone +64-4-463 9451.