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EDITORIAL — KŌRERO TĪMATANGA

It is natural to experience a sense of trepidation when stepping up to the helm of a waka navigated so ably by those who toiled to build it. We, the newly minted Editors-in-Chief of the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine, were concerned that there would be little new content; it has surely all been said before; what new direction could we take?

We scoured the archives of the Feminist Law Bulletin, observed contemporary decisions of the judiciary and legislature, and received a multitude of submissions. We marvelled at the recurring themes. Yet even when territory feels familiar, there is nuance in each tide as it moves against shifting shores. In this edition, we wanted to trace the palimpsest of these tides and shorelines. To do so, we enlisted the help of those who navigated them before us: our tuākana. As a result, several sections of this edition are framed by an intergenerational conversation — tuakana–teina whakawhiti kōrero — which begin to map the contours that have shaped our journey thus far.

Each of the contributors to this edition of the Journal has taken a critical approach to legal thinking, whether that legal thinking is cutting edge, out-dated, or a response to complicated circumstances. And while some if it is not "new", in the sense that iterations of similar issues have challenged wāhine rōia before us, it is in the iterations that nuances and differences are teased out, and in their accumulation that a body of knowledge and critique — a canon and a solidarity — is forged. We see this collection as adding to our understanding of what the law is, what it means, and how it affects us. We see it as shaping the island in our imagination; that place, just over the horizon, where we want the law to go.[1]

We extend our deepest thanks to those who have worked hard for this edition of Journal to come to fruition: to the contributors for your courageous submissions, the reviewers for invaluable critique, our team of editors and

1 Joseph Williams "Can you see the island?" (October 2015) Māori Law Review 21.

marketing managers for hours and hours of brilliant work, and our publishing professionals for your patience and generosity. To our whānau and friends, mentors and models, colleagues and cheerleaders, thank you for your ongoing and generous support. And to our deputy editors and the trustees, kei te mihi nui: this edition stands on the shoulders of your outstanding mahi.

Through producing, reading, and discussing this Journal, we (māua) hope that we (tātou) contribute to a canon that is continually critiqued and refined to enable all wāhine rōia to flourish in the world of law. Iteratively and cumulatively; onward, to the island just over the horizon.

Josie Te Rata and Monique van Alphen Fyfe
Editors-in-Chief
27 October 2019

FOREWORD — KUPU WHAKATAKI

The feminist story of how far we have come and how much there is left to do is not a new story, nor one specific to the tuākana and tēina represented in the inter-generational conversations (whakawhiti kōrero) in this, the third issue of the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine. It stretches back behind us and will carry on beyond us, and it may in fact never end. But this point-in-time examination is ours, specific to this time and place and to our unique journey in this land. And we are delighted to be asked to contribute to it.

Along with many other tuākana, we have been walking this path for a few decades, in a variety of ways, including as editors of the Feminist Law Bulletin, founded near the end of last century, and as advocates with deep personal involvement in some of the law reforms discussed in this Journal.

We welcome the critiques of the reforms in this issue, though it pains us to think about who we left behind (Prostitution Law Reform), the unintended consequences that were inadvertently created (Sexual Offences Act and Property (Relationships) Act) and the gaps we were simply unable to fill (Taylor Mitchell's questions on legal certainty for gender diverse people).

As many of the articles and commentaries reveal, our paths to equality do not travel in a straight line. Instead, contributors paint "a picture of the messy reality — the steps forward and the steps back — that is closer to the truth" of women's journey to equality.[1]

Out of our messy reality, we see that some of the steps our generation took forward were remarkable while others could have been better. We see progress, we see some good foundations to build on, and we see more to do: from bodily autonomy, to gender identity, to the right to be free from violence, and to have a voice as women lawyers in the legal system.

The chance to provide context helps to place tuākana decisions within

1 Srilatha Batliwala and Alexandra Pittman *Capturing Change in Women's Realities: A Critical Overview of Monitoring and Evaluation Frameworks and Approaches* (Association for Women's Rights in Development, Toronto, 2010) at 7.

their time and place, and shows how recently many archaic views held sway. The conversation with Cull J reminds us of the importance of strategic litigation in the feminist strategies of agitation, litigation and negotiation of law reform.

Law reform is not the whole story, of course, but it is a key part of women's progress to full equality. This issue provides a variety of timely and important calls for deeper analysis of pathways for change, including what has worked and what has not.

The articles and commentaries highlight the importance of feminist movements and the need for high quality researchers who can support rigorous critique of practice and help give voice to women's lives. Such research helps reveal systemic bias, as in the work Tolmie, Te Aho, Doolin and others on criminalising Māori women's parenting.

These cautionary tales are important to consider as authors outline new law proposals such as those relating to abortion, discrimination in sport and sex selection for gender diverse people and question whether these will be effective.

We admire the artful blending of the academic and the personal that this Journal achieves. We are heartened by the ongoing efforts to drive change across so many areas.

We are honoured that our tēina asked searching questions of us and provided a space for our replies. We are thankful that the Editors drew out the stories and enabled the conversations between generations because we remember facing down the headwinds of backlash that always accompany law reforms that challenge the status quo. We remember the importance of drawing strength from our sisters, and how it carried us when we grew tired and disheartened. As we reflect on the energising effect of this Journal, we hope that readers will also be energised by knowing that work on the messy reality of progress is in such capable hands.

In sisterhood and manaakitanga
Joy Liddicoat and Wendy Parker
Former editors, Feminist Law Bulletin
19 October 2019

TUAKANA–TEINA WHAKAWHITI KŌRERO

CULTURE IS KEY

Sexual violence policy and prevention in Aotearoa New Zealand — Where to from here?

Charlotte Shade with Jan Logie*

In this tuakana-teina conversation Charlotte Shade, a criminal and family lawyer in Wellington Te Whanganui-a-Tara, gets the scoop from Jan Logie, Parliamentary Undersecretary to the Minister of Justice, on aspects of the Government's justice policy. Their kōrero is a preface to the articles and commentary in this volume that focus on the law relating to sexual violence. It addresses Jan's motivations, the likely shape and direction of sexual violence law reform, and the broader vision that underpins Jan's work.

Charlotte Shade: Jan Logie is no stranger to reform and activism on women's rights issues. The Green Party MP of 8 years and self-described Lefty Feminist Lesbian dedicated a large portion of her pre-parliament life to the women's liberation movement. She has volunteered for Women's Refuge, National YWCA, Wellington HELP, Rape Crisis and, as far back as 1993, spent 3 years as Women's Coordinator for the New Zealand Union of Students' Associations. It is clear protection and empowerment of women is a cause close to her heart.

Now in her role as Under-Secretary to Justice Minister Andrew Little with the specific brief of reforming sexual and family violence legislation and

* Charlotte Shade is an Associate at Zwaan Legal. Jan Logie is a member of parliament for the Green Party, and Parliamentary Undersecretary to the Minister of Justice. Charlotte would like to extend a very special thanks to Gráinne Patterson for her writing assistance.

policy, she is in the prime position to make substantive and lasting change, and already has done through her role. For Jan this is a deeply personal task and one that she is pleased to be able to dedicate her time and energy.

Of course, sexual violence and family harm is not just a women's issue. Anyone can be a victim of this type of harm, regardless of their gender or demographic, and it affects everyone who is touched by it in some way. While legislation matters, Jan also wants to empower Kiwis to be part of the solution, to support each other in their communities to feel equipped to identify and respond appropriately to signs of sexual and family violence. She is clear that "This will take all of us."

My interest in Jan's area of work is keen. As a survivor of sexual violence and someone who is working as lawyer in the family violence and criminal defence spaces, I want to understand what the Government is doing about these issues. Equally, I want to know how the Government is going to be feeding the culture transformation that I believe is required for lasting change. As always, Jan is approachable, warm, and passionate about what she is doing here as an elected representative, and in Government.

Jan Logie: I am very lucky in that the Government, for the first time ever, has somebody within it whose sole focus is around addressing domestic and sexual violence. This enables us to look at that system, which is really important. For me it is deeply personal. This violence has had impacts on my life and the lives of so many people that are close to me and I see how much freer and healthier and better off we would all be if we got on top of this and all got behind the vision of getting rid of this violence.

In terms of the emphasis on wellbeing, there is now a shared understanding that so many of our social problems have an underlying cause of poorly addressed or unaddressed family violence or sexual violence: the mental health crisis, prisons, children in care, housing, and limits around employment. I am really pleased to see that this is now being acknowledged and that we have also set up a new kind of mechanism in Government to be able to develop a coordinated response, because I think we have over-relied on the justice system to solve family violence and sexual violence. The justice system plays an important part in our response, but we need to pay a lot more attention to prevention — primary prevention — and enabling families and communities to be able to identify and respond.

CS: Jan's primary aim is to see everyday New Zealanders enabled to identify and respond to sexual violence that they encounter. Government reforms are one piece of a large puzzle, and she believes we can help many more people by equipping communities to bring these issues to light. Jan hopes that through cross-agency policy and intervention, we will be able to see culture shifts that support recognition and a healthy response to sexual violence.

JL: The evidence tells us that there are more disclosures of family violence through the health system than there are through call-outs to the police. We know the police get a call out every four minutes and yet our investment in supporting the practitioners in the health system to be able to respond effectively have been almost non-existent.

We are in the process of setting up a joint venture which involves ten government agencies, including Justice, Corrections, Health, Education, Oranga Tamariki, Te Puni Kōkiri, ACC, the Department of Prime Minister and Cabinet, and Ministry of Social Development. The chief executives of all of these agencies now meet regularly to oversee the whole of government, because their work has been in silos and sometimes they have been at odds with each other.

For the first time ever we had a joint government budget bid in the family and sexual violence area. There is transparency; people can see a package of investment and that we can be accountable for that whole picture. Parliament is set up so that scrutiny of the Government's work is through portfolio areas, not across systems, so we've changed that in this area. For the first time, we reported to Parliament on the work we were doing on that whole system. That meant people could ask questions around our funding for specialist sexual violence services, as well as what we were doing in the Courts, what Police were doing, as well as education. That has never been possible before.

CS: The government's 2019 Wellbeing Budget has had a huge impact on Jan's work. Some $320 million, the largest portion of the Budget, is earmarked for family violence and sexual violence prevention and response, including reformation of the criminal justice system response to sexual violence cases.

JL: I think the reason for this investment is that we are working towards a plan and this was the foundation. We could see across the system the bits that were missing and that amount of funding is not the end. It is the foundation for transforming our response.

Specifically around sexual violence you will have seen in the Budget significant investment in specialist agencies to be able to help people get the counselling more quickly and the appropriate responses for the areas that they are in. That is really important because it reduces harm.

CS: I was particularly interested to hear about how the judiciary-initiated Sexual Violence Pilot Court has been progressing, having seen the success of other specialised courts such as the Special Circumstances Court in Wellington.

JL: We have had the public evaluation back on that which has been really positive. It showed positive reports from complainants compared to the rest of the system, and really significant shortening of the time frames for cases getting to be heard, which we know again reduces the trauma. The Government is currently considering the evaluation, which was very positive. The Court needs to be seen in the context of all of our courts and their capacity. Based on the evaluation, a lot of strength seems to be around the prioritisation of the list and having specialist judges.

Specialist judges have done additional educational work on sexual violence charges in the justice system, and have been rolling out that education more broadly. I'm hearing really positive feedback on that, even from people who were maybe a bit sceptical before doing it — they found it really helpful.

One of the other aspects I would point out is the process of looking at the physical spaces in our courts, and trying to ensure there is space for people when they are giving their evidence that is a comfortable and trauma-informed space. Some of those rooms are just truly grim. We have completed refurbishments in eight courts around the country, and work has started in another eight. We are trying to bring a sense of humanity into the physical spaces. And then there is also the psycho-social support which is happening up in Auckland as well. The feedback I have been getting of how that is going has also been really positive.

CS: Having been approached multiple times by complainants who are struggling with being offered less "legal support" than defendants, I have encountered a real need for complainants to have good support systems available when bringing a sexual or family violence case. In domestic violence proceedings before the Family Court, complainants who cannot afford legal assistance will generally be eligible for legal aid to support them through the process of applying for a protection order. Complainants wanting Police to press charges

in criminal proceedings are not given the option of having a lawyer, and are not eligible for legal aid as they are acting as a witness. Complainants who are unable to pay for private legal assistance are left with no real options for legal assistance. I asked Jan about whether there is space for legal support for victims of sexual violence when they are navigating the criminal justice system.

JL: There is one law firm in Rotorua that is piloting this level of support. The pilot has been setting up support for complainants and their whānau, helping them understand the court processes and talking through strategies which might help them deal with the potential re-traumatisation of bringing their case to court. We have seen that support make a real difference.

More generally, [lawyers for complainants] is something that has come through continually through the victims' hui that's been part of the conversation around reforms to the justice system. However, in terms of what has been directing our work around the sexual violence reforms up to this point, it's been around numbers of reports going back to the task force for action — which feels a bit ironic, that was back in 2009 and not much action happened — and the work around Elisabeth McDonald and Yvette Tinsley "From Real Rape to Real Justice", as well as of course the Law Commission's work around alternative processes and more recently the Evidence Act. Lawyers for complainants is not on the agenda at the moment but definitely that psycho-social support and information around the processes is — consideration of where the opportunities are for the victim/survivor to be able to indicate what they would like to see happen. I think we have opportunities in that space.

CS: Jan has had to ensure no lines are crossed in terms of a defendant's right to a fair trial while ensuring minimum re-traumatisation to the complainant. Pre-recorded testimonials may become common practice cross-examination. This would still involve defence counsel cross-examining the complainant, but with the option of this occurring in a trauma-informed space, outside of the courtroom, and not in the presence of the defendant.

JL: There is a lot of work to be done to work out how we do this in a way that ensures a right to a fair trial as well as doing our very very best to reduce re-traumatization. I have confidence that, with all of the parties who have an interest in this, we will be able to work that out.

It has been done [cross-examination outside of the Court room and without the defendant present] in Australia where it was piloted initially and

there were concerns that it might impact on the right to fair trail, but it was found that it did not. I am very grateful for the fact that we have a long history of these conversations. A lot of the potential pitfalls have been quite well identified, which gives us a really good chance of being able to avoid them and learn from others' mistakes.

CS: It remains clear that there needs to be some leadership in identifying and normalising an informed and pro-social definition of consent. While we have come a long way in terms of what consent means, with the aid of mainstream media profiling of what consent means through the #Metoo movement, and helpful tool like the "would you like a cup of Tea" analogy, the popular understanding of consent still lags behind the definition accepted by our institutions. Jan say's were working on it.

JL: We are unpacking that the kind of the potential for direction around a range of points where [a jury] may get confused that if there has been a delay in reporting or if there is no evidence of physical injury, that it still can be rape.

We are asking that evidence of the complainant's sexual experience with the defendant is subject to the same heightened admissibility threshold and prior application requirements as the evidence of sexual experience with people other than the defendant, which is really trying to get to the point that, just by having a relationship, a complainant does not give consent forever.

We are also asking that providing evidence of the complainant's sexual disposition is subject to the same heightened admissibility as well and clarifying that evidence of the complainants' reputation for having a particular sexual disposition is inadmissible. And providing that judges must, rather than may, intervene if they consider that witness questioning is improper, unfair, misleading, needlessly repetitive or expressed in language that is too complicated for the witness to understand.

This is alongside the development of [judicial] directions to counter rape myths, otherwise referred to as counter-intuitive evidence. There's the ability [for judges] to provide direction to the jury to clarify those points and that, in combination with the requirement to intervene in inappropriate questioning, we are really trying to get to the point where the trials are heard on the evidence rather than the ability to confuse and befuddle and or wear down a complainant. I do not think it reflects a generally understood concept of

justice to have quite vulnerable complainants who have been on the stand for days, under repeated questioning.

CS: Jan is also hoping to continue pushing for alternatives to complainants going through any court to have their grievances aired. For some victims, a barrier to coming forward is that they don't necessarily want the perpetrators to be convicted of such a serious offence, and in many cases end up in jail. Some might simply want the behaviour to stop, for the harm to be acknowledged, and to know that it will not affect anyone else. They do not necessarily want the consequences to be so severe that the person is irrevocably impacted by the consequences, especially when that person is a member of the family. The Law Commission recommended a restorative justice/diversion option be explored in its report, and this is an avenue Jan would like to continue exploring, although it is not currently on the table.

JL: When you hear the stories of how traumatising the formal system is, of course, people are going to really want to explore alternatives. We have prioritized a focus on reducing re-traumatisation in the existing system so we can make sure that the drive towards [an alternative] option is not because we have created a system that is awful. We want to find a genuine alternative based on other factors rather than our failure to secure people's safety and interests in the system.

I think the Law Commission was given a very constrained timeline for consideration of the alternative processes and I think there are still a lot of outstanding issues that need to be really carefully thought through in terms of evidence of other offences that come up through that process.

There is complexity in this, because we know that throwing people into jail and them not getting support or opportunities to reflect and actually change their behaviour is not necessarily in the long-term interests of society. We have to build some consistency and really think through this. We hear from Project Restore, who does restorative justice, some very positive results in terms of what they are doing, but we have to be very careful that we understand the situations where it is going to work and our ability to roll that out across a system with the same protections and results.

CS: So some of the key barriers that remain are the dominant conventional methods of justice, cultural understandings of consent, continued re-traumatisation of complainants. I ask Jan, can we get through these barriers?

JL: I think I am going to be a Pollyanna on this and say that I am not feeling that the barriers are going to be insurmountable. I really want us to take an approach where we are actually listening to each other to find out how we create a system that achieves justice in that true sense.

So far, we have had cross-parliamentary support and so I am feeling very hopeful, but I would also say to people who care about these issues: the more conversations we have, the more we will achieve the cultural change which ultimately will be at the heart of the success of these reforms. We know that legislation on paper is one thing and the implementation as we intend it relies on a kind of shared cultural understanding.

JUDGING JURIES
The "common sense" conundrums of prosecuting violence against women

Vanessa E Munro*

The jury plays a pivotal role within many criminal justice systems. It has often been lauded for its unique ability to ensure the involvement of, and accountability to, members of the public in the application of criminal laws to citizens. At the same time, however, what goes on in the jury room has remained remarkably opaque. We know little about the nature and content of jury deliberations, about how legal tests are understood and applied therein, and about what persuasive strategies are most effective in securing a verdict. Over the past two decades, I — together with colleagues — have conducted several studies, using trial simulations, designed to explore jurors' approach to decision-making in rape cases. In this article, I reflect on the key findings from that work and situate them in the context of ongoing international dialogue about both how to respond to the "justice gap" in rape cases, and what to do about juries.

I INTRODUCTION

I want to begin by expressing my sincere thanks to the members of the Women in Law Committee for inviting me to give this talk, to the New Zealand Law Foundation and Borrin Foundation for funding my travel to be here, and to Professor Elisabeth McDonald for including me in some fascinating discussions during my visit about the future of sexual offences trials in New Zealand. I am hugely honoured to be giving this year's Shirley Smith Address. It is a particular treat to do so in the prestigious surrounds of this Parliament Building and in

the company of what I know to be allies and fellow travellers on the journey that Shirley herself trail-blazed towards achieving social justice — both in and through the law. I am grateful to every one of you for making the time to come to the talk tonight and I hope that I will be able to do enough for you to feel that investment of time and attention has been duly rewarded.

In a context in which Lord Devlin, at the outset of his 1956 Hamlyn Lectures, observed that the jury trial was a subject on which it was not possible to "say anything very novel or very profound",[1] I may well have set myself a rather uphill struggle on this occasion. But as many feminists before me have said in respect of far bigger challenges, nevertheless I shall persist.

In this lecture, I want to reflect on the precarious nature of our contemporary affections towards the jury, focusing particularly — but not exclusively — on its role within sexual offence trials. Drawing on findings across a number of experimental studies that I have conducted with colleagues over the last 15 years, I want to consider the thorny question of whether — in a world in which legal norms and institutions, as well as social interactions, still bear the hallmarks of patriarchal privilege — we can be confident that justice is being done behind the closed doors of the jury room; and if we cannot, where does that leave us in terms of social and legal reforms?

In approaching that question, I will inevitably draw primarily from my own experience of juries and their operation across United Kingdom criminal justice systems. There, as elsewhere, we have engaged in long-standing and still-very-much-live debates about the extent to which, within the broader parameters of an adversarial system, it is possible to reform the procedural and evidential norms of the rape trial in order to respond adequately to the vulnerability of complainants and ensure they are not re-traumatised by the process of holding their attackers legally accountable.

There have also, in past decades, been several legislative and practical

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* Vanessa Munro is a Professor of Law at Warwick Law School in the United Kingdom. This text (minus subsequently added footnoting) was delivered as the Shirley Smith Address, at Parliament House, Wellington, on 27 August 2019. I am hugely grateful to Shirley Smith's family and to the Wellington Branch of the Women in Law Committee for the invitation to give this address, to the Borrin Foundation and New Zealand Law Foundation for funding my participation (as part of a wider programme of activities in which I was kindly invited to participate by Professor Elisabeth McDonald, to whom I am also much indebted), and to all those who took time to attend the lecture. I am also grateful to Jan Logie, MP and Parliamentary Under-Secretary for Justice, for sponsoring the hosting at Parliament, and for her generous introduction.

1 Patrick Devlin *Trial by Jury* (Steven & Sons, London, 1956) at 3.

innovations that *ought* to have improved the position — including: formal restrictions on the use of certain sexual history and character evidence; special measures to allow complainants to give testimony behind a screen, remotely or via a pre-recorded police statement (and, more recently, pre-recorded cross-examination); provision of detailed training to judges and advocates on reactions to trauma amongst victims of sexual violence; and the introduction of judicial directions designed to challenge certain "rape myths", for example, in respect of the likelihood of resistance or the significance of a delayed report. But despite this, the rate of attrition of rape cases through the criminal justice process in all jurisdictions of the United Kingdom remains a source of serious concern and the evidence suggests that complainants have experienced little improvement in the process.[2]

I know, of course, that these are also very live issues in the New Zealand context — that here too there is a sense of frustration that reforms to date have too often been piecemeal and not always lived up to their transformative potential, even when crafted with good intentions.[3] In neither hemisphere should that, in my view, cause us to abandon legislative and evidential reform initiatives, but this dawning sense of their limitations has, I think, rightly provoked a turn of attention to other aspects of the justice process that also pose obstacles. As part of that shift, the jury, which had for some considerable time been relatively, and — as I will discuss in a moment — somewhat remarkably, insulated from critique, has attracted increased attention.

Though the Law Commissions in the United Kingdom have not gone so far as their New Zealand counterpart in floating the removal of the jury from sexual

2 Indeed, recent statistics suggest the justice gap in rape cases may be widening rather than retracting. The Crown Prosecution Service in England and Wales recently disclosed that attrition at all stages of the process had increased, with approximately 3.3 per cent of reported rape complaints resulting in a conviction: Crown Prosecution Service *Violence Against Women and Girls Report 2018–19* (2019). In England and Wales, and in Scotland, formal reviews of procedures for, and outcomes of, rape complaints are again underway, reflecting the sense of lack of adequate progress following prior reforms.

3 This is evidenced, for example, by New Zealand Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015). While the results of the specialist Sexual Violence Pilot Court are promising (see Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Pilot Court* (Gravitas Research and Strategy, June 2019), particularly when combined with intended additional reforms to the process of giving testimony announced by the Government earlier this year, research currently being conducted by Elisabeth McDonald and others, which draws on trial audio recording and transcripts, and which has formed the basis of stakeholder workshops in Wellington and Auckland in August 2019, continues to raise further concerns.

offence cases,[4] there has certainly been animated debate in recent years over the extent to which jurors can and should be trusted in this context; and of what additional steps might need to be taken to increase confidence in this respect. Current suggestions include, for example, compulsory pre-trial education for jurors, most likely in the form of a DVD. This would be designed to disavow jurors of common but often unfounded and damaging expectations regarding "normal" responses before, during and after a sexual assault.[5] There have also been calls for an intervention to screen jurors on the basis of their levels of "rape myth acceptance", as evidenced by responses to attitudinal questionnaires.[6]

These proposals reflect, I suggest, a broader trajectory of what might be termed "falling out of love" with the institution of the jury; and I want to say a little more about that shifting and increasingly precarious relationship before turning to my own findings on how jurors in our mock rape trials approached their task. Those findings will in turn, I hope, help us to consider the merits and demerits of intervening in the jury, including through pre-trial screening and education, for example, and to reflect more broadly on the jury's future in the criminal process.

II FALLING IN — AND OUT OF — LOVE WITH THE JURY

The liberal state and its legal system's relationship with the institution of "the jury trial" has certainly had its twists and turns. For prolonged periods of its history, though, it has been marked by a romanticisation of the jury, as much for what it symbolises and enigmatically refuses to reveal, as for its actual role in administering justice or its effectiveness in doing so.

In 1956, Lord Devlin might have purported to have nothing novel or profound to say about the jury, but he certainly had things to say about it that were poetic. It is, he said, "the lamp that shows that freedom lives".[7] In

4 Law Commission, above n 3, at [6.34]–[6.49].

5 See, for example, the work of JURIES, a group campaigning for the mandatory briefings in myths and stereotypes about sexual violence for juries in rape, sexual assault and abuse trials. See more at JURIES "JURIES Campaign Brief" (5 November 2014) <www.juriesunderstandingsv.wordpress.com>; and Olivia Smith and Tina Skinner "How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials" (2017) 26(4) S & LS 441.

6 Dominic Willmott "An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials" (Psychology PhD, University of Huddersfield, 2018).

7 Devlin, above n 1, at 164.

other words, its existence reflects a core commitment to public participation in the justice process. It provides an avenue for accountability to the citizenry not only for the substance of the state's laws, but for the way in which that substance is interpreted and applied. As such, when that light cast by the jury is threatened, the citizenry should be alarmed, for it is then, according to Lord Devlin, there is no restraint left to hem in executive power.

The contemporary rejoinder to this, of course, is that, while that may have been true in an era where executive power lay with a singular monarch or undemocratic ruling elite, it no longer applies. Contemporary participatory and representative political systems, coupled with the establishment of an independent judiciary, entail that the jury is not now required to act as a stalwart force against totalitarian power. Its lamp, in other words, can safely be snuffed out.

Yet, as Lady Justice Hallett observed, in a Blackstone Lecture given 50 years after Lord Devlin's, also on the topic of juries:[8] while it might be right to identify a reduction in the jury's role as a crucial guardian of liberty, it remains important for its enhancement of civil participation in the administration of justice, and for ensuring a more inclusive and diverse engagement with law than could ever be achieved whilst judicial and legislative personnel remain so often drawn from privileged social groups (as they surely do, unfortunately, in many legal jurisdictions).

Juries, Lady Justice Hallett explained:[9]

> … provide another form of accountability. They ensure that in each criminal trial it is not just the accused that are on trial. They ensure that the criminal process is itself on trial.
>
> A jury may refuse to convict in spite of the law and the evidence because it concludes that the law is an unjust law. The jury passes its verdict on the law.

That may well be true; and yet it begs as many questions as it answers about the value and legitimacy of the jury. Clearly, there have been cases in which such resistance from the jury has provoked progressive change. Lady Justice Hallett refers, for example, to those involving the historical prosecution of doctors who hastened the death of patients in the process of administering

8 Lady Hallett "Trial by Jury — Past and Present" (Blackstone Lecture, Pembroke College, Oxford, 20 May 2017).

9 At 9.

pain relief, where the jury's refusal to convict notwithstanding a cast iron legal basis prompted the development of the doctrine of "double-effect" to rectify an injustice in the letter of the law.[10] But there are other situations — and sexual offence cases may well be prime amongst them — where jurors' refusal to convict *in spite* of the law and the evidence, and in particular because of a discomfort at the consequences of any such conviction for the accused, takes on a rather different, and I would argue often significantly less progressive, hue.

To properly understand and evaluate this aspect of a jury's functioning requires a stripping away of the romanticised notions in which it has historically been cloaked as a defender of civil freedom, and a candid appraisal of the contemporary role that it does and should play in dispensing justice. But the secrecy that continues to surround jury deliberations makes this difficult. Intrigue over what goes on behind the closed doors of the jury room, and the drama that we presume fills this space as competing perspectives are presented, challenged, and reconciled, may make excellent fodder for Hollywood scripts. But it leaves a substantial gap in our understanding of the operation of justice; a gap that I believe is increasingly hard to reconcile with claims made on behalf of the modern jury to civic responsibility and inclusion.

Lord Devlin himself acknowledged that the jury, in bringing together 12 random strangers with no necessary experience of critical thinking, asking them to listen to and process swathes of information, and then expecting them in a short period of time to form a shared consensus on a verdict regarding the fate of the accused, embodies "a ridiculous and impracticable idea".[11] But, nonetheless, he maintained these bizarre and enigmatic qualities were part of its delicate eco-system, and to dig under the surface, or impose restraint or rationality, on the jury would be ill-advised. As he put it:[12]

> Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist *why* it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming.

But, it is easy to *presume* that a process which is veiled from scrutiny "works", and Lord Devlin's approach, still effectively supported through our respect for

10 At 9, citing in particular the case of Dr Arthur: see "R v Arthur" (1981) 283 BMJ 1340.

11 Devlin, above n 1, at 4.

12 At 57 (emphasis added).

the sanctity of the jury room, has a distinctly self-fulfilling logic.

There are, of course, legitimate reasons to be concerned about tampering with an established system, and maintaining public confidence in the justice process *is* important,[13] but having a deliberative "black hole" at the heart of our criminal justice system is, I would argue, untenable. At the same time, it is important to be clear that our options here are not limited to blind faith in the fact that the jury works on the one hand, and abandonment of the enterprise of lay participation altogether on the other: on the contrary, even if the jury is shown to be falling short, there may still be compelling reasons to retain it. But we surely need to know where, how and why it is falling short and have an evidence-based approach towards how to improve it.

I make that call for transparency from the perspective of someone who, in England and Wales, has seen restrictions remain on the disclosure of juries' deliberations,[14] which have foreclosed the potential for large-scale research on the dynamics and content of "real jury" decision-making. Whilst some useful work has been done exploring certain aspects of the "real" juror experience, delving into the substance and dynamics of the deliberation itself has stayed off-limits.[15] I realise that, by contrast, in New Zealand, you have had the benefit of greater insight into real juries as a result of the excellent work done by Yvette Tinsley and colleagues.[16] But even here, I would suggest, there remain broader questions around access to information about juries and the need to develop a sustained, rather than sporadic and largely responsive, evidence base on the jury.

Thus far, I have suggested that there has been a steady decline in the romanticisation of the institution of the jury within our liberal legal process and a growing impetus to subject it to the sort of exposure and scrutiny imposed upon other arms of the criminal justice system. I have noted that this has been particularly pronounced in the context of sexual offence trials, where

13 For further discussion see M Zander "Research Should Not Be Permitted in the Jury Room" (2013) 177 CL & J 215.

14 Juries Act 1974, s 20D (as amended by the Criminal Justice and Courts Act 2015, s 74).

15 Although the Law Commission of England and Wales recommended that, subject to appropriate safeguards, the restriction on disclosure of juries' deliberations, then contained within s 8 of the Contempt of Court Act 1981, "should be reformed to provide an exception allowing approved academic research into jury deliberations": Law Commission of England and Wales *Contempt of Court (1): Juror Misconduct and Internet Publications* (LC340, 2013) at [4.49].

16 See New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, 2001).

in many jurisdictions there has been a profound dissatisfaction with the lack of progress achieved through doctrinal and evidential reforms, and a concern that such reforms are being undermined by endorsement in the jury room of problematic socio-sexual norms and what are often referred to as "rape myths". Jurors in sexual offences trials often have a particularly expansive remit of discretion afforded to them by prevailing legal tests, and matters of credibility are key to their assessments of contradictory evidential accounts regarding the events in question. In this context, there is a concern that misconceptions about rape, and about "normal" socio-sexual behaviour generally, may be applied with impunity by jurors, in pursuance of judicial instructions to apply their "common sense" and "knowledge of human behaviour" to crucial questions about the existence of, belief in, and responsibility for, consent.

With this concern in mind, I want to turn now to give an account of the findings of key studies that I have undertaken in this area. As we will see, while those findings often reinforce the legitimacy of the concerns raised by critics of the jury, they also illustrate the complicated nature of both juror and jury deliberation, and the potential — despite, or perhaps because of, those complications — to do more to ensure that jurors are properly equipped for their task.

III TRIALS AND TRIBULATIONS: JURIES AND SEXUAL OFFENCE ALLEGATIONS

I conducted my first rape jury study about 15 years ago, around the time the Sexual Offences Act 2003 came into force in England and Wales. This Act introduced for the first time in the United Kingdom a statutory definition of consent — a person consents when she agrees by choice and has the freedom and capacity to make that choice. It also set out a list of circumstances in which consent will be presumed (either rebuttably or conclusively) to have been absent, for example where the complainant was asleep or had been given a stupefying substance, or where violence, the threat of violence or deception had been used. Importantly, the Act also shifted English law from a standard of honest belief in consent to one which required the belief held by the defendant to be reasonable, "having regard to all the circumstances" including any steps taken to ascertain consent.[17] The Act was less radical than the initial reform

17 Sexual Offences Act 2003, s 1(2).

proposals in the Home Office's *Setting the Boundaries' Review,*[18] out of which it developed, but still it was applauded as a substantial step forward. Amongst other things, it was hoped it would provide greater clarity to jurors and move them towards a communicative model of sexual consent.[19]

Since completing that first study, I have conducted three further studies on this broad topic with different groups of colleagues, all of which have relied on a similar methodology. In all studies, a scripted trial reconstruction was created in consultation with legal practitioners. In the first three studies, the trial reconstruction was re-enacted live and in real time before an audience of mock jurors, comprised of volunteer members of the public. In the most recent study, participants watched a recorded version of the trial reconstruction filmed in a real courtroom. In the first three studies, the roles of counsel were played by qualified barristers; in the fourth study, while the role of the judge was played by a real judge, counsel were played by actors who received both advance and on-set advice from qualified advocates in respect of tone and delivery. In each study, the trial reconstruction lasted approximately 75 minutes. Having watched the trial, participants were streamed into separate juries and given up to 90 minutes to reach a verdict. Deliberations were audio and video recorded and combined with participants' responses to short pre- and post-deliberation questionnaires. Across these studies, over 1,500 members of the public have taken part, yielding data from 132 different jury groups.

There are, of course, limitations to such mock jury research, not least the fact that participants know the trial is not "real" and as such will not have actual consequences for the parties. On that point, though, it is worth noting that the level of suspension of disbelief apparent across these studies was remarkable, with some jurors discussing at the end how stressful they had found the process and expressing concern about the effect of the decision on the parties. Moreover, while the trial script and periods of deliberation were inevitably curtailed to be feasible within the experimental context, these simulations nonetheless substantially improved — in terms of their realism

18 Home Office *Setting the Boundaries: Reforming the law on sex offence*s (July 2000).

19 For further discussion, see, for example Nicola Lacey "Beset by Boundaries: the Home Office Review of Sex Offences" (2001) Crim LR 3; Jennifer Temkin and Andrew Ashworth "The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent" (2004) Crim LR 328; and Sharon Cowan "Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape" in Vanessa E Munro and Carl F Stychin (eds) *Sexuality and the Law: Feminist Engagements* (Routledge, London, 2007) 51.

— on the much more limited written vignette stimuli that was often used in prior research. In addition, these studies were relatively unusual in relying on a non-student volunteer sample, having a substantial group deliberation component and providing detailed and accurate legal tests to jurors to frame that discussion. Importantly, moreover, what this simulation method allowed for — in a way that real trials never can, of course — was isolation of certain variables whilst holding others constant in order to test for specific effects.[20]

Thus, whilst all four studies explored jurors' approaches to, and interpretation of, key provisions on consent, freedom, capacity, and reasonable belief,[21] each also had its own distinctive focus. More specifically, the first looked at the way in which jurors approached rape cases in which the complainant was intoxicated or under the influence of drugs at the time of the attack, whether self or surreptitiously administered.[22] The second explored jurors' subscription to popular misconceptions regarding "normal" or "expected" victim behaviour — namely, her propensity to physically struggle during an attack, to report it immediately afterwards, and to appear emotionally distressed whilst recounting her experience to others.[23] And having identified the prevalence of such views amongst mock jurors, the second phase of this second study also tested for an impact as a result of providing to jurors "myth-busting" information, either through expert testimony during the trial or extended judicial instructions.[24]

The third study examined the impact of the adult rape complainant's mode of testimony — in particular, the effect on jurors' assessments of credibility

20 For a more detailed discussion of the methodological strengths and weaknesses of mock jury research, grounded in the context of one of these substantive studies, see Emily Finch and Vanessa E Munro "Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research" (2008) 35 J Law & Soc 30.

21 For discussion on this, see in particular Emily Finch and Vanessa E Munro "Breaking Boundaries? Sexual Consent in the Jury Room" (2006) 26(3) LS 303; and Louise Ellison and Vanessa E Munro "Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and Beyond, the Context of a Mock Rape Trial" (2010) 30 LS 74.

22 Emily Finch and Vanessa E Munro "The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants" (2007) 16 Soc & Legal Stud 591.

23 Louise Ellison and Vanessa E Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility" (2009) 49 Brit J Criminol 202; and Louise Ellison and Vanessa E Munro "'Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation" 18 Soc & Legal Stud 291.

24 Louise Ellison and Vanessa E Munro "Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" 49 Brit J Criminol 363.

where she used a screen, live-link or pre-recorded police statement to give her testimony.[25] And in the fourth and most recent study, the key findings of which will be outlined in a report published by the Scottish Government in October 2019, my colleagues and I have been looking at both rape and physical assault scenarios; exploring in particular the impact that jury size, number of verdicts and anonymity rules have on deliberations, against the background of Scotland's unique system of having 15 jurors choose by a simple majority between guilty, not guilty and not proven verdicts.[26]

In this lecture, I obviously do not have the time to go into detail on what we found in relation to each of these variables. What I do want to do, though, is "zoom out" to reflect more broadly on key findings that span across these studies as a collective, and to think about what they can contribute to ongoing debates about reform, or even abandonment, of the jury in rape cases.

That "zooming out" comes with the disclaimer, of course, that it is not possible to draw strict parallels and comparisons across these studies: amongst other things, the scripts that were used varied slightly over time, and while the actors were held constant within each study, we obviously recruited a new group for the next incarnation. In addition, in the Scottish study, jury groups were directed under slightly different substantive definitions of the rape offence, were not necessarily required to even try to reach a unanimous verdict during their deliberations, and — in line with procedural rules — were only able to return a conviction where they were satisfied that the offence elements had been established on the basis of corroborated evidence.

Nonetheless, across these studies, there are still some striking consistencies and resonances that merit reflection. In their different ways, each highlights, I think, the falsity of assuming that a change in substantive legal tests — whether to include a definition of consent, highlight the importance of freedom and capacity to choose, or impose a different standard of responsibility upon the defendant — will automatically result in a change in interpretation and application on the ground. It was relatively rare across all these studies for

25 Louise Ellison and Vanessa E Munro "A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials" (2014) 23 Soc & Legal Stud 3. See also Louise Ellison and Vanessa E Munro "'Telling Tales': Exploring Narratives of Life and Law within the (Mock) Jury Room" (2015) 35 LS 201 at 212.

26 This research is now published: Rachel Ormston and others *Scottish Jury Research: Findings from a Large-Scale Mock Jury Study* (Scottish Government, October 2019), available at <www.gov.scot>.

jurors to directly employ the language of the legal tests, despite their repeated use by counsel and the judge; and it was even more rare for them to embark on an extended discussion about what those terms might mean exactly in the case at hand. Instead, for the most part, the tests were quickly translated into far more prosaic interpretations — for example, in one jury in the third study, it was maintained by a juror that at its core, "the point we need to decide is whether her removing her knickers or him removing her knickers proves consent".[27] Of course, concepts of freedom and capacity invite complicated philosophical questions, and so it is perhaps not terribly surprising that they do not offer as much useful guidance to jurors as hoped.[28] In respect of capacity, for example, it was clear in the first study that jurors adopted a range of divergent tests, which centred variously on the complainant's level of self-control, her ability to express her sober preferences, her ability to communicate, or level of consciousness during the assault. Whichever approach jurors took had a marked effect on the prospects of a conviction.[29]

In addition, what a belief that was reasonable "having regard to all the circumstances" entailed exactly was unclear to jurors, who typically levelled this test down to focus simply on what the defendant honestly believed. In the third study, for example, one juror remarked that she did not properly understand the test, prompting peers to paraphrase with inaccurate but rarely challenged alternatives, including "did [the defendant] understand that no meant no or did he actually think that she was coming on to him" and "it is saying that we need to look at it from his point of view, and did he think he was in with a chance".[30] This, of course, undermined the shift in *mens rea* brought about under the 2003 Act, reinforcing the prior position in which the only "objective buffer" was what jurors considered it credible the accused himself believed.

In this context, while many jurors emphasised that it was not an understanding they personally endorsed, they continued to accept that a women's silence or passivity could "reasonably" be taken as consent by the

27 Ellison and Munro "'Telling Tales'", above n 25, at 212.

28 Temkin and Ashworth, above n 19, at 336; and Vanessa E Munro "Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales" (2017) 26 Soc & Legal Stud 417.

29 Finch and Munro "The Demon Drink and the Demonised Woman", above n 22; and Emily Finch and Vanessa E Munro "The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited" (2004) Crim LR 789.

30 Ellison and Munro "'Telling Tales'", above n 25, at 212.

accused. As one put it, for example:[31]

> If I were to put him in my shoes, I would have said it was not reasonable, but the evidence, and the way he thought, I know he didn't actually hear a yes, but he didn't hear a no, it's just too much to be able to say guilty.

Jurors often accompanied this with the insistence that an expected response to unwanted sexual contact would be to struggle physically (thereby sending a clear and unequivocal signal of rejection to the accused); and they imposed demanding expectations on a complainant to resist an attacker, and indeed inflict defensive injury upon him. Jurors in the second study, for example, asserted that "a woman can be strong when she is being pinned down", that "the smallest and quietest of people, when you're in a situation you don't want to be in, you find something within you to give him a damn good kicking" and that "no matter how big the guy, even if she's 8 stone and he's 16, at some point she can scratch, she can hit, she can knee".[32]

While some jurors were willing, in principle, to accept that a woman might freeze during an attack, for many the credibility of this only really held in cases where the perpetrator was unknown to the victim. As one juror put it, if it was "someone she didn't know that would be [different], you can believe someone could be paralysed by fear because you don't know what they're capable of".[33] Such contributions map onto a broader point, which is that, while there is a tendency in some literature in this area to talk in short-hand about a "real rape" stereotype, which weds jurors to a narrow conception of rape as involving only an attack by a stranger, the vast majority of our participants were in fact well aware that most rapes are committed by acquaintances.[34] Nonetheless, it was clear that jurors brought to the deliberation certain expectations — including around resistance and freezing — about how a woman would react to an assault by an acquaintance, which were different in kind from those pertaining to a stranger.

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31 Finch and Munro "Breaking Boundaries?", above n 21, at 317.

32 Ellison and Munro "Reacting to Rape", above n 23, at 207.

33 At 207.

34 See further, Louise Ellison and Vanessa E Munro "A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13 New Criminal Law Review 781; and Louise Ellison and Vanessa E Munro "Better the Devil You Know? 'Real Rape' Stereotypes and The Relevance of a Previous Relationship in (Mock) Juror Deliberations" (2013) 17 E&P 299.

In a context in which critics had rightly criticised the previous law for encouraging a focus on the behaviour of the complainant rather than the defendant, it had been hoped that the legislative shift marked by the Sexual Offences Act 2003 would have provided a counter-balance. But across the studies there was little sign of this within the jury room. Indeed, the behaviour of the complainant before, during and after the attack continued to be a primary focus of discussion. Amongst the behaviours that jurors highlighted as indirectly communicating her willingness to engage in intercourse were: offering/accepting a lift, inviting the accused into her home, remaining in the accused's company for a prolonged period, paying/receiving compliments, drinking alcohol, sharing a goodnight kiss, and using sexual innuendo.[35] Talk of "leading the accused on" and "sending mixed signals" were often linked to such behaviours, along with attributions of responsibility for the fact that she was "foolish" or worse for having done so.

And while some jurors did try to distinguish the complainant's previous conduct from the sexual signals that it may or may not have transmitted and the actuality of her sexual consent, many struggled to maintain this separation. This was reflected, for example, in the comment by one female juror in the third study that: "I don't think she gave consent, but I think there was some consent there."[36] Similarly, in response to a peer's assertion that there is nothing "wrong" with inviting a colleague back to your home, another female juror responded: "no, there isn't anything wrong with it, but what is behind the thought of inviting somebody back to your house in the evening — a male person?"[37] Thus, despite accepting, in principle, that any signalling behaviour cannot supplant the need for consent, many jurors were reluctant to abandon this logic altogether, at least in assessing any belief in consent held by the defendant.

In intoxication scenarios, in particular, complainants who "got themselves" into a drunken state were often seen as partially, if not completely, responsible for any subsequent sexual interaction, and even those to whom intoxicants were administered surreptitiously were often still criticised for not taking adequate care of their host substance. Meanwhile, defendants who

35 Ellison and Munro "Of 'Normal Sex' and 'Real Rape'", above n 23, at 295

36 At 296.

37 At 296.

pressured a complainant to drink, or even gave her additional alcohol without her knowledge, were often approached sympathetically for invoking a well-trodden, if not exactly commendable, strategy of using alcohol to "loosen up inhibitions".[38] As one juror put it, for example:[39]

> … you might think yeah, that is very unreasonable but, from his point of view, you might think it's not as unreasonable and the fact that she is at a party, she does look and appear to be drunk, she hasn't told him no, and from the other person's point of view it might look like he's not being unreasonable.

Across all the studies, then, male sexual initiative was often seen as inevitable and as offering its own justification. An onus was placed on women both to appreciate that men would be monitoring their behaviour for evidence of sexual "signals" and to police their own responses accordingly, forcefully and unequivocally where needed. Indeed, the notion that the defendant might have been "so passionate and into it" or "so transfixed" that he would not be able to "register what she was actually doing" was often put forward.[40] Amongst the most striking expressions of this came from one juror who asserted: "a woman can stop right up to the last second … a man cannot, he's just got to keep going, he's like a train, he's just got to keep going".[41]

And these expectations from jurors about how a "credible" victim — that is, one deserving of sympathy and without a taint of contributory responsibility — would act extended not only to the period before and during the attack but also to its aftermath. In the second study in which a complainant waited three days before reporting to the police, for example, this delay presented a significant stumbling block to credibility for many jurors, who were adamant that their instinctive reaction would have been to report immediately.[42] And even in the third study where the delay before reporting was only around thirty minutes, it continued to be a source of consternation. Some jurors

38 Finch and Munro "The Demon Drink and the Demonised Woman", above n 22, at 604. For wider discussion of issues around intoxication and consent, see also Finch and Munro "The Sexual Offences Act 2003", above n 29; and Emily Finch and Vanessa E Munro "Intoxicated Consent and the Boundaries of Drug Assisted Rape" (2003) Crim L R 773.

39 Finch and Munro "Breaking Boundaries?", above n 21, at 318.

40 Ellison and Munro "'Of 'Normal Sex' and 'Real Rape'", above n 23, at 297.

41 At 298.

42 Ellison and Munro "Reacting to Rape", above n 23, at 209.

felt it was "strange" that she had delayed making the call, and "odd" that she had opted to change her clothes in that intervening period but not go for a shower.[43]

IV MOVING FORWARD: FUTURE REFORM OR REMOVAL OF THE JURY?

So, on the whole, it is fair to say that these studies do not give cause for much complacency, let alone confidence, regarding the ways in which jurors approach their deliberative task. As Conley and Conley have observed, jurors — particularly in rape trials — "hear fragmentary and often conflicting accounts of highly contested events"[44] and it is hardly surprising then that they fill gaps, construct stories and make sense of their conclusions through the use of "unofficial" rules and heuristic devices informed by personal, and what is perceived as common, experience.

But this is not an issue that is unique to the rape trial. Many of the unofficial rules, conventions and experiences reflected in participants' contributions across the four studies tap into wider narratives about the normative dynamics of heterosexual relationships and the capricious nature of women's agency, whilst endorsing stereotypical conventions of men as active and women as paradoxically passive but also capable enforcers of personal boundaries. These narratives may also play a crucial role in other contexts in which jurors are tasked with dispensing justice in response to allegations of gender-based harms. Thus, while to date, the focus of jury research has overwhelmingly been on rape offences, and not without good reason — it is important that the findings that emerge in that context are not thought to exist in a ghetto.

To give but one contemporary example, in England and Wales and more recently in Scotland, dedicated "coercive control" offences have recently been created. These are intended to respond, through the criminal law, to situations in which, within domestic relationships, an accused relies on non-physical forms of abuse in order to humiliate or intimidate another person, or to make them subordinate and/or dependent by isolating them from sources of support, exploiting their resources for personal gain, depriving them of the means needed for independence, resistance and escape, or regulating the minutiae

43 Ellison and Munro "'Telling Tales'", above n 25, at 219.

44 Robin H Conley and John M Conley "Stories from the Jury Room: How Jurors Use Narrative to Process Evidence" (2009) 49 SLPS 25 at 31.

of their everyday behaviour.[45] Prosecutions under these offences are still in their infancy. It is not hard to imagine, however, that jurors might struggle to determine appropriately the point at which certain forms of conduct — which might be read by some as chivalrous and protective, albeit clearly over-zealous — cross over into a form of psychological or emotional abuse that merits criminalisation. It is quite feasible that unofficial rules grounded in the same sort of hetero-normative conventions regarding relationship and communication norms, and expectations of resistance and reporting by victims, will be relied upon here as have been in rape cases. It is important, therefore, to continue to see sexual and family violence, and indeed all violence against women, as related in this way, and to reflect on the challenges posed by, and to, the jury in this patriarchal frame.

All of that said, I do not think it is entirely doom and gloom. As I noted at the outset, there have recently been calls to remove the jury from sexual offence cases or at the very least to screen and bar certain individuals from participation on the basis of attitudinal responses. For me, both these proposals are still premature. It is not often that I find myself agreeing with Lord Devlin, but it is right I think that the importance of having lay participation — in the form of the jury — at the heart of our justice system should not be dismissed lightly; and certainly not until it is clear — based on rigorous and transparent research — that its flaws are too substantial to be overcome. There is still, in my view, a good deal more that we could do to ensure that we have given the jury a fair opportunity to dispense justice in rape cases. Amongst other things, that includes preparing jurors and forepersons more appropriately for the practical and emotional challenges of their role; and equipping prosecutors with the resources to build cases in which they can proactively challenge defence strategies grounded in dubious assumptions about normal victim behaviour and be confident in supporting complainants to contextualise their own responses so that they are intelligible to jurors. It also involves encouraging judges to embrace it as part of their role to manage the tone of a trial and intervene actively when necessary to ensure questioning strategies are appropriate, that jurors do not hear irrelevant information that it will be realistically impossible for them to unremember from the narratives they construct of the case before them, and that the directions that they receive

45 Serious Crime Act 2015, s 76; and Domestic Abuse (Scotland) Act 2018.

are truly useful.

There is no question that, across these studies, there have been several occasions when I have felt frustrated and shocked by how participants have approached their deliberative task and been deeply concerned regarding the assumptions about socio-sexual behaviour that some of them have relied upon. At the same time, however, I have also consistently observed that, even in simulations, jurors are — for the most part — genuinely trying to do their best when tasked with an incredibly difficult challenge. And importantly, there is some evidence which suggests that, to the extent that jurors rely on unfounded stereotypes and myths about sexual violence, these *may* be amenable to at least some level of change. For example, in our second study, in which we explored the impact of giving jurors education regarding the frequency with which, and reasons why, complainants fail to physically resist, delay reporting, or display a calm demeanour at trial, we saw a substantial shift in attitudes and tone in respect of the delay and demeanour variables. This was reflected in a reduction of approximately one half in the number of jurors who said — after being provided with education on these points — that it would have made a difference to them if the complainant had reported sooner or been more visibly upset.[46]

It is true, unfortunately, that we saw no such impact in relation to resistance and injury — some 90 per cent of jurors said it would have made a difference if the complainant had more physical injury, and this remained largely constant regardless of whether they received education.[47] But it is also worth noting that we did not in that study specifically explain that freezing reactions are common not only in stranger but in acquaintance scenarios; and given that it was this that jurors often struggled to countenance, it is possible that more targeted information could have had a more positive impact. Some support for that optimism comes, though at this stage without full analysis of the data to confirm it, from the most recent study in which — while the position is complicated by the existence in Scotland of corroboration rules and a not proven verdict — there seemed to be a different tone to jurors' discussion of resistance, with references to, and adoption of language used in, a campaign

46 Ellison and Munro "Turning Mirrors into Windows?", above n 24, at 369 and 371.

47 At 373.

by Rape Crisis Scotland on freezing responses.[48]

The pre-trial DVD that some campaigners have proposed in England and Wales could certainly have a role to play in this education process. But it cannot be the only response. For one thing, concern over its evidential status inevitably means that it would have to be restricted in its content to substantively uncontroversial claims, for example about the prevalence of acquaintance versus stranger rape, or information about the potential impact of trauma on physical responses and memory recall. Its generic nature also means that it would be likely to cover material of no relevance at all to jurors in respect of the case that comes before them (which may ultimately be confusing or counter-productive). But perhaps most significantly, such pre-trial interventions also risk diverting attention and resource away from broader public education initiatives that disavow citizens of their misconceptions about rape, and about normative sexual behaviour in general, regardless of whether they ever enter the jury room. Though evaluation of such initiatives tends to be small-scale and rarely longitudinal, there is evidence that they can be effective in changing attitudes and so have the potential to not only improve justice outcomes in individual cases of abuse, but to prevent abuse in the first place.[49]

To the extent that the objective is to increase informed discussion within the jury room, another option that has been floated — instead of educating incoming jurors — would be to screen out and exclude the less enlightened.[50] There is, on the face of it, an appeal of simplicity to this proposal. But that simplicity belies, however, the substantial in-roads that such an intervention would make into the role and function of the jury as a vehicle for democratic participation in the administration of justice, and the wider ramifications that this may have across the system. What is more, it may also significantly overstate the accuracy with which such screening could ever be achieved. Whilst research in social psychology has substantially improved the subtlety and nuance of rape myth acceptance questionnaires, the discursive and deliberative dynamics of the jury room are multi-faceted and the task facing jurors is far more complicated than a simple "yes" or "no" response. Thus, even if a connection could reliably be made to show that scores on rape myth

48 For more information see Rape Crisis Scotland "I Just Froze" <www.rapecrisisscotland.org.uk>.

49 Beth Cameron and Liz Murphy *Campaign Evaluation Report: 'This is Not an Invitation to Rape Me"* (Rape Crisis Scotland, March 2008).

50 Willmott, above n 6.

acceptance scales predict how participants will approach the evidence and determine their verdict in a rape case, a screening process based upon this will fail to touch the potentially vast number of additional jurors who do not score highly on such scales but who nonetheless also rely on problematic or ill-informed views within the deliberation process.

This is not simply because people are increasingly adept at identifying what is the socially desirable response to attitudinal prompts about sexual behaviour. The reality is that while it is one thing to renounce a problematic view in the abstract, it is quite another to stick to it in a context in which you are being asked to be sure, beyond reasonable doubt, of the guilt of a person, to reach that conclusion on the basis of competing narratives replete with gaps or inconsistencies, and to not only express that perspective to peers but to convince them of its merits. In one of our studies, my colleague and I asked participants to complete an abbreviated rape myth acceptance scale before deliberating and looked at how jurors' responses did or did not correlate to the positions they then defended in discussions.[51] Admittedly, that is only one study and our findings regarding this relationship were ancillary to our main focus. Nonetheless, in it we found the predictive value of attitudinal responses to be potentially limited. Indeed, while — as I have discussed — there was a strong expectation amongst jurors of resistance against a known assailant, only 11 per cent of those sampled agreed with the statement that "if a woman doesn't fight back you can't really say it was rape". Sixty per cent reported that they strongly disagreed.[52] Meanwhile, only eight per cent agreed with the statement that "a rape probably didn't happen if the woman has no bruises or marks", whilst 65 per cent recorded that they strongly disagreed.[53] Likewise, whilst comments endorsing the inevitability of male sexual initiative and excess were common in the juries, 58 per cent of the jurors sampled reported that they disagreed with the claim that "rape happens when a man's sex drive gets out of control"; 50 per cent claimed to disagree with the suggestion that "men don't usually intend to force sex on a woman but sometimes they get too sexually carried away"; and 67 per cent said they disagreed that "when a man is very sexually aroused, he may not even realise that the woman is resisting".[54] In this

51 Ellison and Munro "A Stranger in the Bushes, or an Elephant in the Room?", above n 34, at 789–794.

52 At 790.

53 At 790.

54 At 793.

light, to see screening jurors based on abstract attitudinal responses as a reliable solution to any difficulties regarding how juries approach their deliberations in rape cases would, I believe, be overly optimistic.

V CONCLUDING REMARKS

In closing, I should note that, while it has yet to be published, there have been early indications in England and Wales that recent work conducted at the instigation of the Judicial College into reliance on rape myths amongst real jurors will paint a rather different picture. It will suggest that concerns about the approach of the jury have been significantly overblown, with the explanation for this lying primarily in the fact that, whilst previous research has relied on mock jurors, there is something transformative about the process of observing a real trial that ensures jurors in the non-experimental context approach their task more diligently, with greater respect for the legal tests set by the judge and no substantial reliance on myths or misconceptions. Indeed, based on fieldwork conducted at court with approximately 500 jurors, the research appears to have found that "only" three per cent reported being of the view that rape had to result in bruises or marks, and "only" five per cent that it could not be rape unless a person fought back.[55]

It is hard at this stage, without yet having had the benefit of seeing the full report — and being able to properly evaluate its underlying data and methodology — to know what to make of this finding. I will be genuinely delighted if the study can convince that there is in, in fact, nothing to worry about: that would mean we can have significantly more confidence in the justice process, will no longer feel equivocal about encouraging victims of sexual violence to report, and will benefit from police and prosecutors being less risk averse perhaps in the complaints (and complainants) that they are willing to put before the jury. But to the extent that this research seems to rely primarily on post-deliberation interviews with jurors, in which they are asked in the abstract about their subscription to rape myths, it runs into many of the same potential difficulties and shortcomings that were raised above in

55 These figures and the use of the descriptor "only" are taken from Sir Brian Leveson's Valedictory Lecture: Sir Brian Leveson, President of the Queen's Bench Division "Criminal Trials: The Human Experience" (University College London, London, 13 June 2019) at 13. He cites these findings, emerging from research by Cheryl Thomas, further discussion of which is featured on BBC Radio 4's Law In Action: Interview with Professor Cheryl Thomas, Professor in the Faculty of Laws at University College London (Joshua Rozenberg, BBC Radio 4, 27 June 2019) audio record provided by BBC.

respect of other studies that rely too heavily on abstract attitudinal statements as proxies for what went on in the deliberation. Furthermore, in a context in which participants are asked about subscription to such myths and whether they informed their deliberations immediately after having returned their verdict in a case, there is perhaps reason to expect that they might be inclined to emphasise their compliance with legal tests and deny — consciously or otherwise — other heuristic devices.

Thus, while I await its publication with interest, I am not convinced that this research will, or indeed should, quell the concerns that have amassed about jury deliberation in rape cases over many decades — not only across the United Kingdom, but internationally. Rather than closing down debate in this area, if anything, what it may do most compellingly is strengthen the case for relaxation of current legislative restrictions, so that researchers can embark more easily on responsible investigations that — through a diversity of rigorous methods — engage with the mechanics and complexity of the real deliberation process and shed light on the jury room. Doing so has its risks, of course, but it may be the only thing that can rekindle liberal law's love of the jury.

AWLA STUDENT WRITING PRIZE WINNER

AFFIRMATIVE CONSENT TO "SEX"
Is it enough?

Rosa Gavey*

Societal norms and discourses surrounding affirmative consent to sexual activity have been gaining rapid traction in recent years. The "no means no" model is no longer viewed as satisfactory. Instead, increasing attention is being placed on education about "yes means yes". This article conducts a critical analysis of feminist arguments for and against an affirmative consent standard. Consent is perceived as a fundamental part of an equal and liberal society where an individual's right to have control over their own body is highly valued. I argue, however, that normative and progressive conceptions of consent are limited. To create substantive change to the criminal justice system (and the rest of New Zealand society) we need to understand that consent is mediated through systemic gendered power relations, which shape our interpretations and perspectives. When consent is understood within the wider societal context of neoliberal governmentality and rape culture, women[1] are not always able to freely consent or not consent to sexual activity.

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1 For the purposes of this article I focus on rape perpetrated by men against women.

I INTRODUCTION

Consent is perceived as a fundamental part of an equal and liberal society, where an individual's right to have control over their own body is highly valued. Societal norms and discourses surrounding affirmative consent to sexual activity have been gaining rapid traction in recent years. The "no means no" model is no longer viewed as satisfactory. Instead, increasing attention is being placed on education about "yes means yes". In this article I will analyse New Zealand's current sexual violence laws and present the argument for an affirmative consent standard. I will then contextualise affirmative consent in relation to actual lived experiences and argue that it does not go far enough for progressive legal reform. Indeed, I will argue that to create substantive change to the criminal justice system (and the rest of New Zealand society) we need to understand that consent is mediated through gendered power relations. These relations shape our interpretations and perspectives and result in women not always being able to freely consent or not consent to sexual activity.

The criminal law needs to grapple with these questions for two reasons. First, the law must provide a more robust platform against defences that treat passive acquiescence, and even forms of resistance, as consent. Secondly, the law must keep pace with social changes that are driven by greater recognition of systemic everyday sexism and women's rights. This article aims to problematise the affirmative consent standard, in our current context, as the next feminist step in rape law reform. By doing so, I intend to complicate normative and progressive conceptions of affirmative consent with the hope of generating future discussion on the most just and appropriate response for the criminal law and society.

II CONTEXT

Sexual violence is prevalent throughout all sectors of New Zealand society. In 2018, the New Zealand Crime and Victims Survey found that one in three women reported experiencing sexual violence during their lifetime.[2] Māori

2 Ministry of Justice *New Zealand Crime and Victims Survey: Key findings — Cycle 1 (March–September 2018) Descriptive statistics* (2019) at 82. The prevalence of sexual violence is difficult to measure. In 2001, a similar study found that almost one in five women reported being the victim of sexual violence, see Allison Morris and James Reilly *New Zealand National Survey of Crime Victims 2001* (Ministry of Justice, May 2003) at 166.

women are over-represented in such statistics.[3] Despite normative societal discourse portraying "real" rape as sexual violence committed by a stranger, the majority are committed by someone known to the victim-survivor.[4] Studies suggest that less than 10 per cent of sexual offences are ever reported to police and only 13 per cent of those result in a conviction.[5] At each stage of the criminal justice process a large proportion of recorded sexual offences drop out with no charges laid, are withdrawn or are quashed on appeal.[6]

III RAPE LAW

In this section I highlight systemic problems with legislative provisions in relation to recent New Zealand cases where consent has been a determining issue, and consider the effect of the "reasonable belief in consent" defence on juries. Section 128(1) of the Crimes Act 1961 defines sexual violation as rape or unlawful sexual connection with another person. These acts become unlawful when connection/penetration occurs:[7]

i) without person B's consent to the connection; and

ii) without believing on reasonable grounds that person B consents to the connection.

In Western prosecution-led systems, consent is often the fundamental decider in adult rape cases, as the lack of consent is determinative of whether the act was lawful or not.[8] In New Zealand, consent is usually left for the jury to determine and while it has to be voluntarily given, reluctantly given consent is

3 Denise Lievore, Pat Mayhew and Elaine Mossman *The scale and nature of family violence in New Zealand: A review and evaluation of knowledge* (Ministry of Social Development, 2007) at 55.

4 Elaine Mossman and others *Responding to sexual violence: A review of literature on good practice* (Ministry of Women's Affairs, October 2009) at 6.

5 Ministry of Women's Affairs *Restoring soul: Effective interventions for adult victims/survivors of sexual violence* (October 2009) at 29 and 31–32; and Bronwyn Morrison, Melissa Smith and Lisa Gregg *The New Zealand Crime and Safety Survey: 2009 — Main Findings Report* (Ministry of Justice, December 2010) at 45.

6 Sue Triggs and others *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, September 2009) at 57.

7 Crimes Act 1961, s 128(2)(a)–(b), (3)(a)–(b).

8 Dana Berliner "Rethinking the Reasonable Belief Defense to Rape" (1991) 100(8) Yale LJ 2687 at 2689; and for a detailed discussion of the "justice gap" in rape cases see Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008).

still regarded by the courts as valid consent.[9] The problem with juries deciding what amounts to consent has been discussed by numerous academics who state that "socially entrenched gender norms", in which men are "sexual actors and women are the subject of men's sexual actions", create a dynamic where women have the burden to avoid dangerous situations.[10] These moral judgements and normative attitudes about how women should behave limit what juries are likely to view as "real" rape.[11] While it is expressly legislated that a lack of resistance does not amount to consent, this is not always reflected in jury determinations.[12] This is because, as Dana Berliner notes, the "objective" evaluation of a lack of consent often equates to juries examining whether the complainant physically resisted.[13]

In a series of recent New Zealand rape trials, juries determined that the complainant either consented to the sexual activity or it was reasonable for the perpetrator to believe that they were consenting.[14] In 2008, Tea Ropati was acquitted of raping a woman who was intoxicated to the point that she was not conscious during the offending (even though s 128A(3)–(4) of the Crimes Act 1961 states that a person cannot consent when unconscious).[15] Ropati's lawyer argued that the woman must have known what was happening as she was able to enter her pin number "to buy round after round of drinks".[16] In 2015, Scott Kuggeleijn allegedly raped a woman by pinning her arms above her head, despite her continued protestations as she tried to pull up her underwear while crying.[17] At trial, Kuggeleijn's lawyer argued that "consent is the key

9 Cassandra Mudgway "Commentary on *R v Sturm* 'Well, What Did You Think Would Happen?'" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino: a Two-Stranded Rope* (Hart Publishing, Oxford, 2017) 447 at 447.

10 At 451.

11 Law Commission *The Justice Response to Victims of Sexual Violence — Criminal Trials and Alternative Processes*, (NZLC E31, 2015) at [1.19]–[1.22].

12 Crimes Act, s 128A(1).

13 Berliner, above n 8, at 2697.

14 Media reports give no indication that the key facts of these cases were contested.

15 Julia Tolmie "New Zealand's Jane Doe" in Elizabeth A Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press/Les Presses de l'Université d'Ottawa, Ottawa, 2012) 53 at 61.

16 David Fisher "A question of consent" *New Zealand Listener* (online ed, New Zealand, 16 February 2008).

17 See Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (2nd ed, Routledge, London and New York, 2019) at 219.

word. It matters not whether it was given joyfully, reluctantly, exuberantly".[18] The jury took less than an hour to come back with a "not guilty" verdict.[19] More recently, James Loads allegedly raped a woman when he hit, choked and had "rough sex" with her, even though she vomited, cried, and pleaded with him to stop.[20] His lawyer argued that because the woman did not use the pair's safe word, "avocado", Mr Loads had reasonable grounds for believing she consented.[21] In 2018, a jury found him not guilty.

In theory, the reasonable belief in consent defence aimed to set a higher standard than the previous common-law mens rea for rape, which was based around the defendant's honest belief in consent.[22] An honest belief in consent only necessitated that the accused demonstrate a genuine belief that the other person consented. There was no requirement that their belief be reasonable. The reasonableness requirement, introduced in New Zealand in 1985,[23] sought to ensure that the defendant's belief that a victim was consenting was one that a reasonable person in the defendant's shoes would also believe.[24] As signalled in the brief descriptions of rape trials above, this does not necessarily play out in its intended form. This is because reasonable belief is informed by "rape culture that glorifies and normalizes male force in sexual relations", as well as victim-blaming attitudes.[25] As a result, in reality the standard does not drastically demarcate itself from that of honest belief in consent.[26]

While Berliner suggests that crying and verbal resistance are signs of non-consent that a reasonable person should pick up on, this was not considered to be the case in both the Kuggeleijn and Loads trials, where their victim's tears and other actions during the offending did not persuade the jury of non-

18 Mike Mather "Consent at heart of cricketer Scott Kuggeleijn's rape trial" *Stuff* (New Zealand, 26 July 2016).

19 Donna-Lee Biddle "Kuggeleijn rape trial: Jury finds cricketer not guilty" *Stuff* (New Zealand, 24 February 2017).

20 Sam Kilmister "Man who initiated rough sex found not guilty of rape and assault" *Stuff* (New Zealand, 22 May 2018).

21 Kilmister, above n 20.

22 Wendy Larcombe and others "'I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law" (2016) 25(5) Soc Legal Stud 611 at 612.

23 Crimes Amendment Act (No 3) 1985, s 2.

24 Larcombe, above n 22, at 614–615.

25 Catharine A MacKinnon "Rape Redefined" (2016) 10 Harv L & Pol'y Rev 431 at 450.

26 Larcombe, above n 22, at 614.

consent.[27] While recognising that this may involve a significant challenge to the usual principles of mens rea, scholars have questioned why the perpetrator's beliefs should be able to determine what amounts to rape, rather than those of the victim-survivors.[28]

IV AFFIRMATIVE CONSENT

Given these problems with how judgements of reasonableness are clouded by prejudicial perceptions of masculine sexuality, womanhood and consent, scholars from around the world have championed an affirmative consent criminal standard. I will analyse whether New Zealand should adopt this standard, by defining affirmative consent and exploring its different theoretical bases.

An affirmative consent standard defines consensual sex as both parties giving free and voluntary consent to the sexual interaction.[29] This shifts the onus from the victim-survivor, who has to articulate her unwillingness, onto the instigator of the sexual activity, requiring them to ensure the other party is actually consenting (rather than waiting for an objection).[30] While New Zealand's current model can arguably be described as one where consent is presumed until the woman expressly and unequivocally withdraws it, affirmative consent instead presumes that there is no consent until she either initiates the sexual activity or is asked and responds affirmatively.[31] As a result, under affirmative consent, silence is not indicative of a woman's willingness to engage in sexual acts and sexual ambivalence is assumed to mean a refusal.[32] Some scholars argue affirmative consent requires verbal evidence of an express voluntary agreement, such as "yes" or its equivalent,[33] while others believe affirmative consent can manifest in non-verbal forms, such as the conduct

27 Berliner, above n 8, at 2705.

28 Larcombe, above n 22, at 618; and Mackinnon, above n 25, at 450.

29 Nicholas J Little "From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law" (2005) 58 Vand L Rev 1321 at 1345.

30 See Berliner, above n 8, at 2702; and Chandler Delamater "What Yes Means Yes Means for New York Schools: The Positive Effect of New York's Efforts to Combat Campus Sexual Assault through Affirmative Consent" (2015) 79 Alb L Rev 591 at 605.

31 Little, above n 29, at 1347.

32 At 1347.

33 Lani Anne Remick "Read Her Lips: An Argument for a Verbal Consent Standard in Rape" (1993) 141(3) U Pa L Rev 1103 at 1105; and Ilene Seidman and Susan Vickers "The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform" (2005) 38 Suffolk U L Rev 467 at 485.

of the parties.[34] Lucinda Vandervort suggests that communication of consent "may consist of either words or conduct but must be express, explicit, and unambiguous".[35]

Proponents of affirmative consent argue that rather than focusing on "no means no", the mantra of "yes means yes" promotes and affirms women's rights to "sexual autonomy, sexual self-determination, and equality".[36] Under this standard, women are no longer "viewed as inherently passive subjects of men's sexual acts"[37] and instead are viewed as an equal partner in sexual relations.[38] Affirmative consent eliminates the presumption that women are always consenting[39] and instead presumes men must inquire into the woman's wants and desires, enabling women to take control of their bodies[40] protecting their bodily autonomy.[41]

Scholars have noted that the "yes means yes" model, unlike the "no means no" model, takes into account the different ways in which victim-survivors react to assaults,[42] which is important because, as the Law Commission states, "there is no 'typical' victim response".[43] Affirmative consent, by placing the "burden of communication" on the instigator, also enables the law to take into account the "emotional complexity" of the situation.[44] Further, Nicholas Little argues affirmative consent incentivises rational behaviour in both men and women. It would encourage men to ascertain and respect their partner's desires and it would encourage women to indicate their willingness directly.[45]

In 1992, Canada codified their affirmative consent standard under s 273.1 of the Criminal Code 1992, requiring consent to be "the voluntary agreement

34 Lucinda Vandervort "Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory" (2012) 23 Colum J Gender & L 395 at 402.

35 At 402.

36 At 398.

37 Mudgway, above n 9, at 454.

38 Little, above n 29, at 1336.

39 Delamater, above n 30, at 606.

40 At 613.

41 See Katherine K Baker "Gender and Emotion in Criminal Law" (2005) 28 Harv J L & Gender 447 at 451.

42 Michelle J Anderson "Negotiating Sex" (2005) 78 S Cal L Rev 1401 at 1405.

43 Law Commission, above n 11, at [1.15].

44 Baker, above n 41, at 450–451.

45 Little, above n 29, at 1350.

of the complainant to engage in the sexual activity in question". Subsequent Canadian cases developed these amendments further. *R v Ewanchuk* is the leading Canadian Supreme Court authority, which confirms that "only yes means yes" and silence is not an indication of consent.[46] Additionally, the Court held that consent was to be determined from the subjective position of the victim-survivor.[47]

In New Zealand, the Supreme Court recently considered whether consent must be actively expressed under our current law.[48] While the Court of Appeal concluded that there was a requirement for positive expressions of consent, the Supreme Court overturned this finding.[49] Young, Glazebrook, O'Regan and Ellen France JJ stated that:[50]

> While a failure to protest or offer physical resistance does not, of itself, constitute consent and something more is required, that "something more" may be something other than a positive expression of consent.

The Court accepted the defendant's argument that if there were to be a change in rape laws, these must be made by Parliament, otherwise the courts would be legislating.[51]

Under an affirmative consent standard, the prosecutors in the rape trials of both Kuggeleijn and Loads would have been able to argue that from the complainants' verbal and non-verbal conduct it would not be reasonable to infer a "yes". There were no actions directly at the time of the offending that indicated that the women were actively consenting to penetration. Therefore, while these allegations proved to be contestable under our current law, proponents of affirmative consent would see them as open and shut cases. I argue that while this would be an ideal outcome, in reality an affirmative consent standard is not without its limitations and does not always play out in its intended manner.

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46 *R v Ewanchuk* [1999] 1 SCR 330; and Lise Gotell "Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: A Critique of the Critique of Carceral Feminism" in Anastasia Powell, Nicola Henry and Asher Flynn (eds) *Rape Justice — Beyond the Criminal Law* (Palgrave MacMillan UK, Hampshire, 2015) 53 at 62.

47 Vandervort, above n 34, at 429.

48 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315.

49 At [5(c)].

50 At [5(c)].

51 At [24]. See for further discussion on this case, Emily Blincoe "Yes, no or maybe? The 'odd' result in *Christian v R*" (2018) 2 NZWLJ 265.

V AFFIRMATIVE CONSENT: A CRITIQUE

While affirmative consent has been characterised as a "feminist imposition on criminal law", increasingly some feminist scholars have argued that it does not go far enough to address sexual violations.[52] In this section I will examine critiques of affirmative consent and argue that affirmative consent should not be an end goal, rather it should merely be a stepping-stone on the way to more radical rape law reform.

A Neoliberal governmentality and systemic power relations

Lise Gotell argues that affirmative consent can be seen as a form of neoliberal governmentality, where normative, rational, autonomous subjects interact in a "transactional sexual economy".[53] Affirmative consent, understood in the context of neoliberal governance, places the onus on women to self-manage and adhere to certain practices to ensure their own safety.[54] These issues are contested among feminists. Liberal feminists, for example, would presume that under this standard women would have a voice that is equal to that of men. What this fails to see are the ways in which societal norms and systemic power relations constrain the ability to give or not give affirmative consent.

Catharine MacKinnon argues that rape should be viewed as a crime of gender inequality[55] in which men are actors and women are acted upon.[56] The presence of affirmative consent, she argues, does not make the interaction equal[57] as we live in a society of unequal power relations, where certain groups have more power than others.[58] Men, conforming to hegemonic notions of masculinity, have entitlements that "need" to be met by women and this dynamic results in the domination of women.[59] Gotell contends that rape is a "mechanism" for sustaining these systemic and unequal power relations.[60] Even

52 Lise Gotell "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41(4) Akron L Rev 865 at 866.

53 At 866.

54 Gotell, above n 46, at 68.

55 MacKinnon, above n 25, at 431.

56 At 440.

57 At 440.

58 At 442.

59 Gavey, above n 17, at 304–305.

60 Gotell, above n 46, at 63.

when women believe they are freely consenting, they can be constrained by normative ideas of womanhood and they may not recognise these constraints because "forced trade-offs" become so routine.[61] This also relates to what Jody Raphael has described as the difference between voluntary sexual activity and the wantedness of that sexual activity.[62]

I argue that neither our current system nor affirmative consent legally recognise the systemic gender inequality present in our society. Placing emphasis on consent is not enough, as consent operates within normative patterns of gendered power relations. For example, Nicola Gavey has argued that under an affirmative consent standard, consent could become a tick-box category and may result in a man pressuring a woman for consent to sex, rather than for sex itself.[63] This highlights the inherent limitations of the concept of consent. In the legal context it is used to replace authentic desire but in reality "sex that is actually desired or wanted or welcomed is never termed consensual. It does not need to be; its mutuality is written all over it in enthusiasm".[64] Consent is not a measure of a woman's desire to have sex, rather it is a measure of whether she agrees and/or concedes.[65] MacKinnon's example, where someone states "[w]e had a great hot night, she (or I or we) consented" demonstrates the absurdity of this legal use of consent.[66] In the same vein, one would never ask a person to dinner and say, "do you consent to coming over?" Just like in sexual activity, the word consent implies a level of initial reluctance and resistance, in which the instigator has to try and persuade the other person to agree. MacKinnon draws a connection between a surgeon requesting consent to cut someone and the legal concept of consent in relation to sexual violation: they are both prefaced on the question, "[i]s it all right if I do this to you?"[67] In this case a woman's agency only takes the limited form of responding to the request.[68]

61 MacKinnon, above n 25, at 447.

62 Jody Raphael *Saving Bernice: Battered women, welfare, and poverty* (Northeastern University Press, 2015) at 49.

63 Gavey, above n 17, at 220.

64 MacKinnon, above n 25, at 450.

65 Gotell, above n 46, at 62.

66 MacKinnon, above n 25, at 450.

67 At 465.

68 Ann J Cahill "Unjust Sex vs Rape" (2016) 31(4) Hypatia 746 at 756.

B Rape culture and the risky woman

Rape culture embodies these normative power relations and is pervasive in modern Western societies. In Victoria, Australia, recent analysis of how their "communicative model" of consent works in practice[69] indicates that juries continue to be influenced by societal norms and rape culture.[70] Furthermore, in *Worsnop v R*, the Victorian Court of Appeal found that the law reform which intended to introduce an affirmative consent standard for rape had not changed the law in the way intended, meaning that an honest belief in consent prevailed.[71] Within rape culture and neoliberal governmentality:[72]

> … discourses of responsibilization and risk management … constitut[e] the ideal victim as the rape-preventing subject who exercises appropriate caution (yet fails) and the normative masculine sexual subject as he who avoids the risk of criminalization through securing consent.

An affirmative consent standard impacts what is seen as "good victimhood" by recasting vulnerability as responsibility.[73] Women are expected to manage the risk of sexual violence and ensure their own safety by exerting a level of agency that is not always realistic or reasonable. Risk as a governing technology is inherently gendered.[74] The risky woman, as described by Gotell, is a woman who places herself in situations where she is confronted by the "ever-present risk of sexual violence" and who fails to responsibly moderate her own behaviour.[75] Even in Canada, which has affirmative consent provisions, women are still criticised for failing to act assertively and respond quickly to sexual threats.[76] Under affirmative consent, the "risky woman slides into the traditional place of the promiscuous woman".[77] Therefore, vulnerabilities produced by unequal

69 This is another name for the affirmative consent standard. The Australian state of Victoria introduced these law reforms in 2007, see Crimes Amendment (Rape) Act 2007 (Vic).

70 Anastasia Powell and others "Meanings of 'Sex' and 'Consent': The Persistence of Rape Myths in Victorian Rape Law" (2013) 22(2) Griffith L R 456 at 460.

71 *Worsnop v R* [2010] VSCA 188, (2010) 28 VR 187 at [28]–[35]; and see for further discussion on this case, Wendy Larcombe "*Worsnop v the Queen*: Subjective Belief in Consent Prevails (Again) in Victoria's Rape Law" (2011) 35 Melb U L Rev 697.

72 Gotell, above n 52, at 866.

73 At 867.

74 At 878.

75 At 879.

76 Gotell, above n 46, at 63.

77 Gotell, above n 52, at 882.

power relations disappear when "filtered through norms of risk management".[78] Affirmative consent decontextualizes notions of responsibility and choice, which creates particular issues for marginalised women.[79]

Gotell notes, for instance, that "[s]ystemic relations of race, class and gender, silenced in judicial discourses of affirmative consent, interact to construct some women's bodies as violable".[80] This means that marginalised women are often not afforded the same ability to be seen as "rational" actors, and are instead disqualified and viewed as risky subjects.[81] In the Canadian case *R v Edmondson*, three white men supplied a 12 year old Aboriginal girl with alcohol and proceeded to engage in sexual activity with her while she was intoxicated and passed out.[82] Only one perpetrator was convicted and conditionally sentenced to two years served in the community. In this case, Gotell argues that sexist and racist discourses were used to discount the young, aboriginal complainant's vulnerability and instead portray her as a risk-taking and irrational "threat" who was herself responsible for the violation.[83] This also worked to excuse the behaviour of the white perpetrators, whose deviations were seen as only a temporary departure from their general adherence to responsible neoliberal citizenship.[84]

In a New Zealand context, Māori women are over-represented as victim-survivors of sexual violence.[85] Under coloniality, in which Western European law is presupposed as legitimate, Gotell would argue that Māori women are viewed as non-conforming and "risky" subjects, for whom an affirmative consent standard, with its neoliberal lens of individual autonomy, risks re-entrenching unrealistic and culturally insensitive standards of sexual engagement.[86] This does not accord with Māori practices more specifically, which recognise that sexual violence does not result in just one victim, rather it is a "violation of [the

78 Gotell, above n 46, at 64.

79 At 64.

80 Lise Gotell "Canadian sexual assault law – Neoliberalism and the erosion of feminist-inspired law reforms" in Clare McGlynn and Vanessa E Munro (eds) *Rethinking rape law: International and comparative perspectives* (Routledge, London, 2010) 209 at 218.

81 Gotell, above n 52, at 890.

82 *R v Edmondson* [2005] SKCA 51, [2005] SJ 256.

83 Gotell, above n 52, at 891 and 893.

84 At 894.

85 Lievore, Mayhew, and Mossman, above n 3, at 55.

86 Gotell, above n 52, at 890–894.

victim's] tipuna and her future generations".[87]

VI CONCLUSION

Consent to sexual relations should not be a flexible legal concept, but time and time again judges and juries are acquitting men under our current consent standard. In this article I have argued that although an affirmative consent standard is often proposed as a feminist improvement on New Zealand's current rape law, it has its own limitations and weaknesses. A more radical and nuanced feminist approach challenges the foundations and adequacy of this standard and highlights how consent is constructed within a neoliberal framework that privileges personal autonomy without recognising the systemic constraints on women's ability to freely choose.

Any legal reform must work alongside broader social change that aims to tackle rape culture and systemic unequal power relations.[88] Feminists cannot yet turn their backs on the criminal justice system, however, as this could lead to "re-privatisat[ion] of sexual violence".[89] Instead, feminist-proposed legal reforms must be investigated further.[90] Other legal reforms could include revising sentencing guidelines, for example by lowering the maximum sentence of 20 years,[91] as this could enable juries and judges to more easily convict all forms of rape and not just the "scandalous" ones.[92] This would necessitate expanding the options for non-carceral consequences for some convicted defendants. Within our current context, an affirmative consent standard in rape law will not be enough for those seeking justice through our criminal justice system. While it could be a small step in the right direction, without legal and societal recognition of systemic and unequal gendered power relations, affirmative consent will not be the progressive feminist intervention originally intended.

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87 Leonie Pihama and Huriana McRoberts *Te Puāwaitanga o te Kākano A Background Paper Report* (Māori and Indigenous Analysis Ltd for Te Puni Kōkiri, 2009) at 14.

88 Powell, above n 70, at 477; and Elisabeth McDonald "From Real Rape to Real Justice? Reflections on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 508.

89 Gotell, above n 46, at 54.

90 See Wendy Larcombe "Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law" (2011) 19 Fem Leg Stud 27 at 27–45; and McDonald, above n 88, at 489.

91 Crimes Act, s 128B.

92 See Gotell, above n 46, at 67; and see, for a discussion of potential legal reforms, Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

COMMENTARY — HE PITO KŌRERO

THE SEXUAL VIOLENCE PILOT COURT

Fiona Culliney and Kate Fitzgibbon*

I INTRODUCTION

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

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

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

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

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

II BACKGROUND AND OBJECTIVES

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

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

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

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

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

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

4 At iv.

5 At [18].

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

A Length of time until trial

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

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

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

6 At [4.3].

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

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

9 At [4.3] and [4.8].

10 At [4.3] and [4.13]–[4.14].

11 At [4.3] and [4.9].

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

B Cross-examination

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

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

III THE PILOT — HOW IT FUNCTIONS

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

12 At [4.8] and [4.15].

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

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

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

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

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

i) to improve case and trial management;

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

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

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

A Training and specialisation

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

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

B Active case management

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

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

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

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

19 At 14.

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

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

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

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

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

22 At 29.

23 At 29.

24 At 32.

25 At 32–33.

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

27 At [23].

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

C Resourcing

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

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

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

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

28 At [21].

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

30 At 28.

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

32 Allison and Boyer, above n 7.

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

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

A Time to trial

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

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

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

33 At 17.

34 At 44.

35 At 76.

36 At 44.

37 At 31.

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

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

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

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

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

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

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

41 At [8.2].

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

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

44 Environmental Science and Research Laboratory.

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

B Cross-examination of complainants

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

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

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

As long as sexual violence prosecutions remain adversarial, cross-

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

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

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

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

V LOOKING FORWARD

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

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

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

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

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

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

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

COMMENTARY — HE PITO KŌRERO

A SNAPSHOT OF THE LAW COMMISSION'S SECOND REVIEW OF THE EVIDENCE ACT 2006

Fine lines to draw in sexual violence cases

Luke Elborough[*] and Cheyenne Conroy-Mosdell[**]

I INTRODUCTION

Sexual violence is an area of criminal justice fraught with challenges. The proper detection, investigation and prosecution of perpetrators is imperative. Minimising the risk of re-traumatising complainants through their necessary participation in the criminal justice system is similarly paramount. This will ensure individual wellbeing and recovery, and advance the legitimacy of the criminal justice system as the appropriate means of addressing the harm caused by such offending. Simultaneously maintaining the dignity of the complainant and upholding the fair trial rights of an accused is no easy balance to strike, when the complainant must be empowered and the accused is presumed innocent until proven guilty.

The Law Commission's 2019 report, *Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006*, made a number of recommendations to improve the Evidence Act 2006 (the Act), regarding the rules of evidence in sexual violence cases.[1] The Government is progressing six of the recommendations through a Sexual Violence Bill and also intends to progress

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** LLB(Hons). All views are the authors' own and do not represent the views of any organisation they are associated with.

1 Law Commission *Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) [2019 Review]. This is in contrast to the Law Commission's earlier focus on alternative justice processes, demonstrated in Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) and Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) [2015 Report].

two more.[2] The proposed reforms are intended to improve complainants' experiences. This commentary focuses on the Law Commission's review of four key areas: s 44 and sexual experience evidence; recorded evidence at retrial; judicial intervention in unacceptable questioning; and judicial directions to tackle myths and misconceptions in sexual violence cases.[3]

II EVIDENCE OF SEXUAL EXPERIENCE UNDER SECTION 44

Section 44 of the Act limits the admission of evidence of a complainant's sexual experience in sexual cases. Subsections (1) and (2) provide that no evidence can be given, and no question can be put to a witness, relating directly or indirectly to:

i) the sexual experience of the complainant with any person other than the defendant, except with the permission of the judge;[4] and

ii) the reputation of the complainant in sexual matters.[5]

Under the Act, a defendant has the right to scrutinise the evidence of the complainant, including the sexual experience of the complainant with the defendant. The purpose of s 44, commonly referred to as a "rape shield" provision, is to protect complainants from unnecessarily intrusive questioning about their sexual history, and to prevent the use of reasoning based on "erroneous assumptions arising from a complainant's previous sexual history".[6] The Law Commission recommended extending s 44 to limit the admissibility of all evidence of the complainant's propensity in sexual matters, including previous sexual experience with the accused, and extending the protections to general sexual disposition evidence. The Law Commission proposed replacing s 44 with:[7]

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2 *Government Response to the Law Commission report: The Second Review of the Evidence Act 2006 Te Arotake Tuarua I te Evidence Act 2006* (September 2019) [*Government Response*].

3 The family violence recommendations are outside the scope of this commentary.

4 Evidence Act 2006, s 44(1).

5 Section 44(2).

6 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 [*B v R*] at [53]; and Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [320].

7 2019 Review, above n 1, cl 14 of the draft bill at Appendix 1.

> **44 Evidence of sexual experience or sexual disposition of complainants in sexual cases**
>
> (1) In a sexual case, unless a Judge gives permission, no evidence can be given and no question can be put to a witness that relates directly or indirectly to—
>
> (a) the sexual experience of the complainant with the defendant (except to establish the mere fact that the complainant has sexual experience with the defendant):
>
> (b) the sexual experience of the complainant with any person other than the defendant:
>
> (c) the sexual disposition of the complainant.
>
> …
>
> (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters, including the reputation for having a particular sexual disposition.
>
> (3) The Judge must not grant permission under subsection (1) to bring the evidence or ask the question unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

In a decisive step, the Government is progressing the proposed amendments to make it clear that evidence of the complainant's reputation for having a particular sexual disposition should be barred, and that evidence of a complainant's sexual experience with the defendant (apart from the fact of that sexual experience), and of the complainant's sexual disposition more generally, is only admissible with the judge's permission if it satisfies the "heightened relevance test".[8]

A Complainant's sexual experience with the defendant

The admissibility of evidence of previous sexual relations between the complainant and the defendant is presently only governed by the general

8 *Government Response*, above n 2, at 4.

admissibility requirements in ss 7 and 8 of the Act. The Law Commission recommended that s 44 be amended so that evidence of a complainant's sexual experience with a defendant could only be admissible with the judge's permission, where the evidence is of such direct relevance that it would be contrary to the interests of justice to exclude it (heightened relevance test).[9] In the recommendation, the heightened relevance test would only control evidence about the nature and details of the sexual experience between the parties, and not the fact the complainant and defendant had a previous sexual relationship.[10]

Sexual cases predominantly involve offenders who are known to the complainant.[11] Especially in relationships of an intimate nature, there is a real risk of an assumption that "a woman who has engaged in consensual sexual intercourse with a *particular man* is more likely to do so at another time with *that same man*",[12] and therefore that she may have actually consented to the conduct she has now complained about. Introducing sexual history evidence during trial may therefore divert the jury's attention "from the behaviour of the defendant at the time of the alleged offence, to the behaviour of the complainant

9 2019 Review, above n 1, at R4 and [3.43]. Currently, s 44A sets out the requirements for an application under s 44(1) to offer evidence or ask any question about the sexual experience of the complainant. There is currently no requirement for the notice to specify the grounds relied on for admission of the evidence, despite being recommended by the Law Commission in 2013 (Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 138, R14). Nevertheless, r 2.13(c) of the Criminal Procedure Rules 2012 governs the requirement that grounds be provided when making an application. To enhance access to justice within the law of evidence, however, the Law Commission recommended the section in the Act be amended. The Government has accepted and intends to progress this amendment.

10 At [3.52].

11 See Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) at 5, which records that according to the 2012 Personal Safety Survey conducted in Australia, approximately 16 per cent of women had experienced sexual offences by a known person, compared to five per cent by a stranger. In a study of 400 rape cases in the United Kingdom, 70.7 per cent were committed by someone known to the victim. See also Ministry of Justice *2014 New Zealand Crime and Safety Survey — Te Rangahau o Aotearoa Mō Te Taihara Me Te Haumarutanga 2014 Main Findings* (2015) at 47, where, in 2013, 0.9 per cent of all adults were the victim of a sexual offence by a stranger, while 1.1 per cent of adults were the victim of a sexual offence committed by a current or former intimate partner; 0.2 per cent of adults were the victim of a sexual offence by another family member; and 1.3 per cent of adults were the victim of a sexual offence by someone known to them who is not a family member (such as a colleague, flatmate or friend).

12 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 213–214, citing Hart Schwartz "Sex With the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1994) 31 CR (4th ed) 232 at 253 (emphasis in original).

on earlier, unrelated occasions".[13] This is contrary to the overarching policy of the provision: to prevent the use of erroneous assumptions based on sexual history.[14] This is exacerbated where sexual experiences occur in the context of intimate partner violence where coercion and fear may have been normalised.

Significantly, the Law Commission noted that neither the judges on the judicial advisory committee to the 2019 Review, nor the two judges from the Sexual Violence Court Pilot, all of whom have had the benefit of impartially observing the current provision in practice, supported the recommendation to extend s 44. Notably, "[t]hey were less concerned about a heightened relevance test controlling [such evidence] if there [was] an exception for evidence of *the fact* of a previous sexual relationship, as distinct from evidence of the nature and details of that relationship".[15]

The challenge is enabling the defendant to exercise their right to have evidence of the sexual experience of the complainant with the defendant appropriately presented and scrutinised, but in a way that reduces the prejudice to the complainant. Overall, it is a compelling argument that the risk of illogical reasoning about the complainant's behaviour, based on their previous sexual experience with the defendant, justifies greater legislative control than reliance on ss 7 and 8 alone. A heightened relevance threshold would require the judge and counsel to consciously enquire into the direct relevance of the evidence to the question of consent or reasonable belief in consent on the occasion in question. In appropriate cases such evidence will be admissible, and in others it will not.

B Sexual disposition evidence

The Law Commission recommended that s 44 be amended to govern the admissibility of sexual disposition evidence and that such evidence should be subject to the heightened relevance test, but that evidence of a complainant's reputation for having a particular sexual disposition be inadmissible.[16]

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13 Law Commission *Evidence: Reform of the Law* (NZLC R55 vol 1, 1999) at [184].

14 See 2019 Review, above n 1, at [3.17].

15 At [3.42] (emphasis in original).

16 At R3. In illustration of examples of sexual disposition evidence, the Law Commission refers to a recording of sexual fantasies in a personal diary or evidence of sex toys in the complainant's bedside cabinet, which the complainant uses privately but not with the defendant or others. This is evidence that is captured by the complainant's propensity in sexual matters yet does not appear to be captured by the terms "sexual experience … with any person" or "reputation".

Recent case law has highlighted several concerns as to how sexual disposition evidence should be dealt with under the Act, most notably the Supreme Court's decision in *B (SC12/2013) v R*.[17] Although the Court unanimously held the proposed evidence about the sexual disposition of the complainant that did not involve other persons was inadmissible, three separate judgments were issued, each expressing a different view as to how the Act should treat such evidence. The majority suggested that evidence of sexual disposition may fall within the term "sexual experience" in s 40(3)(b), but not within the narrower phrase "sexual experience … with any person" in s 44(1).[18] Moreover, because sexual disposition is not specifically referred to in s 44, it is arguable that evidence of sexual disposition cannot be led at all.[19] Elias CJ and William Young J critiqued this suggestion.[20] The majority ultimately concluded that s 44 "needs further legislative clarification".[21]

There is a real risk in sexual cases of illogical reasoning about the complainant's behaviour based on evidence of their sexual disposition, which justifies greater restrictions than the general admissibility requirements in ss 7 and 8. However, such evidence may be of direct relevance to the proceeding. For example, the prosecution may wish to offer evidence as to the complainant's sexual orientation.[22] Alternatively, the defence may wish to offer evidence of the complainant's sexual fantasies, perhaps in a complainant's diary or online dating profile. Most submitters, including both prosecution and defence practitioners, considered evidence of sexual disposition should therefore not be barred in its entirety and should be admissible subject to the heightened relevance test.[23] The Law Commission accordingly made that recommendation.[24]

The concepts of experience, reputation and disposition, however, although "analytically distinct, … may overlap in practice" and create

17 *B v R*, above n 6.

18 At [56] per McGrath, Glazebrook and Arnold JJ.

19 At [56]. Their Honours then stated "[s]uch an outcome seems consistent with the policy underlying s 44 and other rape shield provisions".

20 See [119]–[128].

21 At [57].

22 2019 Review, above n 1, at [3.14] and [3.22].

23 At [3.13]–[3.15].

24 At R4 and [3.22].

problems in the application of the Law Commission's recommended approach under s 44.[25] As the majority in *B v R* observed, "evidence of a complainant's sexual experience with others may also relate 'directly or indirectly' to the complainant's reputation in sexual matters".[26] In practice, the Law Commission's recommended amendment may therefore introduce tension. In order to address this tension, in applying the recommended s 44, subs (3) should trump the judge's discretion under subs (4). This would ensure that any evidence relevant to the sexual disposition of the complainant would be barred if it directly or indirectly related to the complainant's reputation in sexual matters, as reputation evidence should never be treated as relevant to whether a defendant believes a complainant is consenting on one particular occasion. Evidence of the complainant's reputation for having particular sexual disposition under the section should continue to be barred, a distinction which would be clarified through legislative amendment to s 44.[27]

Given the protective purpose of s 44, sexual disposition evidence is equally deserving of the heightened relevance threshold, by encouraging trials to focus on the core issues rather than any preoccupation with sexual disposition evidence of limited relevance. The approach recommended by the Law Commission, that such evidence be admissible under s 44 but subject to the heightened relevance test in s 44(3), successfully achieves this balance, provided subs (3) trumps judicial discretion under subs (4) so as to bar any evidence relating to the complainant's reputation in sexual matters, although it may relate to a complainant's sexual disposition and meet the heightened relevance test.

C Extension of s 44 to civil proceedings

There are currently no controls on the admissibility of sexual experience evidence in civil proceedings.[28] The Law Commission recommended that s 44 be amended to apply in both civil and criminal proceedings. It recommended that the definition of "sexual case" in s 4(1)(b) be replaced with:[29]

25 *B v R*, above n 6, at [57].

26 *A*t [57].

27 2019 Review, above n 1, at [3.24].

28 Except where sexual harassment is alleged: see s 116 of the Employment Relations Act 2000 and s 62(4) of the Human Rights Act 1993.

29 2019 Review, above n 1, cl 4 Appendix 1.

(b) for the purpose of section 44 only, a civil proceeding that involves issues in dispute of a sexual nature.

The Government has accepted and intends to progress this recommendation.[30] There is no principled basis not to extend the application of s 44 to civil proceedings considering in both criminal and civil settings the same needs and policy considerations apply: to protect complainants from unnecessarily intrusive questioning about their sexual history, and to prevent the use of erroneous assumptions based on a complainant's sexual history.

D False or allegedly false previous complaints

The Law Commission also considered the need for the Act to clarify the admissibility of a complainant's previous false or allegedly false complaint of sexual offending. However, the Law Commission concluded the Act does not need to clarify the admissibility of such evidence as the Supreme Court has recently provided sufficient guidance in *Best v R*.[31] The previous approach in *R v C* involved a "bright line" test between "clean case[s]" of falsity where s 37 applied, and other cases where falsity was in issue and s 44 applied.[32] The approach in *Best* is more nuanced, reflecting in sexual cases that the evidential assessment is multi-dimensional and requires balancing, which creates a suitably high level of admissibility for allegedly false prior complaints to protect against unwarranted character blackening of complainants. As a number of submitters noted, the Supreme Court guidance is sufficiently clear and the courts have already begun to apply the guidance in *Best*.[33]

III RECORDED EVIDENCE IN SEXUAL VIOLENCE CASES: USE AT RETRIAL

In 2015, the Law Commission concluded sexual violence complainants would benefit from greater use of pre-recorded evidence,[34] and made several

30 *Government Response*, above n 2, at p 5–6.

31 *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186 [*Best*]; and 2019 Review, above n 1, at [3.5]

32 *R v C (CA391/07)* [2007] NZCA 439 at [23]–[24]; and *Hohua v R* [2017] NZCA 89 at [14].

33 For example see *Arona v R* [2018] NZCA 427; and *Hohua v R*, above n 32.

34 This includes evidence-in-chief and cross-examination that is recorded pre-trial in a hearing, as well as evidential video interviews and mobile video records played as evidence-in-chief.

recommendations to facilitate its use.[35] These recommendations remain with the Government for consideration and were not subject to the 2019 Review. In its 2019 Review, the Law Commission considered whether recorded evidence — either pre-recorded evidence or evidence recorded during the trial itself — could assist sexual violence complainants in cases requiring a retrial.[36] The Act does not explicitly prevent evidence recorded for or during a trial from being used in a subsequent trial. However it does not empower a prosecutor to tender a complainant's pre-recorded evidence in any retrial, in contrast to some Australian provisions.[37]

The Law Commission concluded legislative reform in this area is neither necessary nor desirable.[38] This was primarily on the basis that the practical dynamics of a retrial mean there would be very few cases where pre-recorded evidence or evidence recorded at trial could be reused. At a retrial the defence may want to approach cross-examination differently, so it is unlikely the defence would approve the cross-examination being used again at retrial.[39] Trial fairness would require that the recording of the cross-examination could only be tendered at a retrial with the agreement of the defence. It would not be appropriate for the prosecution to be able to "engineer a situation" where a defendant would be constrained from presenting an effective defence.[40] Likewise, if the trial resulted in a hung jury, the prosecution might consider the complainant's trial evidence to be less compelling and the prosecution may not wish to repeat it at the retrial, opting to have the complainant give evidence again. Then there is the cost of recording evidence in all cases for retrial, which would far outweigh the limited cases in which it is actually used.[41]

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35 See the 2015 Report, above n 1, at 72 (R3 and R4) and 76 (R5 and R6). The dynamics of retrials were not considered in the 2015 assessment of the appropriate recommendations for pre-recorded evidence.

36 The Law Commission also recommended amending the Act (reversing the 2016 amendments) to entitle defence counsel to a copy of a complainant's evidential video interview because the Act's current restrictions unacceptably impact on the defence's ability to prepare and present an effective defence. While analysis of that recommendation is outside the scope of the present commentary, interestingly it is the sole recommendation relating to sexual violence cases which the Government is not progressing, the *Government Response*, above n 2, at 8 stating further consideration is needed to "assess the operational implications, such as secure and accessible storage of the video records."

37 2019 Review, above n 1, at [9.80].

38 At [9.6].

39 At [9.89].

40 At [9.88].

41 At [9.85].

There is real concern about how traumatic it is for complainants to give evidence at a retrial and the understandable unwillingness to repeat the entire process where a retrial is ordered. A complainant's unwillingness to give evidence at a retrial means that ordering a retrial can be "tantamount to an acquittal".[42] At the same time, Ministry of Justice data suggests the number of retrials scheduled in sexual violence cases is higher than cases involving other kinds of criminal offending.[43] Clearly, alleviating the pressures on complainants during the retrial process is an important yet underexplored objective.

A recommendation to record evidence at trial for retrial would strongly align with the Law Commission's 2015 recommendations for pre-recording, both in terms of rationale and practicality. The rationale is to ameliorate the stress of the trial process on complainants, which recording evidence at trial achieves by increasing the likelihood the complainant will only have to give evidence in court once, and potentially decreasing the amount of evidence the complainant may have to give again if required. It would also further complainants' autonomy[44] to ensure there is a contingency for those cases where a complainant feels strongly about giving evidence in the ordinary way in court but finds repeating the process too daunting. The practicality of pre-recording evidence, along with potential editing, would only appear to be as involved and costly as recording the evidence at trial. The 2019 Review did not analyse empirical data on the cost of recording evidence at trial, nor of the number of retrials that do not proceed because complainants are unwilling to repeat the process. Given the significant benefits for complainants in retrial cases where recorded evidence could be played, a thorough analysis of the costs and benefits could be appropriate before this avenue is dismissed.

Depending on the reason for the retrial, pre-recorded evidence may be capable of being edited and replayed, and if the witness had been recalled to give evidence at trial this additional evidence would remain unrecorded. Moreover, not all grounds for a retrial relate to evidence. For instance, the retrial might be necessary after a party or third-party approaches jury members, or some other irredeemable impact prevents the jury continuing, the timing of which

42 At [9.84].

43 See figures in the 2015 Report, above n 1, at [6.21]: in 2014/2015, 8 per cent of District Court sexual violence cases were retrials, compared to 0.8 per cent of the total number of criminal trials being retrials.

44 See the 2015 Report, above n 1, at [4.53]–[4.55].

could be after the complainant has given evidence. In those cases, there would be sound reasons for replaying the recorded evidence to the new jury. There would have to be provision to take into account the defendant's fair trial rights, which might render the cross-examination obsolete or require a new line of questioning. As some submitters rightly pointed out, there are trial fairness issues if the decision to play evidence is solely a decision for the prosecution. The concern is that the Law Commission's analysis leaves unexplored the alternative approaches to retrials, and in particular whether there could be a fair and balanced mechanism for deciding whether recorded evidence could be played at retrial. As noted in the Issues Paper, the provision could clarify that defendants "are not prevented from challenging the admissibility of … part of the evidence" or "offering evidence that did not form part of the first trial".[45]

The theme of the Law Commission's recommended amendments is to clarify and expressly authorise, and therefore facilitate, alternative processes for complainants to give evidence and improve the trial process. In light of this, the decision not to clarify the present position — with the Act neither preventing nor empowering evidence being recorded at trial or pre-trial recorded evidence from being used in a retrial — is rather unsatisfactory. Since the Law Commission did not make recommendations, the Government has not responded in this area. As reflected in the thoughtful submissions, the potential for such a process to relieve a complainant of a retrial is an attractive one, and despite the practical obstacles highlighted by the Law Commission and some submitters, may benefit from further consideration.

IV UNACCEPTABLE QUESTIONING

The judge has significant control over the trial process, from the manner in which a witness gives evidence, to questions of admissibility and the content of jury directions, where required. However, research indicates, "judges are cautious about interfering in the questioning of witnesses".[46] As McDonald notes, "this may be the result of good intentions in the context of some trials", for example "to avoid an appeal leading to a re-trial as a result of the judge

45 Law Commission *Second Review of the Evidence Act* (NZLC IP42, 2018) [Issues Paper] at [9.69].

46 McDonald *Principles of Evidence in Criminal Cases*, above n 12, at 93, citing Jonathan Doak *Victim's Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, Oxford, 2008) at 94–97.

'descending into the arena' or prejudicing the defence case or trial strategy".[47]

A Section 85 should include a reference to the vulnerability of the witness

The Law Commission recommended that the "vulnerability of the witness" should be specifically included in the list of factors a judge may consider when deciding whether a question is unacceptable.[48] The factors currently included in s 85(2) of the Act include a witness's personal characteristics such as age, disability, and linguistic ability.[49]

The term "vulnerable" or "vulnerability" is present in a number of other statutes. For example, s 78 of the Criminal Procedure Act 2011 enables the court to order a pre-trial admissibility hearing in a judge-alone trial, including on the ground that "the complainant or witness is particularly vulnerable and resolving the admissibility issue is in the interests of justice".[50]

While complainants or witnesses who fit the characteristics already provided for in s 85(2) may inherently be "vulnerable", a specific reference to vulnerability will prompt judges to consider the particular circumstances of a witness in cases where a witness is vulnerable for reasons other than those already identified. The Law Commission provides the example that a witness who is suffering from the effects of repeat-victimisation could be seen as vulnerable if the term "vulnerable" or "vulnerability" were included in s 85(2). Presently, the Act does not provide for recognition of such a circumstance. There is much to be gained from a specific reference to vulnerability, which could be applied on a case-by-case basis, allowing for a greater number of circumstances to be recognised as vulnerable.

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47 At 93, citing Elaine Mossman and others *Responding to Sexual Violence: Environmental scan of New Zealand agencies* (Ministry of Women's Affairs, Wellington, September 2009) at 111. McDonald also notes at 93 the comments of the Court of Appeal in *R v H (CA421/01)* (2002) 19 CRNZ 518 (CA) at [32]–[34], applied in *Holland v R* [2010] NZCA 279 in which the Court also considered the "manner and extent of a trial Judge's right to intervene and question a witness, without compromising the adversarial nature of a criminal trial" at [17], and allowed the appeal on the basis of inappropriate judicial intervention.

48 2019 Review, above n 1, at [10.34].

49 At [10.34].

50 Criminal Procedure Act 2011, s 78(4)(b). Other Acts that refer to the term "vulnerable" include the Crimes Act 1961, ss 2, 151, 195 and 195A; Family Court Act 1980, ss 11B and 11D; Sentencing Act 2002, s 9(1)(fb); and Children's Act 2014, s 5.

B Duty to interfere if questioning is unacceptable

Section 85 of the Act permits a judge to disallow a question or direct a witness not to answer a question if the question, or manner of questioning, is unacceptable. Unacceptable includes "improper, unfair, misleading, needlessly repetitive or expressed in language that is too complicated for the witness to understand".[51] The provision contains a list of factors the judge may consider when making the decision.[52] To strengthen the provision and encourage a more consistent approach to intervention, the Law Commission recommended amending s 85 to *require* judges to intervene when they consider the manner, structure, or content of questioning is unacceptable. The Law Commission recommended replacing s 85(1) with:[53]

> (1) In any proceeding, if the Judge considers a question is improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand, the Judge must disallow the question or direct the witness not to answer it.

During consultation, members of the defence bar and the judicial advisory committee raised the concern that the introduction of a statutory duty for the judge to intervene would create another ground of appeal. If the judge did not intervene this would be an appeal ground for the Crown who are, generally, less likely to appeal than a defendant. However, it may also create another appeal ground for the defendant being that the judge took an over-interventionalist approach. There is already significant judicial discretion in s 85, as the judge must "consider" the question to be unacceptable and is not limited in the matters they can take into account. However, as the Law Commission concluded, "introducing a statutory duty to intervene in unacceptable questioning will provide a more secure basis for intervention" to protect witnesses, and "may also encourage a more consistent approach to intervention" such that it may, in effect, limit the potential for appeal.[54]

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51 Evidence Act, s 85(1).

52 At s 85(2), including the age or maturity of the witness; any physical, intellectual, psychological, or psychiatric impairment of the witness; the linguistic or cultural background or religious beliefs of the witness; the nature of the proceeding; and in the case of a hypothetical question, whether the hypothesis has been or will be proved by other evidence in the proceeding.

53 2019 Review, above n 1, at cl 18 Appendix 1.

54 At [10.31]–[10.32].

As submitters in support of the amendment noted, it is often "seen as necessary for the witness to come under some form of attack while being questioned".[55] Generally, two concerns arise if a witness is feeling attacked: that the witness is re-traumatised, and as a result is less able to give a reliable account.[56] It is important that vulnerable witnesses and complainants are not re-traumatised, to avoid an adverse and undesirable effect on the quality of their evidence and enable them to give their best evidence. The reporting rate of all sexual offences is calculated as low as seven per cent,[57] and improving a complainant's experience of the justice system may encourage reporting. As it stands, s 85 does not signal that intervention is required where witnesses are particularly vulnerable to intimidation or misunderstanding. If the judge considers that questioning is unacceptable, it is not enough for a judge to be *permitted* to intervene under the current s 85; they should be required to intervene.

Significantly, the Government is progressing both of the Law Commission's recommendations to s 85, requiring judicial intervention when questioning is unacceptable, and including vulnerability of a witness as a factor for determining unacceptable questions.[58]

V ADDRESSING MYTHS AND MISCONCEPTIONS IN SEXUAL VIOLENCE CASES THROUGH JUDICIAL DIRECTIONS

The Law Commission concluded the Act should be amended to expressly empower judges to give a judicial direction to address myths or misconceptions that may arise in sexual violence cases,[59] and these should be contained in a

55 At [10.24].

56 At [10.24].

57 New Zealand Crime and Safety Survey 2014, above n 11, at 106. An estimate for sexual offences in 2013 could not be provided due to a high sampling error. However, 9 per cent of offences were reported in 2005 and 7 per cent of sexual offences were reported in 2008.

58 The Law Commission also considered the following areas did not require amendment to the Act. First, it noted the Act does not need to explicitly refer to "unduly intimidating or overbearing" questions, as it is already possible to disallow such questions under s 85 as "unacceptable". Second, the nature and scope of questioning of vulnerable witnesses can be addressed pre-trial through establishing "ground rules" at case review hearings on a case-by-case basis, as witnesses who appear to be in the same category may have an array of different needs. Finally, that controlling specific types of questions, including "tag" questions, is best considered on a case-by-case basis, particularly if there is a duty to intervene in unacceptable questioning. This case-by-case approach appears to provide sufficient protections as well as appropriate latitude that recognises the diversity of complainants' needs.

59 2019 Review, above n 1, at [12.47] and [12.103].

publicly accessible jury trials bench book rather than in the Act itself.[60]

Commonly held societal beliefs about sexual violence are frequently wrong, with some beliefs not aligning with research and some directly conflicting with it. These beliefs, sometimes referred to as "rape myths", create a real risk in sexual cases that a juror's decision and reasoning could be based on a fundamentally incorrect premise or presumed knowledge.[61] These need to be addressed during the trial process to reduce the risk that jurors will engage in improper or illegitimate reasoning.

A The judicial direction approach

The Law Commission noted that the Supreme Court in *DH v R* confirmed expert evidence, s 9 statements of agreed fact and judicial directions are all available means to correct misconceptions held by jurors in criminal trials.[62] The Court observed judicial directions to juries provide a worthwhile alternative to expert evidence, by either replacing the area otherwise to be covered or at least narrowing its scope substantially.[63] The trial time and costs associated with calling counter-intuitive experts could be reduced if this information is incorporated into the trial through judicial directions. Given the adversarial context of a criminal trial, removing this important material from s 9 agreements between the parties and into the domain of the judge would ensure more consistency.

While the Law Commission noted a suggestion from the research that juries may find expert evidence more compelling at dispelling a misconception,[64] it did not give this suggestion much weight. Neither did it address the concern that any reference to the misconception from a judicial direction may *reinforce* the misconception. The Law Commission emphasised that the proposed clause deliberately does not specify the timing of such a direction in order to optimise its effectiveness, allowing the judge discretion to give the direction when they

60 At [12.47].

61 Set out in Jeremy Finn, Elisabeth McDonald and Yvette Tinsley "Identifying and qualifying the decision-maker: The case for specialisation" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 228 and summarised in the 2015 Report, above n 1, at [6.12]–[6.21].

62 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [110].

63 At [111].

64 2019 Review, above n 1, at [12.40]–[12.42].

consider it most appropriate in the particular circumstances of a trial.[65] While the effectiveness of judicial directions has been queried,[66] these benefits are worth exploring.

B Targeting myths and misconceptions

The existing s 127 enables a judge to give a direction regarding any delay by a complainant to make an allegation in sexual cases. This is designed to counter the misconception that a "real" victim would make a complaint immediately, when the research conclusively demonstrates there are many legitimate reasons why a victim may not come forward earlier.

Since the Issues Paper, the Law Commission has carried out a far-reaching literature review to determine which other myths and misconceptions require addressing. The Law Commission targeted the following misconceptions as a starting point for which judicial directions should be developed:

i) A complainant who dresses "provocatively" or acts "flirtatiously" is inviting or provoking sexual violence, so the complainant is at least partially responsible for the offending, or a defendant may be less culpable. While the Law Commission noted much of the literature it drew on for this point was from overseas, it is worth observing the New Zealand experience shows the same myths continue to prevail in our jurisdiction.[67]

ii) A complainant who drinks alcohol or takes drugs is at least partially responsible for the offending. Notwithstanding that s 128A(4) of the Crimes Act 1961 already provides a legal basis for alcohol or drugs to vitiate a victim's ability to consent, a judicial direction would counter impermissible reasoning about the victim's use of alcohol or drugs short of rendering them legally unable to consent. The need for this is reflected

65 At [12.103].

66 2015 Report, above n 1, at [6.55]. See Finn, McDonald and Tinsley above n 61, at 237–239; and, at least with regard to directions not to make external enquires, see also Law Commission *Juries in Criminal Trials — Part Two: A summary of the research findings* (NZLC PP37 vol 2, 1999) at [7.44]; and Law Commission *Contempt in Modern New Zealand* (NZLC IP36, 2014) at [5.26].

67 See for instance, Belinda Feek "Northern Districts cricketer's rape trial: 'She was dressed provocatively'" *New Zealand Herald* (online ed, Auckland, 28 July 2016); and Marty Sharpe "Rape complainant will never forget shock of seeing the Facebook photo that triggered trial" *The Dominion Post* (online ed, Wellington, 11 May 2019) where the complainant reported "I was asked about my high heels and how my bodysuit could be undone easily to have sex …".

in results from the *Gender Attitudes Survey — Full Results 2017*, where 15 per cent of respondents agreed that "[i]f someone is raped when they're drunk, they're at least partly responsible for what happens".[68] Of those surveyed, 10 per cent were neutral, and 2 per cent did not know, while 73 per cent disagreed with the statement.

iii) "Real rape" is committed by strangers, or sexual violence by a partner or acquaintance is less serious than by a stranger. Sexual offending can, and more often does, take place between people who know each other, with research showing sexual violence is more likely to be perpetrated by someone known to the victim than by a stranger.[69] Dispelling this assumption would help tackle prevailing assumptions about the behaviour of victims who know their assailant compared to those who do not, to prevent such assumptions from permeating jurors' reasoning.

iv) It is not rape unless the offender uses force or the complainant suffers physical injuries.[70] The literature demonstrates that sexual offenders often do not use force, and that "victims may be more likely to freeze rather than fight off the offender".[71]

v) A victim of family violence (be it defendant or complainant) can avoid future violence by leaving the relationship.

The nature of these misconceptions is that they are general enough to be capable of being remedied by a judicial direction, likely without always requiring finely tuned expert evidence. While it may be sensible for the Government to research New Zealand-specific nuances or manifestations, clearly these misconceptions do exist in New Zealand and action is required to effectively counter them.

68 National Council of Women of New Zealand *Gender Attitudes Survey — Full Results 2017* (2018) at 23.

69 Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners*, above n 11.

70 The National Council of Women, above n 68, also indicated that seven per cent of people agreed with the statement "You can't really call it rape if someone doesn't physically fight back". 82 per cent disagreed, 8 per cent were neutral and 3 per cent did not know. Section 128A(1) of the Crimes Act 1961 provides that a person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity, therefore the Law Commission considered there may be some overlap with directions under this.

71 2019 Review, above n 1, at [12.80]. Australian Institute of Family Studies and Victoria Police *Challenging misconceptions about sexual offending: Creating an evidence-based resource for police and legal practitioners* (2017) at 6.

The Scottish Criminal Procedure Act 1995 and the *Crown Court Compendium* of England and Wales are illustrative of the potential for judicial directions in this area and provide valuable comparisons as to how to implement these.[72]

Moreover, by being publicly accessible, counsel's awareness of potential judicial directions may impact the conduct of a case, as counsel may not ask certain questions if such questions are known to likely to prompt a certain judicial direction in response.[73] This might effectively sidestep the need for judicial direction in the long-term. One may query whether this could simply leave the misconception as the elephant in the jury room, although the recommendation is clearly broad enough to allow a judicial direction where the facts of the case require, rather than simply in response to particular questioning.

The Government is progressing the Law Commission's recommendations to both expressly provide that a judge may give a direction to address jury misconceptions; and to invite the judiciary to develop sample judicial directions in relation to myths and misconceptions that jurors may hold in sexual violence cases, to be contained in a publicly accessible jury trials bench book. At the time of writing it is unclear if there will be provision for the development of directions for other misconceptions beyond those presently identified, or if that will require further legislative amendment. The Government considers together these changes will help judges correct assumptions or misconceptions that may lead to unfounded reasoning by juries in sexual violence cases.[74] Whether this means judicial directions will replace more transformative recommended reform remains to be seen. Nevertheless, implementing such directions is a positive step for countering one of the most insidious aspects of sexual violence: that certain societal assumptions protect and promulgate its perpetration.

VI CONCLUSION

Sexual violence is a significant problem in New Zealand and amending the rules of evidence alone cannot resolve the many and often competing interests in such cases. Nonetheless, the provisions in the Act must continue to develop

72 See examples in 2019 Review, above n 1, at [12.64], [12.70], [12.76], [12.82] and [12.83].

73 2019 Review, above n 1, at [12.106].

74 *Government Response,* above n 2, at 5.

alongside common law rules to improve the experience of complainants, notwithstanding the need to address the legitimate concerns about the impacts at trial and on the fact-finding process. The Law Commission's 2019 Review found that several procedural provisions in the Act currently fail to adequately provide for complainants' experiences in the criminal justice system, and presented recommendations to amend the substantive legal rules to address this.

So long as the criminal justice system remains the primary mechanism of addressing the harm caused by sexual offending, the challenge will always be in "designing a principled trial process that succeeds in combining" and balancing "effective fact-finding with [the] humane treatment of witnesses", as well as fairness to the accused.[75] The Government's acceptance of most of the Law Commission's recommendations is a significant step to addressing the needs of vulnerable individuals and improve system deficiencies. The tireless work of the Law Commission and the considered input from submitters is invaluable to remedying these concerns, balancing competing rights and interests, and improving the criminal justice system as a whole, by striving for black letter legislative provisions to truly reflect the human dimension of such cases. While the Government seems to be listening, the extent of the changes remains to be seen.

75 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 442.

COMMENTARY — HE PITO KŌRERO

WHEN GOOD BOYS DO BAD THINGS
T v Police

Camille Wrightson*

I INTRODUCTION

Sexual offending encompasses a great deal more than a strange man jumping out of the bushes and attacking a nice woman. Many people will know a story of a drunk teenage boy making a move on a drunk teenage girl, ignoring, misinterpreting, or oblivious to her half-conscious rejections. Barely any of those cases make it to court. But when they do, how should a court respond? And what if the boy is immediately and genuinely remorseful and shows insight into his offending?

T v Police is such a case.[1] A good boy who does a bad thing, who causes serious harm to a young girl, and who wants to apologise, sincerely so, and then move on with his life. The High Court judgment demonstrates one way of dealing with that scenario: displaying empathy to an offender, minimising the seriousness of the offending and discharging him without conviction. While the result is understandable in the circumstances, this commentary argues the Judge missed an opportunity to contextualise and denounce the offending, which would have not only addressed key principles and purposes of sentencing, but also signalled the Court's support for victims of sexual offending.

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1 *T v Police* [2019] NZHC 533.

II FACTS

T was in his late teens and S was three years younger.[2] Both attended nearby schools and knew each other from the school bus.[3] T was staying at his sister's house over the summer while she was away and he invited S over a few days after New Year's Eve. There was a large quantity of alcohol left over. The two of them, alone in the house, drank significant amounts and became heavily intoxicated. They turned music on and danced.[4]

Later, they entered the only bedroom in the house. S said she lay down on the bed as "the room was spinning because of her intoxication". When T kissed her cheeks and neck, she "expressed discomfort". He removed her jeans and underwear and began kissing the inside of her legs, with his hands on her breasts, before performing oral sex on her. He "inserted first one and then two fingers into [her] vagina". S "attempted to push him away to signal she wanted him to stop".[5]

S described herself as drifting in and out of consciousness due to her level of intoxication.[6] She later woke in bed with wet hair. She thought she may have been in the shower but had no memory of it. She did not have any physical injuries, but said "her vaginal area was sore for up to five days after the incident".[7]

Six months later, Police spoke to T. He "spoke openly … and readily admitted what had occurred, despite not remembering some of the detail".[8] He said he believed what happened was consensual, as they had kissed consensually earlier in the day.[9] He was charged with sexual connection with a young person and pleaded guilty at the earliest opportunity.[10]

III LAW

T was charged under s 134(1) of the Crimes Act 1961, which simply provides:

2 At [2].
3 At [2].
4 At [3].
5 At [4].
6 At [5].
7 At [5].
8 At [6].
9 *Police v T* [2018] NZDC 21163 at [6].
10 *T v Police*, above n 1, at [6].

"Every one who has sexual connection with a young person is liable to imprisonment for a term not exceeding 10 years." The definition of "sexual connection" in s 2 of the Crimes Act includes both digital penetration of and oral connection to genitalia. Consent is not an element of the charge, as those under 16 are deemed unable to consent to sexual activity. T applied for a discharge without conviction under s 106 of the Sentencing Act 2002. Section 107 of the Sentencing Act provides guidance for applying s 106:

> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

As discussed in the High Court judgment, the framework for assessing an application for a discharge without conviction is reasonably well settled.[11] The Court must engage in a threestage assessment: first, considering all the aggravating and mitigating factors of the offending and the offender; secondly, identifying all the direct and indirect consequences of a conviction for the offender, and considering whether they are out of all proportion to the gravity of the offence; and thirdly, considering whether it should exercise the discretion under s 106 to grant the discharge without conviction.[12]

IV DISTRICT COURT

In the District Court, the sentencing Judge began his analysis by considering S' victim impact statement.[13] It showed she had suffered significant harm as a result of the offending, including loss of sleep, self-blame, loss of confidence, frequent self-harm, drug use, suicidal thoughts, truancy, "anxiety around males", and fear when walking alone.[14] The Judge referred to the purposes and principles of sentencing, making particular note of the need for accountability, promoting a sense of responsibility, denunciation of the offending, and both personal and general deterrence.[15]

The sentencing Judge applied the three-stage process described above in

11 At [10].

12 *Z (CA447/12) v R* [2012] NZCA 599, [2013] NZAR 142 at [27].

13 *Police v T*, above n 9, at [8].

14 At [8].

15 At [9].

considering T's application for a discharge without conviction.[16] In assessing the gravity of the offending by reference to the circumstances of the offending and the offender, the Judge described the purpose of the offence as "to increase the protection of young persons who are in a position of vulnerability".[17] The Judge saw the aggravating features as S' vulnerability, because of her age and intoxication level, and the "significant and profound" effects of the offending on her.[18]

In terms of mitigating features, the Judge said that the offending was at a lower level of seriousness because it did not involve full penetrative sexual intercourse.[19] The Judge also discussed T's youth.[20] The Judge acknowledged that T was otherwise of "very good character", was doing well at school and had "taken ownership of the offending".[21] The Judge considered T to have "good insight into the offending" and to be "utterly and genuinely remorseful",[22] trying to "fix what he has done, rather than is often the case in the Court system of shirking any sort of responsibility".[23] He also noted T's offer of a $1000 reparation payment to S, the sum total of his savings.[24]

The Judge considered that the offending was less serious than the offending in cases the Police relied on,[25] and the starting point should therefore be lower than the two years' imprisonment suggested by the Police.[26]

In assessing the consequences of a conviction — the second stage of the s 107 process — the Judge noted concern about the effect of a conviction on T's employment prospects.[27] T's career aspirations were to obtain a position in state services, which would require him to pass police checks. The Judge

16 At [13].

17 At [14].

18 At [16].

19 At [17].

20 At [15] and [18].

21 At [18].

22 At [18].

23 At [19].

24 At [19].

25 *Johns v R* [2015] NZHC 1158, involving full penetrative sexual conduct with a 13 year old; and *R v R* [2015] NZHC 3305, involving two instances of full penetrative sexual conduct with a 12 year old.

26 *Police v T*, above n 9, at [21].

27 At [22].

accepted that a conviction would be a serious impediment to that goal.[28] However, the Judge noted there is a line of authority indicating the Court's hesitance to "usurp the role of a professional employer to decide the significance of a particular conviction".[29] In addition, for employment which requires a full police vetting check, the existence of any proceedings may be disclosed if the Police deemed it relevant, whether or not a discharge without conviction is granted.[30]

The Judge recognised that there were previous cases resulting in discharges without conviction for sexual connection with a young person, but found them distinguishable.[31] The Judge noted that S was strongly opposed to T being discharged, but she did not want him to go to prison either.[32] Ultimately, the Judge concluded that the consequences of a conviction would not be out of all proportion to T's offending and declined to discharge him without conviction.[33]

In deciding the appropriate sentence for T, the Judge observed that T conducted himself after the offending "in a way that the Court would wish many defendants did behave".[34] The Judge sentenced T to 12 months' supervision, 80 hours' community work, and he was ordered to pay reparation of $1000.[35] This sentence expressly represented a balance between rehabilitation, punishment, and providing for the victim.[36]

V HIGH COURT

T appealed to the High Court against the sentencing Judge's refusal to discharge him without conviction.[37] He submitted that the Judge failed to give proper consideration to T's true character, specifically his outstanding school record, his immediate acknowledgement of his conduct, his genuine remorse and concern, his willingness to undertake restorative justice (which S originally

28 At [22] and [23].

29 At [24].

30 At [25].

31 At [28].

32 At [31] and [37].

33 At [29].

34 At [30].

35 At [33] and [35].

36 At [31], [34], [35] and [37].

37 *T v Police*, above n 1.

agreed to), and his payment of his savings as an emotional harm payment.[38]

T also now had evidence that the conviction had had a serious impact on his career prospects: his application for a position in state services had been rejected.[39] T then applied for a transport service licence to enable him to work at a transport company, but the New Zealand Transport Agency (NZTA) rejected his application because of his conviction.[40]

A Stage one: gravity of the offending

In respect of the gravity of the offending, the appellate Judge accepted the Crown's submission that the offending was moderately serious, but only regarding T's specific criminal acts.[41] In contrast to the sentencing Judge's comment that the lack of full penetrative intercourse reduced the seriousness of the offending, the appellate Judge quoted a judgment of the Court of Appeal that stated oral sex is "very close to sexual violation" and is "not necessarily less serious than full intercourse".[42] Her Honour also noted that "Parliament has made this clear by imposing the same maximum penalty for sexual violation by unlawful sexual connection as for sexual violation by rape".[43]

However, the appellate Judge considered that a s 107 analysis requires an assessment of the overall circumstances of the offending, wider than just the "specific character of the criminal acts involved".[44] The Judge characterised those circumstances as follows:[45]

> Here, the offending occurred in circumstances where two teenagers, who knew each other as friends, were left alone in circumstances where they could access alcohol and they chose to do so. Alcohol is known to have a disinhibiting effect, particularly on teenagers and especially when they are not regular users, which is likely to have been the case here. The alcohol they consumed included drinks with a high alcoholic content, which would have exacerbated the impact of the drinks they consumed. Secondly, the offending

38 At [19].

39 At [22].

40 At [22].

41 At [32].

42 At [32] citing *Faapuea v R* [2010] NZCA 20 at [5] and [9].

43 At [32]; and Crimes Act 1961, s 128.

44 At [33].

45 At [34].

> involved one incident rather than a continuous course of conduct. Thirdly, the offending occurred in circumstances where the absence of aggravating factors and the presence of many mitigating factors go towards reducing the level of seriousness of this offending.

In support of her view that there were no aggravating factors in respect of the offending, the Judge said there was no evidence of premeditation or grooming by T; no evidence of a power imbalance that favoured T or, if one existed, that he knew about and relied on it; no evidence that T induced S to drink alcohol; no evidence that T consciously forced himself on S or realised that she was not receptive to his actions; and no evidence that T knew about S' mental health issues and used them to his advantage.[46]

The Judge held there were no personal aggravating features relating to T.[47] He had no prior convictions and had an excellent school record.[48]

In terms of mitigating factors relating to the offender and the offending, the Judge first considered T's youth and gender.[49] She notably quotes from Winkelmann J's judgment in *R v M*:[50]

> … the law recognises that young people may in some circumstances be less culpable for their offending. This is because young people are less able than adults to make good choices as to their actions and to control impulses. In her report, Dr Blackwell says something of the reasons for this. Adolescents, especially boys, do not reach full development of their brain functioning until their early to mid-20s. The part of the brain which governs planning, appreciation of consequences and impulse control, is not fully developed for many boys prior to the age of 19. When this fact is combined with the higher levels of testosterone in young men, it often if not frequently produces flawed decision making.

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46 At [35].

47 At [36]. It appears the Judge has departed from the *R v Taueki* [2005] 3 NZLR 372 (CA) methodology by looking at the aggravating features of both the offending and the offender, before considering the mitigating features of both, rather than first considering the offending in total before considering the offender in total. In any event, it appears little turns on this.

48 At [36].

49 At [38].

50 At [38] citing *R v M* [2014] NZHC 1848 at [29], a case about an assault with intent to injure, not sexual offending. Her Honour also quoted from *R v Churchward* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[55].

The appellate Judge then discussed T's remorse. T acknowledged his offending, pleaded guilty at the earliest opportunity and paid reparation from his personal savings, an order which he did not seek to have set aside in the appeal.[51] Referring presumably to the pre-sentence report, the Judge said:[52]

> The information available to me shows he has insight into his conduct and recognises it was wrong and harmful to the victim. In this regard I note the victim impact report describes the victim as saying she wants [T] to understand the effect the offending has had on her and to know that what happened "was not ok". I have seen nothing to suggest that [T] does not have this insight. Indeed, I consider that from the time he was first approached by Police he has shown that he fully recognises the unacceptable nature of his conduct and the harm that it has caused to the victim.

The Judge considered that the lenient penalty imposed in the District Court was consistent with offending that was less than "moderately serious" as it had been characterised.[53] While acknowledging that the offending was more serious than would be the case where two young people engage in consensual sexual activity, the appellate Judge said:[54]

> … here the gravity of what occurred can be no more than one or two degrees higher. I consider the offending was very much influenced by the circumstances in which it occurred and the diminished decision-making ability, including poor impulse control, that are well recognised characteristics of seventeen-year old boys.

B Stage two: consequences of a conviction for T

The appellate Judge considered herself better placed than the sentencing Judge had been to determine the consequences of a conviction for T, as she had received updated information. T's application to work in state services had been rejected, as had his application for a transport service licence.[55]

Based on his school record, the appellate Judge considered that T would have been "an ideal candidate" for the position he had applied for in state services. The Judge noted: "[f]or a young man who has worked so hard and done so well

51 At [43]

52 At [43].

53 At [44].

54 At [45].

55 At [46].

to date rejection in the field he has worked so hard [for] has come as a crushing blow".[56] These rejections established that there was "a real and significant risk that [the conviction] will pose a barrier for his employment in other fields where his present accomplishments and strong potential would otherwise take him".[57] The Judge noted that the organisation had made a guarded indication that it would re-assess T's application should the conviction be set aside.[58]

C Stage three: exercise of the s 106 discretion

As the appellate Judge had concluded that the gravity of the offending was "at the lower end of the spectrum" and the conviction was demonstrably affecting T's career prospects, it naturally followed that she would declare the consequences to be out of all proportion to the gravity of the offending.[59] In coming to that conclusion, the Judge noted:[60]

> Whilst his previous good character gives assurance that little is needed by way of rehabilitation to discourage him from further offending there remains the need to rehabilitate his reputation in the eyes of society.

The Judge said there was public interest in T being able to use his "excellent academic abilities and other good qualities" to "make a worthwhile contribution to our society".[61] The Judge acknowledged that discharging someone without conviction can deprive prospective employers of the full information of a candidate's background when making hiring decisions.[62] However, she maintained that the Court "has a greater familiarity with criminal cases and the variety of circumstances that can underlie criminal conduct" and "[a]ccordingly, it is well placed to determine the occasions when such conduct should not attract a conviction".[63] The Court should thus "be careful not to shy away from exercising the responsibilities and the authority that Parliament has placed upon it".[64]

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56 At [47].
57 At [48].
58 At [49].
59 At [50], [51] and [55].
60 At [53].
61 At [54].
62 At [56].
63 At [58].
64 At [58].

On that basis, the Judge found the grounds under s 107 were met, and so under s 106, she discharged T without conviction.[65] The reparation order of $1000 remained in force.[66]

VI DISCUSSION

Cases involving sexual assault between drunk young friends rarely progress to this stage in the court process. As Elisabeth McDonald and Rachel Souness wrote:[67]

> … the experience of those who have been sexually assaulted by someone they know, perhaps in the context of a date where alcohol was consumed, is very different. They report less interest from the police in investigating, a decision to prosecute may well not be made and, if it is, the woman is likely to receive less access to support, will have less contact with the prosecutor and it will be rare for there to be a conviction.[68] These are the cases which are "sure-fire losers".[69]

The very fact this case got this far is good news. That S came forward with her complaint and that the Police took it seriously is promising, even though T's engagement with Police and early guilty plea would have removed some of the barriers that might usually arise. It is an indication that sexual assaults, in all their nuanced forms, are being recognised for what they are: criminal acts.

T's early acknowledgement of the offending, expressed in his cooperation with Police and his guilty plea, likely spared S further distress. He could have put the Police to the proof, meaning S would have had to give evidence had the case got to trial.[70] Even if his early guilty plea was partially motivated by increasing his chances of being discharged without conviction, it validated S'

65 At [61].

66 At [64].

67 Elisabeth McDonald and Rachel Souness "From 'real rape' to real justice in New Zealand Aotearoa: The reform project" in Elisabeth McDonald and Yvette Tinsley (eds) *From 'Real Rape' to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 31 at 41–42.

68 Richard B Felson and Paul-Philippe Pare "Gender and the victims' experience with the criminal justice system" (2008) 37 Social Science Research 202.

69 Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) at 134.

70 If S was older, an alternative argument may be that she consented. However, given she was under 16, her consent would not be a defence to the offence of sexual connection with a young person. If the connection had been consensual, however, it is unlikely a prosecution would have followed.

version of events and showed T's willingness to be held accountable.

According to the appellate Judge's summary of his pre-sentence report:[71]

> … [T] spent his interview displaying a large array of emotions; frustration, embarrassment, heartfelt disappointment. He never made an attempt to minimise, justify or excuse any portion of his behaviour and accepts that he should not have allowed the situation with alcohol consumption to reach the level it did. He is described as having displayed a good deal of insight into his offending, and being genuinely concerned with the potential damage he has caused the victim and her family… [T] was described as insightful, and as displaying genuine empathy for his victim.

In circumstances like this, a discharge without conviction is not necessarily inappropriate. Convictions, especially one with such serious connotations as sexual connection with a young person, do have a significant impact on a person trying to establish a career and a life. It is particularly evident here, given T was not even able to obtain a transport service licence with his conviction.[72] Section 107 of the Sentencing Act provides that a discharge will be appropriate if the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence. As demonstrated by T's sentence in the District Court, the courts generally have sufficient discretion in sentencing to tailor the direct consequences of a conviction to the gravity of the offence. However, the indirect consequences are typically what justifies a discharge, when the stigma of a conviction notably affects an offender's employment and acceptance in the community while the offending itself may not be as serious as the conviction implies. If employers, public decision makers and society as a whole continue to make it so difficult for people with criminal histories to rehabilitate and move on to become productive members of the community, discharges without conviction will always have a role to play.

In the common situation of a young male offender and young female victim, due to a lack of consent education, a normalisation of the objectification of women, and other features of rape culture, offenders sometimes do not understand the vastness of the distress their actions can cause. Indeed, some do not know they have done anything wrong. Through ignorance or ambivalence rather than malevolence, they do not consider the impact on the young women

71 *T v Police*, above n 1, at [7].

72 At [22].

they pursue. In situations like this, a discharge without conviction may be appropriate, so long as the seriousness of his actions is brought home to the offender in order to prevent any further such offending. It appears likely that this case falls into that category.

As such, it is not entirely unreasonable that T was granted a discharge without conviction. However, certain aspects of the judgment in the High Court served to minimise the offending and S' pain and distress.

Unlike the sentencing Judge, the appellate Judge did not discuss the purposes of sentencing in s 7 of the Sentencing Act in any detail. Of the purposes listed in s 7, the only one mentioned by the appellate Judge is rehabilitation, but rather than in the context of T needing to rehabilitate, she mentioned that T's *reputation* needed rehabilitating.[73] Ideally, in granting T the benefit of a discharge without conviction, the appellate Judge would have used the purposes of sentencing to drive home that his behaviour was unacceptable. The Judge could have stressed that these sorts of sexual assaults were far too common and the Court needed to denounce the conduct and deter T and others from committing similar offences. Her Honour did not take that opportunity, which contributed to a sense that there was little in the judgment clearly indicating the Court's concern about the offending and the harm caused to S.

The Judge's discussion of a potential power imbalance between T and S due to their difference in age was somewhat dismissive. In disregarding that idea, the Judge said that T and S "were both immature young people" and that while T "was some three years older than the victim they were both under the age of 18 years, and it is generally accepted that males mature later than females".[74] While relationships between teenagers are always contextual, a three-year gap is not insignificant at that age, especially when they know each other through school. For instance, it is entirely possible that a girl in Year 10 feels pressured and intimidated by the social power of a boy in Year 13, regardless of his maturity level.

It is also odd that the appellate Judge cites T's gender as a mitigating factor.[75] Her point appears to be that adolescent men have underdeveloped

73 At [53].

74 At [35].

75 At [38].

brain activity, notably in the area of impulse control and appreciation of consequences, and when combined with high levels of testosterone, this often results in poor decision-making.[76] While this is true, it is difficult to see how the fact that the person committing a sexual offence is male could be a mitigating factor. Deeper understanding of psychological development is useful, but when used like this, it feels uncomfortably close to saying "boys will be boys" and excusing the behaviour.

In general, unlike the District Court judgment, the High Court judgment barely engages with S at all. All we know about her, in a 64-paragraph judgment, is that the Judge believed "she wanted [T] to be held to account",[77] that the Crown made submissions about the offending's serious ongoing effects on her mental health,[78] and that she had experienced mental health issues since she was eight years old.[79] It appears the appellate Judge did not even have a copy of S' victim impact statement.[80] The sentencing exercise is, of course, about the offender, but this lack of engagement with S, what she has experienced and what she wants out of the criminal justice process, does a disservice to the efforts of Parliament to increase victims' involvement in the process.[81] It also does a disservice to S, as without her bravery in coming forward, the Court would not have been able to do its job to censure T's criminal behaviour.

What is really missing in this judgment is cultural and social context. The judgement makes this a case about an individual boy whose offending is motivated by testosterone, youth and alcohol. There is no hint of the wider cultural or social conversations about rape culture, about male entitlement, about the role of consent education. This sort of offending is very common and has been for a long time. In recent years, there has been a shift away from women silently tolerating these assaults towards speaking out and condemning them. Parliament and the courts have acknowledged the complexity of prosecuting sexual violence by introducing alternative ways of giving

76 At [45]

77 At [28] and [43].

78 At [29].

79 At [35].

80 At [28]. However, the Judge does mention it in other parts of the judgment, perhaps drawing from the Crown's submissions and the District Court judgment.

81 For example through the Victims' Rights Act 2002.

evidence,[82] evidential rules around sexual histories,[83] and the Sexual Violence Pilot Court. It is disappointing that this judgment did not engage with this wider discussion at all. There is no need for a long history of the feminist movement in a sentencing decision, but it would have been valuable for the Court to acknowledge it has a role to play in denouncing a class of offending that has traditionally gone under its radar.

S came forward about her sexual assault. Many women in similar situations do not. It seems unlikely that a woman contemplating whether to lay a complaint would read this judgment and feel that the criminal justice system would support her and validate her experience as a victim of crime, even if the offender pleaded guilty.

VII CONCLUSION

In *T v Police,* the Court had an opportunity to soundly denounce acquaintance sexual assault. It did not avail itself of that opportunity. Rather, the judgment expressed empathy for the teenage boy offender and ambivalence towards the teenage girl victim. Granting a discharge without conviction in circumstances where the offender was insightful and remorseful was not necessarily inappropriate, but the judgment failed to highlight the experience of the victim and contextualise the offending within wider patterns of sexual assault. These cases will continue to come before the court. It should not shy away from its responsibilities to denounce such offending.

82 For example Evidence Act 2006, s 105.

83 For example Evidence Act 2006, s 44.

TUAKANA–TEINA WHAKAWHITI KŌRERO

KA KŌRURE TE HAU
Lankow v Rose *and its aftermath*

Emily Stannard with Justice Cull QC*

In this tuakana–teina conversation, Justice Cull, who sits on the High Court bench in Wellington Te Whanganui-a-Tara, is interviewed by Emily Stannard, a civil and family lawyer practicing in Hastings Heretaunga. The following kōrero is a preface to articles and commentary in this volume that relate to family and relationship property law. It focuses on Justice Cull's reflections on arguing the pivotal case in trust law and the division of relationship property, Lankow v Rose*, the social and legal circumstances at the time, and the progress made in the aftermath of the decision. In doing so, it provides some of the broader historical backdrop to the proposed property relationship law reform considered in this volume.*

Emily Stannard: Your Honour was counsel for Ms Rose in the now famous case of *Lankow v Rose*.[1] What challenges did de facto couples face at that time?

Cull J: The explanatory note to the De Facto Relationships (Property) Bill described the legal position for de facto partners as follows:

> … there is currently no legislative regime for the division of property when a de facto relationship ends. At present, on the breakdown of such relationships,

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1 *Lankow v Rose* [1995] 1 NZLR 277 (CA).

> the partner with legal title to the property retains it unless the other partner can establish a beneficial interest. To establish an interest in the property, the non-owning spouse must have recourse to the general law, particularly the law of trusts.

Thus, unmarried couples faced costly challenges to claim a share in acquired property during the de facto relationship, when property was not held in their names. There was a huge divide between the way married women were treated compared to women in de facto relationships. The Matrimonial Property Act 1976 did not cover de facto relationship property and the prevalent view was that recognition of de facto relationships undermined the institution of marriage.

A governmental Working Group on Matrimonial Property and Family Protection[2] was established in March 1988 as part of the Government's social policy reform programme. The Group reported to the Cabinet Social Equity Committee in September 1988, recommending changes to the law. However, the majority of the group considered that "legal and de facto marriages should not simply be equated" because "the legal concept of marriage involves a public commitment and interdependence which it cannot be assumed that all cohabiting couples desire to adopt".[3]

At the time of *Lankow v Rose*, the problem of defining de facto relationships was unresolved and there was no legislative guidance on the division of property at the end of such relationships. The judiciary expressed its concern as how de facto relationship property should be shared, in the absence of legislative guidance. This passage from *Phillips v Phillips*[4] sets the scene well:[5]

> In a legal marriage the *Matrimonial Property Act 1976* creates a very strong presumption of equal sharing of the matrimonial home and chattels, with a less strong presumption of equal sharing of other matrimonial property. *The Courts have no warrant to impose a similar regime on so-called stable de facto relationships which prove eventually unstable. Nor am I by any means convinced that it would be in the long term interests of women to abolish the distinction between legal marriage and de facto union.*

2 *Report of the Working Group on Matrimonial Property and Family Protection* (Department of Justice, Wellington, October 1988).

3 At 68.

4 *Phillips v Phillips* (1993) 10 FRNZ 110 (CA).

5 At 122 and 123 (emphasis added).

In addition, the Court in *Phillips* expressed its discomfort in making findings of unconscionability and equitable relief for and against men and women in such relationships, when the Senior Courts Benches were comprised of male Judges only. Cooke P said:[6]

> The six Judges who have sat on this case in the two Courts are all men, most of us of more than middle age. This is a type of case suggesting that a woman's insight would be helpful on at least one of the benches in assessing the claims, personality and situation of a litigant woman and arriving at justice between man and woman. I do not feel confident enough to make a finding of unconscionability against the husband when the trial Judge has made none.

So, when you read those comments you can really see how things were in the early 1990s.

In *Lankow v Rose*, the Court of Appeal reinforced that "there is a basic difference between legal marriage and de facto union".[7] Some expressed the view that the Court was not happy with the trial Judge making an analogy with the Matrimonial Property Act. Tipping J said it is erroneous to ignore "the fundamental difference between a legal marriage and a de facto marriage".[8] He said, under the Matrimonial Property Act 1976, the status of wife or husband gives each spouse a presumptive half-share while a de facto claimant starts from nothing. "The de facto claimant must demonstrate first a case for an interest and then what that interest should be."[9]

At the time, I was keenly aware that the Judges in the Court of Appeal were very conscious of the provisions of the Matrimonial Property Act, and sought to distance the half share award to Ms Rose from an analogous matrimonial property award over all the property. It would have been revolutionary, as Hardie Boys J said, for the courts to give marriage and de facto relationships equal footing without a change in the legislation.

Because we have come so far, people forget how difficult it was for people to accept that de facto couples should be treated in the same way as married couples. Legislative reform did not occur until after *Lankow v Rose*.

6 At 124.

7 *Lankow v Rose*, above n 1, at 280.

8 At 295.

9 At 295.

ES: When you look at the award in *Lankow v Rose*, the quantum seems quite low. What was the reasoning behind not applying for share of Mr Lankow's company and the flats?

Cull J: With the constructive trust claim, the Court had to be satisfied that there was a qualifying contribution. In the High Court, the trial Judge awarded my client a share in the family home and the chattels and an award for interest which made things more even-handed. I had argued, in the High Court, for a claim over Mr Lankow's business and the flats. This was not successful.

I did not cross-appeal the High Court decision because I thought, at the time, we had won and had achieved a half share of the home and chattels. *Pasi v Kamana* stressed that there must be a direct or indirect contribution by one partner to a specific property, usually the home.[10] I knew the trial Judge had taken a brave step to award a half share of the family home to Ms Rose. You can compare *Lankow*, with an award of a half-share in the home with *Gillies v Keogh*, where the male claimant received $10,000, being half of the capital gains in respect of his partner's first house, after a four-year relationship.[11] There was no way I was going to risk cross appealing on quantum, as I feared that any analogy to the Matrimonial Property Act regime, in the absence of legislative reform, could result in a reduction of Ms Rose's award.

Looking back at this case reminds me of how far we have come. As it was, Mr Lankow appealed and the case was in preparation for the Privy Council, before it settled.

ES: What happened after *Lankow v Rose*? Was there a shift in how lawyers brought cases?

Cull J: Following the Court of Appeal decision, Mr Lankow filed an appeal in the Privy Council, but withdrew the appeal and settled with Ms Rose in 1995. Shortly after the Court of Appeal decision, a professor in Auckland, DRH Webb wrote an article on matrimonial property and cited *Lankow v Rose* as authority for the differences in property sharing approaches between de facto relationships and marriages.[12]

It was difficult back then. Trust claims had to be brought in the High

10 *Pasi v Kamana* [1986] 1 NZLR 603 (CA).

11 *Gillies v Keogh* [1989] 2 NZLR 327 (CA).

12 PRH Webb "Matrimonial Property" [1995] 4 NZLJ 384 at 385–385.

Court and most family lawyers did not do High Court work, which is the reason I was briefed. When I issued these proceedings, I had recently gone to the Bar and constructive/resulting express trust proceedings were not common.

However, after *Lankow v Rose*, my colleagues started filing more claims in the High Court. The issue of contributions for a de facto claimant was still a big hurdle. The Courts were distinguishing contributions in de facto property claims from the statutory "contributions" under the Matrimonial Property Act. You needed to show common intention and reasonable expectation, as well as contribution as required in *Gillies v Keogh* and *Pasi v Kamana*.

Lankow v Rose generated huge publicity. That publicity fuelled the parliamentary process. The De Facto Relationships (Property) Bill was introduced in 1988 and that led to the significant changes to the legislation.

ES: One thing that can be quite difficult in practice at the moment is when legal aid is obtained for Family Court matters but the main asset is in trust. It can be difficult getting legal aid for High Court matters, which can leave you stuck with just the remedies in the Property (Relationships) Act 1976 rather than being able to make a claim against the trust in the High Court. Was that an issue for you?

Cull J: The situation was quite urgent; Ms Rose had been served with a Property Law Act notice, demanding she leave. There was no time to apply for legal aid and it was unlikely it would been granted, because Ms Rose was in clerical employment. I acted on that case on the basis that if we won, I would receive a fee.

ES: In the feminist judgment of *Lankow v Rose*, the feminist Judge uses unjust enrichment which results in an increased award for Ms Rose.[13] What was the reasoning behind focusing on the constructive trust claim rather than pursuing unjust enrichment on appeal?

Cull J: Ms Rose's statement of claim pleaded five causes of action: unjust enrichment, constructive trust, implied trust, express trust and equitable estoppel.[14] I think the trial Judge upheld the constructive trust cause of action

13 Mark Bennett "*Lankow v Rose* [1995] 1 NZLR 277 Judgment" in Elisabeth McDonald and others (eds) *Feminist Judgments in Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Bloomsbury, Oxford England, 2017) at 252.

14 *Rose v Lankow* HC Wellington CP1009/90, 27 July 1993.

rather than the other causes of action because he found guidance in the Court of Appeal's approach in *Pasi v Kamana* and *Gillies v Keogh*. There was an established jurisprudence already there in the constructive trust approach. Without legislation governing de facto relationships, as the Court of Appeal warned, any decision equating de facto relationships with marriage would not have been upheld on appeal.

The feminist judgment looks at the English test of unjust enrichment. You still needed to show a reasonable expectation of a share in the property. If you look at *Gillies v Keogh*, Cooke P canvassed the different approaches to de facto relationships. He preferred the objective test of reasonable expectations. In *Lankow v Rose*, Tipping J mentions the Canadian, Australian and English approaches to unjust enrichment,[15] but the reasonable expectation test was preferred.

In practice at that time, a claim in unjust enrichment did not get a lot of traction. It was not thought to be an easy or measurable means of approach to compensation or restitutionary damages. Everyone shied away from it. One of the complications in advancing unjust enrichment was that Mr Lankow had not provided discovery. We could not value his assets, so it was hard, if not impossible, to demonstrate how much he had been unjustly enriched. Further, the value of the work Ms Rose did to rescue his company, which was in financial difficulties, was not commensurate with the company's value.

ES: It is now pretty standard to argue non-monetary contributions to property when bringing a constructive trust claim. How common was it back at the time of *Lankow v Rose*?

Cull J: It had started emerging at that time, particularly non-financial domestic contributions but it was not as straightforward as it is now. There were no children of the relationship in *Lankow v Rose*. It would have been interesting if there had been children, as it might have made some of the other causes of action easier to argue.

I note, in an article by Margaret Briggs and Nicola Peart, the authors refer to how domestic contributions could be indirectly linked to the acquisition of property by the owning partner, and they cite *Lankow v Rose*.[16] However,

15 *Lankow v Rose*, above n 1, at 698–699.

16 Margaret Briggs and Nicola Peart "Sharing the increase in value of separate property under the Property (Relationships) Act 1976: a conceptual conundrum" (2010) 24 NZULR 1 at 9.

as I have said, the Court of Appeal strained to make the distinction between the Matrimonial Property Act definition of contributions and contributions supporting a claim for an interest in a de facto partner's property. The argument for non-monetary contributions was not standard for de facto property claims at that time, unless it could support a claim for a reasonable expectation in the property claimed against.

ES: How long was it before de facto relationships were treated as normal?

Cull J: Following *Lankow v Rose*, counsel would issue proceedings and then settle. People started to think "let's give it a go". However, it was only three years after the Court of Appeal's decision in *Lankow v Rose* before the De Facto Relationships (Property) Bill was introduced. The pace of change was huge after the bill was introduced. Practitioners then treated de facto relationships consistently with the Property (Relationships) Act principles.

Emily's reflections: My kōrero with Cull J was eye opening in terms of demonstrating how quickly social change can happen once legislation passes. Lawyers at the time of *Lankow v Rose* brought different and, at times, highly creative arguments to mould the existing law to meet changing social norms. What really hit home for me was the importance of legislative change, as changes to the common law can only happen if they are consistent with statute. Also important is creative legal argument, which can induce that legislative change and, as *Lankow v Rose* illustrates, mitigate some of the injustice that often results from law that is or has become out of step with society. I look forward to seeing how recent and upcoming changes, for example amendments to the Oranga Tamariki Act 1989 and any changes that result from the Law Commission's recent report in relationship property law, will impact on the family law I practice and affect the community we lawyers serve.

RULES OR DISCRETION?
Towards a better approach to quantum in addressing post-separation economic disparities in New Zealand

Seb Recordon*

The way in which family finances ought to be divided following separation has been a persistently vexing issue for New Zealand courts to resolve. Although once considered socially radical, the Property (Relationships) Act 1976 has failed to give substance to the gender equality principles it originally purported to enshrine. This article outlines the ways in which the New Zealand relationship property regime has been unsuccessful in striking an appropriate balance between rules and discretion. In particular, the discretion afforded to judges where economic disparity exists between parties following separation has been the cause of considerable uncertainty, confusion and injustice. This article details the unsatisfactory manner in which post-separation economic disparity has been addressed to date (particularly in respect of quantum) before looking to the future. It concludes that, in order to give meaningful effect to the principle of gender equality, discretion ought to be abandoned in favour of an entirely rules-based regime.

I INTRODUCTION

The New Zealand relationship property regime has consistently failed to provide substantive justice to New Zealand women. Despite a number of significant legislative changes over the past 50 years, purportedly aimed at remedying the regime's underlying gender inequalities, women have remained

economically disadvantaged as a result of its application. Section 15 of the Property (Relationships) Act 1976 (the Act) was introduced in 2001 to address the failure of the equal sharing rule to mitigate the impact of the economic disparity arising between partners at the end of a qualifying relationship. In practice, however, s 15 has been an impractical, nebulous and ineffective tool. Given that further relationship property law reform appears imminent, New Zealand must use this opportunity to create a more long-lasting, robust and accessible remedy for those who suffer disadvantage as a result of the rigid application of the equal sharing rule.

In this article, I will first discuss the historical context of s 15, including the impact of the equal sharing regime on women in so-called "traditional" relationships, and will introduce the key problems in addressing economic disparity. I will then identify and discuss the merits of a rules-based rather than a discretionary approach to the calculation of the quantum of economic disparity, including issues related to gender and negotiation. I discuss the key recent developments in New Zealand in respect of s 15 including, in particular, the Supreme Court's decision in *Scott v Williams* before turning to consider the New Zealand Law Commission's suggestions for reform.[1] In order to test the viability of the Law Commission's proposals, I compare its suggested forwards-looking approach to income sharing with the Canadian approach to post-separation spousal support in the context of notable appellate-level s 15 cases. Finally, I consider a number of other options for reform and conclude that, despite a number of reservations about its workability, the Law Commission's suggested forwards-looking approach is most likely to deliver a greater degree of substantive justice and, more specifically, gender equality to New Zealand's separating couples.

II HISTORY OF ECONOMIC DISPARITY IN NEW ZEALAND

Prior to 1976, the law relating to matrimonial property was almost entirely

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1 *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507.

discretionary, based largely on direct financial contributions to property.[2] One of the main problems with that discretion, however, was that it was overwhelmingly exercised to the disadvantage of women.[3] Therefore, at the time it was first enacted as the Matrimonial Property Act in 1976 (the 1976 Act), the Act was considered to be a socially radical piece of legislation.[4] The 1976 Act introduced the concept of the presumption of equal sharing of any property classified as "matrimonial property". The introduction of this presumption gave effect to the principle that men and women have equal status, that this equality should be maintained and enhanced,[5] and that all forms of contribution to a relationship should be treated equally.[6] In particular, the equal sharing rule recognises that financial contributions to a relationship are not, of their nature, of greater significance than non-financial contributions.

Although the 1976 Act represented a significant step forward in terms of achieving equality between men and women on separation, by 1988 the Royal Commission on Social Policy (Royal Commission) noted that the 1976 Act's notion of formal equality had "failed to produce true equality between the sexes".[7] In the same year, a Working Group on Matrimonial Property and Family Protection (Working Group) identified that the formal equality entrenched in the 1976 Act did not lead to substantive equality in all cases and had "failed to secure an equitable division of what might be called the product of the marriage".[8] The Working Group acknowledged that "women's living standards tend to drop after dissolution while those of their former husbands tend to rise".[9] This disparity in living standards was particularly acute where the wife had the majority of the care of any children of the relationship after separation, and occurred despite an equal division of relationship

2 Mark Henaghan "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (United Kingdom), 2017) 293 at 297–301.

3 Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [2.25]–[2.28].

4 Henaghan, above n 2, at 301.

5 This principle is now enshrined in the Property (Relationships) Act 1976, s 1N(a).

6 This principle is now enshrined in the Property (Relationships) Act 1976, s 1N(b).

7 The Royal Commission on Social Policy "The April report: report of the Royal Commission on Social Policy – Te Kōmihana a te Karauna mō ngā Āhuatanga-Ā-Iwi" [1988] IV AJHR H2 at 218.

8 Department of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4.

9 At 7.

property.[10] The Working Group acknowledged that the spouse who has the primary responsibility for the household and childcare generally experiences economic disadvantage at the end of the relationship whilst the spouse who is freed from those responsibilities to pursue career-advancing opportunities usually experiences attendant economic advantages.[11] The Royal Commission concluded that the 1976 Act "is neither able to compensate the wife for her actual loss or her loss of future expectations, nor is it able to attack any future earnings of the husband" and that, for the wife, a consequent reduction in living standards is the "usual economic outcome of divorce".[12]

The Working Group considered a proposal for reform akin to what we now know as s 15 of the Act. However, the Working Group considered that this proposal would likely invoke "extremely wide judicial discretion" and would be "conceptually awkward" as it was perceived to be aimed at meeting future needs, which the law of spousal maintenance already served to address.[13]

The Court of Appeal decision in *Z v Z (No 2)* in 1997 constituted the most significant attempt to advance a claim to entitlement to share future earnings under the 1976 Act.[14] The case was argued on the basis that it was consistent with the policy and spirit of the 1976 Act to treat enhancement in earning capacity as relationship property. Although the Court considered that this argument had "strength",[15] it was ultimately rejected as contrary to the intention of Parliament,[16] and on the basis that it would involve (as the Working Group had earlier concluded) a "radical departure" from ordinary definitions of property.[17] The Court, however, considered that this outcome "perpetuates the injustice the Act was aimed at remedying".[18] The Court's conclusion acknowledged that the 1976 Act was not achieving gender equality and made it patently clear that law reform was necessary in order to address this injustice.

10 At 4.

11 At 5.

12 Royal Commission on Social Policy, above n 7, at 219.

13 Department of Justice, above n 8, at 11.

14 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).

15 At 280.

16 At 280.

17 Department of Justice, above n 8, at 4; and *Z v Z*, above n 14, at 281–282.

18 At 280.

III INTRODUCTION OF S 15

That reform ultimately arrived: the enactment of the Property (Relationships) Amendment Act 2001 introduced s 15 as part of New Zealand's relationship property regime. The new provision was intended to address the "gross unfairness" and "serious injustices" which were occurring as a result of the equal sharing rule.[19] In her introduction to the third reading of the Property (Relationships) Amendment Bill, the Hon Margaret Wilson noted that "those injustices have been most acutely experienced by women who have devoted many years of their lives to unpaid domestic duties and childcare".[20] However, concerns were raised in Select Committee submissions on the Bill about the lack of certainty and unpredictability that the introduction of such a discretionary provision would introduce.[21]

Section 15 of the Act represents one of the most significant departures from the usual equal sharing rules enshrined in the Act. A person who has been in a qualifying relationship under the Act is entitled to make a claim under s 15 if, following separation, the other party's income and living standards are likely to be significantly higher than their own because of the effects of the division of functions within the relationship. In those circumstances, the court may award compensation to the claimant from the other party's share of relationship property. Broadly, s 15 was designed to address any economic disparity arising between the parties following separation and, in particular, any economic disadvantage to the typically female spouse resulting from a "traditional" division of functions.[22]

The concerns about the wide discretion under s 15 proved to be well founded. From the outset, s 15 was fraught with practical difficulties, which have not abated since its enactment. These difficulties can broadly be divided into two categories: the first being the hurdles a claimant faces in order to meet the jurisdictional threshold; and the second being the calculation of the quantum

19 (27 March 2001) 591 NZPD 8625.

20 At 8625.

21 Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109-3) (Select Committee Report) at 17.

22 In this context, a "traditional" division of functions — or a "traditional relationship" — is one in which one party assumes the "primary responsibility for home-making and child-care" whilst the other assumes primary responsibility for "income-earning": see *Scott v Williams*, above n 1, at [264] per Glazebrook J, at [282] per Arnold J and at [331] per Elias CJ.

of the award, in the event a claimant is able to successfully establish a claim.

The complexities and uncertainties involved in making a s 15 claim, as well as the relatively paltry quantum of awards made to date, have meant that s 15 awards are largely inaccessible to many New Zealanders, more specifically New Zealand women. The reported cases to date indicate that s 15 claims tend only to be litigated where the relationship property pool is significant and, even in those circumstances, the awards have been insignificant in comparison to the net relationship pool.[23] Although the focus of this article is on the quantum of s 15 awards, I will now turn to briefly summarise some of the key issues with the jurisdictional requirements in order to illustrate why there is a need for a new remedy to address post-separation economic disparity.

IV SECTION 15: ISSUES WITH ELIGIBILITY

The legal test that a claimant must satisfy in order to establish a claim under s 15 has been subject to significant criticism.[24] The test is elaborate, divided broadly into a preliminary jurisdictional threshold, a causation test, and a final overall exercise of discretion. Perhaps the most significant hurdle for a claimant to overcome relates to causation; that is, the requirement to establish that the economic disparity is *because of* the division of functions during the relationship.[25] Some judges have taken the approach that, where there is a clear division of functions within the relationship and economic disparity exists at the end of the relationship, causation is effectively assumed.[26] In other cases, a more significant onus has been placed on an applicant to establish causation, leading to anomalous and harsh outcomes.[27]

These differing approaches have meant that, whilst in some instances the court may require a lesser evidential basis for a s 15 claim, this is not always

23 For a survey of the quantum of s 15 awards see Law Commission, above n 3, at [18.82]–[18.84]. See also Vivienne Crawshaw "Section 15 – a satellite overview" (2009) 6 NZFLJ 155 at 162–163.

24 See Bill Atkin *Relationship Property in New Zealand* (3rd ed, LexisNexis, Wellington, 2018) at 105–116; Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD Thesis, University of Otago, 2013) at 49–64; and Law Commission, above n 3, at [18.26]–[18.80].

25 The Law Commission had anticipated the difficulties with causation when s 15 was originally proposed: see Select Committee Report, above n 21, at 18, where the Select Committee noted the submission made by the Law Commission that s 15 awards would be rare because "it will be difficult to show that the disparity in income and living standards is due to the division of functions during the marriage".

26 Law Commission, above n 3, at [18.60], [18.62] and [18.64].

27 At [18.61] and [18.65].

the case. The evidential onus on a claimant, in respect of both so-called "diminution" and "enhancement" of earning capacity claims, has tended to constitute a significant barrier to prospective claimants.[28] There has, however, been particular judicial hesitation to find the required causative nexus where the claim has an enhancement component.[29]

In addition to the barriers caused by the evidential hurdles, in diminution claims the claimant is liable to have their contributions to the relationship and/or abilities diminished or completely dismissed not only by the other party but also potentially by the court.[30] Economically advantaged partners have, in the past, been successful in arguing that the choice not to undertake paid work during the relationship was a unilateral choice made by the disadvantaged partner or that the domestic role could have been performed by a nanny.[31] The economically advantaged party will also frequently argue that any enhancement in their earning capacity is due to their own unique skills and individual success, not the division of functions, an approach that ignores the usual reality that the division of functions enabled these successes to be pursued.[32] These kinds of arguments inherently diminish the value of the domestic roles performed by the economically disadvantaged (and still, usually, female) partner.[33] These evidential issues appear to undermine the workability and compensatory purpose of s 15, as well as a principle in the Act that a just division of relationship property has regard to the economic advantages or

28 At [18.69]. See also Fae Garland "Section 15 Property (Relationships) Act 1976: Compensation, Substantive Equality and Empirical Realities" [2014] NZ L Rev 355 at 364–365. A "diminution claim" in this context refers to a claim for compensation based on the income the claimant would have earned following separation but for the division of functions within the relationship, whilst an "enhancement claim" refers to a claim for compensation based on the enhancement of the advantaged partner's future income-earning capacity caused by the division of functions: see *Scott v Williams*, above n 1, at [157] per Glazebrook J.

29 See Green, above n 24, at 267–268; and see also Law Commission, above n 3, at [18.55]–[18.57].

30 See, for example, the comments of "Claimant One" in Green, above n 24, at 203–204.

31 For a discussion on the "nanny argument" see Susannah Shaw "Disparity in *Jack v Jack*: Judicial Overreach or a Just Result at Long Last?" (2014) 45 VUWLR 535 at 538–541.

32 See Tasneem Haradasa "Causation in Section 15 of the Property (Relationships) Act 1976: Analysing the New Zealand Supreme Court's 'Working Assumption' – Is it Really Working?" (2019) 50 VUWLR 77 at 91–92.

33 Michael Fletcher "An investigation into aspects of the economic consequences of marital separation among New Zealand parents" (PhD Thesis, Auckland University of Technology, 2017) at 120–121 and 139–140; Law Commission *Relationships and Families in Contemporary New Zealand – He Hononga Tangata, He Hononga Whānau I Aotearoa O Nāianei* (NZLC SP22, 2017) at 44 and 60; and Garland, above n 28, at 366.

disadvantages arising from the relationship or its ending.[34]

V QUANTUM OF ECONOMIC DISPARITY: BACKGROUND

Despite the significant issues with eligibility under s 15, perhaps the most truly vexing issue for the courts to resolve has been the appropriate method of calculating the quantum of the award. Section 15 offers almost no practical assistance as to how compensation should be calculated. A wide range of methodologies have therefore been presented to, and accepted by, the courts. This has had a significant impact on the predictability of the law, as cases with substantially similar facts may not be treated alike. The Court of Appeal decision of *M v B* provided limited clarity in relation to the calculation of quantum of awards.[35] Robertson J considered that the methodology of calculating s 15 awards was "necessarily a matter of impression" and therefore that "rote applications of a formula will not be appropriate".[36]

Amidst this uncertainty, members of the legal community, including judges, anticipated that the Court of Appeal decision of *X v X* would bring some necessary clarity to s 15.[37] This decision ultimately introduced a particular methodology for calculating awards under s 15 that would prove to be influential. The so-called "*X v X* formula" was, broadly, as follows:[38]

i) Calculate the claimant's "but for" income, being the difference between their estimated actual future income and their likely future income but for the division of functions within the relationship;

ii) Allow deductions for tax;

iii) Deduction made to reflect the time value of money;

iv) Deduction made for relevant contingencies, including death, ill health, re-partnering and early retirement;

34 Property (Relationships) Act 1976, s 1N(c).

35 *M v B* [2006] 3 NZLR 660 (CA).

36 At [147].

37 See Judge Jan Doogue "Sections 15 and 15A of the Property (Relationships) Act 1976 – six years on: certainty or uncertainty?" (2007) 5 NZFLJ 282 at 282.

38 *X v X* [2009] NZCA 339, [2010] 1 NZLR 601 at [172] per O'Regan and Ellen France JJ.

v) Overall assessment of whether the award is "just"; and

vi) Halving that final figure.

The majority in *X v X* were at pains to point out that other approaches to the calculation of awards may be appropriate in other cases.[39] However, the majority also considered it would be helpful to provide a degree of "structure for the exercise that judges are required to undertake, which should enhance the predictability of awards".[40] Whilst enhancing the predictability of awards was a noble aim, the *X v X* methodology was, crucially, only applicable to diminution claims and failed to take into consideration the future income of the party who was the main income earner during the relationship. The majority did not rule out the possibility of methodologies based on enhancement claims.[41] However, they indicated that, where both enhancement and diminution aspects were present, the *X v X* methodology would still be appropriate in respect of the calculation of the diminution component.[42]

Despite these comments, the *X v X* methodology was ultimately adopted almost wholesale by practitioners in negotiating relationship property settlements.[43] The methodology also did not diminish the involvement of financial experts, including accountants and actuaries, and the majority in *X v X* appeared to endorse the usefulness of the evidence and assistance of such experts.[44] This inevitably burdened claimants with significant costs and led to a perception amongst practitioners and commentators that, with the exception of partners with a high net worth, it was simply not economically viable for most people to pursue s 15 claims.[45] Practitioners surveyed by Green indicated a consensus that s 15 was perceived to be a remedy reserved for the wealthy,[46] a sentiment shared by legal commentators.[47]

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39 At [175] per O'Regan and Ellen France JJ.

40 At [175].

41 At [171] and [238].

42 At [238].

43 See Claire Green "Economic disparity claims in New Zealand: Will *C v C* [2013] NZFC 8396; [2014] NZFLR 9 herald a change?" (2014) 8 NZFLJ 1 at 3.

44 *X v X*, above n 38, at [176] per O'Regan and Ellen France JJ.

45 See Green, above n 24, at 195–196 and 233; and Garland, above n 28, at 379–381.

46 Green, above n 24, at 254.

47 See Atkin, above n 24, at 107; and Garland, above n 28, at 362 and 366.

The High Court decision of *Jack v Jack* constituted a new avenue for the calculation of quantum under s 15 or, rather, a return to the "broad brush" of *M v B*.[48] Anne Hinton QC notably advanced the case without relying on expert financial evidence.[49] Significantly, Goddard J ultimately upheld the Family Court's decision to adopt the broad-brush approach to quantum that had been proposed on behalf of Mrs Jack.[50] The decisions in both the Family Court and the High Court were received positively by legal commentators, who considered that the new approach signalled a "welcome change" to the quantification of s 15 claims and noted the "bold" and "courageous" approaches taken by both counsel and the Court.[51]

Jack v Jack was also significant for including an enhancement component in the award, making good on obiter comments in *X v X* supporting the future possibility of enhancement claims.[52] However, Shaw expressed concern that neither the Family Court nor the High Court decision in *Jack v Jack* dealt with the diminution component of the claim by applying the *X v X* methodology, as had been proposed by the majority in that case.[53] This would have provided some "precision" to the calculation of at least one component of the claim.[54]

VI QUANTUM OF ECONOMIC DISPARITY: RULES OR DISCRETION?

These concerns illustrate some of the difficulties experienced with the operation of s 15 and, in particular, the tension between rules and discretion in achieving the compensatory ambitions of the section. A robust, broad-brush approach to discretion was perceived to constitute positive progress because a broad brush at least removed the necessity for extensive financial expert involvement. However, that "positive progress" was, in turn, thwarted by a lack of certainty and predictability in the calculation of awards. There continued to be an underlying tension, therefore, between accessibility of the law on the

48 *Jack v Jack* [2014] NZHC 1495.

49 Green, above n 43, at 5.

50 *Jack v Jack*, above n 48, at [118].

51 Shaw, above n 31, at 535; and Green, above n 43, at 7.

52 *X v X*, above n 38, at [49] per Robertson J and at [170], [171], [237] and [238] per O'Regan and Ellen France JJ.

53 Shaw, above n 31, at 543.

54 At 544.

one hand and certainty and predictability on the other. Because of the complex approach to quantum, s 15 became a remedy typically accessible only to those able to afford to engage legal counsel and expert financial advisors, and to fund often protracted litigation. This outcome is seemingly contrary to the principle in the Act that relationship property proceedings should be resolved as inexpensively, simply and speedily as is consistent with justice.[55]

Green's empirical research in relation to s 15 suggested that there was a significant lack of predictability in the way that economic disparity claims would be approached by key participants, including lawyers, judges and financial experts.[56] Green went so far as to state that the extent of the unpredictability caused by s 15 "may challenge the integrity of the rule of law" and that, particularly in respect of the calculation of the quantum, "people cannot know what their rights and obligations may be".[57]

How this uncertainty factors into settlement negotiations is a significant issue as the vast majority of relationship property disputes are resolved in the shadow of the law. Wilkinson-Ryan and Small have observed the issues that gender-based differences in behaviour may pose in negotiating rights and entitlements on divorce.[58] In particular, they have noted the general vagueness with which legal standards in modern family law are framed and that it is within these indeterminate legal boundaries that "gender is most likely to matter".[59] Martin has similarly observed that significant gender-based issues may arise in negotiation and that these issues can be most acutely illustrated by differences where the spousal support claimant is negotiating from a position of entitlement as opposed to negotiating on the basis of a claim subject to wide judicial discretion.[60]

Martin differs from Wilkinson-Ryan and Small in that he considers that the disadvantage to women in negotiation does not necessarily arise out of gendered differences in negotiating behaviour, but rather from "the structure

55 Property (Relationships) Act 1976, s 1N(d).

56 Green, above n 24, at 266.

57 At 267.

58 Tess Wilkinson-Ryan and Deborah Small "Negotiating Divorce: Gender and the Behavioral Economics of Divorce Bargaining" (2008) 26 Law & Ineq 109.

59 At 112.

60 Craig Martin "Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law" (1998) 56 U Toronto Faculty L Rev 135.

of a society that places them predominantly in the position of support claimant in divorce".[61] The uncertain discretionary nature of a support claimant's claim places them in the "domain of gain and the respondent in the domain of loss for any amount that is greater than zero", which has an inherent impact on the respective bargaining power of the parties.[62] In particular, the support claimant is placed at a significant disadvantage compared to the other party out of whose share of property or income the claim will be satisfied.[63]

At least in the modern common law context, there appears to be a general shift towards rules-based family law schemes as opposed to "more nuanced, 'Rolls Royce' service[s] offered by strong judicial discretion".[64] Rogerson has noted the irony that "it is at the very time that family law has come to recognize the diversity of family forms that the need for rules and standardization has increased".[65]

Although many jurisdictions have implemented a discretionary approach in relation to the issue of post-separation economic disparity, that discretion is exercised with different levels of consistency between jurisdictions. For example, the largely discretionary English matrimonial property regime, which takes economic disparity into consideration,[66] has been described as "inconsistent" (although this may be improving).[67] The Scottish law of matrimonial property on the other hand, which is based on a set of broad principles (including economic disparity),[68] has been described by practitioners as affording a

61 At 159.

62 At 158.

63 Notably, at 159, Martin considered that "such disadvantage could be prevented or reduced by a reformulation of the support provisions in such a way as to provide a very clear formula conferring a time-limited entitlement to a percentage of the future income of the primary wage earner in the family".

64 Joanna Miles and Jens M Scherpe "The legal consequences of dissolution: property and financial support between spouses" in John Eekelaar and Rob George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) 138 at 142.

65 Carol Rogerson "Child support, spousal support and the turn to guidelines" in John Eekelaar and Rob George (eds) *Routledge Handbook of Family Law and Policy* (Routledge, London, 2014) 153 at 154.

66 *Miller v Miller* and *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

67 Joanna Miles "Should the Regime be Discretionary or Rules-Based?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (United Kingdom), 2017) 261 at 279 and 282.

68 Family Law (Scotland) Act 1985 (UK), s 9.

satisfactory combination of certainty and flexibility.[69]

It is the Canadian experience, however, that is perhaps the most truly ground-breaking. The Canadian Spousal Support Advisory Guidelines (Canadian Guidelines), developed by Rogerson and Thompson, guide the decision-making of judges in relation to the quantum of spousal support, a concept encompassing both compensation for economic disparity and assistance in meeting reasonable needs.[70] Before turning to examine the Canadian Guidelines in further detail as a viable model for our own municipal law reform, I examine the current New Zealand position and, in particular, the state of the law in the wake of *Scott v Williams*.

VII RECENT DEVELOPMENTS: *SCOTT V WILLIAMS*

The Supreme Court issued its decision in *Scott v Williams* in December 2017, the first occasion on which the Supreme Court substantively considered s 15. This decision has now provided determinative guidance on the proper approach to quantum under s 15. Mr Williams had conceded that Mrs Scott's s 15 claim had been established and Mrs Scott's eligibility under s 15 was, therefore, not in issue.[71] However, the Court took the opportunity to provide fairly extensive comments on the proper approach to causation.[72]

Elias CJ and Arnold and Glazebrook JJ considered that, where there has been a division of functions "along traditional lines" and economic disparity is likely to exist after separation, this gives rise to a "working assumption" that the division of functions caused the disparity.[73] O'Regan and William Young JJ disagreed, considering that such an assumption was contrary to the wording of s 15.[74]

In relation to the issue of quantum, the Court abandoned the focus on diminution and enhancement in favour of an approach directed at the actual disparity. Elias CJ went so far as to state that the Court of Appeal decisions that focused on diminution and enhancement "steered the law in the wrong

69 Jane Mair, Enid Mordaunt and Fran Wasoff "Built to Last: The Family Law (Scotland) Act 1985 – 30 years of financial provision on divorce" (Project Report, University of Glasgow and University of Edinburgh, 2016) at 172.

70 Divorce Act RSC 1985, c 3, s 15.2(6).

71 *Scott v Williams*, above n 1, at [159] per Glazebrook J.

72 See Atkin, above n 24, at 111.

73 *Scott v Williams*, above n 1, at [293] per Arnold J, at [204] per Glazebrook J and at [345] per Elias CJ.

74 At [382] per O'Regan J and at [446] per William Young J.

direction".[75] Although the abandonment of this terminology was received as a "great relief", the Judges each took different approaches to the quantification methodology.[76] There is a degree of overlap between the different approaches taken. However, determining the commonalities and differences between the five separate judgments has been described as a "confusing" exercise.[77]

The formula set out in Arnold J's judgment provides what is perhaps the clearest articulation of the Supreme Court's move towards actual disparity.[78] Although Arnold J's formula is similar to the *X v X* methodology, the starting point is, significantly, not the claimant's "but for" income (nor the enhancement of the other partner's income) but the extent of the disparity between the parties resulting from the division of functions. This causative language implies that a causation inquiry is necessary at the first stage of the formula. However, Arnold J considered that where the working assumptions referred to above have not been displaced, the starting point in the formula is the whole of the economic disparity between the parties.[79] Arnold J stated that identification of the extent of the disparity is "presumably most easily done by reference to likely annual income over a period of years, given the close link between income and living standards".[80]

The wide range of awards made in Mrs Scott's favour at the various stages of the court hierarchy, ranging between $188,000 and $850,000, illustrates the problems with the quantification of s 15 awards.[81] Between the ten judges who issued decisions in relation to Mrs Scott's claim, there were six different outcomes in relation to the quantum of the s 15 award. Despite the extensive commentary on the various possible methodologies, no formula was actually

75 At [347].

76 Atkin, above n 24, at 119.

77 Nikki Chamberlain "The Future of Economic Disparity Redress in New Zealand" (2018) 28 NZULR 293 at 300.

78 *Scott v Williams*, above n 1, at [326].

79 At [326], fn 420.

80 At [326].

81 The award in the Family Court was $850,000: *Williams v Scott* [2014] NZFC 7616 at [366]. The award in the High Court was $280,000: *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 at [169]. The award in the Court of Appeal was $470,000: *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 at [133]. In the Supreme Court, a majority awarded $520,000: *Scott v Williams*, above n 1, at [271] per Glazebrook J, at [329] per Arnold J and at [389] per O'Regan J. William Young J would have awarded $188,000: at [477]. Elias CJ would have remitted the matter to the Family Court for determination: at [331] and [358].

used by the majority of the Supreme Court because of the absence of suitable expert evidence to apply the formulae.[82] The majority therefore adopted the midpoint between the Court of Appeal's starting point and its final order, in order to recognise that the Court of Appeal had taken into account irrelevant matters in reaching its decision, resulting in an award of $520,000.[83]

Unfortunately, therefore, it appears that *Scott v Williams* "takes stakeholders no further in clarifying the methodology to use".[84] The decision has generally been criticised on the basis that it does not appear to remove the problems faced by prospective s 15 claimants, namely accessibility, cost and reasonable certainty.[85] The majority's inability to apply any formula due to the absence of expert evidence perfectly encapsulates the barriers that are likely to continue to be faced by prospective s 15 claimants, and the continuing need for financial experts to be involved. The ostensible ambitions of the Judges to resolve longstanding issues with s 15, combined with the practical implications of the judgment, is perhaps what led Atkin to describe the decision as containing "something of the beauty and the beast".[86]

It is therefore likely that economic disparity claims continue to be out of reach for many. In light of these ongoing issues, I suggest that the core problem may lie in the drafting of s 15. Despite suggestions by legal commentators of amelioration by way of a better approach to the interpretation of the section,[87] judicial interpretation and guidance may not provide the necessary solution. Reform seems inevitable. In the following parts of this article, I discuss and analyse the Law Commission's recommendations for reform.

VIII LAW COMMISSION'S RECOMMENDATIONS: FISA

During the course of its review of the Act, the Law Commission issued a comprehensive Issues Paper, a "Preferred Approach" paper and, most recently, a Final Report. The Law Commission has propounded that the best approach to reform of s 15 would be to repeal it and replace it with a new "limited entitlement to share family income through a Family Income Sharing

82 See *Scott v Williams*, above n 1, at [225] per Glazebrook J.

83 At [258] and [271] per Glazebrook J, at [329] per Arnold J and at [389] per O'Regan J.

84 Chamberlain, above n 77, at 310.

85 At 309–310.

86 Atkin, above n 24, at 121.

87 See, for example, Haradasa, above n 32.

Arrangement or FISA".[88] The spousal maintenance regime under the Family Proceedings Act 1980 would also be repealed and incorporated within the ambit of a FISA.[89]

If enacted, this proposal would constitute a radical reform of this area of law and a significant departure from the "clean break" principle that has arguably been central to the Act.[90] The FISA proposal would abandon discretion almost wholesale in favour of a rules-based approach to both eligibility and quantum. It would also have the effect of amalgamating both a needs-based and compensation-based foundation of post-separation support between separated couples.[91]

Eligibility for a FISA by a partner (Partner A) would arise if the parties have a child together, the relationship lasts for ten or more years, or if during the relationship:[92]

> i) Partner A stopped, reduced or did not ever undertake paid work, took a lesser paying job or declined a promotion or other career advancement opportunity, in order to make contributions to the relationship; or
>
> ii) Partner B was enabled to undertake training, education and/or other career sustaining or advancing opportunities due to the contributions of Partner A to the relationship.

This appears, for the most part, to remove the jurisdictional hurdles faced in establishing a claim under s 15. Accordingly, the proposals can be seen as welcome. They address the practical realities of the division of functions within most relationships, the effect of children on the division of functions, and the expectation that — over the course of a long-term relationship — the economic advantages and disadvantages arising from the relationship will be shared. Departure from the eligibility criteria and/or statutory formula will be

88 Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach – Te Arotake i te Property (Relationships) Act 1976: He Aronga Mariu ai* (NZLC IP44, 2018) [*Preferred Approach*] at [5.42].

89 At [5.42].

90 Although the "clean break" principle is notably absent from the express list of purposes and principles contained in ss 1M and 1N.

91 Although a FISA would have the new object of sharing the economic advantages and disadvantages arising from the relationship or its end: Law Commission *Review of the Property (Relationships) Act 1976/Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) [*Final Report*] at [10.55].

92 At [10.62].

possible if to do otherwise would result in "serious injustice", having regard to a non-exhaustive list of statutory considerations.[93] The adoption of a rules-based approach to eligibility would represent a radical departure from the approach taken in most directly comparable overseas jurisdictions (for example, the United Kingdom, Scotland and Canada) in which eligibility continues to be the subject of judicial discretion.

The evidential onus appears to be reversed under a FISA. All that Partner A would be required to do to establish a claim in the first instance would be to give notice to Partner B.[94] However, Partner B would then be entitled to challenge Partner A's claim to entitlement, in which case the retention of the causative terminology "in order to" and "due to" under the third eligibility criterion could cause the difficulties with causation experienced under s 15 to arise once again, albeit in a different legislative framework and context. My primary interest in this article is, however, the calculation of the quantum of a FISA, which I now turn to discuss.

IX QUANTUM OF FISA: PRELIMINARY ISSUES

Eligibility for a FISA gives rise to an entitlement to half of the "family income" for a duration of approximately half the length of the parties' relationship, up to a maximum of five years.[95] In the Law Commission's Preferred Approach paper this was to be calculated on the basis of the parties' respective post-separation incomes (forwards-looking approach).[96] However, in its Final Report the Law Commission recommended a calculation based on the parties' respective average incomes in the three years prior to separation (backwards-looking approach).[97]

The forwards-looking approach would effectively equate to a statutory enactment of the Arnold J approach to quantum as it addresses the actual disparity in income between the parties, albeit by way of regular instalment payments as opposed to an upfront lump sum. However, an income sharing approach based on the parties' respective actual future income does away with both the necessity to undertake the crystal ball gazing exercise of determining

93 At [10.116]–[10.117].

94 At [10.77].

95 At [10.86].

96 *Preferred Approach*, above n 88, at [5.74].

97 *Final Report*, above n 91, at [10.88].

likely future income and the requirement to make the deductions for contingencies and for time value of money.

A Definition of income: Forwards or backwards looking?

The definition of "income" under a FISA is broader than under the child support regime as it includes both taxable and non-taxable income.[98] However the definition of income under the forwards-looking approach would exclude, inter alia, child support payments, state benefits, income acquired after separation by succession, survivorship or gift, and any distributions as a beneficiary of a trust settled by a third party after separation.[99] Under the forwards-looking approach, a court may impute income if it considers that the income declared by that partner "does not fairly reflect the income available to that partner".[100]

The range of possible circumstances where income may be imputed indicates the potential problems with this approach, in particular in relation to those parties who may attempt to circumvent the proper operation of the FISA scheme. Chapple considers that the introduction of the forwards-looking approach would result in significant disincentives on both parties to continue to work during the duration of the FISA, which is "likely to result in long-term adverse consequences" for the parties.[101] Indeed, the variety of ways in which FISA obligations could be avoided under a forwards-looking approach is reminiscent of the issues with administrative reviews and applications for departure orders under the Child Support Act 1991, where parties have used various means in order to attempt to minimise and/or avoid their child support obligations.[102]

The Law Commission appears to have placed significant weight on these concerns in arriving at its final recommendation that the calculation of the family income should be backwards-looking rather than forwards-looking.[103] However, the concerns about the potential wider economic consequences of a

98 Compare Child Support Act 1991, s 35.

99 *Preferred Approach*, above n 88, at [5.80].

100 At [5.77].

101 Dr Simon Chapple "Splitting up hard enough without splitting income too" *Newsroom* (New Zealand, 15 November 2018).

102 See for example *EVJ v AJCB* [2013] NZCA 100, [2013] NZFLR 325.

103 See *Final Report*, above n 91, at [10.89].

forwards-looking approach to income sharing may be overstated. One only has to look to the success of the Canadian spousal support regime to see that these concerns may not be valid. If implemented, a backwards-looking approach would place New Zealand apart from other jurisdictions where income-sharing regimes exist, for example, the Canadian spousal support regime. Departing from these established regimes ought to occur on a principled basis.

It is unlikely that a backwards-looking approach will result in justice or fairness to either party, nor adequately address the economic advantages and disadvantages arising from the relationship or its end. In particular, in many circumstances it is only after separation that the rewards of the contributions made to the enhancement of income-earning capacity will be reaped. It is an unsatisfactory response to the potential avoidance concerns with forwards-looking assessments that the FISA claimant will not be entitled to share in the actual advantages of their contributions to the enhancement of the other party's income. In addition, a claimant may have taken steps towards re-entering the workforce or advancing their own career since separation. However, a backwards-looking approach would not take into account any of the claimant's post-separation income. Whilst there are potential problems with a forwards-looking approach (in particular, potential workforce-participation disincentives and avoidance concerns), a backwards-looking approach would be unlikely to result in an acceptable level of broad-brush justice. In rejecting a backwards-looking approach, in the balance of this article I will focus on the forwards-looking FISA approach as a viable option for reform.

B Discovery issues and avoidance

Applications for departure orders under s 104 of the Child Support Act 1991 necessarily rely to a significant extent on the proper compliance by the liable parent with their discovery obligations. However, the combined application of the child support scheme and FISA is likely to exacerbate existing issues with discovery.

The Law Commission made a number of proposals with the aim of strengthening the discovery obligations in the Act.[104] Although these measures may serve to diminish the problems in ascertaining the true extent of the

104 These include the introduction of specific procedural rules relating to discovery in the Family Court Rules, an express duty of disclosure, and introducing stricter penalties for any failures to comply with discovery obligations, as well as educative measures: *Final Report*, above n 91, at [16.142]–[16.149].

parties' respective incomes, a cynic may consider that these measures would not serve to ensure adequate compliance. Liable parties, in particular, may devise creative ways in which their income can remain undetected, particularly in circumstances where the liable party is unsalaried and/or has interests in complex financial structures, including trusts.

Perhaps in order to attempt to address these residual concerns with discovery and avoidance, in its Preferred Approach paper the Law Commission suggested that in imputing income under the forwards-looking approach, the court would be entitled to have regard to the income of the liable party for the three years prior to separation.[105] Whilst the option of this imputing exercise appears helpful, it seems destined to revisit previous problems in predicting likely future career trajectories, including the necessary crystal ball gazing process — and, in all likelihood, expert evidence — which that process entails.

The Law Commission's backwards-looking recommendation in its Final Report was reached at least in part on the basis that this would limit potential issues with discovery. The Law Commission's position is that it is likely the information would be available to the claimant and that the parties will readily have access to all relevant information to calculate the family income, enhancing certainty.[106] However, this rationale is also unsatisfactory. It is unlikely that differences in pre-separation and post-separation discovery issues will be as significant as anticipated, nor does this justify the substantial and widespread unfairness that will likely result from a backwards-looking assessment of income.

Issues undoubtedly will also arise in relation to discovery in the context of the pre-separation period, particularly where the advantaged party had primary responsibility for management of the family finances during the relationship. However, in general, the option of imputing income on the basis of pre-separation income sufficiently remedies any significant discovery issues in the context of the forwards-looking approach. Imputing income in this way is likely to provide the court with at least some reliable information on which to estimate the parties' respective likely future earning capacities, where reliable information relating to the parties' actual incomes is unforthcoming. Imputing income on the basis of pre-separation discovery, where necessary,

105 *Preferred Approach*, above n 88, at [5.79].

106 *Final Report*, above n 91, at [10.90].

would therefore provide an adequate, if inconvenient, response to the Law Commission's concerns in relation to avoidance behaviour.

C Duration

Turning to the duration of a FISA, a five-year limit is seemingly arbitrary and is liable to significant injustice, particularly in circumstances where a relationship spanned several decades and involved a so-called "traditional" division of functions. In such circumstances it is likely that, particularly where the relationship property pool is insignificant, a five-year FISA will neither serve to meet the claimant's reasonable needs or adequately compensate them for the economic disparity resulting from the relationship, nor will it address the economic advantages and disadvantages arising from the relationship or its end.

It is unclear whether so-called "traditional relationships" of long duration would reach the proposed serious injustice threshold, where departure from the quantum and duration of a FISA would be permissible. However, it is conceivable that many relationships would fall into this category. The words "serious injustice" appear in various sections of the Act and have been subject to context-specific judicial interpretation.[107] It is therefore unclear how the "serious injustice" terminology will be interpreted in the specific context of a FISA departure order. However, it seems unlikely that these long duration relationship cases would reach the proposed serious injustice threshold if they were not truly exceptional. In this context, if the rule does not provide substantive justice for these relationships then it is doubtful whether the rule is a workable one.

As part of a possible option for reform, which is broadly akin to the Law Commission's forwards-looking FISA proposal, Henaghan suggests a maximum duration of ten years, a durational limit suggested on the basis that in longer relationships the liable party is "likely to be close to retirement".[108] I also consider that, if the FISA scheme were to be adopted, a ten-year limit would be more likely to meet the purpose of a FISA. The five-year limit is

107 See for example *Public Trust v Whyman* [2005] 2 NZLR 696, [2005] NZFLR 433 (CA) at [47]–[48], in which the words "serious injustice" were interpreted in the context of s 88(2) of the Property (Relationships) Act 1976. In *Tod v Tod* [2015] NZHC 528, [2015] 3 NZLR 397 at [51], Brown J considered that, following *Public Trust v Whyman*, the "serious injustice" test in s 21J of the Property (Relationships) Act 1976 is "a more substantial threshold" than that in s 88(2).

108 Henaghan, above n 2, at 325.

presumably imposed in order to promote a clean break. However, with respect, the FISA proposal already throws the clean break principle out with the proverbial bathwater of s 15 lump sum awards. In the context of a forwards-looking income sharing scheme, a conservative limit on duration is unlikely to result in broadly fair outcomes, particularly in relationships of long duration.

X FISA: INCOME SHARING VERSUS LUMP SUM

If the law applicable to family finances on relationship dissolution is to retain any possibility of a clean break, then further consideration will need to be given to the possibility of capitalising a FISA; that is, claiming a FISA as an upfront lump sum payment as opposed to ongoing periodic payments.[109] The strong preference for the clean break afforded by lump sum payments or unequal division of relationship property was a key reason provided by the Law Commission of England and Wales for its hesitation in adopting a periodic spousal support formula.[110]

In the New Zealand context, the Law Commission has suggested that any capitalisation of a forwards-looking FISA must be by agreement,[111] but has suggested the possibility of a capitalised lump sum payment at the time the parties' relationship property is divided if a backwards-looking approach is adopted.[112] Particularly in circumstances where there is sufficient relationship property to capitalise a FISA without undue hardship being placed on the economically stronger party, it is difficult to see why judges should not also be empowered to order capitalised payment, even on a forwards-looking approach. In addition, I suggest that the purpose of a FISA may be more effectively served by a lump sum payment, possibly in combination with a more limited periodic FISA payment. This would have the effect of assisting

109 Caldwell has also argued for the retention of a compensatory lump sum payment on the basis that it gives effect to the clean break principle: see John Caldwell "Maintenance – Time for a Clean Break?" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Law and Policy in Modern Family Finance: Property Division in the 21st Century* (Intersentia, Cambridge (United Kingdom), 2017) 393.

110 Law Commission of England and Wales *Matrimonial Property, Needs and Agreements* (LAW COM No 343, 2014) at [3.130]. A clean break is, however, not necessarily always achievable or desirable, particularly when the needs of any children of the relationship are taken into consideration, and can serve to compromise a fair division of the "fruits" of the relationship: see Caldwell, above n 109 at 406–409; and Henaghan, above n 2, at 326.

111 *Preferred Approach*, above n 88, at [5.91].

112 *Final Report*, above n 91, at [10.113].

the FISA claimant, for example, with purchasing a home for themselves and any children of the relationship. The possibility of FISA capitalisation is a significant benefit of the Law Commission's backwards-looking assessment of income. However, the potential benefits of the increased likelihood of obtaining a lump sum FISA payment may not outweigh the disadvantages of a backwards-looking assessment (as outlined above).[113]

Where sufficient relationship property is available, I suggest that a capitalised FISA payment satisfied from the relationship property pool should be an option available to the court (on the economically disadvantaged party's application) and where the parties agree. The reality is that the economically stronger party is more likely to be in a position, for example, to obtain a sizeable mortgage and may not have the same need for a significant upfront lump sum as the FISA claimant. A lump sum payment would also be more likely to give effect to the interests of children because it may mean that the party who is responsible for the primary care of the children, who is usually a woman,[114] may be in a position to purchase the other party's share in the family home.[115]

The main issue with a lump sum payment in the context of a forwards-looking approach is that it inevitably necessitates an inquiry into the likely future income of the parties at a time when that is unknown. This would involve the same issues experienced under s 15 with quantifying future probabilities, including involving financial experts and taking into consideration contingencies. It may be, therefore, that the disadvantage of sharing future income by way of regular instalments is acceptably counterbalanced by the relative simplicity and efficiency this system would afford.

XI THE CANADIAN SPOUSAL SUPPORT ADVISORY GUIDELINES

As mentioned above, during its review of the Act, the Law Commission gave consideration to the Canadian Guidelines. The Guidelines were developed amidst similar concerns as those created by the operation of s 15

113 In particular, a backwards-looking approach is likely, in many circumstances, to result in a significantly lower FISA quantum than a forward-looking one and it would not reflect the parties' respective post-separation realities, running a higher risk that the economic disparity will not be appropriately compensated.

114 See Law Commission, above n 33, at 39–45.

115 In certain circumstances, this may be more desirable than, for example, obtaining an occupation order under s 27 of the Act as it would afford the parties a clean break.

in New Zealand. The Canadian law on spousal support had become highly discretionary following a series of decisions by the Canadian Supreme Court.[116] Similar to the recent New Zealand context, the Canadian experience was that the law was leading to inconsistent, arbitrary and unpredictable outcomes.[117]

The fairly comprehensive Canadian Guidelines were therefore developed for the purpose of both aiding judges in attaining greater consistency of outcomes, and aiding parties and their counsel in negotiating settlements.[118] A consultation process was undertaken with key participants in litigation and negotiation processes in order to gauge what was occurring in practice.[119] The Canadian Guidelines, however, only address the quantum and duration of spousal support and do not address the issue of eligibility, which remains a prior discretionary issue.[120] Although the Canadian Guidelines themselves do not have legal force and technically remain a guide only, their use is widespread among the Canadian judiciary, including at the appellate level.[121]

The Canadian Guidelines provide a broad formula for calculating the duration and quantum of spousal support, generally based on the length of the relationship and the disparity in the parties' incomes after separation. However, rather than providing a definitive quantum and duration based on the relevant inputs, the Canadian Guidelines provide a set of available ranges for both, which can be adjusted depending on the particular circumstances of the case.

Notably, the Canadian Guidelines provide a different formula depending on whether or not the parties have dependent children and therefore whether child support is being paid. The "without child support" formula provides a duration range of between half the duration of the relationship and an indefinite duration in certain circumstances. The range of quantum under the "without child support" formula is calculated on an accrued annual basis up

116 See for example *Moge v Moge* [1992] 3 SCR 813; and *Bracklow v Bracklow* [1999] 1 SCR 420. See also Carol Rogerson and Rollie Thompson "The Canadian Experiment with Spousal Support Guidelines" (2011) 45 Fam L Q 241 at 248–249.

117 Rogerson and Thompson, above n 116, at 249.

118 At 249.

119 At 250.

120 At 251.

121 See Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines: The Revised User's Guide* (Department of Justice Canada, April 2016).

to a cap of 50 per cent of the difference between the parties' gross incomes.[122] The calculation is, however, significantly more generous where the parties have dependent children.[123]

The Canadian Guidelines also contain guidance on a number of specific exceptions to the general formula, including where debt exceeds assets, in the event of illness and disability, and where there is a prior support obligation. The Canadian Guidelines also provide for review of the formula in the event that a recipient re-partners or in the event the payor subsequently has children with a new partner, although they do not provide significant guidance as to how the court's discretion should be exercised in those circumstances.[124]

In its Preferred Approach paper, the Law Commission concluded that, following further consideration and consultation, the Canadian approach should not be adopted in New Zealand. In reaching this conclusion, the Law Commission stated that the law of spousal support in Canada, including the Canadian Guidelines, was "designed specifically for Canada and certain features would not be appropriate in the New Zealand context (such as the potentially unlimited duration of spousal support)".[125] Other than ensuring that the New Zealand regime gives effect to the personal autonomy of the parties (in particular, the liable party), it is unclear what other specific aspects of the Canadian approach are not suitable to the New Zealand context. I therefore suggest that further consideration should be given to the Canadian Guidelines in order to inform New Zealand's future approach. Although the Canadian approach provides scope for broader discretion than FISA, an approach akin to the Canadian scheme may be a better one for New Zealand to adopt. Whilst the Canadian approach appears to have some remaining issues to resolve,[126] it has been described as successful.[127] Therefore, in the next part of this article I

122 The total number of years of the relationship is multiplied by between 1.5 and 2, providing a percentage figure that is then used to calculate the proportion of the disparity in the incomes between the parties that the claimant is entitled to: Carol Rogerson and Rollie Thompson *Spousal Support Advisory Guidelines* (Department of Justice Canada, July 2008) at 32.

123 In the event the parties have children, the Canadian Guidelines take into consideration the child support obligations and provide a range of between 40 per cent and 46 per cent of the "individual net disposable income" between the parties: see Rogerson and Thompson, above n 122, at 33.

124 At 148–150.

125 *Preferred Approach*, above n 88, at [5.44].

126 Rogerson and Thompson, above n 116, at 264–268.

127 Atkin, above n 24, at 132.

compare the forwards-looking FISA approach and the Canadian approach in order to examine their respective positive and negative aspects.

XII COMPARISON OF THE FORWARDS-LOOKING FISA APPROACH AND THE CANADIAN GUIDELINES

In order to contextualise the differences between the two approaches, I apply each of them to the facts of several key appellate New Zealand decisions: namely *Jack v Jack*, *X v X* and *Scott v Williams*.[128] Both quantum and duration are calculated (without deductions for tax) based on the two different approaches and the outcomes are contrasted with the actual s 15 awards made in these cases. Although these "big money" cases are not reflective of the experiences of the majority of New Zealanders, this comparative exercise highlights some of the issues with the different approaches to quantum. The figures adopted in the calculations are limited to the estimated future taxable earnings of the parties as referred to in the judgments and (where the information is available) any actual income received as at the date of hearing. Given the combination of needs-based and disparity-based components of the Canadian regime — and FISA's replacement of both s 15 and the maintenance regime — any maintenance paid or awarded is also factored into the calculations.

In addition, the Canadian Guidelines calculations are based on the without child support formula.[129] However, it is likely that the quantum during the period in which child support was payable would be around the higher end of the range of sums calculated below and could in some cases be significantly higher. The FISA formula, by contrast, does not change depending on whether the parties have dependent children.[130]

Before I turn to address the comparison of the quantum under the FISA and Canadian regimes, I should note the key facts of the cases. Each of the three cases involved relationships of over 20 years' duration. In addition, each relationship produced two children and involved a relevant division of functions. All three of the FISA eligibility criteria proposed by the Law Commission are therefore satisfied in each of these cases.

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128 *Jack v Jack* above n 48; *X v X* above n 38; *Scott v Williams* above n 1.

129 This approach is taken because it was unclear from the cases what level of child support, if any, was paid for the relevant years and for what period the liability persisted.

130 Although any child support paid or received would be excluded from the calculation: *Preferred Approach*, above n 88, at [5.80].

The results in *Jack v Jack* illustrate the problems inherent in the broad-brush approach. By adopting such a broad approach, the court runs the risk of failing to address the actual disparity between the parties. The difference in the "spousal support" payments totalling approximately $757,541 made to the wife in that case and the payments that would have been made under a FISA is approximately $1,628,090.[131] A similar level of award resulted from applying the Canadian approach,[132] although that award could have been indefinite and therefore potentially significantly higher than the FISA award.

The results in *X v X* highlight the potentially significant discrepancies in awards where a diminution approach is taken to the calculation of awards, rather than an approach that focuses on the actual disparity in incomes. Although Mrs X was awarded $240,000 pursuant to the "*X v X* methodology", the awards under the FISA and Canadian schemes are notably higher. Under a FISA, Mrs X would have received approximately $372,179. However, the Canadian approach notably provides a greater level of flexibility and potentially produces a range of results from $355,748 over 10.5 years,[133] to a result that is $650,730 over a span of 21 years.[134]

Finally, the results in *Scott v Williams* (adopting Mr Williams' "notional" salary of $200,000) highlight the limits of the FISA approach, particularly where there is a significant diminution component to the award and where the relationship is one of long duration.[135] After deduction for tax, the total sum that Mrs Scott would receive under a FISA would be approximately $227,390. The result of the FISA calculation is notably lower than almost all of the s 15 awards made at each level of the court hierarchy.[136] It is difficult to see how this level of award could be considered "just" when there is likely to be a further disparity in the parties' respective incomes of over $2 million between

131 Under the forward-looking FISA scheme, Mrs Jack would receive approximately $2,385,631. There does not appear to be any reference in the judgment to Mr Jack's income for the fifth year after separation. A conservative approach to the quantum of the fifth year is therefore adopted in the calculation. The figure adopted for the fifth year is $959,500, calculated as the combined average of Mr Jack's annual income for the first four years after separation.

132 Under the Canadian scheme, Mrs Jack would receive between approximately $1,789,223 to $2,385,631 for the same period.

133 Approximately $16,431 lower than the FISA award.

134 Approximately 1.75 times higher than the FISA award. The duration of spousal support may, however, have been indefinite.

135 *Scott v Williams*, above n 1, at [70] per Glazebrook J.

136 With the exception of William Young J in the Supreme Court: see *Scott v Williams*, above n 1, at [477].

five years after separation and Mr Williams' retirement. Under the Canadian scheme, Mrs Scott would have received between approximately $629,275 and $1,593,034.[137]

The differences between the FISA approach and the Canadian approach become more clearly apparent in both short duration and long duration relationships. In the case of short duration relationships, it is likely that the quantum received under a FISA will be much more significant than under the Canadian approach. For example, in a relationship of six years' duration, entitlement to a FISA would result for a period of three years, equalising the parties' incomes during that period. Where the income disparity for this period is, for example, $600,000, the entitlement under a FISA would be $300,000 over three years. This illustrates that the quantum of a FISA in shorter duration relationships may be significant and therefore may be liable to challenge by the higher income earner. By contrast, under the Canadian scheme, the available range would be nine per cent to 12 per cent of the gross income difference for a period of between three to six years. The award under the Canadian approach would therefore be between approximately $27,000 over three years and $72,000 over six years. Arguably, the award under the Canadian approach may not be sufficient to address the disparity, particularly if there are both significant diminution and enhancement components to the award.

The Canadian Guidelines do contain a number of "exceptions" to the general formula, including where there is a significant compensatory component in short duration relationships where the parties do not have children.[138] In those circumstances, the Canadian Guidelines recognise that a more generous approach may need to be adopted, taking into account the particular circumstances and that "the formula will not offer much assistance".[139]

Whilst a FISA may be sufficient in shorter duration relationships to address any economic disparity, a FISA is less likely to be just and to adequately address the disparity where the relationship is of long duration. The Canadian approach appears to provide more appropriate results where the relationship is of long duration. The ranges produced appear to provide scope for levels of awards that would appropriately address the disparity, providing reasonable

137 On the assumption that Mr Williams would continue to work as a partner until he reaches the age of 70. Once again, however, the duration of the award would likely have been indefinite.

138 Rogerson and Thompson, above n 122, at 124–125.

139 At 125.

leeway to take the individual circumstances of the case into account. This is highlighted by the different awards under the FISA and Canadian approaches when applied to the facts of *Scott v Williams*. The FISA approach, with respect, would clearly fail to adequately address the disparity whereas the Canadian approach would provide a range of awards that would more effectively address the disparity. The Canadian approach acknowledges, in particular, that in long duration relationships the effect of the division of functions is likely to continue to have a significant operative effect on the economic disparity between the parties for an extended period of time.

XIII ANALYSIS

The Law Commission's "preferred approach" in relation to addressing economic disparity — the introduction of a forwards-looking FISA — represents a welcome rejection of the previous approach to both causation and quantum under s 15. Whilst the Law Commission ultimately endorsed a backwards-looking approach in its Final Report, either FISA approach would make New Zealand a leader in terms of favouring a virtually entirely rules-based approach to economic disparity, almost completely doing away with judicial discretion. The forwards-looking FISA approach would effectively provide presumptions of causation in certain circumstances, producing an entitlement to a FISA. In substance (if not in name), the future income of both parties is treated as relationship property for a limited period of time after separation. This addresses the conceptual concerns identified by the 1988 Working Group — which also barred the claimant in *Z v Z (No 2)* from succeeding — in classifying future income as relationship property. A FISA would be a statutory entitlement, not a property right, which would arise for a limited period of time. The notion of a presumptive entitlement would reverse the significant evidential hurdles that have historically been placed on s 15 claimants.

A Challenges to entitlement

Despite these comments, I suggest that a FISA scheme would not successfully address all issues currently faced by s 15. In particular, although the evidential onus would be almost entirely removed under the FISA scheme, a party who receives notice of a FISA would still be entitled to challenge the entitlement to a FISA and both parties would be entitled to apply to the court to adjust the

statutory formula in terms of both amount and duration.[140] The litigation that is likely to develop in these discretionary margins may permit a discretionary approach to undermine the rules-based approach that the FISA regime explicitly purports to adopt. Where entitlement and quantum are challenged, it is likely that a claimant will be faced with the same hurdles as under s 15 in respect of both causation and the calculation of quantum, although the evidential burden would technically be reversed.

A rules-based approach is more likely to provide substantive justice where the rules provide broadly acceptable results. However, where the outcomes of those rules are likely to be subject to significant challenge, and significant litigation results, this may have the effect of undermining the intended impact of the rules. If the desired outcome of adopting rules in favour of discretion is certainty, predictability and accessibility of the remedy, then rules that can be undermined by discretion through the "back-door" may fail to meet their intended purpose.

B Challenges to quantum

As mentioned earlier, the Law Commission has suggested that a challenge to quantum may only succeed if serious injustice results. The serious injustice threshold is the same threshold adopted under s 21J of the Act in setting aside contracting out and settlement agreements entered into under the Act. I accept that the wording implies that the test is a difficult one to overcome. However, if the substantive remedy frequently does not result in justice, it is questionable whether it is defensible to allow exceptions to the rule only in a very limited class of cases. In this context, a forwards-looking assessment with an extended limit of 10 years' duration is more likely to be perceived by both parties to be fair and just than a static backwards-looking entitlement based on historical pre-separation income with a more limited duration.

In addition, whilst the high threshold for departure may be sufficient to deter prospective applicants from applying to the court to adjust the statutory formula, I am sceptical as to whether this would in reality have a significant deterrent effect. By way of comparison, the total number of applications for departure orders under the Child Support Act 1991 was approximately 66,581

140 *Preferred Approach*, above n 88, at [5.69]–[5.72] and [5.99]–[5.102].

as at June 2011, 61 per cent of which were filed by the liable parent.[141] This is despite the fact that such applicants have generally had to prove, as part of the legal test for departure, that one or more "special circumstances" exist, which has placed a significant limit on the success rate of applications for departure.[142] The significant number of applications for departure from the formula assessment indicates that a rules-based approach will not necessarily lead to a decrease in litigation. In my view, however, the continuing relevance and availability of some level of judicial discretion may be an unavoidable necessity in any spousal support regime. The "default position" under the FISA regime will, however, be a more satisfactory starting point than that under s 15.

C A statutory entitlement

One of the main benefits of the FISA approach is that it is an entitlement that can simply come into effect without the parties needing to be involved in the stress and cost of litigation. The scheme would be administered by the Inland Revenue Department and could operate reasonably efficiently. The rules-based nature of a FISA is important given the potential issues (as outlined above) that gender may pose in the negotiation process, particularly where a claim is based on a broad discretion rather than a clear entitlement.[143] This concern is particularly acute given a recent study indicating that women in New Zealand remain generally economically worse off after separation than men,[144] as well as research indicating that post-separation economic disparity remains an issue primarily affecting women in the context of the dissolution of heterosexual relationships.[145]

Following on from Martin's argument (referred to earlier) about the historically gendered inequalities in bargaining power in the context of post-separation settlement negotiations, a FISA would have the effect of reversing those gendered negotiating roles.[146] Possible arguments related to departure

141 Bill Atkin "Financial support – who supports whom?" in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 163 at 184.

142 At 184; and Child Support Act 1991, s 105(2)(a)–(c). The remaining grounds for departure contained in ss 105(2)(d)–(e) of the Child Support Act 1991 were not introduced until 2016: see Taxation (Annual Rates for 2015–16, Research and Development, and Remedial Matters) Act 2016, ss 40(2)–(4).

143 See Miles, above n 67, at 274–278.

144 Fletcher, above n 33, at 120–121 and 139–140.

145 Law Commission, above n 33, at 44 and 60.

146 See Part VI above.

from the FISA formula may factor into negotiations. However, FISA claimants will now be bargaining from a position of entitlement and no longer from, as Martin describes it, "zero".[147]

This positive aspect of the FISA approach, that it is a rules-based entitlement, also reflects a concomitant negative aspect of the Canadian Guidelines. In contrast to the FISA approach, the Canadian scheme still permits the involvement of a judge as of right to hear and determine the entitlement issue, with consequent anxiety, delays and expense involved with the court process. The Canadian Guidelines, in conjunction with the accompanying User's Guide, attempt to address these concerns by providing parties, lawyers and judges with a high level of guidance to analyse and determine the appropriate quantum and duration of spousal support.[148] Guidance is provided in respect of how to apply the two different formulae,[149] how to restructure the entitlement by "trading" quantum off against duration or by making a lump sum payment,[150] and what to do where an exception applies justifying departure from the formulae.[151]

D Contracting out

One potentially concerning aspect of the FISA proposal is that parties will be able to contract out of the scheme under s 21 of the Act, subject to the usual procedural requirements and the ability to challenge the agreement in certain circumstances.[152] This is concerning because, whilst parties can contract out of the provisions of the Act under s 21, parties are currently unable to contract out of the maintenance regime and, generally, ought not to contract out of s 15 given the significant likelihood that those agreements will become seriously unjust over time. Arguably, therefore, a significant number of agreements purporting to contract out of the FISA regime would also become subject to challenge under s 21J. The Law Commission has suggested that this risk can be ameliorated if the parties are encouraged to review their contracting out

147 Martin, above n 60, at 158.

148 The most recent User's Guide was released in April 2016: see Rogerson and Thompson, above n 121.

149 At 24–48.

150 At 49–54.

151 At 59–72.

152 *Preferred Approach*, above n 88, at [5.108]–[5.110].

agreements during the relationship.[153] However, with respect, this suggestion does not seem a realistic one, nor one that would be likely to significantly enhance the workability of the FISA regime.

Permitting parties to contract out of the FISA regime will, for a number of reasons, serve to undermine the purpose of the regime. Contracting out of the FISA regime would be entirely different to contracting out of the provisions of the Act pursuant to s 21. Parties contracting out of the Act agree to a different arrangement in respect of the way in which their property interests will be acquired and classified during the relationship and divided on dissolution. Although framed in terms of the "advantages" and "disadvantages" arising from the relationship, for practical purposes a FISA will also serve to meet the reasonable needs of the disadvantaged party (filling the gap left behind by the repeal of the maintenance regime) as well as addressing any economic disparity between the parties.

It is acknowledged that, in certain circumstances, parties to arms-length commercial transactions may contract out of specific forms of liability that may otherwise exist to pay compensation if something goes wrong. However, it is doubtful whether it should be permissible to contract out of a needs-based/compensatory entitlement in the context of social legislation. Parties are already permitted the significant freedom to contract out of the Act in determining property interests arising over the course of their relationship. If they are also permitted to contract out of the FISA regime this would only serve to perpetuate the historical injustices referred to earlier in this article,[154] subject to the possibility that a court will grant relief if serious injustice results.

If contracting out of FISA were permissible, parties would inevitably incur unnecessary legal costs in order to ensure that the agreement is valid. Such agreements may frequently occur at the beginning stages of a relationship, at which time any changes in circumstances that will occur during the relationship are unknown. In this context, the parties run the risk that the disadvantaged party will, at the end of the relationship, be unable to have any recourse to the "fruits" of the relationship at a time when such recourse is needed most. My view is that courts ought not to be concerned with a discretionary inquiry into whether such agreements should be set aside on the grounds of serious

153 At [5.111].

154 See Parts II–V above.

injustice when serious injustice will undoubtedly be the rule, not the exception, in respect of those agreements.

If the FISA regime is to serve its purpose, it ought to be a universally available — and unavoidable — entitlement. This will ensure that a broadly consistent level of fairness and justice is achieved. The possibility of negotiating a FISA entitlement and/or applying to the court for variation of a FISA at the end of the relationship should sufficiently address any residual concerns about the unavailability of a contracting out mechanism.

XIV POSSIBLE ALTERNATIVE APPROACHES

Although there are certainly benefits to the FISA approach, most notably certainty and accessibility, alternative options may provide a higher degree of broad-brush justice. One alternative option could be the development of a more nuanced "merger over time" statutory formula, based on the Canadian Guidelines. As the Law Commission has pointed out, the Canadian Guidelines were developed and introduced in a different social and legal context to New Zealand.[155] The Canadian approach may therefore require tweaking so that the formula is appropriate in the New Zealand context. However, even if an adjusted formula were adopted, a statutory formula based on the Canadian Guidelines may still be subject to significant litigation where the outcome results in perceived injustice.

The better approach could therefore be a guided discretionary approach to quantum, based on the Canadian spousal support regime, in combination with FISA's rules-based approach to entitlement. In adopting that approach, the flow of cases through the court system would hopefully, over time, provide even further guidance so that any discretion is limited and significantly fettered, even in atypical cases.

A further alternative could be the adoption of FISA, alongside a set of guidelines that provide guidance in respect of the exercise of the court's discretion where a party applies for departure from the FISA formula. However, as mentioned above, despite the time that has elapsed since their introduction, the Canadian Guidelines do not provide much practical guidance in circumstances where a party would be most likely to apply for departure,

155 *Preferred Approach*, above n 88, at [5.44].

including in the case of re-partnering and subsequent children.[156] It therefore seems unlikely that New Zealand would be able to successfully limit the court's discretion as to quantum in those circumstances.

In any case, the problem with all of these alternative options is that significant time and resources would likely be required in order to develop a unique legislative formula or set of guidelines in respect of quantum and duration for use in New Zealand. It may also be inappropriate for a New Zealand formula to be based on current practice, given the problems identified with the inconsistent manner in which economic disparity is apparently being factored into settlement negotiations.[157] Furthermore, if parties were ordinarily permitted to apply to the court for orders in respect of quantum and duration, this would increase the likelihood that the higher income earner would seize the opportunity (once in the litigation arena) to attempt to challenge the applicant's entitlement as well. Distasteful arguments in relation to causation may therefore be more likely to re-enter "through the backdoor". In that context, an entirely rules-based approach would seem more desirable.

XV CONCLUSION

The forwards-looking FISA approach may in fact be the best available option. Despite the reservations and qualifications expressed in this article, on balance I consider FISA may be more likely to address the current problems with s 15 than the Canadian approach. Similarly to the Canadian scheme, the FISA approach addresses the scenario where the relationship property pool is small or non-existent, particularly in comparison to the higher-earner's future income. Income sharing, rather than a lump sum payment from relationship property, may also be more appropriate when applied to lower income earning families (particularly where the pool of relationship property may be small) and circumstances where the parties have significant interests in trust-owned assets,[158] but where these interests are not classified as relationship property.[159]

FISA would also do away with the problem of arguments about the

156 See Part XI above.

157 See Green, above n 24, at 255–258.

158 Including, for example, those arising under the Family Proceedings Act 1980, s 182; and *Clayton v Clayton (Claymark Trust)* [2016] NZSC 30, [2016] 1 NZLR 590.

159 As they were for example in *Clayton v Clayton (Vaughan Road Property Trust)* [2016] NZSC 29, [2016] 1 NZLR 551.

appropriate formula in the available range of formulae to adopt in a particular case. Although FISA may be fairly rigid in its application, the ease with which a FISA is calculated and accessed in comparison with the Canadian approach makes it a desirable alternative. The Canadian approach would likely still, given the relative complexity and comprehensiveness of the Canadian Guidelines and User's Guide, involve the cost of a lawyer to provide advice, even if the parties do not pursue recourse through the court process. By contrast, under the FISA regime (as with the current child support regime), lawyers need not ordinarily be involved in providing advice.

The FISA approach largely removes the crystal ball gazing and expert evidence that is inevitably involved in analysing likely future earning capacity, increasing the accessibility of the remedy. Although an approach based on sharing of future income (unlike s 15 awards) clearly defeats the clean break principle, the impact is diminished to a certain extent by the limit placed on the duration of payment. I consider that a more appropriate cap on the duration of payments would be a period of 10 years. This is because, in relationships of long duration, a five-year limit is unlikely to sufficiently address the economic advantages and disadvantages arising from the relationship or its end.

Addressing economic disparity on relationship dissolution continues to be a vexing and complex issue to resolve. However, the search for an appropriate solution to the problem is crucial in order to give meaningful effect to the principles enshrined in the Act and, in particular, to remedy any gender inequalities arising from the rigid application of the equal sharing rule. I consider that the Law Commission is leading the way towards appropriate law reform with the forwards-looking FISA proposal recommended in the Preferred Approach paper, rather than the backwards-looking approach in its Final Report. In doing away with judicial discretion, the FISA proposal renders the concerns with evidential hurdles, cost and calculation of quantum largely nugatory. It does so, arguably, at the expense of "individualised justice". The compromise for that expense, however, is that this area of law — in respect of which those who have suffered disadvantage have predominantly been women — is afforded a level of certainty, predictability and accessibility, which is so clearly and desperately needed.

CRIMINALISING PARENTAL FAILURES
Documenting bias in the criminal justice system

Julia Tolmie, Fleur Te Aho and Katherine Doolin, with Sylvie Arnerich and Natanahira Herewini*

In this article some evidence is presented to suggest that Māori women are overrepresented in the group of parents who are prosecuted for the criminal breach of a parental duty. It is suggested that this over-representation may reflect, at least in part, bias in the application of the law. Examples are provided from the case law to illustrate how norms and assumptions around "race" or ethnicity, class and gender may operate in practice to disadvantage such women.

I INTRODUCTION

The duty that parents have under s 152 of the Crimes Act 1961 towards their children was drawn so broadly when it was reformed in 2011,[1] that since then, potentially every New Zealand parent with the care and charge of their child could be subject to scrutiny and criminal prosecution at some point in time.[2] In a previous article, we set out the law governing when parental

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1 Crimes Amendment Act (No 3) 2011, with effect from 19 March 2012.

2 Julia Tolmie "Criminalising Failure to Protect" (2011) 11 NZLJ 375.

failures might result in criminal charges.[3] We documented all New Zealand cases on the public record over the last 30 years in which parents have been prosecuted for omissions in relation to their children, noting a trend over time to increasingly criminalise parenting mistakes in New Zealand. Whilst deliberate assaults on children and sustained patterns of parental neglect have always been prosecuted, it was not traditionally the case that parents' mistakes that are better categorised as isolated instances of supervisory neglect rather than child abuse, received a criminal justice response.[4] Indeed, the heavy costs of such a response, and the possibility of other less damaging mechanisms for accountability, suggest that we may have expanded the criminal scrutiny of parenting decisions too far.

Here we address a different issue. In this article we suggest that the disproportionate number of Māori women, many of whom may occupy positions of economic precarity, in our sample of parents who were prosecuted for omissions over the last 30-year period may partially reflect the operation of bias. In other words, the standards and processes used to judge what amounts to criminally negligent parenting may give expression to racist, sexist and classist norms and assumptions that mean the criminal justice system is not operating in a fair and equitable manner.

We first set out the evidence suggesting that Māori (and Pasifika) women are over-represented among those prosecuted under the provisions criminalising parental omissions, raising the possibility that class is also relevant. After briefly outlining the law that is being applied in these cases, we go on to provide examples from the case law of how norms and assumptions around "race" or ethnicity, class and gender operate in practice to disadvantage such women in the application of that law. In doing so, we consider issues relevant to ethnicity for Māori, precarity and gender, in that order. Because we tackle these issues separately and sequentially, our analysis does not completely capture the intersectional impact of experiencing multiple forms of discrimination, although we do endeavour to highlight how these issues interact throughout.[5]

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3 Julia Tolmie, Fleur Te Aho and Katherine Doolin "Criminalising Parenting Through the Omissions Provisions: An Expanding Creep?" (2019) NZ L Rev 143.

4 See for example *R v Vanner* HC New Plymouth CRI-2005-021-001091, 23 February 2006; *R v Illston* HC Whanganui CRI-2011-034-000273, 26 October 2011; *R v Mataafi* [2016] NZHC 3076; *R v X* [2015] NZHC 1244; and *R v Nagle* [2013] NZHC 2532.

5 See Kimberle Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U Chi Legal F 139.

"Intersectionality" in this context refers to the manner in which racism, sexism and classism operate simultaneously in the lives of Māori women who are living in precarity, to transform and compound the difficulty of the circumstances in which they are obliged to parent relative to others. Intersectionality also informs the judgements made of Māori women once they come under the scrutiny of the criminal justice system. Behind the current experience of intersectional disadvantage for many of these women, of course, is New Zealand's brutal history of colonisation.[6]

Our analysis in this article is based on the 139 New Zealand cases that left some kind of public record between 1988 and 2017, in which parents (or substitute parents) were prosecuted for criminal offending under the Crimes Act, on the basis of their breach of a duty towards their child victim.[7] To access information about these cases, several people independently conducted searches of multiple (including duplicate) electronic databases of reported and unreported cases, legislation citators, and databases containing media stories over that time period.

We note that our analysis is significantly limited by the materials we have been able to access. Because we have only been able to access information on the public record, full information about the defendants' life circumstances was inaccessible to us, as was any insight into how the facts were constructed and interpreted by those responsible for presenting and arguing the facts or instructing the jury at trial. Attempting to analyse the effects of (for example) ethnicity and class by relying on the information generated by a system that could be accused of "imagin[ing] inclusiveness by imagining away any obstacles"[8] is an inherently problematic undertaking.

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6 Ani Mikaere "Three (Million) Strikes and Still Not Out: The Crown as the Consummate Recidivist" in *Colonising Myths — Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 180.

7 A more fulsome discussion of methodology and a complete list of cases can be found in Tolmie, Te Aho and Doolin, above n 3, at 157–159 and 175–184.

8 Patricia Williams *Seeing a Color-Blind Future: The Paradox of Race* (Farrar, Straus and Giroux, New York, 1997) at 5. In other words, a justice response that assumes that if race/racism and class/classism are not noticed then that response is "neutral" in respect of what are significant and relevant social experiences — what Patricia Williams refers to as "the false luxury of a prematurely imagined community".

II THE BURDEN OF CRIMINALISATION

An analysis of the cases on the public record[9] suggests that the burden of the provisions that criminalise parents for failing to act, as opposed to acting, falls particularly heavily on women. The 139 recorded cases prosecuted between 1988 and 2017 (inclusive) involved 182 defendants. Of these defendants, 119 were women (114 mothers, two grandmothers and three female caregivers) and 63 were men (46 fathers and 17 stepfathers or male caregivers). In other words, women as mothers and caregivers were prosecuted approximately twice as much as men. While women may be likely to have more responsibility for the day-to-day care of their children and so are statistically more likely to come within the ambit of the applicable duties, this fact alone does not appear to account for the disproportionate number of prosecutions against women.[10] For example, our analysis reveals instances where mothers were prosecuted for failing in their parental duty to act, when fathers or de facto partners — who were also present at the time of the offending or contributed to the circumstances giving rise to the offending — were not.[11] We return to this point below.

It is difficult to determine with certainty how many of the women in our sample were Māori, given that the defendants' ethnicities were rarely addressed in court.[12] However, there are indications that Māori women are overrepresented in our sample. In the statistics set out below, we have taken defendants' names as a crude measure, and assumed that those defendants with a te reo Māori (Māori language) first or last name are likely to be Māori and counted them as such (although we acknowledge that this is not a guarantee).[13] Because many Māori people have Pākehā (New Zealand European) first or last names, and so defendants with Pākehā names could also be Māori, we have likely undercounted the number of Māori defendants overall. In addition to

9 Tolmie, Te Aho and Doolin, above n 3, at Appendix One.

10 Jeanne Fugate "Who's Failing Whom? A Critical Look at Failure-to-Protect Laws" (2001) 76 NYU L Rev 272 at 274.

11 See for example *R v "Jane Doe"* [2015] NZDC 24943; *R v Tuheke* DC Hamilton CRI-2013-019-005479, 3 February 2014; and *R v Tukiwaho* [2012] NZHC 1193.

12 We acknowledge but do not address here the many complex issues involved in defining identity and collecting ethnicity data.

13 Some women, of course, may carry a te reo Māori or a Pākehā surname as a result of marriage. However, we note that, of the 26 cases where a couple were both charged and so the name of each was known, only eight couples had the same surnames: four were Pākehā, three were Pasifika and one was another ethnicity.

looking at names, in four cases the parent who was prosecuted was explicitly identified as using social services that are targeted for Māori; and in one further case, despite having a Pākehā name, the Judge explicitly identified the defendant as Māori. These parents have also been included in our count as Māori. In two of these cases, this meant that a parent with a Pākehā name was reclassified as Māori, whilst in three cases it meant that a parent with name suppression was classified as Māori. In many of the cases name suppression was granted to protect the identities of the children (or surviving children) and the defendants' names were not reported in either the judgment or the media coverage of the case. Furthermore, in the vast majority of cases, the names of the social services with which the defendant parent was engaged were not mentioned. We have engaged in the same process for Pasifika defendants.

In total, the names of the defendant are known in 79 of the cases we reviewed; but in two of these cases the parents' classifications in our data reflected specific information provided in the judgment about their ethnicity, rather than their names. In three additional cases, as described above, such information enabled us to identify the parent as Māori despite name suppression. These 82 cases involved 109 defendants, comprised of 72 mothers and grandmothers, and 37 fathers or stepfathers. Of these defendants we have recorded all three grandmothers as Māori, 30 mothers as Māori, and eight as Pasifika; while 10 fathers/stepfathers have been recorded as Māori, and six as Pasifika. Even considering that this rough method of generating data is likely to undercount defendants who identify as Māori or Pasifika, we can see that Māori and Pasifika are over-represented. Approximately 46 per cent of mothers and grandmothers were recorded as Māori and 58 per cent of mothers and grandmothers as Māori or Pasifika. Further, 27 per cent of fathers/stepfathers were recorded as Māori, while 43 per cent were recorded as Māori or Pasifika. By way of comparison, Māori comprise approximately 14.9 per cent of New Zealand's total population and Pasifika approximately 7.4 per cent.[14]

Socio-economic positioning in the cases we reviewed is impossible to document by any measure, however clumsy, given that it is not typically explored in media reports or appeal and sentencing judgments. This is despite the fact that, if socio-economic pressures are present, they are likely to be highly significant in limiting the resources available to the defendant as a parent.

14 Statistics New Zealand "2013 Census" <archive.stats.govt.nz>.

Nonetheless, throughout the case law there are potential glimpses of precarity in the lives of those who are prosecuted[15] (for example unemployment,[16] itinerant or seasonal employment,[17] or not having a fridge in the house).[18] Factors such as "unemployment, low incomes, residence in deprived urban areas, and lower educational attainment"[19] have a strong correlation with criminal offending generally, and this area of the law is unlikely to be different.[20]

We note that there are numerous methodological flaws in this dataset. For example, it is unlikely that the cases on public record are a complete set of all prosecutions for parental omissions. The sample set is likely therefore to be representative not of all cases actually prosecuted but those considered worthy of reporting on. Nonetheless, these results are consistent with the general overrepresentation of Māori women in the criminal justice system and do provide some, albeit limited, support for the proposition that the burden of omissions liability falls particularly heavily on Māori women.[21]

III THE LAW ON PARENTAL FAILURES

A parent's failure must amount to a breach of their duty to their child as set out under s 152 of the Crimes Act,[22] before it can form the basis of a criminal offence.[23] Section 152 provides that a parent who has the "actual care or charge of a child" under the age of 18 years is under a legal duty to provide that child

15 A fact noted elsewhere: Sarah Singh "Criminalizing Vulnerability: Protecting 'Vulnerable' Children and Punishing 'Wicked' Mothers" (2017) 26(4) S&LS 511 at 520.

16 *R v Ahotau* HC Auckland CRI-2009-092-7420, 23 June 2009.

17 *R v Kuka* [2009] NZCA 572.

18 Imogen Neal "Neglected kids survived on rotten bread" *Timaru Herald* (Timaru, 4 March 2017).

19 Parliamentary Library *Background Note: 'Gaps' between ethnic groups: some key statistics* (1 June 2000) New Zealand Parliament <www.parliament.nz> at 9, referencing Statistics New Zealand *New Zealand Now: Crime* (1996) at 32–34.

20 Khylee Quince "Maori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 333 at 343–344.

21 Marianne Bevan and Nan Wehipeihana *Women's Experiences of Re-Offending and Rehabilitation* (Department of Corrections, November 2015) at 10, found 62 per cent of those receiving custodial sentences and 57 per cent of those receiving community sentences were Māori.

22 Note that parents can also be charged under s 156 (which creates a duty on those in charge of dangerous things) or s 195A (which both creates and criminalises an obligation on those in the same household to reasonably respond to the threat of death, grievous bodily harm or sexual assault to a child) of the Crimes Act 1961, but this is much less common.

23 Typically these would be either s 195 (ill-treatment or neglect of a child or vulnerable adult), s 145 (criminal nuisance) or s 160(2)(b) (culpable homicide amounting to manslaughter — if death results as a consequence of the omission) of the Crimes Act.

with "necessaries", and to take "reasonable steps to protect that child from injury". Under s 150A of the Crimes Act, they will be in breach of this duty:

> … only if, *in the circumstances*, the omission or unlawful act is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies or who performs that unlawful act (emphasis added).

This test makes it clear that what is reasonable to expect of a parent must be determined in the context of the actual circumstances in which the defendant is parenting. A parent's failure to act must be a "major departure" from what is reasonable in those particular circumstances before it can form the basis of a criminal offence.[24]

The English Court of Appeal in *R v Khan*[25] also said that the parameters of a person's duty to protect another are confined to what are reasonable steps to expect of a person in their particular circumstances. What can be expected of them will be affected, for example, by any abuse they themselves had been subject to:[26]

> … In the present case, for example, if either of the female appellants had herself been subjected by [the perpetrator] to serious violence of the kind which engulfed [the deceased victim], the jury might have concluded that it would not have been reasonable to expect her to take any protective steps, or that any protective steps she might have taken, even if relatively minor, and although in the end unsuccessful to save the deceased, were reasonable in the circumstances.

While this must be correct, New Zealand case law emphasising the importance of judging negligence in the context of the actual circumstances of the defendant for the purposes of duty liability is lacking.[27] Some of the cases in our sample involve extremely vulnerable women in circumstances of great

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24 Anna Watson "Failing to Break the Silence: A Critical Analysis of Part 8 of the Crimes Act 1961" (LLB (Hons) Dissertation, University of Otago, 2012) at 27; and Law Commission *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person* (NZLC R111, 2009) at [5.48]. Note that it may not be necessary to show a major departure where the offence on which the omission is based is criminal nuisance under s 145 of the Crimes Act: see *R v Vanner,* above n 4.

25 *R v Khan* [2009] 1 Cr App R 28. See also *R v Adomako* [1995] 1 AC 171.

26 At [33].

27 Although see *R v Hamer* HC Rotorua T02/2676, 24 December 2003 and *R v Hamer* [2005] 2 NZLR 81 (CA) for an acknowledgement that circumstances are relevant.

stress. For example, young mothers with multiple children, little by way of financial resources or social support, histories of trauma and poor parenting in their own childhoods, and some of whom are victims of intimate partner violence in their current relationship.[28] It is not possible to access the jury directions in these cases in order to determine whether individual judges are consistently stressing to juries the importance of this context in evaluating what is a reasonable parenting response in the defendant's circumstances. It is also impossible to assess whether some of these life circumstances are being understood by decision-makers as "personal characteristics" to be disregarded in the application of reasonable parenting standards.[29] For example, age may be considered to be a personal characteristic,[30] despite the neuroscientific evidence demonstrating that human information-processing and decision-making capacities are not likely to be fully developed until the age of 25.[31]

We have noted above that there is some indication that Māori women are more likely to bear the burden of the provisions criminalising parental failures to act. If this is the case there may be many reasons why. One is that young, unmarried, solo Māori mothers living in deprived areas, who are financially stressed and in rental accommodation, are more likely to be the victims of crime/repeat crime.[32] Prosecutions against such women for failures in respect of their children could reflect the fact that they are more likely to be in the kinds of dangerous and difficult life circumstances that activate heightened parental

28 See for example *R v Waiba* HC Auckland T025743, 8 August 2003 and *R v Haddock* HC Rotorua CRI-2005-077-461, 6 December 2007 (which involved a 17-year-old mother with three children under three years of age). As one would expect in a sample in which Māori (Marie, Fergusson and Boden "Cultural Identity and Pregnancy/Parenthood by age 20: evidence from a New Zealand birth cohort" (2011) 37 Social Policy Journal of New Zealand at 13) and those in positions of precarity (Myron D Friesen and others "Living Standards and Material Conditions of Young New Zealand Families" (2008) 33 Social Policy Journal of New Zealand 47 at 49) are over-represented, there were a number of young parents in our sample of those prosecuted for parental omissions.

29 See for example *R v Hamer* in the High Court, above n 27, and the discussion in *R v Hamer* in the Court of Appeal, above n 27, at [37]–[39].

30 *R v Majoram* [2000] Crim LR 372 (CA). Compare *R v Sam (No 17)* [2009] NSWSC 803 at [21] and *R v Moffa* (1977) 13 ALR 225 at 243.

31 This is because the medio prefrontal cortex does not finish developing on average until about age 25, meaning that parents under 25 are neurologically less able to process information with a great deal of executive control: Mariam Arain and others "Maturation of the adolescent brain" (2013) 9 Neuropsychiatric Disease and Treatment 449 at 451–452. We are grateful to the comments of Associate Professor Carrie Leonetti on this point.

32 Ministry of Justice *New Zealand Crime and Safety Survey: Main Findings* (2014) at 61, 70 and 73.

obligations. In addition, we have noted elsewhere[33] that s 152 is currently so broad that potentially any New Zealand parent or person in the place of a parent with the actual care and charge of a child could be held to have failed their obligations at some point before that child turns 18. The cases that have been prosecuted may therefore only reflect which parental failures come to the attention of the police, meaning that defendants from communities already under scrutiny are more likely to experience prosecution. In the rest of this article we raise questions about the role that bias in the application of reasonable parenting standards might also play in the overcriminalisation of Māori mothers.

In the application of an "objective standard" of "reasonable parenting", bias could operate in a number of ways. First, there could be a failure to consider or understand relevant life circumstances when applying the objective standard, so that the defendant is held accountable to a standard that is inappropriate to their actual circumstances. Second, the normative judgement as to what is "reasonable to expect of a parent" might be applied in such a way as to give expression to the norms and values of a particular sector of New Zealand society that does not include the defendant's community. In other words, the standard that is applied may be neither "objective" nor represent the fair expectations of the community that the defendant belongs to (for example, if it is applied so as to reflect middle class Pākehā values). Third, the standard of reasonable parenting expectations may be adjusted up or down because of bias towards the social group to which the defendant belongs. In other words, behaviours that would be considered reasonable by individuals in one social group may be considered unreasonable when performed by those in another social group.

IV THE RELEVANCE OF BEING MĀORI

In this section we examine how ethnicity — specifically, how being Māori — has a bearing on the prosecution and conviction of parents for omissions in relation to their children. We suggest that standards of appropriate parenting are strongly influenced by a person's culture, and that the culture that informs the application of legal standards when Māori parents are on trial is not informed by a Māori worldview. To illustrate this point we use the example

33 Tolmie, Te Aho and Doolin, above n 3.

of the prosecution and conviction of Māori mothers for bed-sharing with their infants, which undermines traditional Māori parenting arrangements and protective practices. We also suggest that parents who were in state care as children may be expected to reach standards of parenting that they never received themselves, an issue that disproportionately affects Māori. Finally we suggest that discriminatory practices within the criminal justice system are likely to contribute to the over-criminalisation of Māori for unsatisfactory parenting. It is worth noting that, in addition to the penalisation of traditional Māori cultural behaviours, the deprivation of culture experienced as a result of colonisation (with a resulting absence of traditional Māori cultural norms and protective factors in the lives of many Māori) can also lead to a heightened risk of offending.

A The application of culturally inappropriate norms in assessing parenting — the example of bed-sharing

Decision-makers may apply inappropriate cultural norms when assessing whether Māori parents have fulfilled their legal duties towards their children. This is evident in the prosecution and conviction of Māori mothers for bed-sharing with their infants. The term "bed-sharing" is used here to refer to sharing a sleeping surface with an infant (whether it is a bed or not), in contrast to the term "co-sleeping" which refers to sharing a room with an infant but sleeping on separate surfaces.[34]

Our review of cases on the public record[35] reveals that in the last 30 years, there have been seven prosecutions of parents based on the breach of a parental duty to provide safe sleeping conditions where infants have died while bed-sharing (including where parents have fallen asleep while breastfeeding), although this is likely to be an undercount. Three of these cases involved prosecutions for manslaughter (which carries a maximum penalty of life imprisonment);[36] three for the offence of criminal nuisance under s 145 of the

34 See Monique Jonas and Joanna Manning "Setting parental standards through criminal prosecutions: criminality and co-sleeping in Aotearoa New Zealand" (2019) 31(2) CFLQ 99.

35 Tolmie, Te Aho and Doolin, above n 3, at Appendix One.

36 *R v Tukiwaho*, above n 11; *R v Tuheke* above n 11; and *Q v R* [2017] NZCA 185 (the accused in *Q v R* had a kaiāwhina, or qualified Māori health worker, supporting her).

Crimes Act (which carries a maximum penalty of one year in prison);[37] and one was a prosecution under the previous version of s 152(2) of the Crimes Act for an offence which was abolished in the 2011 reform of that provision.[38] Presumably, parents were not charged with a homicide offence in cases where a necessary causal link could not be established between an infant's death, and bed-sharing or falling asleep whilst breastfeeding. From our review, the first time sleeping practices appear to have been prosecuted was in 2012, with the manslaughter conviction of a Māori mother in *R v Tukiwaho*.[39] In that case, Ngaire Tukiwaho pleaded guilty to the charge. She accidentally smothered her baby whilst sleeping in a car after her partner punched her in the face and she left the home she shared with him, taking her baby with her.

Six of the seven prosecutions were of mothers; in only one case was a father charged (in addition to the mother). All three of the prosecutions for manslaughter involved Māori mothers. All three were convicted of manslaughter, although in one instance that conviction was overturned on appeal.

Traditional Māori approaches to infant sleeping arrangements focus on co-sleeping, bed-sharing and responsiveness to infant cues.[40] The idea that infants should remain physically close to parents and caregivers was central to traditional understandings of successful child-rearing.[41] These practices are evidenced in Māori oral narratives, whakataukī (proverbs), oriori (lullabies) and waiata (songs).[42] Recent research confirms that Māori whānau (extended families) continue these practices today, with Māori parents more often using

37 See Sybil Harrison and Elray Marsh in Marty Sharpe "Hawkes Bay mother charged with sharing bed with baby that died" The Dominion Post (online ed, Wellington, 13 October 2015); and *R v "Jane Doe"* above n 11.

38 This was the prosecution and acquittal of a mother in 2014 who fell asleep whilst breast feeding, resulting in the death of her baby. See Marty Sharpe, above n 37.

39 *R v Tukiwaho,* above n 11.

40 Horiana Jones and others "Māori child rearing and infant sleep practices" (2017) 46(3) New Zealand Journal of Psychology 30 at 31.

41 Jones and others, above n 40.

42 Kuni Jenkins, Helen Mountain Harte and Te Kahui Mana Ririki *Traditional Māori Parenting: An Historical Review of Literature of Traditional Māori Child Rearing Practices in Pre-European Times* (Te Kahui Mana Ririki, Auckland, 2011). For example, "He tangi to te tamariki, he whakamā to te pakeke" (when the child cries, the elder blushes).

parent-assisted soothing styles and frequently sharing a bed with their infants.[43] Traditionally, these practices were understood to help raise "independent, brave and confident" children.[44]

Research has now linked such sleeping practices to positive outcomes, for example the "promotion of breastfeeding, the development of independence in children, and higher self-esteem".[45] These approaches may also contribute to helping keep infants' cortisol levels lower:[46] prolonged extreme levels of cortisol have been found to negatively affect infant brain development.[47] In fact, "bed-sharing, breastfeeding, and increased contact between infant and mother have been associated with reduced infant mortality rates, in the absence of drugs and alcohol".[48]

Despite these benefits, approaches to infant sleep that involve the use of separate sleep locations, are widely promoted in New Zealand.[49] For example, the Ministry of Health, Plunket and health care providers currently advise against bed-sharing.[50] In New Zealand, bed-sharing has been negatively associated[51]

43 Jones and others, above n 40, at 35. See also Sally Abel and others "Infant care practices in New Zealand: a cross-cultural qualitative study" (2001) 53(9) Social Science & Medicine 1135.

44 At [31].

45 Jones and others, above n 40. See also James J McKenna and Thomas McDade "Why babies should never sleep alone: A review of the co-sleeping controversy in relation to SIDS, bedsharing and breast feeding" (2005) 6(2) Paediatric Respiratory Reviews 134; and Fern R Hauck and others "Breastfeeding and Reduced Risk of Sudden Infant Death Syndrome: A Meta-analysis" (2011) 128(1) Pediatrics 103.

46 Wendy Middlemiss and others "Asynchrony of mother-infant hypothalamic-pituitary-adrenal axis activity following extinction of infant crying responses induced during the transition to sleep" (2012) 88 Early Human Development 227 at 230 found that infants' cortisol levels which elevated during the process of "self-soothing" remained elevated even when they fell asleep.

47 National Scientific Council on the Developing Child *Excessive Stress Disrupts the Architecture of the Developing Brain* (Center on the Developing Child, Harvard University, Working Paper 3, January 2014) at 1.

48 Jones and others, above n 40, at 31. See also James J McKenna, Wendy Middlemiss and Mary S Tarsha "Potential Evolutionary, Neurophysiological, and Developmental Origins of Sudden Infant Death Syndrome and Inconsolable Crying (Colic): Is It About Controlling Breath?" (2016) 65(1) Family Relations 239; and Peter S Blair and others "Bed-Sharing in the Absence of Hazardous Circumstances: Is There a Risk of Sudden Infant Death Syndrome? An Analysis from Two Case-Control Studies Conducted in the UK" (2014) 9(9) PLoS ONE e107799 1 at 5.

49 Abel and others, above n 43, at 1146–1147.

50 David Tipene-Leach and others "Methodology and recruitment for a randomised controlled trial to evaluate the safety of *wahakura* for infant bedsharing" (2014) 14 BMC Pediatrics 1 at 2; Tipene-Leach and others "SIDS-related knowledge and infant care practices among Māori mothers" (2010) 123(1326) The New Zealand Medical Journal 88; Ministry of Health "Keeping baby safe in bed: the first 6 weeks" (27 May 2019) <www.health.govt.nz >; and Plunket "Sleep" <www.plunket.org.nz>.

51 Jones and others, above n 40, at 30.

with sudden unexpected death in infancy (SUDI), which encompasses both unexplained sleep related deaths (or "SIDS" deaths), and deaths with an identified cause, such as suffocation.[52] In response to these health directives, we are now seeing parents in New Zealand being criminally prosecuted for bed-sharing (including falling asleep whilst breastfeeding). Jonas and Manning argue that the prosecutions suggest the formalisation of a legal prohibition on bed-sharing, despite the fact that bed-sharing practices are only "discouraged" by the medical profession.[53]

The prosecutions have not been without criticism. For example, in 2015 the police prosecuted a young mother from Napier who was convicted of criminal nuisance under s 145 of the Crimes Act after her baby died whilst sharing her bed. Dr Tipene-Leach, a Māori public health physician, told Radio New Zealand's Morning Report programme that bed-sharing was common, that "mothers sleep with babies" and that it was the police who had turned this woman into a criminal.[54]

The police defended their decision to prosecute in this case on the basis that the mother had been given comprehensive information on the dangers of bed-sharing with her baby, who had been born prematurely. She had also been provided with a "pēpi-pod" (a portable sleep space designed to keep babies safe when sharing a bed with their parents) and a family safety plan. When the police attended after the baby had died they found the pēpi-pod propped against the wall of the bedroom unused.[55] In other words, the police defended their decision on the basis that they were monitoring adherence to, and prosecuting failure to follow, parenting advice. What is troubling about this is that such parenting advice may not be appropriate in all cultural contexts, including in relation to Māori for whom bed-sharing is a traditional cultural practice. Furthermore, such advice may promote a practice that research suggests is not always in the best interests of children. Moreover, prosecutions are counterproductive if they discourage communities with the most at-risk children from engaging with medical and health services for fear of criminal charges. Prosecutorial discretion must always be informed by the public interest, which arguably should encompass a consideration of cultural interests

52 Jonas and Manning, above n 34, at 102.

53 Jonas and Manning, above n 34.

54 "Woman ignored Plunket advice prior to baby's death" *NewsHub* (New Zealand, 4 December 2015).

55 "Woman ignored Plunket advice prior to baby's death", above n 54.

and any potential negative impacts of prosecution upon those belonging to a particular culture or community.[56]

As suggested by Dr Tipene-Leach, the police are prosecuting a parenting practice that is perhaps more common across New Zealand than is acknowledged.[57] One parenting writer stated in 2017: "I do not know any mothers who never co-slept [used in this context to refer to bed-sharing]. I know many mothers who have lied to Plunket and their GPs to avoid being told off for co-sleeping."[58] It is not clear whether evidence was presented at trial in any of these cases regarding how common it is for parents to bed-share with their infants in practice, despite medical advice to the contrary. To take a different example, in *R v Vanner*,[59] a farmer was charged with manslaughter on the basis of a breach of his duty under s 156 of the Crimes Act to take care when in charge of a dangerous thing. His four-year-old daughter drove off on his quad bike while he was momentarily distracted, and overturned the bike on herself. Evidence of the widespread practice of children riding on quad bikes within the farming community was presented in court to demonstrate that Gavin Vanner's actions were not a major departure from the standard of care expected, even though his daughter's presence on the bike was in clear contravention of the manufacturer's safety standards.[60] A similar argument could be run in bed-sharing prosecutions: that bed-sharing with a baby is common within the community and, therefore, bed-sharing is not a major departure from the standard of care expected of a reasonable parent, even if it does not accord with the formal advice of medical professionals.

B The undermining of traditional Māori parenting arrangements and protective practices

Traditional Māori approaches to child rearing are collective in nature. In

56 See the public interest test in Crown Law Office *Solicitor-General's Prosecution Guidelines* (July 2013) at 8–10. The Police have their own prosecutorial guidelines that are not publicly accessible.

57 Sharpe, above n 37, quotes coroner Wallace Bain as saying that in 2013, 55–60 babies had died from co-sleeping in each of the four previous years. Clearly not all of these deaths resulted in prosecutions.

58 Emily Writes "Is the advice on co-sleeping actually realistic?" *The Spinoff* (New Zealand, 7 August 2017). See also Jonas and Manning, above n 34, at 26.

59 *R v Vanner,* above n 4.

60 The Court acknowledged that the jury was entitled to have regard to "practical considerations" and "evidence of what occurs in practice": *R v Vanner,* above n 4, at [19]–[20]; and "Vanner carries burden of daughter's death" *New Zealand Herald* (online ed, Auckland, 11 March 2006).

traditional Te Ao Māori (Māori society), fathers and mothers, uncles and aunts, grandparents, older siblings and cousins all had rights and responsibilities in relation to the raising of children.[61] Kaumātua (elders), in particular, had significant responsibility for childcare and authority in caregiving decisions.[62] For example, according to one historical account, it was the grandparents' decision, rather than the biological parents' decision, as to whether a child should be adopted and raised by another family member.[63] Other records describe the authority that aunts and uncles exercised in relation to their nephews and nieces as akin to the authority of the children's parents.[64] Older siblings and cousins took upon the role of supervising children on the marae.[65] This collective approach to child rearing is reflected in the whakataukī "Nāu i whatu te kākahu, he tāniko tāku" meaning, "You wove the body of the cloak, I made the tāniko border".[66] It describes how the complementary work of different whānau members come together to shape a child's character and behaviour.[67] This meant that parents were not the only caregivers and did not have the exclusive right to make decisions about how their children were raised.[68] It also meant that the burden of raising children was shared across the whānau.[69] In varying degrees this whānau dynamic remains true today.[70]

In contrast, under s 17 of the Care of Children Act 2004, the biological

61 Jones and others, above n 40, at 31; and Natanahira Herewini *Māori Communities Raising Children: The Roles of Extended Whānau in Child Rearing in Māori Society* (Ngā Pae o te Māramatanga and the Michael and Suzanne Borrin Foundation, 2018) at 10.

62 Herewini, above n 61.

63 Tamati Cairns "Whāngai — Caring for a Child" in Gabrielle M Maxwell, Ian B Hassall and Jeremy P Robertson (eds) *Toward a Child and Family Policy for New Zealand* (The Office of the Commissioner for Children, Wellington, 1991) at 100–102; and Joan Metge *New Growth from Old: The Whānau in the Modern World* (1st ed, GP Print, Wellington, 1995) at 101.

64 Metge, above n 63, at 190.

65 At 154.

66 As quoted in Metge, above n 63, at 175.

67 Joan Metge *Tuamaka: The Challenge of Difference in Aotearoa New Zealand* (Auckland University Press, Auckland, 2010) at 51.

68 Herewini, above n 61, at 10. See also Ani Mikaere "The Balance Destroyed: Consequences for Māori Women of the Colonisation of Tikanga Māori" (MJur Thesis, University of Waikato, 1995) at 50; and Metge, above n 63, at 148–149.

69 The Royal Commission on Social Policy "Women and Social Policy Part 1 Māori Women" in *The April Report, Vol II, Future Directions, Report of the Royal Commission on Social Policy Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi* (The Royal Commission on Social Policy, Wellington, April 1988) 163 at [2.2.12] and [2.2.13].

70 Metge, above n 63, at 153 as cited in Herewini, above n 61, at 10.

mother and father of a child are usually joint guardians of the child, affording them authority over decision making in relation to their children, including decisions about who the child lives with.[71] For Māori whānau, a legal system that gives priority rights to the biological parents undercuts the care arrangements that extended whānau might put in place to support the children of parents who are not coping.

In our sample there were cases where children were returned from appropriate protective care arrangements with extended whānau to the biological parents — who were not managing — and who were then prosecuted for their parenting failures.[72] For example, in a 2017 case called *R v Neil,*[73] an aunt of the child had, on an earlier occasion, found the mother and grandmother like "zombies" as a result of their drug addiction, and removed the two older children. The whānau was Māori. Documentation from the Department of Child, Youth and Family Services (CYF) (now Oranga Tamariki) showed the aunt had informed the police about the mother's addiction to synthetic cannabis and they had reported this to the CYF social workers. However, the aunt had no legal right to keep the children with her and they were returned to their mother. Three months later, the youngest child was dead after being left in a hot car for three hours whilst his mother and grandmother smoked synthetic cannabis and fell asleep.[74]

Concerned whānau who intervene are at risk of legal action. For example, in 2001, it was reported that a Māori grandmother, Mere Rapana, was convicted of four counts of abduction in respect of her four granddaughters (aged between five and 12).[75] The children lived with their mother and her gang-affiliated boyfriend. After Ms Rapana's granddaughters visited her with dirty clothes and told her about parties and fights at the house, and their distress and their being left in the house alone, she contacted CYF three times asking them

71 Care of Children Act 2004, ss 15–16.

72 See *R v Ngati* HC Auckland CRI-2006-092-001919, 15 June 2007.

73 *R v Neil* [2017] NZHC 1494.

74 Isaiah's mother (Te Whetu) and father (Neil) pleaded guilty to manslaughter. Parangi (Isaiah's grandmother) was convicted of manslaughter at trial but, owing to a successful appeal in 2018, her conviction was set aside with order of a retrial (*Parangi v The Queen* [2018] NZCA 46). Upon retrial she was convicted again: Belinda Feek "Rūātoki grandmother Donna Parangi found guilty of baby Isaiah Neil's manslaughter in hot car" *New Zealand Herald* (online ed, Auckland, 25 March 2019).

75 "Girls taken after tales of neglect" *The Press* (Christchurch, 1 February 2001) 7; and "Punished for caring" *The Dominion Post* (Wellington, 14 February 2001).

to intervene. Given the fraught history that Māori whānau have had with child protection services, with many Māori children having been taken into state care (a point we return to below), Ms Rapana's actions should have been treated very seriously because they indicated the high level of concern that she felt for the wellbeing of her granddaughters.[76] She said that she "pleaded" with CYF to intervene, but CYF declined after the social worker noted there was no evidence of sexual abuse or violence. At this point, Ms Rapana took matters into her own hands and removed her granddaughters from their mother, which resulted in her convictions for abduction.[77]

Māori mothers whose children are being cared for by whānau members are also at risk of being judged to be "bad mothers" because they have abdicated their responsibility, according to Pākehā cultural norms, to care for "their own" children. Sentencing cases frequently note how many children the defendant has and whether or not they are in her immediate care.[78]

C The state's own culpability as a "negligent parent"

In 2017, the Human Rights Commission reported that more than 100,000 children and vulnerable adults were put into state care over a 40-year period, beginning in the 1950s.[79] Whilst the loving care that Māori communities provided children at the point of colonisation has been well documented,[80] by the 1970s nearly half of all children in state care were Māori. In some parts of New Zealand, that figure rose to nearly 80 per cent.[81]

The increasing numbers of Māori children in state care also correlates to

76 See also *R v Harris* HC Wellington CRI-2004-078-1816, 26 August 2005; "Grandmother says she tried to get CYF to help with baby" *Radio NZ Newswire* (New Zealand, 7 June 2005); and "Father's pleas for his baby's life fell on deaf ears" *Stuff* (New Zealand, 20 November 2015). For discussion on this point regarding Aboriginal mothers in Australia see Kyllie Cripps "Who's Failing Who? New Failure to Protect Laws in Victoria and the Impact on Indigenous Mothers and Their Children" (2012) 8(13) ILB 15, at 16.

77 Above n 75.

78 See, for example, *R v Tiatoa* HC Auckland CRI-2009-055-001007, 11 October 2010.

79 Human Rights Commission *Submission in relation to the twenty-first and twenty-second periodic review of New Zealand under the Convention on the Elimination of All Forms of Racial Discrimination* (July 2017) at [82].

80 Family Violence Death Review Committee *Third Annual Report: December 2011 to December 2012* (Health Quality & Safety Commission, June 2013) at 22–23.

81 Human Rights Commission, above n 79.

the incarceration rates of Māori women.[82] This is because female inmates are almost three times more likely than male inmates to have dependent children, and are more than twice as likely to be single parents of those children.[83] Whilst children's care arrangements do not change in 74 per cent of cases where a father is imprisoned, this is not the case when women are imprisoned.[84]

The state historically did not exercise care in the discharge of its obligations to those children for whom it had assumed responsibility. For example, the Confidential Listening and Assistance Service has found that "[b]efore 1992 there was little or no accountability in the care service provided by the Government"[85] and "[t]he State delegated its responsibilities to others" then "abandoned" the child "to his or her fate … These children felt there was no one for them to turn to, there was no protection offered by the State."[86]

Māori children have disproportionately experienced abuse and neglect while in state care, including physical and sexual abuse.[87] These experiences have compounded the intergenerational trauma suffered as a result of colonisation, which had the flow-on effect of contributing to cycles of abuse and family violence.[88] The immense scale of stories of abuse and neglect from children in state care, along with the lodging of a Waitangi Tribunal claim for an inquiry into the abuse of Māori children in state care in 2017,[89] prompted the New Zealand government to announce a Royal Commission of Inquiry

82 At [87]; Waitangi Tribunal *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 14; and Committee on the Elimination of Discrimination Against Women *Concluding observations on the eighth periodic report of New Zealand* UN Doc CEDAW/C/NZL/CO/8 (20 July 2018) at [43].

83 Julia Tolmie "Women in the Criminal Justice System" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2007) 295 at 311.

84 Tolmie above n 83.

85 Carolyn Henwood *Final Report of the Confidential Listening and Assistance Service* (Confidential Listening and Advice Service, Wellington, 2015) at 9.

86 At 13.

87 Henwood, above n 85, at 18; Robert Templeton, Sarah Crichton, Sarah Tumen, and Rissa Ota *Research Using Administrative Data to Support the Work of the Expert Panel on Modernising Child Youth and Family* (Treasury, Wellington, 2016) at Table One; and Human Rights Commission "Aotearoa's Lost Generation: Māori Children in State Care" (press release, 2 March 2017).

88 Bronwyn Labrum "'Bringing families up to scratch': the distinctive working of Māori State welfare, 1944–1970" (2002) 36(2) The New Zealand Journal of History 161.

89 Aaron Smale "Claim for child abuse inquiry lodged with Waitangi Tribunal" *Radio New Zealand* (New Zealand, 14 March 2017).

into Historical Abuse in State Care in February 2018.[90]

It is the nature of the criminal justice system that when parental failures are prosecuted they are necessarily understood in terms of the personal individual choices of the individuals who are being prosecuted. The irony is that the state may have had a significant role to play in the failures of Māori parents, and yet is not criminally liable for its own failures under corresponding duty provisions in the Crimes Act. At the most general level, a defendant may have come from a community and whānau suffering compounding inter-generational trauma traced back to state-driven colonial processes and the "devastatingly brutal attacks"[91] on communities, land, culture, language and identity that these entailed.[92] More specifically, the state may have played a direct role in setting up the parental failures that it is prosecuting by being instrumental in the parents' own experiences of childhood abuse and neglect, and the poor parental role models they experienced whilst in the child welfare system. It is arguable that the state has failed in its own historical role as parent.

Occasionally there is recognition in a sentencing judgment that the defendant's experiences of childhood abuse and neglect may have impacted on their parenting skills. In *R v Tiatoa,*[93] for example, the defendant was acknowledged to have been seriously neglected as a child. She was a 21-year-old Māori woman with five children, who was convicted of wilful neglect for failing to obtain timely medical treatment after one of her children sustained serious injuries. Her partner, the stepfather, was charged, but acquitted, of injuring the child. The sentencing Judge said of the mother:[94]

> The probation officer notes that it is only since you have attended a parenting course which put your own poor parenting skills into context that you realised that neglect was not a way of bringing children up.

Addressing the mother the Judge added, "[y]ou acknowledge that you would

90 Rt Hon Jacinda Ardern "Inquiry into abuse in state care" (1 February 2018) New Zealand Government <www.beehive.govt.nz>.

91 Donna Awatere *Māori Sovereignty* (Broadsheet, Auckland, 1984) as cited in Fiona Cram and Suzanne Pitama "Ko Toku Whānau, Ko Toku Mana" in Vivienne Adair and Robyn Dixon (eds) *The Family in Aotearoa New Zealand* (Auckland, 1998) at 130.

92 Family Violence Death Review Committee, above n 80, at 22–25.

93 *R v Tiatoa*, above n 78. See also *R v Waiba,* above n 28, at [20]–[21]; and *R v Webster* HC Auckland CRI-2007-092-013782, 18 February 2009 at [5].

94 *R v Tiatoa*, above n 78, at [24].

go out partying and leave the child with others but did not at the time view those actions as neglect based on your own childhood experiences."[95]

Despite such recognition of the intergenerational impact of childhood abuse and neglect at sentencing, we have found no discussion of the state's historical role in relation to any particular defendant (although we would expect that some of the parents in our sample had been in the care of the state as children).[96]

Another manner in which the state may have played a role in parental failures that are prosecuted as individual failures is where it has failed to provide effective interventions where children who were harmed were known to state agencies to be vulnerable. For instance, in *R v Neil*,[97] discussed above, CYF had been advised on two occasions about the deteriorating state of mind of the mother but had not intervened.

D Discriminatory practices within the criminaljustice system

New Zealand crime statistics reveal high levels of offending by Māori.[98] However, as observed in 2015 by the United Nations Working Group on Arbitrary Detention, bias in decision-making also appears to influence the numbers at which Māori are filtered into, progressed through, and over-represented in all stages of the criminal justice system.[99] To take the investigative stage as an example, the degree to which Māori are apprehended may be attributable, in part, to disproportionate state surveillance and

95 At [24].

96 There has, however, been some discussion of the State's historical role in the form of cultural reports at sentencing: see *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.

97 *R v Neil*, above n 73.

98 See, for example, Ministry of Justice *Adult Conviction and Sentencing Statistics: Data Highlights for 2017* (2017) <www.justice.govt.nz>.

99 Human Rights Council *Report of the Working Group on Arbitrary Detention*, UN Doc A/HRC/30/36/Add.2 at [93]. See also Bronwyn Morrison *Identifying and Responding to Bias in the Criminal Justice System: A Review of International and New Zealand Research* (Ministry of Justice, November 2009). For an example of a study finding evidence of potential bias in New Zealand see Bridgette L Jones *Offending Outcomes for Māori and Non-Māori, An Investigation of Ethnic Bias in the Criminal Justice System: Evidence From a New Zealand Birth Cohort* (MSc (Psychology) Thesis, University of Canterbury, 2016). See also Human Rights Commission *A fair go for all? Rite tahi tātou katoa? Addressing Structural Discrimination in Public Services* (July 2012) at 3.

policing of Māori communities.[100] Further, because of their socio-economic precarity, Māori experience higher levels of dependency on the state and its welfare agencies, which in turn leads to increased monitoring and surveillance by those agencies.[101] For instance, Māori mothers may be more likely to be reliant on state benefits for survival and, therefore, subject to scrutiny from state agencies.[102]

Khylee Quince suggests that Māori women fare worse than both Māori men and Pākehā women within the criminal justice system.[103] For example, whereas Pākehā women are likely to be "filtered out" of the criminal justice system at every point where discretionary decisions are made, Māori women are more likely to be filtered in.[104] It has been suggested that, whilst the criminal justice system responds positively to women who conform to cultural norms of white middle class femininity, women who fail these standards are responded to punitively.[105] Racist and classist readings of particular Māori women may pre-package them as women who fail these standards, and therefore as people who "belong" in the criminal justice system.[106]

Certainly, New Zealand media coverage of child abuse and neglect cases perpetuates the discourse that parental failures are a "Māori problem", with

100 Simone Bull "'The land of murder, cannibalism, and all kinds of atrocious crimes?' Māori and Crime in New Zealand, 1853–1919" (2004) 44(4) Brit J Criminol 496; Paul Quinton, Nick Bland and Joel Miller *Police Stops, Decision-making and Practice* (United Kingdom Home Office, Police Research Series Paper 130, September 2000); and Gabrielle Maxwell and Catherine Smith *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri* (Victoria University of Wellington, March 1998).

101 Quince, above n 20, at 344–345.

102 At 349–350.

103 At 349.

104 Tolmie, above n 83, at 302.

105 See the discussion in Singh, above n 15, at 515.

106 This might be seen as an example of representational intersectionality in operation: see Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color" (1991) 43(6) Stan L Rev 1241 at 1282–1283.

mothers especially to blame.[107] Liz Beddoe argues that:[108]

> Where children are framed as "at risk" and adults (especially "welfare" mothers or [Māori] mothers) are seen as "a risk", we are likely to see an overly moralistic and individualising approach to the most troubled children and families, one that assumes that all deep-rooted social problems can be solved by interventions aimed at dysfunctional individual behaviours. Adults become subject to surveillance and punishment, not support.

The possibility of bias against Māori was not discussed in the case law on parental omissions. There is a lack of recognition, for example, of the distrust many Māori may feel towards governmental institutions and authorities in light of inter-generational (and perhaps personal) experiences of discrimination and harassment by these agencies.[109] For example, in *R v Witika*,[110] a young Māori mother and her partner were each convicted of two counts of manslaughter, including manslaughter by omission to provide medical care, after her child died following a fatal assault. The prosecution was unable to prove which of the defendants had committed the fatal assault, although there was evidence presented during the trial that both had used physical violence against the child and that Witika had experienced severe physical violence from her partner.[111] The trial Judge emphasised that each defendant knew what the other was doing and had opportunities to remove the child from the dangerous environment presented by the abuser, such as going to the police for help, which was not done.[112] In relation to Witika, this presumes that she would have found

107 Elena Maydell "'It just seemed like your normal domestic violence': ethnic stereotypes in print media coverage of child abuse in New Zealand" (2018) 40(5) Media, Culture & Society 707 at 710. Michael Laws' opinion pieces about "the Ferals", who he refers to as "disproportionately Māori", are examples of this: Michael Laws "Pay them, sterilise them, but don't let them have kids" *Sunday Star Times* (Auckland, 3 June 2012).

108 Liz Beddoe "Race, gender, class: The 'bad mother' and child abuse in media reporting" (18 May 2013) Economic Social and Research Council Moral Panic Seminar Series 2012–2014 <www.moralpanicseminarseries.wordpress.com>.

109 Irene de Haan and Marie Connolly "Anticipating Risk: Predictive Risk Modelling as a Signal of Adversity" in Marie Connolly (ed) *Beyond the Risk Paradigm in Child Protection* (Palgrave, London, 2017) 29 at 31.

110 *R v Witika* [1993] 2 NZLR 424 (CA).

111 At 428: "A doctor examined Witika on 17 September 1990 and when asked in her experience to rank the violence to which she had been subjected in sustaining her injuries on a scale of severity from 0-10 said 'It would have to be close to 10.'"

112 At 431. This failure to protect formed the basis for secondary liability in relation to the unlawful assault for the parent who was not responsible for that assault as the primary party.

sympathy and safety with that institution.[113] However, in research conducted in conjunction with the New Zealand Police and Te Puni Kōkiri (Ministry of Māori Development) from around that period, two-thirds of the 737 police respondents reported hearing other police use racist language about Māori, and one-third of the police respondents reported having a higher tendency to suspect Māori of committing an offence.[114] In turn, some of the Māori participants in that research expressed distrust of the police and indicated that they would be hesitant to call upon the police when in need of assistance.[115]

V THE RELEVANCE OF LIVING IN PRECARITY

Precarious life circumstances make parenting (already a stressful undertaking) considerably more stressful, and make ideal parenting, if judged according to the norms of well-resourced middle class families, impossible. Such circumstances must therefore be part of the context in which we assess what is reasonable to expect of individual parents. For example, providing the necessaries of life to children, including adequate food, housing, supervision and medical care, is considerably more onerous when there is not enough money to cover basic living costs. For low-income families dealing with the high cost of living, both parents can be working and yet still not be earning enough to cover basic expenses, let alone a babysitter for the children at the times they need to be away from home. Families migrating to areas with cheaper rents can be forced to move away from extended family who would otherwise provide childcare support. Peter Sykes, from the Mangere East Family Service Centre, is reported as saying:[116]

> Sometimes the fact is they don't have any food because the income levels of our families [are] lower than what's sustainable in my view. Some of them work their butts off and don't actually have any choice because Mum's working, Dad's working, it's almost institutional-created neglect because they can't afford anybody to look after the children.

113 To the contrary, see the response the defendant received in *Police v Kawiti* [2000] 1 NZLR 117 (HC) as critiqued in Khylee Quince and Julia Tolmie "Commentary: Kawiti at the Centre" and "Judgment" in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand Te Rino: A Two-Stranded Rope* (Hart Publishing, London, 2017) 481.

114 Maxwell and Smith, above n 100; and Quince, above n 20, at 334.

115 Pania Te Whaiti and Michael Roguski *Māori Perceptions of the Police* (He Parakeke, Wellington, September 1998); and Quince, above n 20, at 346.

116 As quoted in Neal, above n 18, at 5.

A Who is the precariat?

A significant percentage of New Zealanders are living in conditions of considerable economic deprivation. Cochrane and others estimate that around 17 per cent of New Zealanders live in circumstances of precarity, and 57.7 per cent of them women.[117] They define the "precariat" as:[118]

> … a class-in-the-making that can be characterised by three dimensions. First, its members have insecure employment; that is, they are in and out of jobs often, failing to secure long term contracts. They are, as a result, habituated to a life of unstable labour and unstable living. Second, its members rely on money from wages that are flexible, rather than from wealth or enterprise-based incomes. They thus experience chronic income insecurity on top of their employment insecurity. Third, its members have fewer civil, cultural, social, political and economic rights, which translates into limited access to rights-based state benefits. Accompanying these reduced rights, they must perform a great deal of work outside of their paid jobs, in "seeking jobs and in appeasing the state, by queuing, form filling, [and] retraining."[119] This combination tends to induce a sense of relative deprivation and a consciousness of loss.[120]

Māori comprise approximately 21.8 per cent of the precariat, whilst Pacific peoples make up approximately 10.1 per cent.[121] The prevalence rates of precarity for Māori and Pasifika are almost double those of Pākehā, at 28.8 per cent and 29.2 per cent respectively, compared with 14.6 per cent for Pākehā. This means that while "one in every seven Europeans is in the precariat, for Māori and Pacific peoples more than one in every four fall into" this category.[122] Although the statistics have not been broken down by both gender and ethnicity, it is likely that Māori women have higher prevalence rates than Māori men. Whilst Māori are statistically overrepresented in almost every socio-economic index

117 William Cochrane and others "A Statistical Portrait of the New Zealand Precariat" in Shilot Groot and others (eds) *Precarity: Uncertain, Insecure and Unequal Lives in Aotearoa New Zealand* (Massey University Press, Auckland, 2017) 27 at 30.

118 At 29.

119 Guy Standing "Why the Precariat Is Not a "Bogus Concept" (2014) openDemocracy <www.opendemocracy.net> as cited in Cochrane and others, above n 117, at 27.

120 Guy Standing "Understanding the Precariat Through Labour and Work" (2014) 45(5) Development and Change 963 as cited in Cochrane and others, above n 117, at 29.

121 Standing, above n 120, at 31. Population figures are from the 2013 Census, above n 14.

122 At 32.

compared with non-Māori, including having lower incomes, higher rates of unemployment and poorer health, Māori women fare worse than Māori men across many of these indicators and, in addition, are more likely to have the sole charge of dependent children.[123]

The marginalised position of Māori is directly linked to New Zealand's violent colonial history,[124] which has taken a significant spiritual, psychological and communitarian toll on Māori and provides the setting for many of the parental omissions cases we canvassed.[125] For Māori women the colonial experience was pronounced in particular ways. Māori women lost their rights to own property,[126] lost the benefits of collective parenting within whānau, and became isolated in individual households and burdened with the primary responsibility for domestic tasks, including parenting. Away from the watchful eye of the community, Quince argues that Māori women became more vulnerable to violence, a point we return to below.[127]

B Precarity is unacknowledged in the cases prosecuting parental failures to act

Acknowledgement of the precarious socio-economic position of many Māori mothers (and its roots in colonialism) is absent from the case law on parental omissions.[128] Considering that precarity is likely to significantly alter the

123 Ministry of Health "Socioeconomic indicators" (2 August 2018) Ministry of Health <www.health.govt.nz> at 123.

124 Kim Workman "Politics and Punitiveness — Limiting the Rush to Punish" (paper presented to Australian and New Zealand Association of Psychiatry, Psychology and Law and the Royal Australian and New Zealand College of Psychiatrists (Faculty of Forensic Psychiatry) Conference "Crime and Punishment: The Rising Punitiveness", 17–19 November 2011, Wellington) at 5–6; Quince, above n 20, at 342.

125 The overrepresentation of Māori and Pasifika in the precariat aligns with the overrepresentation of Māori and Pasifika in our prisons. Some sociologists use the term the "criminalisation of poverty" to describe neoliberalism's mass incarceration of poor ethnic minorities. See for example Loïc Wacquant, "The Penalization of Poverty and the Rise of Neo-Liberalism" (2003) 31(1) Capítulo Crimológico 7 at 16.

126 Ani Mikaere "Collective Rights and Gender Issues: A Māori Woman's Perspective" in Nin Tomas (ed) *Collective Human Rights of Pacific Peoples* (University of Auckland, International Research Unit for Māori and Indigenous Education, 1998) at 79; and Quince, above n 20, at 349.

127 Quince, above n 20, at 349–350.

128 There is also no recognition in the case law of the state's complicity in the broader harms that children who grow up in precarious socio-economic circumstances are exposed to: Linda Fentiman *Blaming Mothers: American Law and the Risks to Children's Health* (New York University Press, 2017) at 7–9 and 38.

resources available to parents,[129] and therefore the circumstances in which the standards of what we can reasonably expect are to be applied, it is troubling that the case law generally fails to discuss the economic circumstances of the parents who are being prosecuted.[130] In *R v Kuka,*[131] for example, the mother of a young child was convicted twice of manslaughter on the basis that she had failed to protect her child by leaving her in the care of those who were abusing her (the mother's partner and housemates), and then failed to get her child medical care quickly enough once her child had been injured. The first head of liability rested upon the fact that Lisa Kuka had left her children in the care of others. Ms Kuka worked long hours in her low-paid agricultural sector job, at a considerable distance from the house, six days a week. She was the only one working in her household and had three young children. One can question what feasible options a low-paid mother in her position could draw upon for affordable childcare, for three children over long hours for six days.[132] Precarity also informed the options available in *R v Tukiwaho*,[133] discussed above. If Ngaire Tukiwaho had been in the financial position to pay for a motel for the night for her and her baby following the assault by her partner, she may not have ended up sleeping outside her sister's house in a car, where her baby was accidentally smothered.

In a neoliberal political climate, poverty may be assumed to be the result of individual failings. In such a climate there is a risk that precarity is viewed as part of the narrative of individual parental failure, or is considered to be a personal characteristic to be disregarded in the application of the objective test,[134] rather than viewed as a circumstance in which the objective normative

129 Obvious parental resources that are affected by precarity are money and access to support services, but other resources such as time, sleep, nourishing food and general levels of stress are also affected.

130 Fentiman found the same absence in her research in the United States: above n 128, at 193.

131 *R v Kuka,* above n 17.

132 In the coronial inquest "Royal Australasian College of Physicians paediatrics chairman Johan Morreau said hers was a story of poverty": Michael Dickison "Coroner considers support Nia missed" *New Zealand Herald* (Auckland, 24 August 2010) at A5.

133 *R v Tukiwaho*, above n 11.

134 An example of this is the media coverage of a South Auckland mother, Tala Pita, who was convicted and sentenced in 2017 on five charges of wilful neglect for leaving her children for extended periods of time in the care of their 11-year-old sibling (above n 18). The media heading read "Neglected kids survived on rotten food". Buried in the details about this case is the fact that Tala did not have a fridge in the house. No mention is made of the fact that whiteware is prohibitively expensive for someone who does not have enough money to cover basic living costs.

standards of what is reasonable parenting must be applied. Zygmunt Bauman argues that the poor have been excluded from "the universe of moral empathy" through "rewriting their stories away from the language of deprivation to that of depravity. The poor are portrayed as lax, sinful and devoid of moral standards."[135]

It is not just that circumstances of precarity are not seen as significant in the discussion of the facts in parental omissions cases, but also that the parenting standards that courts give expression to in omissions cases often appear to be informed by middle class norms. For example, the courts frequently articulate an expectation that parents will assess the information presented to them about risk on a particular occasion and, in response, implement rational courses of action that reduce that risk. This assumes a level of social and financial resourcing, including reflective time to ponder risk and decide on future courses of action, minimal competing safety and other considerations, and the resources to implement safety plans. It also reflects a life strategy founded on the belief or experience that with careful planning one can eliminate or minimise the harms and dangers that life presents. Parents who do not have informal networks of support or the money to pay for support services and who are struggling with multiple complex life stresses, may well be able to do little more than react from moment to moment to the immediate demands that are placed upon them.

In *Q v R*,[136] a single Māori mother with a long-standing opiate addiction was working with her midwife through the process of bearing, birthing and caring for her baby. The appellant was put on methadone when she became pregnant because this was judged to be less harmful to her unborn child. On the day in question she was chronically sleep deprived (having been unable to settle her baby throughout the night), coming down with pneumonia and under the influence of methadone, zopiclone (a sleeping pill prescribed to her) and alcohol. She fell asleep whilst breastfeeding, accidently smothering her child. The Court excluded evidence that the defendant had disclosed drug and alcohol use to her midwife on previous occasions as unfairly prejudicial on the basis that there was no evidence that the midwife had warned her that

135 Zygmunt Bauman *Consuming Life* (Polity Press, Cambridge, Massachusetts, 2007). See also Dorothy Roberts "Prison, Foster Care, and the Systemic Punishment of Black Mothers" (2012) 59 UCLA L Rev 1474.

136 *Q v R*, above n 36.

drugs and alcohol might cause her to fall asleep whilst breastfeeding. If such a warning had been given, the Court thought that such evidence would have been highly relevant because the failure to adhere to such a warning would go to gross negligence. The expectations embedded in this approach can be contrasted with the expert evidence of the paediatrician in that case, to the effect that the defendant was finding it difficult to function because of extreme fatigue and a physical infection and "found herself in a very tight situation",[137] using the sleeping tablets and alcohol in an endeavour to cope. The doctor said that alcohol use that did not cause intoxication was not a problem and, as an addict, she had built up a tolerance. What was not noted in this case was that mothers with better social supports or the resources to pay for them would have had the opportunity to cope by organising or paying for others to step in and care for their baby, allowing them to have some unbroken sleep.

Similar expectations are evident in the Court's response in *R v Tuheke*.[138] In this case, a baby was smothered whilst sharing a bed with her intoxicated mother. The parents were socialising with friends, and by the time they decided to stay the night and realised that they had left their pēpi-pod at home, they were too intoxicated to drive and get it. The sentencing judge found it highly significant that the parents had been educated about safe sleeping and had been provided with a pēpi-pod.[139] However, these parents had been sharing their bed with their babies for years with only one major incident,[140] and were likely to have been making decisions that night based on many factors in their complex lives.[141]

VI THE RELEVANCE OF GENDER

In this section we address the fact that gendered parenting norms mean

137 At [21].

138 *R v Tuheke*, above n 11.

139 At [9].

140 This had occurred because the child had been left in the bed of the father six days before she died whilst the mother went out drinking: "It was common practice in your family and with the children that you had previously had for them to share a bed with you" (*R v Tuheke*, above n 11, at [4]). When the mother returned home she found the baby in the bed distressed and shaking, called an ambulance, and the baby's life was saved as a result of medical intervention: "you had a very rare lesson in the dangers of leaving an infant like that in a bed in those circumstances" (*R v Tuheke*, above n 11, at [5]).

141 Bauman, above n 135. See also Rosemary Hunter "Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism" in Margaret Davies and Vanessa Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, London, 2013) 27.

that mothers are likely to be held to higher parenting standards than fathers and, therefore, more likely to be held to have failed those standards. We also highlight the courts' failure to adequately accommodate intimate partner violence victimisation and addiction when assessing a mother's parenting.

A Mothers are held to higher parenting standards than fathers

Although gender neutrality and equality in parenting is the norm that guides formal post-separation parenting arrangements in the Family Court, what society *actually* expects of mothers and fathers tends to be significantly different. Mothers are expected to be "involved caregivers",[142] to have a "greater capacity for nurturing",[143] and a heightened capacity to notice what is happening to their child and to respond in an immediate and self-sacrificing manner.[144]

For example, in 13 cases in our sample, mothers were prosecuted for leaving their children in the care of those who were abusive or neglectful, usually the child's father or stepfather.[145] By way of contrast, in only two cases in our sample were fathers prosecuted for leaving the child in the mother's care.[146] Fathers were not prosecuted even in circumstances where their behaviour had a direct impact on the mother's subsequent harmful parenting decisions. For example, Ngaire Tukiwaho's partner (and the father of her child) punched her in the face and then left the house they shared together. Ngaire Tukiwaho was

142 Cathy Banwell and Gabriele Bammer "Maternal habits: Narratives of mothering, social position and drug use" (2006) 17(6) International Journal of Drug Policy 504 at 512.

143 Fugate, above n 10, at 275. See also Fentiman, above n 128, at 279.

144 Singh, above n 15, at 512 and 517; and Michelle S Jacobs "Requiring Battered Women Die: Murder liability for mothers under failure to protect statutes" (1998) 88(2) J Crim Law 579. Mothers are expected to be hypervigilant and immediately respond to indications that something might be wrong. They do not appear to be permitted the normal human processes (such as denial), for example, involved in the grief of accepting that, instead of the life that they hoped they were creating for themselves and their children, they are in a situation that is dangerous and harmful. See *R v Kuka*, above n 17.

145 *R v Witika*, above n 110; "Mother faces trial after failing to stop ill-treatment" *The Evening Post* (Wellington, 9 October 1998) at 3(3); "Mum did nothing to stop abuse — Crown" *The Dominion* (Wellington, 31 August 1999) at (2)7; "Judge jails mother who 'failed to protect her son'" *Stuff* (New Zealand, 28 September 2000); *R v Harris*, HC Wellington CRI-2004-078-1816, 26 August 2005; Pat Booth "Broom handles, fear and rubbish tins" *Stuff* (New Zealand, 1 July 2009); *R v Kuka*, above n 17; "'Bad father' jailed for assault, neglect" *Otago Daily Times* (online ed, 17 September 2008); "Jailed for neglect" *Dominion Post* (Wellington, 14 April 2011) at (2)1; Chris Hyde "Mother jailed for silence on rape" *Stuff* (30 November 2013); "Discipline was 'sadistic'" *Wairarapa Times-Age* (online ed, 20 January 2017); "Mother pleads not guilty to failing to protect her daughter" *New Zealand Herald* (online ed, 23 March 2017); and Karoline Tuckey "Mother sentenced for child neglect after five years covering up serious abuse" *Stuff* (New Zealand, 13 April 2018).

146 *R v Witika*, above n 110; and *T v R* [2012] NZCA 570.

traumatised, highly intoxicated, without a safe place to sleep and with the care of their baby. However, he does not appear to have been prosecuted for a breach of his duty of care in relation to their child.[147]

Fathers are apparently not expected to be actively involved in the work of caring for their children and are held accountable only according to the amount of responsibility they personally *choose* to assume, even when they are that child's biological parent and living with the child and mother.[148] For example, in *R v Neil*,[149] the child was left in a hot car for three hours after his mother and grandmother arrived home with him before his father went looking for him. At this point, instead of getting him medical care, the father, Mr Neil, put the child to bed for several more hours. The sentencing Judge held that Mr Neil was in a "different category" from the child's mother and grandmother. This was because he did not know Isaiah was in the vehicle between 12.30 to 3.30pm. The Judge held that:[150]

> Having regard to the evidence at trial, I do not find that surprising. The evidence was to the effect that you played virtually no part in the upbringing of the children. You left that entirely to Ms Te Whetu and other members of the household … Your culpability lies in the fact that you were the person who discovered Isaiah in the vehicle in a clearly unwell state.

By way of contrast, it seems unlikely a mother could wait three hours after her child's father came home with the child before checking on her child, and

147 *R v Tukiwaho*, above n 11. This is the case despite the fact that he was the child's biological father and appeared to be living with the child.

148 In *R v Korewha* HC Auckland CRI-2007-092-007651, 8 September 2008, a Māori father was acquitted under s 195 of the Crimes Act of neglect for allowing his child to live in a house where methamphetamine was being manufactured. He was the child's biological father, one of the child's legal guardians, in relationship with the child's mother, and sometimes stayed at the house, sharing a bedroom with the child and his mother. However, the Court said that: "There was no evidence establishing that Mr Korewha had custody of Napiah in any ordinary meaning of that term. There was, at the least, a reasonable possibility from the evidence that the person who undertook responsibility for the day to day care of Napiah was his mother" (at [44]). The living arrangements of couples who occupy the precariat are likely to be informed by the structure of benefit payments in New Zealand. Women in relationships with men who cannot financially support them may not be able to afford to live with their male partner because they would lose their entitlement to sole parent support under the Social Security Act 1964. In R v Webster, above n 93, at [19], a father who was violent and controlling was not permitted to pass responsibility onto his wife for failing to take their baby to the doctor after they had been injured because the Court found him to have decision-making veto over the mother.

149 *R v Neil*, above n 73.

150 At [36]–[37].

find herself exonerated from liability until that point on the basis that she lived with, but played no part in, the child's upbringing. A mother in this position is likely to be found to have failed her parental obligations to her child, rather than being found to have limited "care or charge" of her child.

The gendered expectations that land on mothers must also be seen through the lens of race and class for Māori mothers. Marshall and Woollett point out that "[t]he ideal mother of legal discourse is very much tied to middle-class notions of child rearing".[151] This may result in unfair standards being applied to mothers who are tackling the challenges of parenthood with little by way of personal, social and financial resources and support.[152] For example, parents who do not have sufficient financial or social resources to pay for or organise for alternative caregivers and who therefore make care arrangements judged to be inadequate, or who attempt to combine caregiving and socialising, are prone to being constructed as irresponsible and selfish parents. They are not viewed as people who are attempting to meet their legitimate human needs in difficult circumstances. Gendered parenting standards may also be monitored in a particularly punitive manner for racialised women. For example, in 1998, Queenie Pourau pleaded guilty to charges of leaving a child under 14 without making adequate provision for their supervision and care,[153] after her one-year-old and four-year-old children were found wandering in the street.[154] In fact, she had organised a babysitter for her children but the babysitter had abandoned them. This was considered to be Ms Pourau's fault because she "[did] not know the woman well" and had organised the babysitter so she could go to the pub with her partner.[155] Judge Adeane said Ms Pourau showed a "complete dereliction of her duty as a mother, simply following her own social agenda".[156] It is questionable whether a middle class mother who paid for the

151 Singh, above n 15, at 519, citing Harriette Marshall and Anne Woollett "Fit to reproduce? The regulative roles of pregnancy texts" (2000) 10(3) Feminism and Psychology 351 at 359.

152 At 517. For example, in 1997 a McDonald's manager called the police to report a Māori mother, Roana Bennett, for abandonment of her three year old child. She left the child for "10 minutes" in a play area whilst she took her other two children (two and four) to the toilet. She said she was "insulted and embarrassed" to be publicly interviewed by the police, commenting that she could not "be in two places at once": "Mother denies she abandoned child" *The Dominion* (Wellington, 11 August 1997) at (1)7.

153 Under s 10B of the Summary Offences Act 1981.

154 "Mother fined for child neglect" *The Dominion* (Wellington, 14 May 1998) at (2)6.

155 Above n 154.

156 Above n 154.

services of a babysitter she did not know particularly well in order to take some needed respite from parenting would be judged so harshly.

Traditional gender roles view "a woman's place" as being in the home caring for the children. Linda Kenix suggests that mothers who do not adhere to this expectation can be judged in ways that fathers are not when they simply fail to assume any parenting responsibilities.[157] However, in *R v X* the defendant was a middle-class mother who pleaded guilty to manslaughter after she forgot to drop her 16-month-old child at day-care and instead left him in the car while she went to work, resulting in his death from heatstroke and dehydration.[158] The defendant was lauded for her "challenging" and "selfless" work in the community as a health care professional and discharged without a conviction.[159] This suggests that the expectation that a mother's place is in the home is subject to other influences, such as the social value attached to her work. It is interesting to speculate whether the Court would have responded to the defendant in *R v X* as compassionately if the exhaustion that led to her "extraordinary blanking of the mind"[160] had been the product of her childcare responsibilities alone or her participation in "unskilled" but demanding employment.[161]

Because motherhood and the sacrifices involved in being a mother are culturally idolised, mothers who fail to meet these standards are prone to being demonised.[162] For example, in 2000, the Children's Commissioner said that Sharon Moke (described in the media as "killer mum") "should seriously think

157 Linda Jean Kenix "The Traitor and the Hedonist: the mythology of motherhood in two New Zealand child abuse cases" (2011) 139(1) Media International Australia 42 at 45–46. Maternal care is expected, whereas when a father cares for the children it is perceived as an act of altruism, as he goes against his societal role as the "bread winner": see, for example, *R v Mataafi*, above n 4, at [33]. By way of further example, in *R v Kuka,* above n 17, the fact that Kuka (the mother) spent most of her time at work and left her children with the abusers was indicative of neglect since she "should have been there": Brenda Midson "The Helpless Protecting the Vulnerable? Defending Coerced Mothers Charged with Failure to Protect" (2014) 45 VUWLR 297 at 312.

158 *R v X*, above n 4, at [7].

159 At [4] and [8].

160 At [8].

161 See *R v Kuka*, above n 17; and *Q v R*, above n 36. Our point here is not that these cases are factually comparable. It is, for example, that Lisa Kuka was not lauded for the contribution she made to her community in her unskilled agricultural employment, despite working six days a week, and having been given a managerial role in recognition of the quality of her service.

162 Singh, above n 15, at 516; Tolmie "Women in the Criminal Justice System", above n 83, at 305; and Jane Murphy "Legal Images of Motherhood: conflicting definitions from welfare 'reform,' family, and criminal law" (1998) 83 Cornell L Rev 688 at 718.

about getting herself sterilised".[163] These remarks were made in response to Ms Moke, who had been convicted of the infanticide of her 17-month-old child two years prior, giving birth to her fifth child (who was subsequently placed in her aunt's care).

In another example, *R v Marks*,[164] where the defendant pleaded guilty to manslaughter after accidently smothering her crying child with a duvet, the sentencing Judge said:[165]

> Putting it bluntly Ms Marks, you do not have a good track record as a parent. It would be best for you and probably for society if you cease to have any more children. Whether you have the insight or the wisdom to do that is uncertain.

Most of these remarks concern mothers who are Māori.[166] We have yet to come across any calls for a father, Māori or otherwise, to be sterilised on the basis that his parenting was so inadequate that he should not "breed".[167]

B A failure to understand family violence dynamics

A mother's failure to act frequently takes place in the context of her own experience of intimate partner violence and child abuse by her partner.[168]

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163 Ruth Berry "Killer mum should get sterilised — McClay" *The Evening Post* (Wellington, 8 March 2000) (3)1.

164 *R v Marks* HC Auckland T.032930, 12 February 2004.

165 At [27].

166 Michael Laws "The Tragic Life of JJ Lawrence" *Sunday Star Times* (Auckland, 18 November 2012): "simple messages can go out now ... and especially to Māori mothers ... If you can't handle the job, stop breeding".

167 Although there are calls to question the provision of public services to "families" continuing to have babies that they cannot afford: Kate Coughlan "Declining to Limit Size of Families" *The Evening Post* (Wellington, 27 May 1995) at (3)9; and Juli Malo "Angry father battles MP and council" *The Evening Post* (Wellington, 24 May 1995) at (3)1.

168 A similar phenomenon has been noted elsewhere: Linda J Panko "Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse" (1996) 6(1) Hastings Women's Law Journal 67; Fugate, above n 10; and Jonathon Herring "Mum's not the word: An analysis of section 5, domestic violence, crime and victims act (2004)" in S Cunningham and C Clarkson (eds) *Criminal Liability for Non Aggressive Death* (Ashgate, London, 2008) 125. For a recent account of young Māori mothers' experiences of intimate partner violence see Simran Dhunna, Beverley Lawton and Fiona Cram "An Affront to Her *Mana*: Young Māori Mothers' Experiences of Intimate Partner Violence" (2018) Journal of Interpersonal Violence 1. Further, Singh points out that expectations of "the good mother" — that she be "responsible, capable, resilient and protective" — are "diametrically opposed to stereotypes of the ideal victim, who is frequently portrayed as 'pathologically weak', 'helpless', 'dysfunctional' and passive": above n 15, at 517.

Sometimes mothers are charged with failing to protect their children from their partner;[169] sometimes the issue is that they failed to seek timely medical care for their child after their partner inflicted injury;[170] and sometimes it is that they sought medical help without disclosing to health professionals the cause of the injuries as resulting from family violence.[171] In other instances, a mother's generally neglectful parenting occurred whilst she was in a state of apparent trauma or dissociation against a background of ongoing brutality by her partner towards herself and her children.[172]

The model of violence used by the courts[173] to assess the negligence of a mother who is parenting in the context of intimate partner violence, has been labelled the "bad relationship with incidents of harm" model.[174] The assumption is that intimate partner violence is a series of physical assaults with:[175]

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169 See the examples cited at above n 145.

170 For example "Judge jails mother who 'failed to protect her son'", above n 145; and "Judge slates mother of bashed baby" *The Press* (Christchurch, 25 May 2004) at (2)1.

171 See for example *P v R* [2014] NZCA 439.

172 See *E v R* [2011] NZCA 13.

173 In Linda Coates and Allan Wade "Language and Violence: Analysis of Four Discursive Operations" (2007) 22(7) Journal of Family Violence 511 it is suggested that a poor understanding of intimate partner violence manifests in language that minimises and mutualises the abuse, removes offender accountability and renders invisible victim resistance. By way of illustration, in *E v R*, above n 172, at [7], the judgment uses language suggesting that the predominant aggressor's violence was a product of the "relationship", fails to acknowledge that this violence would have been a significant influence in diminishing the defendant's parenting capacity at the point when her baby drowned in the bath and mentions the predominant aggressor (also the father of the child) as a victim, a person greatly affected by the offending.

174 See Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" [2018] NZ L Rev 181 at 201–203. The clearest articulation of this is in *R v Witika,* above n 110, at 431. See also the position taken by the Crown in *R v Tukiwaho,* above n 11, where the defendant left her home with her baby after her partner punched her in the face to sleep in a car with her baby. The Crown said it was an error of judgement not to return home after her partner had left the house. The assumption that once he left her home she was safe or that, even if he later returned the danger had passed, demonstrates an understanding of intimate partner violence as an incident based phenomenon. The Crown also made the assumption that calling the police or going into a refuge were options, without exploring why the defendant in this case did not see them as realistic possibilities. Important information is missing about what her past experiences may have been and what the likely outcome of taking these courses of action was. Similarly, the Crown suggested that she could have gone into her sister's house rather than sleeping in the car outside. However, it is not possible to assume that the people unknown to her were safe without knowing more about Ms Tukiwaho's actual experiences of her community.

175 Evan Stark "Coercive Control" in Nancy Lombard and Lesley McMillan (eds) *Violence Against Women: Current Theory and Practise in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kinglsey Publishers, London, 2013) at 17 and 19.

> … sufficient time "between" assaultive episodes for victims … to contemplate their options and make self-interested decisions to end their abuse or exit the abusive relationship.

As a consequence, mothers are considered accountable for their failure to exit the relationship or seek help from authorities in between assaultive incidents.[176] Whilst they, as adults, might be entitled to "choose" to remain in a violent relationship on their own behalf, they are said to have an obligation on behalf of their children (who cannot make such choices) to act protectively. The abuse that such women are personally experiencing can even be considered to exacerbate their culpability because it put them on notice as to what their partners were capable of and, therefore, rendered their subsequent "choice" not to seek safety more negligent.[177]

This means that even mothers who are dealing with extreme levels of physical brutality directed at themselves and their children can be effectively held criminally responsible for failing to "manage" that abuse.[178] For example, in 2000 Hoana Matiu was sentenced to seven years' imprisonment on two counts of manslaughter as a result of breaching her duty to protect her three-year-old son from her abusive partner, and failing to get him medical assistance in time after he had been assaulted.[179] Her partner, Genesis Mahanga, was described as "controlling, dominant and violent".[180] He had isolated her and her children from those around them and used serious and sustained violence against them all. The defendant had had her baby teeth knocked out by her

176 But note that the obligations that lie on women to protect their children in the context of intimate partner violence are complex and contradictory. For example, there is the expectation that women should protect their children by separating from their children's father if he is using violence. However, there is also the risk in the Family Court that if they attempt to protect the children from their father they will be viewed as alienating parents or that they will attract the scrutiny of child protection and risk having their children removed: Mandy Morgan and Leigh Coombes "Protective mothers: Women's understandings of protecting children in the context of legal interventions into intimate partner violence" (2016) 28(1) The Australian Community Psychologist 59 at 60–61.

177 See the Crown in *R v Tito*, as reported in Juliet Rowan "Failure to stop son's abuse brings jail term" *New Zealand Herald* (online ed, Auckland, 15 March 2006). This phenomenon has been noted elsewhere: Fugate, above n 10; and Herring, above n 168, at 146.

178 See, for example, *R v Kuka*, above n 17. Silke Meyer examines how gendered policies have meant that children's exposure to domestic violence tend to be viewed as an issue to be rectified by mothers: Silke Meyer "Women, domestic violence and child protection" in Sheila Shaver (ed) *Handbook on Gender and Social Policy* (Edward Elgar, Cheltenham, United Kingdom, 2018) 324.

179 "Judge jails mother who 'failed to protect her son'", above n 145.

180 "Judge jails mother who 'failed to protect her son'", above n 145.

mother as a child, and her adult teeth knocked out by a previous male partner, who had also shot her in the thigh. The Judge remarked that Ms Matiu had "done nothing to break the cycle of abuse that began when, as a child, she herself was subject to sexual and physical abuse".[181]

It appears that abused women are expected to behave as though they are not constrained by the violence of their partner, even when others, with more distance and independence, are too scared of him and his associates to intervene. For example, in 2008 Kylie Tekani was sentenced to eight months' home detention after she was convicted of assault and a failure to protect her children (who were five, six, and eight years old) from her violent partner.[182] While the Judge took into account that she had also been a victim of her partner's violence and was too scared to act, he commented that she "still failed to protect [her] three vulnerable children".[183] In this case, neighbours knew the three children were scavenging for food in neighbourhood rubbish bins and suffering terrible abuse. These neighbours secretly slipped the children food as they passed on their way to school but told police they were too frightened to report what they saw and knew, partly because of the intimidating patched Mongrel Mob members who were associates of Ms Tekani's partner and who lived on the street.

The New Zealand Family Violence Death Review Committee (FVDRC) has suggested that intimate partner violence should be understood as a form of "social entrapment", rather than as a bad relationship in which there are incidents of violence.[184] Social entrapment has three dimensions.

The first dimension is the isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's life.[185] Such tactics include isolating the victim from other people so he becomes her main source of connection and information, depriving her of survival resources so she depends on him for everything, keeping her under surveillance so she knows he is always watching her, microregulating the minutiae of her behaviour so she

181 "'Naughty' Tangaroa died of 100 vicious blows" *New Zealand Herald* (online ed, Auckland, 28 August 2000).

182 Booth, above n 145.

183 Booth, above n 145.

184 Tolmie and others, above n 174; and Family Violence Death Review Committee *Fifth Annual Report: January 2014 to December 2015* (Health Quality and Safety Commission, February 2016) at 37–52.

185 Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007).

becomes conditioned to following his rules whether or not they make sense, degrading her so that she becomes acclimatised to being treated as an object for his use, and using violent retaliation and threats to condition obedience and close down her resistance. As a result she becomes exhausted and terrified and starts containing herself in order to manage his violent behaviour. The abuse tactics are strategic and retaliatory — they are used to punish victim resistance and have the effect of limiting the victim's space for independant action. They also have a cumulative and compounding effect over time. Thus, when assessing the behaviour of an adult victim, it is important to understand her behaviour as taking place within the greatly reduced sphere of autonomy that the abuse allows her, and the risk of retaliation from the predominant aggressor. This may mean that there is no time in which she is making decisions that are unaffected by the abusive circumstances that she is in.

The second aspect of entrapment requires a realistic understanding of the current lack of adequate safety responses for women who are dealing with very dangerous men.[186] An assumption that a victim who is committed to the safety of herself and her children will address the violence by separating from the predominant aggressor,[187] fails to acknowledge the fact that separation may not be a viable choice for some women, and is certainly not sufficient to create safety, particularly during the high risk time of separation, in the absence of adequate responses by agencies.[188] Separation may, in fact, escalate the frequency and severity of the abuse and mean that children are "'forced' into extensive unsupervised contact with abusive fathers, [and] exposed to post-separation violence and abuse which occurs at handover".[189]

Third, the manner in which both of these first two dimensions of social entrapment are exacerbated by the structural inequities associated with gender,

186 Family Violence Death Review Committee *Fifth Annual Report: January 2014 to December 2015*, above n 184, at 23–33.

187 *R v Felise* DC Auckland CRI-2007-090-007382, 27 November 2009.

188 Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality and Safety Commission, June 2017) at 35–38; and Randy H Magen "In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect" (1999) Child Maltreatment 127.

189 Cathy Humphreys and Nicky Stanley "Shifting the Focus: Working Differently with Domestic Violence in Risk Paradigms" in Marie Connolly (ed) *Beyond the Risk Paradigm in Child Protection* (Palgrave, 2017) 147 at 151.

class, race and disability should be considered.[190] For example, women in poverty and women who have (or belong to communities that have) discriminatory experiences of the institutions charged with protecting them are more likely to experience entrapment when in relationships with dangerous offenders.[191] Women with gang-affiliated partners are dealing not just with one man who is using violence but a male collective, spread throughout her social network, who will implement and reinforce her partner's abusive behaviour. Such women may not be able to access public services because their partner and his associates are deemed to pose risks to other clients or staff of the service.[192]

The FVDRC has also pointed out that intimate partner violence and child abuse are entangled phenomena.[193] This means that not only are the two frequently co-occurring,[194] but often they are one and the same thing. In other words, acts of abuse directed at the child or the mother may be intended to affect (and constitute abuse of) the other.[195] Anne Morris proposes analysing family violence using the concept of "an abusive household gender regime", which captures how the abuse constitutes a "coercive web-like regime" with interlocking forms that simultaneously operate on and entrap all family members.[196] We saw evidence of predominant aggressors using children to entrap the adult victim in the relationship in some of the cases in our sample. For example, some women were threatened that if they left the relationship the father would get custody of their children,[197] and some women actually left the relationship without their children because their partner "wouldn't let them"

190 Family Violence Death Review Committee *Fifth Annual Report: January 2014 to December 2015,* above n 184. The discussion here pertains to intimate partner violence in heterosexual relationships, as is relevant to the dynamics of parenting prosecutions in this article, but "social entrapment" is not limited to heterosexual relationships.

191 Committee on the Elimination of Discrimination against Women, above n 82, at [25(a)], [25(b)] and [25(g)].

192 See the statements made by Nicola Dally-Paki at the inquest into her son's death: Jared Savage "Moko inquest: Mother urges victims of domestic violence to get out and 'never look back'" *New Zealand Herald* (online ed, Auckland, 30 August 2017).

193 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality and Safety Commission, Wellington, June 2014) at 76–77.

194 Lundy Bancroft, Jay G Silverman and Daniel Ritchie *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Sage, Los Angeles, 2002) at 6–7.

195 Domestic Violence Act 1985, s 3.

196 Anne Morris "Gendered Dynamics of Abuse and Violence in Families: Considering the Abusive Household Gender Regime" (2009) 18 Child Abuse Review 414.

197 "Judge slates mother of bashed baby" *The Press* (Christchurch, 25 May 2004) at (2)1.

have the children. Some abandoned their children in order to protect them from their violent partner, for example, kicking their teenage daughters out of the home for their own protection.[198] David Mandel explains that when child protection is undertaken in a manner that is not "intimate partner violence competent", the perpetrator is not held to account for his role in depleting the parenting of the child's other parent or family functioning.[199] Instead, the adult victim is held responsible for the predominant aggressor's violence and expected to protect the child, despite being unable to protect herself.

For the purpose of s 152 of the Crimes Act, s 150A requires that a mother who is experiencing intimate partner violence must have her actions judged as a "major departure" from what is reasonable to expect of a parent in her particular "circumstances". To fully adhere to the wording of that section, a decision-maker must decide what is reasonable to expect of a person who is parenting under siege, and the conditions of her particular siege should be explored in making that assessment. Instead, there are examples in case law of the court failing to explore or understand the abusive circumstances of the adult victim, and simply assuming that she "chose" not to exercise safety on behalf of herself and her children. Furthermore, intimate partner violence and child abuse are often dealt with as separate, rather than entangled, phenomena that mean "that the interests of abused children are … seen as oppositional to, or disconnected from, the interests of their abused mothers".[200]

In *R v Tito,*[201] for example, the defendant, Jill Tito, was a vulnerable young woman (described as "emotionally unstable and immature") with a young child, who entered a relationship with a man who subjected her to abuse, along with his associate. Both men physically beat Ms Tito during what they described as "lags", and one smeared his faeces in her bed.[202] "Depressed and

198 Saskia Konynenburg "Mum: We lived in fear of him" *Northern Advocate* (Whangārei, 22 May 2008) at 3.

199 Safe & Together "Domestic Violence Informed Child Welfare System Practice Continuum Chart" (2013) <www.safeandtogetherinstitute.com>. See also Humphreys and Stanley, above n 189, at 148, 151 and 156.

200 Singh, above n 15, at 526–527. See also Jonathon Herring "Familial homicide, failure to protect and domestic violence: who's the victim?" [2007] CLR 923; and Simon Lapierre "Mothering in the context of domestic violence: the pervasiveness of a deficit model of mothering" (2008) 13(4) Child and Family Social Work 454.

201 Rowan, above n 177.

202 Juliet Rowan "Face a judge wants us all to see" *New Zealand Herald* (online ed, Auckland, 18 March 2006).

disempowered",[203] she began drinking heavily, while both she and her young son endured abuse at the hands of the two men.

The Crown described Ms Tito as being "in love" and "indulging in her own drunken lifestyle and sexual relations with the worst abuser".[204] Her explanations for the relationship were characterised as "excuses" and her own experience of abuse at the hands of the men was considered by the Crown to aggravate her liability because it meant that she was aware of their capacity for violence but failed to protect her child by making the rational decision to leave. [205]

Although Ms Tito attempted to reduce contact between the men and her child, including reducing opportunities for them to be alone with him by keeping food away from the house and having meals away with her son, she was present when her son was abused. Her protective actions were noted by the sentencing Judge but characterised as "inadequate steps" and a failure "to avail yourself of opportunities you could've taken to prevent what happened".[206] The Judge told Ms Tito "you are responsible" for the harm done to her child because "by doing nothing you permitted the abuse to continue to its awful escalation".[207] He said it was necessary to send a "clear message about the responsibility of parents to protect their children, including in situations where they were in relationships with the abusers and where there were imbalances of power".[208]

This account of the violence fails to articulate the dynamics of intimate partner violence as a form of entrapment; minimises the abuse that the adult victim experienced (including failing to acknowledge that the abuse of her child was also the abuse of her); holds her responsible for her partner's abuse; and discounts the ways in which she had, as a vulnerable young woman in dangerous circumstances, attempted to protect her son. Instead, she was

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203 Rowan, above n 177.

204 Rowan, above n 202. Fentiman, above n 128, at 199 also points out that there is evidence in some states of the United States "that jurors, judges, and prosecutors are animated ... to believe that single mothers are highly sexualized beings, whose actions must be closely scrutinized for evidence that lust overcame their maternal instincts".

205 Rowan, above n 177. One can compare this with the approach taken in *Newton v Police* (1990) 6 CRNZ 630 (HC) at 635.

206 Rowan, above n 177.

207 Rowan, above n 177.

208 Rowan, above n 177.

construed as a selfish mother choosing her own "drunken sexual pleasure" over clear avenues of safety for her son, and then making excuses.

In *R v DK*,[209] a mother of 14-month old twins took the children to hospital thinking that one of them had meningitis. An examination revealed that both children had multiple bone fractures that had been inflicted at different times over a 14-day period. Despite the likelihood that it was the children's father who was the perpetrator, given the father's propensity for violence towards the mother, the police could not prove who had assaulted the children. Both parents were therefore charged with, and pleaded guilty to, an offence under s 195 of the Crimes Act (ill-treatment or neglect of child), based on a failure to get timely medical treatment (despite the fact that the injuries came to light precisely because the mother had sought medical treatment).

There was a history of intimate partner violence by the father towards the mother.[210] In 2011 there were two police callouts for intimate partner violence and the father was convicted of assault, and he was subsequently convicted of four breaches of his sentence in respect of the assault. In 2013, the police issued a Police Safety Order because of the father's abusive behaviour towards the mother, and she spent short periods living with her parents after fleeing the family home. Despite the fact that the father was living with the mother and was unemployed, she was the "primary caregiver" for their premature twin babies, as well as for older children from another relationship. She was suffering extreme exhaustion and sleep deprivation at the time the babies died. Even though the mother was parenting in the context of trying to manage a violent offender, and neither she nor her children were made safer by the family violence interventions that occurred when she sought help, she was sentenced to three years and six months' imprisonment. This was only eight months less than the four years and four months the father received.

In another case in June 2018, a father was sentenced to three years and 10 months' imprisonment, while the mother received a sentence of three years and six months (four months less), for the gross neglect of their three children, aged nine, three, and one.[211] The neglect that was criminalised was a general deterioration in the household and living standards — no one was putting out

209 *R v DK* [2015] NZHC 2137; and *M v R* [2016] NZSC 72.

210 *R v DK*, above n 209, at [20].

211 Anna Leask "Pair jailed for keeping children in squalor" *Weekend Herald* (Auckland, 16 June 2018) at A5.

rubbish, doing laundry or buying food. The mother was a vulnerable young woman who had been in state care since she was 12, and was raped and gave birth to her first child at 15. Her partner, whom she met when she was 17, had introduced her to drugs and gotten her addicted to methamphetamine, thereby ensuring her dependency on him. He belonged to the Head Hunters gang. Her strategy for survival was described as "being subservient to others with authority and power over her".[212]

The father was described as "toxic", "brutal", and "abusive and controlling" towards the mother and the children. The mother does not appear to have used violence against the children but was "impotent to intervene" when he beat the children.[213] One strong indication of the level of violence within the household is the fact that the father had threatened the nine-year-old girl whilst he was assaulting her that he would "chop out her tongue" if she told her mother. The sentencing Judge said that none of the mother's circumstances "excused" what she had done — her behaviour was described as a gross breach of trust towards her children.

C The stigmatisation of mothers suffering from substance use disorders

Substance addiction can be understood as a mental disorder or illness, as well as being commonly associated with other mental disorders.[214] Research has identified that substance-abusing mothers often have histories of "poor parental role modelling, sexual, physical and emotional victimisation, psychiatric co-morbidity, low self-esteem, high levels of stress, and feelings of guilt".[215] This is more likely to be the case for women from communities devastated by the

212 At A5.

213 At A5.

214 See the National Institute on Drug Abuse *Comorbidity: Addiction and Other Mental Illnesses* (US Department of Health and Human Services, Research Report Series, September 2010) at 2. A 2016 study published by the Department of Corrections confirmed the prevalence and co-occurrence of mental health and substance use disorders among New Zealand prisoners at rates far higher than the general population and found that comorbidity was especially high among women prisoners: Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Department of Corrections, Wellington, June 2016) at v–vi.

215 Martha L Velez and others "Parenting knowledge among substance abusing women in treatment" (2004) 27(3) Journal of Substance Abuse Treatment 215 at 216. Fentiman, above n 128, at 16 points out that "[v]ictims of childhood abuse are much more likely than non-abused children to misuse drugs and to develop mental illness, particularly depression and post-traumatic stress disorder, in response to that abuse".

intergenerational effects of historical trauma.[216] In other words, mothers using alcohol or drugs (or both) may be self-medicating untreated trauma or coping with difficult life circumstances[217] that they do not have the personal means to otherwise address.[218]

Addiction and mental health issues are characterised as personal issues (therefore to be disregarded in the determination of what the "reasonable" parenting expectations may be in any given case), rather than comprising the circumstances in which standards of reasonable parenting must be assessed.[219] Another way of expressing this would be to say that the reasonable parent for the purposes of ss 150A and 152 is always sober and does not suffer from addiction or mental health issues.

Cathy Banwell and Gabriele Bammer suggest that of all the groups of minority women who are judged for their parenting practices, substance-abusing mothers are subject to the most stigma and social surveillance.[220] A number of the judges and experts in our sample of cases were professional and compassionate in their response to mothers with addiction issues. However, there were other instances where the response raised concerns that the stigma attached to mothers who abuse alcohol and drugs[221] might mean that some women were judged to have failed their duty because of their history of parenting with addiction issues, rather than because of the particular omission

216 Scholars have linked the violence of colonisation to the increased rates of alcohol and other drug addictions, violence and abuse within Māori communities: Mason Durie *Ngā Tai Matatū: Tides of Māori Endurance* (Oxford University Press, Melbourne, 2005) at 65 as cited in Quince, above n 20, at 344.

217 In *R v Neil*, above n 73, at [32] the sentencing Judge acknowledged that the mother — who had fragile mental health and had frequently threatened to harm herself — smoked daily to "escape from the pressures of [her] everyday world". In *R v Peterson*, HC Whangarei CRI-2007-088-899, 20 December 2007 Baragwanath J acknowledged that for the defendant "[t]he tragedy began much earlier in [her] life", at [3]. He described the emotional pain that originated in the defendant's childhood and meant that over the years she had "moved through a series of very deep valleys" (at [3]) and "without the drug component [she] as a loving mother would never have dreamed of abandoning [her] child" (at [9]).

218 Phyllis L Baker and Amy Carson "'I take care of my kids': Mothering Practices of Substance-Abusing Women" (1999) 13(3) Gender and Society 347 at 360.

219 See *R v Hamer*, above n 27.

220 Banwell and Bammer, above n 142, at 506.

221 Casey Bohrman and others "Being Superwoman: Low Income Mothers Surviving Problem Drinking and Intimate Partner Violence" (2017) 32(7) Journal of Family Violence 699 at 700.

that formed the basis for their criminal liability.[222] For example, in *Q v R* discussed above,[223] the theme of the Crown's closing address was that the mother "had made selfish choices, despite all the support and warnings she had been given, which created an unsafe feeding environment for her child". The prosecutor stated that the defendant put "vodka to her lips and sinks it, [her baby] doesn't come into her thoughts when she refills it and drinks it".[224] In this case the defendant's conviction for manslaughter was overturned on appeal and the prosecution was chastised by the Court of Appeal for "emotional and pejorative" remarks,[225] as well as triggering a direction to the jury from the trial judge that a messy house was not relevant to the disposition of the issues in the case. Nonetheless, the prosecution's attitude is concerning considering that in at least half of the cases for breach of parental duty[226] the conviction results from a guilty plea. This is understandable since parents who have been responsible for death or harm to their child have strong incentives to plead guilty, but necessarily means that the strength of the case is not tested by the public safeguard that is the judge or jury. In these instances it is the Crown, rather than the jury or the appellate court scrutinising the jury decision, who is responsible for deciding that the parent's omission belongs in the criminal justice system.

VII CONCLUSION

This article might be seen as a small part of a much larger project — one directed at addressing the gross over-criminalisation of Māori women in New Zealand today.[227] It has done so by querying whether the law in a particular area is being

222 For example, in *R v Tukiwaho,* above n 11, at [15] the Court said that the "real wrongdoing that night was to engage in a sustained period of drinking that effectively robbed you of the ability to reason and make sound judgements about your son's welfare". Much was made in the committal statements from various witnesses of her long history of alcohol use and poor mothering when under the influence, including drinking whilst pregnant. See also *W v R* [2017] NZCA 304 in which a drug addicted couple's constant search for, and use of drugs, are implicitly presented as selfish decisions that they continued to make despite being aware of the impact this was having on their ability to care for their children.

223 *Q v R*, above n 36.

224 At [44]

225 At [65].

226 Tolmie, Te Aho and Doolin, above n 3.

227 Bevan and Wehipeihana, above n 21. Such project has important ramifications not just for the women concerned but for the wellbeing of their children and their communities: Roberts, above n 135, at 1495.

applied in a fair and equitable manner. We have raised the possibility that the overrepresentation of Māori women in the group who are prosecuted for a criminal breach of parental duty reflects, at least in part, bias in the application of the law.

This bias may operate in three potential ways. First, there may be a failure to properly assess reasonable parenting expectations in the circumstances of the defendant's life, because of a more fundamental failure to realise the significance of certain circumstances or a failure to accurately understand those circumstances. This means that the criminal justice response fails to adequately account for the challenges and complexities confronting certain parents when deciding what is reasonable to expect of them and whether their departure from those expectations is "major". Second, decision-makers' assessments of reasonable parenting expectations may use cultural norms and standards that reflect the values and life experiences of certain (and better resourced) sectors of the community to which the defendant does not belong. Third, responses may be particularly punitive towards certain defendants because of racist, classist and sexist judgements about the social group that the defendant belongs to (who they are, how they are living and their history of parenting), as opposed to responses being based on a compassionate and realistic appraisal of what they did or did not do on the relevant occasion.

We have raised these as possibilities rather than certainties because such biases do not explicitly advertise themselves, rather they are embedded in the facts selected by a decision-maker as important in each case, in the meaning that is made of those facts and the normative judgments arrived at. In the words of Linda Fentiman:[228]

> Each occasion for individual choice is also an opportunity for unacknowledged prejudices and cultural norms (including those based on gender, marital status, class, and race) to affect not only how key legal requirements are framed but also judgments about whether those requirements are met in a particular case; frequently these biases and unarticulated norms are outcome determinative.

The question then becomes how to go about trying to ensure that the criminal justice system operates in a more fair and equitable way for such defendants.

We would suggest there is a need to emphasise to juries that when they are

228 Fentiman, above n 128, at 6.

invited to determine what is reasonable to expect of a parent in any particular case and what amounts to a major departure from those expectations, they need to make normative assessments in the context of people's actual life circumstances. We would also suggest that juries need adequate information about a particular defendant's life circumstances, especially if those circumstances are not ones that they are likely to have personal experience of, and therefore are not experiences they are able to readily imagine. Life circumstances include experiences of precarity, caretaker fatigue, prior negative experiences with law enforcement or medical personnel personally or by others in the defendant's community, inequity in the delivery of social services, and other significant stressors such as intimate partner violence.[229] Importantly, juries need help in realistically assessing how such life experiences may reasonably inform individual choice or potentially constrain individual autonomy.[230] At trial this responsibility falls upon defence counsel to articulate. However, given the significant role that the Crown plays in determining which parents to prosecute, it is important that Crown prosecutors are also making realistic and informed assessments of people's life circumstances.

A more difficult issue is ensuring that decision-makers do not apply standards or construct facts in a manner that is informed by "unconscious cognitive shortcuts, cultural norms, biases, and stereotypes",[231] so as to disadvantage particular sectors of the community. By way of example, there is a real issue as to whether it is appropriate for police to monitor and prosecute certain parenting practices. Tikanga Māori approaches to infant sleep and collective child-rearing should be supported, rather than treated as deviant

229 For discussion of the importance of understanding socio-economic factors in relation to sudden infant death in Māori communities rather than individualising risk, see Carla Houkamau, David Tipene-Leach and Kathrine Clarke "The high price of being labelled 'high risk': Social context as a health determinant for sudden infant death in Māori communities" (2016) 52 New Zealand College of Midwives Journal 56. See also Verne McManus and others "Narratives of deprivation: Women's life stories around Maori sudden infant death syndrome" (2010) 71 Social Science & Medicine 643 at 643, which "articulates … the bereaved mothers' experiences of alienation, marginalisation and exclusion, as a testimony of lives lived under conditions of serious deprivation in an affluent society".

230 A similar point has been made in relation to female victims of intimate partner violence who kill their primary aggressor by Terrance et al who found that where juries are given instructions, which include the subjective experiences of battered women, this helped to encourage juries to integrate these realities into their decision making. See Cheryl A Terrance, Kimberly Matheson and Nicholas P Spanos "Effects of Judicial Instructions and Case Characteristics in a Mock Jury Trial of Battered Women Who Kill" (2000) 24(2) Law and Human Behavior 207 at 225.

231 Fentiman, above n 128, at 17.

or undermined by the criminal justice response. Care should also be taken to ensure that mothers are not held to higher standards than fathers, or standards that are unrealistic in their circumstances; and care should be taken that substance-addicted mothers are not judged for their history of poor parenting whilst under the influence or their status as an addicted parent, as opposed to the actual neglect that forms the criminal charges that they are facing. In *R v Barton*[232] the Supreme Court of Canada acknowledged "the detrimental effects of widespread racism against Indigenous people" within the criminal justice system. It said that trial judges should provide express instruction to juries with the objective:

> … to identify specific biases, prejudices and stereotypes that may reasonably be expected to arise in the particular case and attempt to remove them from the jury's deliberative process in a fair, balanced way, without prejudicing the accused.

This article also raises broader justice issues for further reflection. For example, should we be prosecuting parents for neglect when they themselves have been failed by the state when they were children? This does not mean failing to hold parents accountable, but it might mean employing means of accountability that have a therapeutic or restorative dimension, as opposed to the criminal justice system, which is guaranteed to inflict further damage on the parent and their surviving children, including the immediate victim. Moreover, if we are unable to resolve current biases in the application of an "objective" parenting standard under s 152, should we instead confine the criminal justice response to knowing or intentionally harmful parenting?

232 *R v Barton* 2019 SC 33 at [199]–[204].

TUAKANA–TEINA WHAKAWHITI KŌRERO

"EVEN NOW, PEOPLE STILL SEE A GOOD LAWYER AS BEING A MAN IN A SUIT"

The voice of women in New Zealand's senior courts

Alice Anderson with Mary Scholtens QC*

This tuakana–teina conversation pairs Mary Scholtens QC, a barrister practicing in Wellington Te Whanganui-a-Tara, and Alice Anderson, a lawyer also now practicing in Wellington Te Whanganui-a-Tara. The following kōrero is a preface to two articles in this volume regarding women and women's perspectives being heard in court, and addresses thoughts and experiences of being a wahine rōia in the context of updated statistics on wāhine appearing in the senior courts of Aotearoa.

The 2018 report of the New Zealand Bar Association,[1] and its update in this volume,[2] show the number of wāhine appearing in the senior courts of Aotearoa is significantly lower than tāne. I jumped at the opportunity to speak with my tuakana, Mary Scholtens QC, about these statistics. I am relatively fresh into the legal arena, currently in my third year of practice. Anyone who knows my journey though, knows that I have seen a fair bit in that time. So whilst I was eager to get Mary's view on the topic at hand, what I was really more interested

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1 Jenny Cooper and Gretta Schumacher *Gender Ratio of Counsel Appearing in Higher Courts: Report of the New Zealand Bar Association* (September 2018).

2 Jenny Cooper "Who Gets to Speak in New Zealand's Top Courts?" [2019] NZWLJ 189.

in was Mary's own journey, and the journey of the profession; where we are, how far we have come, and where we still have to go.

I KO WAI KOE? WHO IS MARY SCHOLTENS QC?

Mary Scholtens QC readily admits she fell into the law. Truth be told, she thought that it would please her father. Fast forward to 2019 and she is a Queen's Counsel, highly regarded in the profession and a voice regularly heard in our senior courts. Despite her success, Mary remains humble and down to earth as we discuss her journey over the telephone, late on a Friday afternoon after another hectic week.

Mary's story is not typical. She confesses early in our kōrero that she does not think she would have survived in the legal profession had she joined a medium or large private law firm. After graduating from Victoria University of Wellington Mary joined the Department of Education in what she described as a "fabulous" job. Unlike her friends, who had gone into some of the bigger and more well-known firms, Mary did not start her career merely photocopying and paper shuffling. Her job with the Department of Education saw her hands on straight away, writing legal opinions and carrying out negotiations.

Mary says, however, the pivotal role in her career came from her time as Crown Counsel. Following a stint overseas, Mary returned to Wellington and joined the Crown Law Office. It was here that Mary became familiar and confident with the court rooms of Aotearoa. Acting for the Crown created a pathway for Mary that provided access and experience in the court room that is rarely available in any other legal office across the country.

Mary was supported in particular by the late Sir John McGrath QC, who was the acting Solicitor-General during Mary's time with the Crown. Mary acknowledged that his support and confidence in her directly led to the opportunities she enjoyed as Crown Counsel (including three appearances in the Privy Council, two in which she was lead counsel).

This experience with Crown Law, and the leadership and challenging legal work she was exposed to, is what Mary sees as being pivotal to the fact that she is part of a small percentage of wāhine who appear in the senior courts of Aotearoa.

II WHAT DO THE NUMBERS SAY?

Statistics confirm that wāhine make up of half of the legal profession in

Aotearoa. Despite this, wāhine make up less than a third of appearances as lead counsel in our senior courts.

Between 2012 and 2018 less than thirty percent of all counsel appearing in a leading role in the Court of Appeal and Supreme Court were wāhine, and if counsel instructed on behalf of the Crown are removed, the numbers drop to less than twenty per cent. The New Zealand Bar Association 2018 report analyses these figures in more depth. The updated figures for 2018 presented in this volume "continue to show an absence of any overall upwards trend" in wāhine appearing as lead counsel.[3]

III WHY AREN'T WOMEN APPEARING IN AOTEAROA'S SENIOR COURTS?

I still find statistics around wāhine in the law fascinating. I know that we are yet to receive pay parity or equality at not just the top levels, but at most if not all stages of a legal journey. I have seen it, and I have experienced it — I know it is there. At the same time I find it fascinating because my experience in the law to date has been championed and influenced by wāhine toa every step of the way.

I was nurtured through the University of Otago Law School by Professor Jacinta Ruru before joining a law firm in Invercargill where I was mentored by Crown Solicitor Mary-Jane Thomas. I have a village of wāhine around me who I have met through Te Hunga Rōia Māori o Aotearoa, all who are committed to creating change, excelling in their roles and leading by example for themselves, their whānau and their communities. For the entirety of my practice, the Chief Justices of our Supreme Court and Presidents of the New Zealand Law Society have all been wāhine. My point being that, in my experience, with the wāhine I have met and the leadership we currently have, I am confident we can start to turn these statistics and the outdated culture of the New Zealand legal profession around.

Coming back to the voice of wāhine in our senior courts specifically, I asked Mary why she thought the statistics are what they are. Together, we came up with a few possible reasons.

3 At 194.

A Unconscious bias

Although she is instructed by both wāhine and tāne, Mary is keenly aware that the perception still exists whereby (in her words) "people still see a good lawyer as being a man in a suit". Those who instruct lawyers to act, as well as clients themselves, often still see tāne as being the go-to person for the job. Mary said this is disappointing, given wāhine can often be better lawyers for the job. She puts such perceptions down to the unconscious bias that still exists in society and certainly still exists in the legal profession.

B Practice area

With the push for dispute resolution and mediated outcomes increasing, the opportunities for court appearances (even at a lower-level) can be scarce depending on where you work around the motu. Combine that with structural discrimination and wāhine likely find their opportunities to appear in court are few and far between.

Both Mary and I have seen first-hand the typical diet of a Crown lawyer, where going to and from the court room is a normal part of everyone's day. In contrast, lawyers at most law firms do not regularly attend court and often are involved in the "bigger" cases, as it is common to brief out such cases to a more experienced litigator. Without regular court time, it is difficult to build the foundational skills to be able to take on bigger cases or run a trial of any size that requires a very particular skillset.

The lack of court time, coupled with the fact that often wāhine are commonly seen as better suited to that of junior counsel (and often organising their tāne lead counsel), has the effect of rarefying the opportunities for wāhine to act as lead counsel.

C What women want

Now this was interesting. Mary mentioned that wāhine often don't actually want to be in trials that go for weeks for a variety of reasons, including a tendency to shy away from the arguments in the senior courts and stress associated with it. Part of that probably reflects a lack of change in society's view on what wāhine should or should not be doing, but for me, it raised some very important questions. What do wāhine rōia want? And, more broadly, what do we want legal work to look like?

We know the statistics reveal that women are not appearing in the senior

courts as much as our tāne colleagues. However, what the statistics do not show (at least from what I have seen), is whether wāhine actually want to be there. I think this may be an important piece to the puzzle: is it that we are overlooked, is it that we are not inclined, is it that we have competing priorities, or is it every one of these issues? In any event, should we be looking to change the way in which court work is conducted to better enable wāhine to appear?

IV WHAT CAN WE DO MOVING FORWARD?

With all this in mind, I asked Mary what we could do to improve the statistics and opportunities for wāhine to appear in our senior courts. Mary said there are a number of things that need to be improved and identified two in particular:

Addressing unconscious bias and calling it out when we see it. Mary thinks that this is starting to happen, but it will be a slow process. This links back to Mary's whakaaro around the perception that the "man in the suit" is the best lawyer.

Reflecting and changing the culture of our profession. Mary acknowledged the Bazely Report and the sad reflection of our culture it revealed. This job is hard, and if it gets any harder it is not going to be a great way for anyone to live. She said that as we work through change, and start to eliminate the level of bullying, harassment and overworking that occurs in the profession, we may see change in our statistics and equality in representation (and hopefully address the burnout that has become prevalent in the statistics).

He waka eke noa — if we are to truly make change and address these two factors Mary has identified as being the key to that change, we must all do it together.

V REFLECTIONS ON MY KŌRERO WITH MARY

There really are no simple answers to statistics. There are many different reasons why statistics reveal what they do, and with the statistics often come more questions. So, we may not know exactly why wāhine are not appearing in the senior courts as often as tāne, but our experiences can provide some pretty good guesses as to contributing factors.

Speaking with Mary was incredibly refreshing. Her humility and frankness was welcomed, and it was fantastic to hear a wahine toa in our profession speak about the issues confidently and directly. I also enjoyed hearing Mary's clear passion for her job. This gave me hope for myself that if someone called me in

a few years' time seeking my reflections on wāhine in the law, I will still love my job as much as (if not more than) I already do today, despite the challenges we face.

For my part, I do not take for granted the fierce and determined leadership of the many wāhine toa who I call mentors, friends and sisters in the law. The leadership I have experienced is from wāhine who, as they help me up through the glass ceilings through which they themselves have forced navigable cracks, want me to learn, excel and, ultimately, be happy. It is this type of unity that we need to hold fast to as we move forward. We cannot do it alone, but as a collective we can do anything. He waka eke noa.

Nor do I take for granted the pathways my tuakana have paved. Their mahi reinforces the responsibility we all share to continue to push the boundaries as we, in the words of our rangatira (and epitome of a wahine toa) Tiana Epati, "ride the wave to a totally new future".[4] Read the statistics; absorb their meaning. But ultimately, remember we can — together, with a spirit of unity and āwhina — change them.

4 Tiana Epati "150 years on" (2019) 932 LawTalk 6 at 6.

COMMENTARY — HE PITO KŌRERO

WHO GETS TO SPEAK IN NEW ZEALAND'S TOP COURTS?

Jenny Cooper QC*

I INTRODUCTION

Women now make up over half of the New Zealand legal profession,[1] but make less than a third of appearances as lead counsel in our top courts. A review of all substantive judgments issued by the Court of Appeal and Supreme Court from 2012 to 2018 shows that less than 30 per cent of all counsel appearing in a leading role in New Zealand's two highest courts were women. When counsel instructed on behalf of the Crown are removed from the numbers, the figure drops to less than 20 per cent.

The low proportion of women lead counsel is not adequately explained by a natural time lag between women entering the profession and achieving seniority. If time were the only issue, the proportion of women appearing as lead counsel would be steadily trending upwards in line with the historic increase in the number of women entering the profession since the 1980s. The absence of any such upwards trend suggests that other factors are involved and that active steps are required if we want to hear more women's voices in the senior courts.

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* With acknowledgements to Gretta Schumacher, co-author of *Gender Ratio of Counsel Appearing in Higher Courts* (New Zealand Bar Association, 3 September 2018), to Rosa Gavey and Bonnie Simmonds for their research for the 2018 Report, to the New Zealand Law Foundation for generously funding the 2018 Report, and to Bonnie Simmonds for compiling the additional data for 2018 used in this article, and to the New Zealand Bar Association and the New Zealand Law Foundation for co-funding the compilation of the 2018 data, as well as committing to fund additional data collection for 2019.

1 See Geoff Adlam "Snapshot of the Profession" *LawTalk* (online ed, Wellington, March 2019) at 34. Women make up 51.3 per cent of practising lawyers in New Zealand. Over 60 per cent of new lawyers admitted each year are women.

This article revisits the New Zealand Bar Association's September 2018 report *Gender Ratio of Counsel Appearing in Higher Courts*, co-written by the author and Gretta Schumacher, with research assistance from Rosa Gavey and Bonnie Simmonds, and funded by the New Zealand Law Foundation.[2] Drawing on an additional 12 months of data covering the period immediately after the introduction of the New Zealand Bar Association and New Zealand Law Society's joint Gender Equitable Engagement and Instruction Policy,[3] this article looks at whether there has been any progress, and whether any initial conclusions or lessons can be drawn.

II BACKGROUND: THE SEPTEMBER 2018 REPORT

In the New Zealand Bar Association's September 2018 report, Gretta Schumacher and I analysed the gender ratio of counsel listed as appearing in the Court of Appeal and Supreme Court of New Zealand in judgments issued in the years 2012 to 2017.[4] The data for the gender of all counsel appearing in those courts was obtained by taking the names of counsel from published judgments and confirming their gender as recorded on the New Zealand Law Society database. We assumed that counsel for each party were listed on the judgment in order of seniority, which is the usual convention.

For the Court of Appeal, data was collected only for judgments delivered following an oral hearing with counsel appearing. Decisions made "on the papers" were excluded. Appearances by litigants in person and McKenzie Friends were also excluded. For the Supreme Court, data was collected for all substantive decisions, including written decisions declining leave which may not have had an oral hearing. This balanced the comparatively lower number of oral hearings conducted by the Supreme Court each year.

The resulting data enabled a comprehensive review of the gender ratios of lead and junior counsel who appeared in New Zealand's top courts over the relevant period.

In short, the data showed that throughout the period 2012 to 2017

2 Jenny Cooper QC and Gretta Schumacher *Gender Ratio of Counsel Appearing in Higher Courts* (New Zealand Bar Association, 3 September 2018).

3 New Zealand Bar Association and New Zealand Law Society *Gender Equitable Engagement and Instruction Policy* (5 December 2017).

4 The results of the *Gender Ratio of Counsel Appearing in Higher Courts* report are summarised at Cooper and Schumacher, above n 2, at 3–5. An overview of the methodology adopted can be found at 36.

women appeared as lead counsel significantly less frequently than men, and in a significantly lower proportion than their overall representation in the legal profession. In each year in the six-year period surveyed, women made up less than 30 per cent of lead counsel appearing in the Court of Appeal, with no discernible upwards trend over that time, while their overall numbers in the legal profession increased over the same period from approximately 45 per cent to just over 50 per cent.[5]

The number of appearances by women lead counsel in the Supreme Court was subject to greater fluctuation, probably due to the smaller number of cases and greater variation in the number of cases heard per year. Even so, for the period surveyed, the proportion of women lead counsel exceeded 30 per cent only once, in 2017, peaking at 30.49 per cent. In the previous year, the figure was only 19 per cent.

Within these overall figures, there was a material difference in the proportions in which women appeared as lead counsel for appellants versus respondents, and for civil versus criminal appeals. Women made up less than 20 per cent of lead counsel for the appellant in either the Court of Appeal or the Supreme Court in every year surveyed. The respondent figures demonstrate a better picture: women represented between 27 and 40 per cent of respondent lead counsel in both courts.

When only criminal cases were analysed, women's involvement as lead counsel grew in both appellant and respondent roles. In fact, the only lead counsel category in which women reached a level of involvement that closely reflected the constitution of the legal profession was in criminal appeals.

The significant differences between the appellant and respondent figures and between civil and criminal appeals led us to consider whether this was related to the presence or absence of the Crown as a party. Crown Law represents the Crown on most, if not all, criminal appeals in the Court of Appeal and Supreme Court. Most criminal appeals involve a criminal defendant appealing, which places the Crown as the respondent. Crown Law also appears for the Crown in civil litigation, but far less frequently.

To investigate this possible connection, we re-calculated the figures for all appeals but excluded counsel instructed by Crown Law. The exclusion had a

5 The figures for the proportion of women in the profession are based on statistics in the "Snapshot of the Profession" published annually by the New Zealand Law Society and available at <www.lawsociety.org.nz>.

stark effect on the figures. When instructions from the Crown were excluded, the number of women appearing as lead counsel dropped dramatically. For respondent counsel, the decrease was particularly severe. For example, in 2013 in the Court of Appeal, the proportion of women lead counsel for the respondent dropped from 35 to 10 per cent when counsel for the Crown were omitted. In 2015, the drop was from 27 to 13 per cent. In 2017, the drop was from 38 to 16 per cent.

As we noted in our September 2018 report, Crown Law has had a gender equitable briefing policy since 2009, having adopted the New Zealand Bar Association's former gender equitable briefing policy in that year. Crown Law also adopted the more recent joint New Zealand Bar Association and New Zealand Law Society Gender Equitable Engagement and Instruction Policy on its launch in December 2017. Whether this explains the effect on the data is hard to determine, but the role Crown Law plays in placing women in leadership roles in the higher courts is notable.

The figures for women QCs who appeared, as a proportion of all QCs appearing across both courts, were very low. In 2017, women QCs represented only nine per cent of all QCs appearing in the Court of Appeal in relation to judgments issued in that year, despite 18.6 per cent of practicing QCs at that time being women.[6] That was slightly less than the proportion in the same Court in 2013 (10 per cent) despite the fact that, at that time, only 14 per cent of practicing QCs were women.[7] In the Supreme Court, women QCs represented 12 per cent of all QCs appearing in 2017, and only six per cent in 2016. Consistent with the overall picture, the lowest figures for women QCs were as lead counsel for the appellant in civil cases.

Junior counsel figures showed a higher level of representation of women, with women appearing as junior counsel in over 50 per cent of cases in which a junior was present at an oral hearing in some years. The average proportion of women junior counsel over the entire period was 47 per cent in the Court of Appeal and 39 per cent in the Supreme Court. The proportions were similar across both criminal and civil cases, and where Crown Law was excluded.

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6 The percentage of practising QCs in 2017 who were women is based on QC figures as reported by Geoff Adlam "Snapshot of the Profession at 1 February 2018" *LawTalk* (online ed, Wellington, March 2018) at 51.

7 The percentage of women practising QCs in 2013 is taken from New Zealand Law Society "A Snapshot of the New Zealand Law Profession on 1 March 2013" *LawTalk* (online ed, Wellington, March 2013) at 12.

III INTRODUCTION OF THE GENDER EQUITABLE ENGAGEMENT AND INSTRUCTION POLICY

The most striking finding of the September 2018 report was the absence of any discernible upwards trend in the proportion of women appearing as lead counsel over the six year period from 2012 to 2017, despite the steadily increasing proportion of women in the profession over that period and throughout the preceding decades. As discussed further below, this tends to suggest that the issue of gender inequality in this area is unlikely to resolve itself over time and that deliberate intervention is required to achieve change.

It was therefore timely that the New Zealand Bar Association and New Zealand Law Society launched a joint Gender Equitable Engagement and Instruction Policy in December 2017, with the goal of increasing representation of women in lead roles in litigation, and with a specific target of having women lawyers with relevant expertise take a lead role in at least 30 per cent of court proceedings, arbitral proceedings and major regulatory investigations by 1 December 2018.

The 30 per cent target was adopted before the data for 2012 to 2017 was available and was based on anecdotal evidence about the current figures and feedback about what was thought to be an achievable near-term goal. Having regard to the objective of choosing a figure that was above current levels but achievable in the short-term, the data supports the choice of an initial 30 per cent target as a stepping stone to the longer-term goal of gender parity.

The Gender Equitable Engagement and Instruction Policy is voluntary. According to the New Zealand Law Society's website, as at 1 August 2019 there were 47 adopters of the Policy. This included corporate clients, law firms, barristers' chambers and individuals. The Policy requires adopters to report their performance against the 30 per cent target biennially to the Law Society. Policy adopters are due to file their first reports in December 2019 and so should be taking steps to ensure that they meet the 30 per cent target.

IV WHAT THE 2018 DATA SHOWS

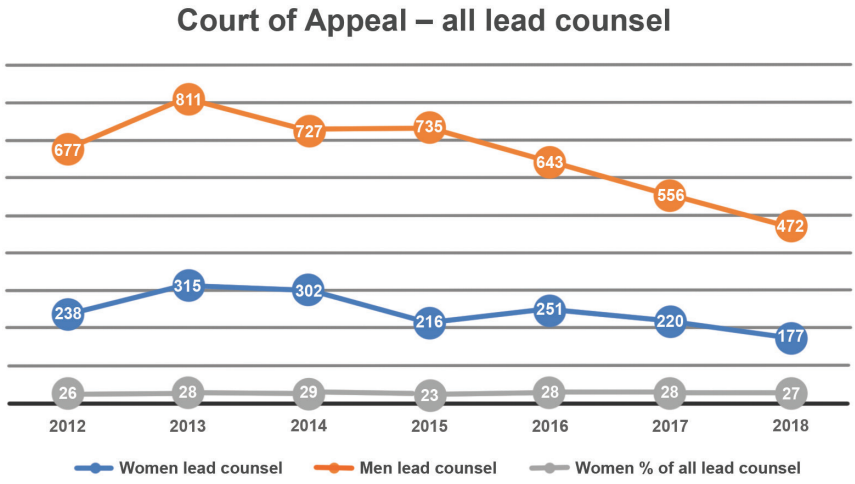
The data for the gender of counsel appearing recorded in judgments of the Court of Appeal and Supreme Court, issued from 1 January to 31 December 2018, was compiled by Bonnie Simmonds using the same method used for the September 2018 report, with the exception that, for the 2018 judgments,

decisions in the Supreme Court reached on the papers, rather than following an oral hearing, were not included. (To ensure consistency, for the purposes of the discussion below, Supreme Court decisions on the papers have been removed from the data for the 2012 to 2017 period.) The resulting figures for 2018 are remarkably consistent with the figures for 2012 to 2017 and continue to show an absence of any overall upwards trend in the proportion of women appearing as lead counsel.

Broken down between the Court of Appeal and Supreme Court, the 2018 figures show that women made up 27 per cent of all lead counsel appearing in the Court of Appeal and 23 per cent in the Supreme Court. The equivalent figures for 2017 were 28 per cent and 27 per cent respectively.[8]

When lawyers instructed on behalf of the Crown are excluded, the figures for 2018 drop to 18 per cent in the Court of Appeal and 13 per cent in the Supreme Court, compared with 17 per cent and 18 per cent respectively in 2017.

The graph below shows the overall figures for all lead counsel appearing in substantive hearings in the Court of Appeal over the period from 2012 to 2018, with the top line showing the number of men lead counsel, the middle line

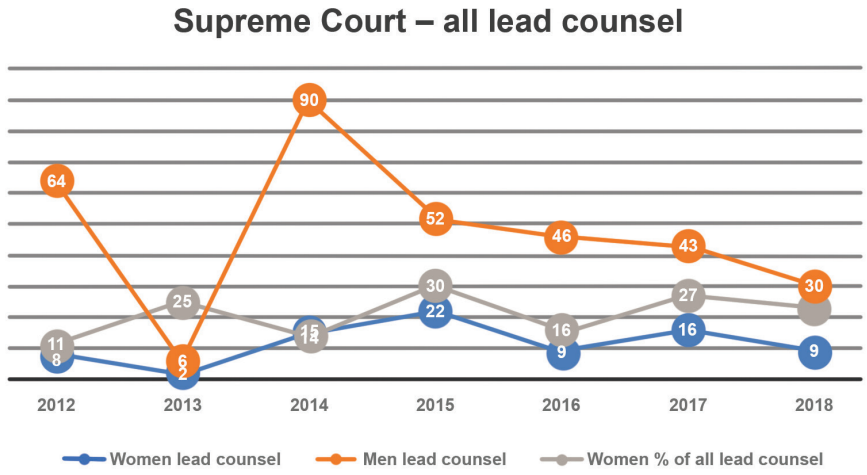


8 Note the 2017 figure for the proportion of women counsel appearing in the Supreme Court has been adjusted to include only substantive judgments, to ensure consistency with the 2018 figure. The 2017 figure for both substantive and non-substantive judgments was 30 per cent.

the number of women lead counsel, and the bottom line the percentage of the total comprised by women:

As this shows, total numbers of counsel of both genders appearing in the Court of Appeal have declined since 2013. However, the figure for the number of women appearing as a percentage of the total has remained fairly consistent, between 26 and 29 per cent, with the exception of 2015, when it was only 23 per cent.

There is more fluctuation in the figures for the Supreme Court, reflecting the smaller sample size. Nevertheless, the proportion of women lead counsel has remained at or below 30 per cent, with only a minor upwards trend over the seven years since 2012, as demonstrated in the graph below:[9]



The 2018 figures generally show the same trends as the earlier data in relation to the gender break-down of counsel, with a higher proportion of women junior counsel than senior counsel, a higher proportion of women appearing as lead counsel for the respondent than appellant, and a higher proportion of women appearing as lead counsel in criminal appeals than in civil appeals. Likewise, as in previous years, the role of the Crown as a litigant

9 Note that the 2012 to 2017 figures in this graph differ from those in the September 2018 report as leave judgments have been excluded from the figures to ensure consistency with the 2018 figures.

has a material effect on the figures for 2018, with the percentage of all lead counsel who are women falling from 25 per cent to 18 per cent in the Court of Appeal, and from 23 per cent to 12.5 per cent in the Supreme Court if counsel instructed by Crown Law are excluded. Finally, the proportion of QCs appearing in the Court of Appeal in 2018 who were women was nine per cent, which is identical to the figure for the previous year. In contrast, the proportion of QCs appearing in the Supreme Court in 2018 who were women was a remarkable 40 per cent, with women QCs making eight out of a total of 20 QC appearances in total. This represented all but one of the nine occasions on which a woman appeared as lead counsel in the Supreme Court that year.

V IS IT JUST A MATTER OF TIME?

The number of women entering the New Zealand legal profession has been equal to or higher than the number of men since 1993, and currently sits at around 61 per cent.[10] The total number of women practising surpassed the number of men for the first time in January 2018.[11]

Nevertheless, because women entered the profession in smaller numbers before 1993, and have gradually increased in number over time, on average, women in the profession have fewer years of practice than men (12 years as compared with 20).[12] This raises a question as to whether the relatively less experienced profile of women in the profession is a reason for why the proportion of women appearing as senior counsel is lower.

This is certainly a possibility that warrants serious consideration. However, if the current figures were simply a reflection of women's relative lack of years in practice, one would expect to see the figures tracking upwards in a similar way to the increase in the proportion of women being admitted in previous decades, as steadily larger numbers of women progress to seniority.

For example, the proportion of admissions of women to the legal profession in New Zealand increased by 16 per cent between 1980 and 1985, by just under four per cent between 1985 and 1990, by five per cent between 1990 and 1995, and then by a further seven per cent between 1995 and 2000.[13] Assuming that it takes around 20 to 30 years to reach a sufficiently senior level

10 Adlam, above n 1, at 32.

11 At 32.

12 At 33.

13 At 32.

in the profession before a lawyer is likely to appear as lead counsel in the Court of Appeal or Supreme Court, one would expect the figures from those courts over the last seven years to be showing an upwards trend of at least five per cent. However, as already discussed, there is no such trend.

This does not rule out disparity in experience as a relevant factor. However, it does indicate that the historical disparity in numbers entering the profession is not a complete explanation for the current disparity in the senior levels of the profession. Higher exit rates of women from the profession, or from litigation roles, may be another part of the explanation. But whatever the reason, the figures strongly suggest that simply waiting for time to pass is not likely to provide a solution.

VI WHAT DO THE FIGURES TELL US ABOUT THE EFFECTIVENESS OF THE GENDER EQUITABLE ENGAGEMENT AND INSTRUCTION POLICY?

A The New Zealand experience

To the extent that the 2018 figures for counsel appearing in the Court of Appeal and Supreme Court might be expected to show a material change in briefing practices in the 12month period following the introduction of the Gender Equitable Engagement and Instruction Policy, they in fact suggest there was not.

However, there are several possible reasons why the Policy has not led to any noticeable change in the 2018 figures. The most likely is that a year is too short a timeframe for the effect of the Policy to appear in these figures. Most appeals follow months or even years of prior litigation and the counsel who appeared in the court below is often retained for the appeal. In addition, the figures capture *judgments* released during 2018, rather than *appearances* during that period, and therefore incorporate a further time lag from the point at which briefing decisions are made. Accordingly, it is not surprising that there has not yet been any visible impact.

A second possible explanation is that the initial adopters of the Policy were largely client organisations and firms who were already meeting the target—indeed many of the early Policy adopters expressed confidence that they were already compliant. If that were true, it would not be surprising that the Policy had little impact on the figures in its initial stages, before its impact spreads more widely.

For both these reasons it is too early to draw inferences about the effectiveness of the Policy based purely on the lack of visible impact on the 2018 figures. If anything, the latest figures underscore the need for the Policy by highlighting the continuing absence of any "natural" progression towards gender equity in courtroom advocacy.

To the extent the figures could suggest a potential weakness in the Policy, that weakness is the risk that adoption of the Policy is likely to be biased towards those who already instruct women in relatively high numbers, while failing to reach those who do not. This highlights the need to continue to push for wider adoption of the Policy, as well as the importance of ensuring follow up and reporting on progress towards meeting the target by existing Policy adopters.

B The Australian experience

It is interesting to compare the situation in New Zealand with the experience in Australia. A 2016 paper by Kate Eastman SC identified similar issues in Australia to those identified in this report, including a lower proportion of women appearing in lead counsel roles relative to their numbers at the Bar, lower numbers of women appearing as lead counsel in civil matters and for private litigants, and no significant improvement in the figures since 2009.[14]

The Law Council of Australia introduced a National Model Gender Equitable Briefing Policy in 2016, which has the ultimate aim of briefing women barristers in at least 30 per cent of all matters and paying women barristers at least 30 per cent of the value of all brief fees by 2020.[15] Those that adopt the Equitable Briefing Policy commit to "making all reasonable efforts to brief or select women barristers with relevant seniority and expertise, experience or interest in the relevant practice area".[16]

In its Equitable Briefing Policy Annual Report for 2017–2018, the Law Council of Australia reported that:[17]

> i) women barristers received 25 per cent of total briefs reported by the reporting entities, a five per cent increase from the 2016–

14 Kate Eastman *Visible targets: the case for equitable briefing* (30 June 2016) at 15.

15 Law Council of Australia *Equitable Briefing Policy: Annual Report 2017–2018 Financial Year* (2018) at 8.

16 At 10.

17 At 6.

2017 reporting year;

ii) women barristers received 17 per cent of the total fees reported by briefing entities, a two per cent increase from the 2016–2017 reporting year;

iii) barristers reported that 55 per cent of junior barristers who appeared with them were women and 23 per cent of senior barristers who appeared with them were women, a three per cent increase from the 2016–2017 reporting year; and

iv) barristers recommended women barristers in 61 per cent of current matters and 60 per cent of new matters, representing a one per cent increase in recommendations for women barristers overall from the 2016–2017 reporting year.

These figures demonstrate a slow upward trend in instruction and recommendation of women barristers by adoptees of the Equitable Briefing Policy. As in New Zealand, adoption of the policy is voluntary. Therefore, it is difficult to draw any firm conclusions from the Australian data but for the fact that those who have voluntarily committed themselves to targets to brief more women appear to have made progress towards that goal. It is also difficult to assess the significance of that without data on what is happening across the Australian legal market as a whole. However, it certainly suggests that it is worthwhile to promote and encourage voluntary adoption of an Equitable Briefing Policy.

VII GENDER IS NOT NECESSARILY THE BIGGEST PROBLEM, JUST THE EASIEST TO MEASURE

Gender imbalance in senior litigation roles is just one aspect of a broader diversity problem in the legal profession. The relative lack of women's voices being heard in court is by no means a more important issue than the lack of Māori, Pasifika, or Asian voices, for example. On the contrary, there are strong arguments that many other groups face greater levels of exclusion within the legal profession than the majority of women do, with serious consequences for social cohesion, justice and equality.

Given the relative lack of diversity in the profession as a whole, it appears very likely, for example, that the overwhelming majority of counsel appearing

in the top courts are Pākehā (whether men or women).[18] As the ethnicity information collected by the New Zealand Law Society is not made publicly available, except in statistical form, it is not currently possible to confirm this using public data.

It is also possible, if not likely, that a disproportionate number of counsel appearing in the senior courts come from relatively economically privileged backgrounds. However, lawyers are not required to provide any information about their economic backgrounds and it would be a significant task to investigate this.

Nevertheless, despite the existence of potentially greater inequalities and marginalisation of other voices, gender imbalance is still an important issue that deserves attention. It is an issue that affects approximately half the population and the profession, across all races and backgrounds. It is also an issue that can be measured and tracked relatively easily. It can therefore provide something of a test case for diversity more broadly.

From this wider diversity perspective, the fact that we have failed to make any material progress over the last seven years on improving the proportion of women appearing as lead counsel in the senior courts bodes poorly for other, less privileged, groups in our profession and society. If we wish to maintain the trust and confidence of the communities we serve, we have to do better to represent and reflect those communities. Ensuring that a broader range of voices is heard in our senior courts is an important aspect of that.

18 In 2019, 78 per cent of lawyers who identified their ethnicity to the New Zealand Law Society identified themselves as New Zealand European: Adlam, above n 1, at 34.

FEMINIST INTERVENTIONS
Learning from Canada

Elizabeth A Sheehy* **and Julia Tolmie****

This article explores the potential of third-party interventions by feminist lawyers in ongoing litigation to support the development of the common law consistent with women's equality rights. The article briefly illustrates the need to account for the realities of women's experiences in the New Zealand common law, outlines the legal basis for third party interventions and describes the few feminist interventions that have taken place in New Zealand. It then draws on the extensive experience of feminist interventions before the Supreme Court of Canada, including those by the Women's Legal Education and Action Fund, and the literature that attempts to measure the effects of interveners to both describe the factors that have supported such interventions and suggest that they have had an impact on legal development. To illustrate the potential of feminist interveners, the article then compares two cases from Canada (R v JA) and New Zealand (R v S), each dealing with the issue of the legal culpability of men who sexually penetrate unconscious women and decided within a few years of the other. While not a proposition fully capable of causal "proof", the article concludes that the evidence suggests that feminist interveners make a difference in the law's progress in bringing women's collective interests before the courts and addressing the systemic impacts that specific doctrinal interpretations will have on women's rights and interests.

I INTRODUCTION

Whilst the legal system is ostensibly committed to gender equality, current legal doctrines and processes reflect patriarchal and colonial origins as well as broader social inequities, and fail to accommodate the realities of women's lives.[1] There are multiple instances in the criminal law of decision-making by the New Zealand courts that have negative implications for women's access to justice.[2] These judicial decisions have often been made without any apparent engagement with the broader equality implications that the case presents.

Measures to improve the gap between legal doctrines and women's lives have been mooted and/or implemented over the years. Women can organise themselves and vote for political parties who will enact legislative reforms that serve women;[3] they can run for political office and pursue feminist law reform as legislators;[4] they can seek judicial appointment and interpret the law in a manner consistent with an understanding that the law must equally serve women and men;[5] and they can represent women's interests as feminist lawyers through legal practice, including by litigating on behalf of both parties and interveners.

In this article, we examine the potential of third-party interventions in ongoing litigation to support the development of the common law in a way that is consistent with women's equality rights. While not a proposition fully

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1 See Catharine MacKinnon *Women's Lives, Men's Laws* (Harvard University Press, Cambridge MA, 2007).

2 For examples from these and other areas of law see Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds) *Feminist Judgments of Aotearoa New Zealand: Te Rino: A Two-Stranded Rope* (Hart Publishing, London, 2017) [*Feminist Judgments of Aotearoa New Zealand*].

3 In fact, civil society women's groups exert a powerful influence on policy development. See Mala Htun and S Laurel Weldon "The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective 1975–2005" (2012) 106 American Political Science Review 548.

4 Anne Phillips *The Politics of Presence* (Clarendon Press, Oxford, 1995); and Lena Wängnerud "Women in Parliaments: Descriptive and substantive representation" (2009) 12 Annu Rev Political Sci 51.

5 Bridget J Crawford, Kathryn M Stanchi and Linda L Berger "Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment" (2018) 47 U Balt L Rev 167; and Elizabeth Sheehy (ed) *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Irwin Law, Toronto, 2004) [*Adding Feminism to Law*].

capable of causal "proof", we argue that the evidence supports the claim that feminist interveners make a difference in the law's progress in this regard. Without feminist interveners to bring women's collective interests before the courts, neither individual lawyers nor judges can easily address the systemic impacts that specific doctrinal interpretations will have on women's rights and interests.

In focusing on the intervener role, we recognise that litigating as a party offers significant advantages: test cases can be carefully planned and geared towards securing key precedents;[6] counsel for a party can direct the course of the litigation by shaping the evidentiary record, framing the issues and setting the timelines; and parties need not undergo the uncertainty of applying for — and possibly being denied — participation in the litigation.[7] However, few civil society organisations who pursue women's equality have the enormous resources required to shepherd a case from trial through to final appeal, let alone to execute a multiplicity of test cases over decades. The role of intervener thus permits involvement in many more cases and also avoids the complex ethical dilemmas that arise when a client's instructions conflict with the organisation's aims or values.[8]

Non-party interveners in litigation serve important functions in the legal system. They can bring to the attention of the court the far-reaching impacts that particular outcomes may have on other groups or interests; introduce sources of law, arguments, social facts and materials not advanced by the parties themselves; and they may ask the court to consider other values, legal norms or constitutional principles. On the level of participatory democracy, non-party interventions allow members of civil society to feel "heard" by the judicial branch of government, thus affirming access to justice as a principle. In turn, intervener participation serves a public education function and can foster acceptance of a court's decision.[9]

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6 Karen O'Connor *Women's Organizations' Use of the Courts* (Lexington Books, Lexington, MA, 1980).

7 For example, the Women's Legal Education and Action Fund (LEAF) was denied intervener status by the Federal Court of Appeal in *Minister of Citizenship and Immigration v Ishaq* 2015 FCA 151, [2016] 1 FCR 686.

8 Women's Legal Education and Action Fund *Equality and the Charter: Ten Years of Advocacy Before the Supreme Court of Canada* (Emond-Montgomery, Toronto, 1996) at xxiii [*Equality and the Charter*].

9 Benjamin RD Alarie and Andrew J Green "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall LJ 381.

Non-party interveners also present risks. They may "hijack" the litigation, taking it in directions to which the parties are opposed;[10] they may add time and costs if the parties are to respond to their submissions; they may overwhelm the court, absorbing valuable time and energy;[11] they may lend the appearance of bias to the proceedings if not evenly distributed between the parties; and they may use their role as interveners to publicise their cause or engage media, thereby "politicising" the court, according to some.[12] The potential negative effects of intervener involvement can be largely curtailed by rules that limit the issues to those already raised by the parties, that impose restrictions on the page length for facta and the time for oral argument, and that bar interveners from costs awards.[13]

The courts of the United States, England and Wales, New Zealand, Australia and Canada recognise third-party interveners,[14] providing the opportunity for feminist interveners to ensure that judges are educated about the implications of their decisions for women. New Zealand has a modest (but developing) and relatively new history of third-party interventions,[15] and an even more modest record of feminist interventions. The University of Auckland Centre for Human Rights Law, Policy and Practice has embarked on a project aimed at promoting greater understanding of the role of the public interest intervener in light of the recent growth in third-party interventions[16] and the formal function of the Human Rights Commission under the Human Rights Act 1993 to intervene. It is therefore timely to examine whether feminist third party interventions could contribute to the development of the common law

10 Justice Susan Kenny "Interveners and Amici Curiae in the High Court" (1998) 20 Adel L Rev 159 at 167–168.

11 See for example a Canadian example where the 26 interveners necessitated the scheduling of an additional day at the Supreme Court to accommodate the numbers: Linda McKay-Panos "Interveners in Human Rights Cases" (8 September 2017) Law Now <www.lawnow.org>, referring to the Trinity Western University (TWU) case, which involved TWU's challenge to two provincial law societies who refused accreditation to the law students of their private, Christian institution on the basis that its Code of Conduct discriminated against gay and lesbian students.

12 Kenny, above n 10, at 168.

13 See discussion below at n 78–83.

14 For a comparative discussion of interveners in these jurisdictions see Edward Clark "The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand" (2005) 36 VUWLR 71.

15 See the Law Commission *Review of the Judicature Act 1908 — Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [15.51].

16 At [15.51].

in a way that equally serves the legal interests of women in the New Zealand context.

In the first part of this article we briefly outline the legal basis for third party interventions in New Zealand. We then provide examples of New Zealand legal decisions that have failed to account for the realities of women's experiences, before describing the few feminist interventions that have taken place in New Zealand.

In the second part of this article, we use the Canadian example to assess the promise offered by interveners. Canada has a rich and long-standing history of third-party interventions, including three decades of feminist interventions before the Supreme Court of Canada. In this part, we set out the legal basis for, and history of, third-party interventions in Canada. We examine the developments that normalised the acceptance of interveners appearing before the Supreme Court, including a "made in Canada" funding mechanism to support this form of legal work. We review the literature that attempts to measure the effects of interveners, including those by the Women's Legal Education and Action Fund (LEAF), a feminist organisation founded for the specific purpose of pursuing women's equality rights through litigation. LEAF's experience as an intervener in more than 100 cases[17] since it was founded in 1985 provides a basis on which to assess the potential of this strategy.

In the third part of this article, we engage in a case study comparing two cases from Canada and New Zealand, each dealing with the same legal issue and decided within a few years of the other. The Canadian case is *R v JA*,[18] a 2011 decision of the Supreme Court of Canada that dealt with the legal issue of whether a complainant can consent "in advance" to sexual contact that will occur while she is unconscious. New Zealand's 2015 equivalent decision is *R v S*,[19] where the High Court answered the slightly different but related question of whether a man's "reasonable belief" in consent remains a defence when the complainant is unconscious. The Canadian court answered "no"; the New Zealand court answered "yes." The Canadian court had the benefit of the arguments of a feminist intervener (LEAF); the New Zealand court had no similar benefit. Although the Canadian decision did not explicitly engage

17 For a list of all the cases see "Search cases" Women's Legal Education and Action Fund <www.leaf.ca>.

18 *R v JA* 2011 SCC 28, [2011] 2 SCR 440.

19 *R v S* [2015] NZHC 801.

with feminist arguments, it adopted the intervener's proposed legal reasoning and arrived at an outcome that respects the equality and autonomy interests of women.

We conclude that feminist interventions can potentially serve a critical role by: articulating the deeper policy aims of progressive legislation in order to assist in the interpretation of that legislation; inviting judges to consider the social context in which the law will operate; articulating the equality interests of women that are raised by the particular legal dispute, as well as linking these to broader constitutional and human rights obligations; and stimulating consideration of the future impact of potential decisions on women's lives when the case presents an interpretative choice for judicial decision makers. Regardless of whether judges embrace the position adopted by the interveners in any particular case, interveners can help foster a more thoughtful quality of jurisprudence, as well as a common law that is consciously responsive to the impact of the law on women's lives.

II INTERVENERS IN NEW ZEALAND

A Legal basis for interveners

In New Zealand, the jurisdiction for public interest interventions in the Court of Appeal is found in r 48(1)(a)(ii) of the Court of Appeal (Civil) Rules 2005. This rule allows the court to direct that a notice of appeal be served on a non-party.[20] It has been held that the jurisdictional basis for such interventions in the High Court lies in r 7.43A(d) and (e) of the High Court Rules 2016 and that Court's inherent jurisdiction.[21]

The criteria for allowing an intervention appear to be similar in both courts: the case must raise issues of general principle or public policy that have

20 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

21 *Seales v Attorney-General* [2015] NZHC 828 at [41]. Clark, above n 14, suggests that the more limited role of an amicus curiae has been absorbed into the broader role of the public interest intervener in New Zealand. The Attorney-General has a long recognised the right to intervene as a third party in order to protect the public interest: Crown Proceedings Act 1950, s 35(2)(h); and High Court Rules 2016, rr 4.27, 7.4 and sch 5(2).

"wider implications … than those of immediate concern to the parties";[22] the court would be assisted by submissions from the intervener (in other words the intervener offers expertise or information that counsel for the parties cannot provide);[23] and measures can be taken to avoid or ameliorate any potential detriment to the parties (such as the "risk of expanding issues, elongating the hearing and increasing the costs of litigation").[24]

Section 5(2)(j) of the Human Rights Act 1993 sets out one of the primary functions of the New Zealand Human Rights Commission as being:

> … to apply to a court or tribunal … to be appointed as intervener … if … taking part in the proceedings in that way will facilitate the performance of its functions [to advocate for and promote respect for, and an understanding and appreciation of, human rights in New Zealand society].

Under s 92H of that Act, the Human Rights Commission has a right to appear before the Human Rights Review Tribunal and in appeals from that body, even if it is not a party to the proceedings, when it considers this necessary to facilitate the performance of its functions. The role of the Human Rights Commission is therefore relevant to this discussion as New Zealand is a signatory to international human rights instruments directed at women's equality interests, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[25] and the Declaration on the Elimination of Violence against Women.[26]

B The need for feminist interventions

The need for feminist input into the development of New Zealand law can be

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22 *Seales v Attorney-General*, above n 21, at [46]–[48]. It may be appropriate to grant leave where the proceeding is likely to result in the development of the law (*X v X*, HC Auckland CIV-2006-404-903, 4 July 2006 at [25]), but not where the proceeding essentially involves statutory interpretation and is unlikely to involve broad questions of policy (*D v C [Intervention]* (2001) 15 PRNZ 474 (CA) at [7]). See also *Drew v Attorney-General,* above n 20, at [17]; *C v ACC* [2013] NZCA 34 at [12]; and *Ovation New Zealand Ltd v Te Kuiti Meat Processors Ltd* [2018] NZEmpC 101.

23 *Seales v Attorney-General*, above n 21, at [46]; *C v ACC*, above n 22, at [12]; and *Drew v Attorney-General,* above n 20, at [18].

24 *Seales v Attorney-General*, above n 21, at [45]; *C v ACC*, above n 22, at [12]; and *Drew v Attorney-General*, above n 20, at [11] and [18].

25 *Convention on the Elimination of All Forms of Discrimination against Women* GA Res 34/180 (1979) [CEDAW]. CEDAW was ratified by New Zealand in 1985.

26 *Declaration on the Elimination of Violence against Women* GA Res 48/108 (1993). The Declaration was adopted as a complement to, and in furtherance of, CEDAW.

demonstrated by reference to many areas of common law principle that have been developed without apparent discussion or accommodation of women's interests. For example, judicial interpretations of the legal requirements for self-defence, provocation and duress[27] effectively foreclose these defences in the one circumstance where women, who typically offend against a background of victimisation, might consistently need them. This is offending that takes place in response to a dangerous and coercive partner.

For example, in *Police v Kawiti*,[28] the High Court held that the common law defence of necessity (duress by emergency circumstances) is only available to a defendant where the threat they were responding to comes from a non-human source, a decision recently upheld by the Supreme Court in *IA v R*.[29] The High Court held that duress as a result of threats from a human is codified in the defence of compulsion (duress by stand-over threat) set out in s 24 of the Crimes Act 1961 — despite the fact that this defence is not the same as the common law defence of duress by emergency circumstances and has narrow legal requirements that women in violent relationships generally struggle to satisfy.[30]

Those most affected by the inability to access these defences are women who experience the highest levels of social entrapment.[31] These women are likely to have histories of serial victimisation, high levels of precarity and multiple other intersectional inequities.[32] They will also be disproportionately Māori.[33] It is worth pointing out that the outcome in *Police v Kawiti* was not one that

27 See also the New Zealand common law on self-defence: Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at 77–85; and Lexie Kirkconnell-Kawana and Alarna Sharratt "Commentary on *R v Wang*: Finding a Plausible and Credible Narrative of Self-Defence" in *Feminist Judgments of Aotearoa New Zealand*, above n 2, at 497. For a discussion of the defence of provocation see Julia Tolmie "Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation" [2005] NZ L Rev 25 at 36–44.

28 *Police v Kawiti* [2000] 1 NZLR 117 (HC).

29 *IA v R* [2013] NZSC 88, [2014] 1 NZLR 17.

30 Shivan Nouri "Critiquing the Defence of Compulsion as it Applies to Women in Abusive Relationships" (2015) 21 Auckland U L Rev 168.

31 Julia Tolmie and others "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" [2018] NZ L Rev 181.

32 New Zealand Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality and Safety Commission, Wellington, 2017) at 40–44 and 50.

33 At 50.

the Court was bound to arrive at.[34] In the words of the Hon Sir Anthony Mason,[35] this was a decision where there was "a lee way of choice". Different interpretations of the Crimes Act, each rationally based, could have dictated different outcomes. A commitment to women's equal access to justice might have tipped the scales the other way in what was a finely balanced decision.

Another example from the criminal law is the fact that failures to act have been coupled with the legal test for establishing causation in the context of homicide to convict mothers whose one child died at the hands of their abusive partner, of *two* counts of manslaughter.[36] Multiple manslaughter convictions were said to be justified on the basis that these mothers had first breached their duty to protect their child from their partner *and* then also breached their duty to get their child medical care once they became aware that their child had been injured. The legal requirements of the offence of manslaughter were satisfied on the basis that each separate breach of duty caused death.

Non-criminal law examples of legal developments that fail to account for women's interests include the exercise of the judicial discretion to award costs.[37] Recently, Mariya Taylor took civil proceedings against her former boss, Robert Roper, for sexually harassing, bullying, assaulting and unlawfully imprisoning her when she was an 18-year-old air force recruit. Edwards J accepted that it was likely that Mr Roper had behaved as alleged and that these acts were a material and substantial cause of the plaintiff's post-traumatic stress disorder.[38] However, the claim against Mr Roper was dismissed on the technical grounds that it was time-barred by the Limitation Act 1950 (and/or the Accident

34 See Julia Tolmie and Khylee Quince "*Police v Kawiti*" in *Feminist Judgments of Aotearoa New Zealand*, above n 2, at 489 for a feminist rewrite of the decision.

35 Sir Anthony Mason "Judging" (paper presented to the Conference to Mark the Retirement of the Chief Justice, Auckland, 1 February 2019).

36 See *R v Kuka* [2009] NZCA 572; and the case of Hoana Matiu reported in "Judge jails mother who 'failed to protect her son'" *Stuff* (online ed, New Zealand, 28 September 2000).

37 For a decision on damages see *Attorney-General v Hewitt* [2000] 2 NZLR 110 (HC), where the Court ordered the New Zealand Police to pay punitive damages to a man who had strangled his partner to unconsciousness in front of their child and other witnesses. Damages were awarded because the police officers who arrested him had failed to exercise their *individual* discretion to arrest as opposed to implementing a pre-determined Police pro-arrest policy in family violence cases.

38 *Taylor v Roper* [2019] NZHC 16 at [3]. Mr Roper was serving a 13-year term of imprisonment in respect of 20 sexual offences committed against five other women. See also Meghan Lawrence "Sexual assault victim must pay attacker" *New Zealand Herald* (New Zealand, 22 January 2019) at A9.

Compensation Act 2001).[39] Because he had "won," Ms Taylor was ordered to pay him $27,819.25 in costs.

Rule 14.7(g) of the High Court Rules, which permits reasonable exceptions to costs awards, should arguably have been interpreted to give expression to New Zealand's international human rights obligations. Mr Roper's proven behaviour breached a number of Ms Taylor's human rights.[40] The result of asking Ms Taylor to pay the perpetrator's costs merely because he successfully asserted a technical bar to her attempt to seek redress, is arguably to use the legal system to "re-victimise" her "because of laws insensitive to gender considerations, enforcement practices or other interventions", contrary to art 4(f) of the Declaration on the Elimination of Violence against Women.[41]

C History of feminist interveners

Despite the failures in law to account for women's lives, New Zealand has an extremely modest history of feminist interventions. The Human Rights Commission has made only a few interventions directed at women's equality rights. These have been in cases deciding: whether "equal pay" under the Equal Pay Act 1972, as applied to roles predominantly performed by women (such as rest home caregivers), allows comparison with wages for work of equal value in non-female dominated sectors;[42] whether a pregnant woman with childcare obligations was discriminated against on the grounds of sex and/or family status

39 *M v Roper* [2018] NZHC 2330; and *Taylor v Roper*, above n 39.

40 These included her rights to equality under art 3(b), liberty and security of person under art 3(c), just and favourable conditions of work under art 3(g) and to not be subjected to cruel, inhuman or degrading treatment under art 3(h) of the Declaration on the Elimination of Violence against Women, above n 26.

41 Note that it is not uncommon for victims of sexual violence (a significant proportion of whom are women) to take many years before they are in a position to seek redress for what happened to them. At this point they are likely to be disqualified from seeking civil redress, even if they are in position to discharge the burden of proof on the basis of the evidence that is available.

42 *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437.

when her employer made her position full time;[43] and whether the Ministry of Health's policy not to pay family members caring for their children for disability support services was unjustified discrimination on the basis of family status under the New Zealand Bill of Rights Act 1990.[44] It is not clear from the judgments in these cases whether the Commission's intervention was directly based on gender equality concerns and therefore whether these are accurately characterised as "feminist" interventions. The Human Rights Commission has yet to intervene in a criminal case[45].

Aside from the activities of the Human Rights Commission, the Auckland Women Lawyers' Association (AWLA) has pursued two interventions. Both of these directly articulated the central legal issues to be decided in terms of women's equality rights. However, only one of these was fully "successful" in the sense that the outcome was that argued for by the interveners.[46]

In *Ruka v Department of Social Welfare*,[47] Ms Ruka was originally convicted of multiple counts of wilfully omitting to supply material particulars under s 127 of the Social Security Act 1964 and fraudulently using a document to obtain a pecuniary advantage under s 299A of the Crimes Act. The Department of Social Welfare alleged that she had received benefits she was not entitled to because she was living in a "relationship in the nature of a marriage" at the time and had failed to disclose that fact. Ms Ruka apparently lived for 14–18

43 *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 (HC) at [154]. This case was lost on the facts. The plaintiff was not dismissed from her part time position because of her family status or her announcement that she was pregnant. Her role was restructured for legitimate business reasons — the employer needed a full time person to cope with increased business demand and had offered her that role — and she had resigned during subsequent negotiations. Note that the court engaged in a gender neutral discussion of "family status" on the grounds of child care responsibilities, drawing a distinction between "traditional" and "modern" family situations and asking "can it seriously be contended that a full time earner has no care responsibilities for the children in a situation where his or her income is an essential component of that care?"

44 This issue has gender implications because women are disproportionately (although not exclusively) likely to be engaging in such caring work, although gender equality concerns were not raised by the court. See *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456; and *Spencer v Ministry of Health* [2016] NZHC 1650, [2016] 3 NZLR 513 .

45 Subsequent to the writing of this article, the Court of Appeal released its decision in *Zhang v R* [2019] NZCA 507 relating to sentencing for methamphetamine offending. The Human Rights Commission, among others, acted as intervener in the hearing.

46 We use the word "success" in speech marks because measuring success in this context is complex. As explained below (see text below, n 122 and 155), success cannot simply be understood in terms of whether the outcome in the case coincided with the intervener's position.

47 *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

years with "Mr T," who was the father of her child. However, after the first couple of years, Mr T became extremely abusive and she did not want to be in relationship with him. He raped her repeatedly, was physically violent towards her (hospitalising her on a number of occasions), threatened to kill her, limited her social contact, came and went as he pleased, had relationships with other women, refused to offer her or their child any financial support (in fact, taking money from her), and did not parent their child. Ms Ruka worked whenever she could and only claimed benefits when she was unable to work so that she and her child could survive.

The trial judge accepted Ms Ruka's evidence but held that she was in a de facto relationship, albeit an "appalling one," and was therefore not entitled to the benefits that she had claimed. Her appeal to the High Court was dismissed on the basis that she had known she was in a "relationship in the nature of a marriage" and therefore had the intent to defraud, even if she suffered from Battered Woman Syndrome and was trapped. She appealed to the Court of Appeal.

It was at this point that AWLA requested leave to intervene on the basis that the case raised issues of importance for women. AWLA was granted permission to make written submissions and to deliver oral arguments about the policies that underpinned the Social Security Act and the broader human rights issues for women under CEDAW. Catriona MacLennan writes that:[48]

> AWLA submitted that the Social Security Act and the Crimes Act could not be interpreted as contrary to international human rights instruments which New Zealand had adopted or ratified, unless there was a positive indication to the contrary. The facts of the case disclosed that Ms Ruka's most fundamental human rights had been violated. She had been subjected to violence because she was a woman. Her sexual relationship was one of victim and rapist.

The majority in the Court of Appeal held that Ms Ruka was not in a marriage-like relationship and allowed the appeal. Blanchard and Richardson JJ said that whilst Ms Ruka and Mr T "may to a casual observer have appeared to be a couple", it was "a distortion of reality" to describe the relationship as one that

48 Catriona MacLennan "Commentary on *Ruka v Department of Social Welfare*: Defining a Relationship for the Purposes of State Support" in *Feminist Judgments of Aotearoa New Zealand*, above n 2, at 88. AWLA also argued the common law defence of necessity.

"can fairly be equated to a marriage".[49] For them, it was necessary in deciding the nature of the relationship that the "primary focus should properly be on financial commitment" because this factor related directly to the purpose of the social security legislation:[50]

> The concern of the legislation was with the provision of financial help for people who for one reason or another could not adequately support themselves … it is apparent that absence or inadequacy of financial support of an applicant with a dependent child is a central concern.

It was significant, then, in deciding the nature of the relationship that there "was a complete absence of any contribution of financial support on the part of the man and no willingness to contribute if needed".[51] The judges also noted in obiter that "a long series of rapes" is "hardly consonant with matrimonial sexual relations",[52] and that there is no "election of any meaningful kind to continue the relationship if it is 'almost impossible' for the appellant to extricate herself".[53]

Thomas J, in the majority but providing his own reasons, also thought an essential feature of a marriage was "an assumption of financial interdependence or responsibility",[54] and it was significant to him that this was "totally lacking" on the facts.[55] Equally significant was the fact that Ms Ruka had no emotional commitment to the relationship. The abuse she suffered meant that she was "powerless" to leave even though she wanted to.[56]

In the introduction to his judgment, Thomas J noted that violence against women is "a major barrier to women achieving fundamental human rights and freedoms",[57] and has a "disastrous effect" and an "extensive impact … on the basic rights of women".[58] In conclusion, his Honour commented that

49 *Ruka*, above n 47, at 207–208.

50 At 206 and 197.

51 At 207.

52 At 207. At 202, Blanchard J commented: "The Court has been assisted by [the] submissions" of counsel for AWLA.

53 At 205.

54 At 232.

55 At 232.

56 At 232. At 215, Thomas J said "the Court has been greatly assisted by the submissions of Ms Bates QC and Ms Joychild, who appeared for the [AWLA]".

57 At 217.

58 At 217.

many indicia of a relationship in the nature of a marriage[59] "must be taken into account having regard to the effects of the battering relationship or violence on the woman".[60] For example, a sexual relationship "loses its significance as an indicia of marriage if the woman's consent to sexual intercourse is coerced and she is regularly raped".[61]

In contrast to *Ruka*, in *Z v Z (No 2)*,[62] AWLA's position as an intervener was not fully "successful".[63] In this case the issue was whether a spouse's enhanced earning capacity (or future earning capacity) was "property" within the meaning of the Matrimonial Property Act 1976. The issue arose in the context of a divorce in which the couple had split, on a gendered basis, the responsibilities during their marriage. The wife had given up her (at the time) higher earning job in order to raise their children and run the household so that the husband could invest in his career. By the time they separated, he had been in the private sector for seven years and was earning a significant salary.

The Court was mindful of its role in interpreting rather than rewriting legislation, stating that "care is required not to read more into the section than is justified by the language, always having regard to the policy of the Act".[64] It canvassed the history and wording of the Act to conclude that: [65]

> … essentially personal characteristics which are part of an individual's overall make-up such as the person's level of intelligence, memory, physical strength, or sporting prowess are not to be seen as "property" within the meaning of the Matrimonial Property Act.

It followed that the husband's enhanced earning capacity was not "property". The Court reached this conclusion "notwithstanding the strength of the argument advanced for the wife that to treat enhanced earning capacity as matrimonial property is consistent with the policy and spirit of the legislation".[66]

The Court noted that the Matrimonial Property Act was intended

59 Set out by Tipping J in *Thompson v Department of Social Welfare* [1994] 2 NZLR 369 (HC) at 373.

60 *Ruka*, above n 47, at 230.

61 At 230.

62 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).

63 Note that the Fathers' Rights and Equality Exchange was also granted leave to intervene in this case: *Z v Z (No 2),* above n 62, at 273.

64 At 294.

65 At 279.

66 At 280.

to recognise the domestic contributions of women as equally important contributions to the marriage partnership: the Act is "social legislation … it can be regarded as one facet of the wider legislative purpose of ensuring the equal status of women in society".[67] Despite these aims, the Court noted a growing recognition that, whilst the Act: [68]

> … achieves formal equality between the spouses in that the conventional items of property are divided equally … it does not achieve actual equality when the husband is left with the ability to earn a significant income and the wife is left with little or no ability to earn a living and possibly little or nothing in the way of material assets from the marriage to assist her. The relative hardship is likely to be exacerbated when the wife, as is likely, obtains custody of the children or is left to look after them by default. Such an outcome cannot be easily reconciled with the objectives of equality and justice underlying the Act.

In other words, the Court recognised that women who have invested in their husband's earning capacity over the course of the marriage, but who separate before that capacity has been converted into significant capital assets, are not treated equitably under the property division schema in the Matrimonial Property Act, despite the spirit and intention of the Act. The Court canvassed research literature, policy reports and judicial acknowledgement of the social fact that many women suffer a significant decline in income following divorce, whilst men's income increases or, at worst, remains stable.[69]

However, the Court was able to ameliorate some of the injustice by concluding that the husband's rights and interest in his accountancy partnership were "property", despite the fact that these rights were not "transferable" and did not have an "exchange value". It acknowledged that this interpretation might be a departure from traditional conceptions of property, but: [70]

> … properly interpreted, and having regard to the objective and policy of the Act, the definition [of property] is broad enough to encompass a right or interest in the nature of the husband's rights and interests in the partnership.

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67 See Woodhouse J in *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580, cited in *Z v Z (No 2)*, above n 62, at 267.

68 *Z v Z (No 2),* above n 62, at 275.

69 At 276–277.

70 At 282.

The Court commented that this was "in effect, to recognise the husband's enhanced earning capacity once that capacity is harnessed through an external mechanism such as a partnership deed".[71]

What seems clear from the very limited experience of feminist interventions in New Zealand, is that the "success" of an intervention is not necessarily best measured by whether the intervener's position was ultimately adopted.[72] In both *Ruka* and *Z*, the reasoning of the majority showed a clear understanding of the equality issues for women that were at the heart of the matter they were required to determine — including the progressive aims of the legislation at issue, the broader international human rights obligations at play, and the social realities of women's lives. Certainly, these cases are unique in the New Zealand legal landscape in that the court explicitly engaged with gender equality arguments in the process of arriving at a determination. One could conclude that, regardless of the outcome, the intervener's contribution in both cases enhanced the quality of the reasoning of those judges who were receptive to it. We return to this point below.

As this account also demonstrates, New Zealand's history of feminist interventions is limited and ad hoc. It occurred in *Ruka* and *Z* only because of the initiative of a particular leader of AWLA at a particular moment in history and her chance acquaintance with the relevant cases.[73] We now turn to discuss the more comprehensive experience of such interventions in Canada.

III INTERVENERS IN CANADA

A Legal basis for interveners

Non-party interventions in Canada find their legal origins in the inherent jurisdiction of the common law court to appoint lawyers appearing before it to provide advice as amicus curiae "to assist its deliberations".[74] This practice evolved to include the appointment of eminent lawyers regardless of whether

71 At 282.

72 Indeed, the *Ruka* decision (where the position adopted by interveners corresponded with the Court's decision) was not implemented by the Department of Social Welfare in practice. See MacLennan, above n 48, at 90–92.

73 These took place when Judge Ema Aitkin was President (prior to her elevation to the bench). She became aware of the cases through her practice in South Auckland.

74 Bernard M Dickens "A Canadian Development: Non-Party Intervention" (1977) 40 Mod L Rev 666 at 671.

they happened to be before the court.[75] In the United Kingdom, for instance, this person was frequently the Attorney-General.[76]

The Supreme Court of Canada has, since its inception in 1875, had jurisdiction to issue its own rules of procedure governing the conduct of appeals before it.[77] By 1882, not only the federal Attorney-General but also the provincial Attorneys-General had been granted the right to intervene to provide legal positions on constitutional issues regarding the division of powers between the federal and provincial governments on appeals before the Supreme Court of Canada.[78] Other third-party interveners, in contrast, must seek leave of the Court to participate.

The Court has developed rules governing interveners in response to changes in the volume and nature of appeals. Its current rule, put in place in 1987, requires applicants to identify their interest in the appeal and the prejudice they will suffer if denied intervention. Applicants must also show why their proposed intervention will be useful to the Court and how their arguments differ from those advanced by the parties themselves.[79] Interveners are not permitted either to make submissions as to the order sought (unlike parties to the appeal)[80] nor to raise new issues[81] without express leave to do so. They must request time to make an oral submission as well as permission to file a factum.[82] If granted, interveners are limited to a 10-page factum (exclusive of authorities)[83] and five minutes of oral argument.[84]

Provincial courts have similar rules requiring leave to intervene, granted at

75 At 671.

76 At 671.

77 "Creation and Beginnings of the Court" (5 October 2018) Supreme Court of Canada, Ontario <www.scc-csc.ca>.

78 Katherine Swinton *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Carswells, Toronto, 1990) at 69.

79 Rules of the Supreme Court of Canada, SOR/2013-175, r 57.

80 Rule 42.

81 Rule 59(3).

82 Rule 42(2)(e).

83 Supreme Court of Canada "Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada" (1 January 2017), Ontario, r 42.

84 Registrar for the Supreme Court of Canada "Allotting Time for Oral Argument" (2 March 2017), Ontario <www.scc-csc.ca>.

the discretion of the court.[85] The Federal Court also has its own rules governing proposed interveners, which have been interpreted more restrictively than those of the Supreme Court.[86] The Supreme Court has held that administrative tribunals have implied authority to hear interveners unless the governing legislation expressly indicates otherwise.[87]

B Modern history of interveners

The seed for feminist interventions in litigation raising women's equality rights was planted in 1974 in *Lavell v Canada*.[88] This marked the second time that the Supreme Court permitted non-governmental third party interveners to make submissions in a case.[89] *Lavell* raised the issue of whether it was discriminatory on the basis of sex under the Bill of Rights to deprive Indigenous women and their children of "Indian status" if they married non-status men, given that Indigenous men who married non-status women not only retained their status but passed it on to their wives and children. Multiple interveners, including Indigenous and women's groups, were permitted to file facta and make oral argument, although they were unsuccessful in persuading the Court on the sex discrimination issue.[90]

Third-party non-governmental interveners were admitted by the Supreme Court in a criminal matter in *Morgentaler v The Queen*,[91] another case involving women's rights, one year later. *Morgentaler* involved the prosecution of a doctor for violating the criminal law restrictions on abortion then in force. The

85 See *Styles v Canadian Association of Counsel to Employers* (2016) ABCA 218 at [14]. The question is whether the proposed intervener is "directly and significantly affected" and has "experience and a fresh perspective" to assist in resolving the issues on appeal.

86 Gillian Hnagiw "In defence of interveners" (20 July 2015) Canadian Lawyer <www.canadianlawyermag.com>, comments on *Ishaq v Canada*, above n 7. She explains "the crux of the decision is that the organizations could not advance their proposed arguments without social science evidence to back them up. The existing record was found to be insufficient to support the arguments advanced, and the court determined that it could not take judicial notice of any of the facts necessary to support them. The court proceeded to offer a list of ideas that could not be referenced in argument, even abstractly, without the benefit of social science evidence. These included the phenomenon of violence against women and the historical disenfranchisement of women."

87 *Canada (Combines Investigation Act Director of Investigation & Research) v Newfoundland Telephone Co* [1987] 2 SCR 466.

88 *Lavell v Canada* [1974] SCR 1349.

89 The first time was *Robertson v The Queen* (1963) 41 DLR (2d) 485, mentioned in Dickens, above n 74, at 674.

90 Dickens, above n 74, at 674.

91 *Morgentaler v The Queen* [1976] 1 SCR 616. The case was argued in 1975.

defence asserted that the criminal prohibition denied women's right to equality under the then Bill of Rights.[92] All together six groups, including a women's group, a civil liberties organisation, a doctors' association and anti-abortion groups were permitted to intervene in the litigation.[93] Feminist interveners were unsuccessful, but just over a decade later succeeded in their argument that the prohibition on abortion violated the constitution once the Charter of Rights and Freedoms was enacted.[94]

Chief Justice Bora Laskin, who presided over the Court from 1973–1984, is said by legal scholar Bernard Dickens to have been the force behind the Court's early acceptance of the role of interveners in *Lavell* and *Morgentaler*.[95] Laskin, a constitutional law scholar himself, also oversaw the transition of the Court from one that was required to hear every appeal from the appellate courts in the country, to one granted almost complete discretion over the appeals it would hear in 1975.[96] As Daniel Songer describes, "the Court [was] transformed from a court primarily concerned with resolving private disputes between individuals and businesses into a court of public law".[97] Constitutional litigation became a much larger part of the Supreme Court's docket, from seven per cent of its cases in 1970–1982 to 25 per cent in the period 1982–2003.[98]

Perhaps not surprisingly, a steady rise in non-party interveners in the Supreme Court occurred soon after *Morgentaler*.[99] After all, as Justice Bertha Wilson, another member of the Laskin Court, reflected, "[i]f constitutional decisions have ramifications for a broad range of interests and involve distinct choices between conflicting social policies, then we must devise some way of bringing these interests before the court".[100] This rise could justifiably be called

92 Canadian Bill of Rights SC 1990 c 44.

93 Dickens, above n 74, at 668.

94 *R v Morgentaler* [1988] 1 SCR 30. The Court ruled that the law violated s 7 of the Canadian Charter of Rights and Freedoms, pt I of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK), c 11, which protects the right to life, liberty and security of the person.

95 Dickens, above n 74, at 668–670, 673 and 675–76.

96 Supreme Court Act SC 1973-74-75 c 18, s 5, amending RSC 1970 c S-19.

97 Donald R Songer *The Transformation of the Supreme Court of Canada: An Empirical Analysis* (University of Toronto Press, Toronto, 2009) at 58.

98 At 66.

99 Jillian Welch "No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada" (1985) 43 UT Fac L Rev 204 at 215.

100 Songer, above n 97, at 124.

an explosion of interveners before the courts: by 2008 an annual average of 176 interveners were appearing before the Supreme Court, and roughly half of the appeals the Court heard included the voices of interveners.[101]

This dramatic change can be attributed to several developments beyond Bora Laskin CJ's openness to interveners and the ability of the Supreme Court to focus its attention on cases raising constitutional issues. The entrenchment of Canada's Charter in 1982,[102] the extension of the federal Court Challenges Program (CCP) to include funding for interveners in equality rights Charter litigation in 1985,[103] and the Court's liberalisation of its rules governing interveners in 1987[104] also may have played a role in fostering the acceptance of interveners.

First, when the Charter of Rights and Freedoms was proclaimed in force in 1982, it created the clear opportunity for courts to strike down laws — whether legislation, regulations or common law rules — when rights violations were found, increasing the stakes and the incentive for Charter litigation. The equality guarantee (s 15 of the Charter) was given a three-year window before it became operative in 1985 to allow legislatures to amend laws to bring them into conformity with the guarantee. In the period 1982–2003, 84 per cent of the constitutional cases heard by the Court were Charter cases.[105] Charter appeals now account for 90 per cent of interveners in the Supreme Court.[106]

Second, the financial burden of intervening was somewhat alleviated in 1985 when the mandate of the CCP, an independent, federally funded organisation, was expanded beyond funding only language rights challenges to also funding s 15 equality rights litigants and interveners under the new Charter.[107] The extraordinary cost of Charter litigation, particularly at the level of the highest court, meant that without aid most civil society groups

101 Alarie and Green, above n 9, at 382.

102 Songer, above n 97.

103 Shannon Salter "Rights without Remedies: The Court Party Theory and the Demise of the Court Challenges Program" (LLM Thesis, University of Toronto, 2011) at 1.

104 John Koch "Making Room: New Directions in Third Party Intervention" (1990) 48 UT Fac L Rev 151 at 161–162.

105 Songer, above n 97, at 66–67.

106 Alarie and Green, above n 9, at 398.

107 The CPP was originally established in 1978 to fund language rights claims: Larissa Kloegman "A Democratic Defence of the Court Challenges Program" (2007) 16 Constitutional Forum 107. The extension of the CCP to encompass equality rights litigation was recommended by the Parliamentary Sub-Committee on Equality Rights, *Equality for All* (Queen's Printer, Ottawa, 1985).

would have no access to the courts to assert their equality rights. According to one estimate, the cost of intervening before the Supreme Court can exceed $100,000.[108] Thus, in the period 1985–2006,[109] the CCP used its annual budget of approximately CA$1.5 million dollars to support civil society interveners in presenting their specialised knowledge and advocating for a systemic and substantive approach to the interpretation of equality rights.

A third factor that contributed to the increase in interveners was the Supreme Court's liberalisation of its rules. Although its rules were broad and generous prior to 1982, in the early Charter years (1982–1984) the Supreme Court tightened access to the Court as it struggled to respond to its burgeoning appeal docket.[110] In this period only "a handful" of interveners succeeded with their applications,[111] such that by 1984, only six of 16 applications were granted. In 1985, two of seven intervener applications were granted and in 1986 no applications by interveners were even made.[112] Outcry by public interest groups prompted the Supreme Court to seek guidance from the Canadian Bar Association Supreme Court Liaison Committee and civil society groups, resulting in rule changes in 1987 that once more expanded intervener access.[113] In the period 1987–1989, 58 of 68 intervention applications were approved.[114] In 1996, for example, the number granted intervener status reached 95.[115] As reported in a 2010 study, 90 per cent of applicants in the Supreme Court were granted intervener status.[116]

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108 "FAQs" Women's Legal Education and Action Fund <www.leaf.ca>.

109 The programme was de-funded in 1992–1994, and again in 2006 by Conservative governments: Kloegman, above n 107, at 108. The CCP has just been reinstated and expanded to include other Charter rights claims as of 2018: <www.canada.ca>.

110 Koch, above n 104, at 159, citing Welch, above n 99, at 215.

111 Welch, above n 99, at 214.

112 Kenneth Swan "Intervention and Amicus Curiae Status in Charter Litigation" in Robert J Sharpe (ed) *Charter Litigation* (Butterworths, Toronto, 1987) 27 at 35, 37.

113 See text above n 79–84.

114 Koch, above n 104, at 161–162.

115 Roy Flemming reports data shared with him by researcher Lori Hausegger, in his book review of Christopher Manfredi *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (UBC Press, Vancouver, 2004) in (2004) 14 L & Pol Book Rev 861 at 863.

116 Alarie and Green, above n 9, at 383.

C Impacts of interveners

Many authors have attempted to assess the role that public interest groups have played in shaping Canada's jurisprudence. While recognising that different studies capture different eras of the Court, use various methods of inquiry, and engage specific understandings of "success", overall, the collection of available studies shows that interveners do help shape the law. This brief review will summarise what we know about the impact of interveners in litigation in the Canadian Supreme Court, with a focus on equality rights litigation and particularly on LEAF's role.

In an early study of the Supreme Court of Canada's first 352 cases in the period 1984–1997, James Kelly found an average success rate of 34 per cent: Aboriginal rights claims had a success rate of 46 per cent; language rights cases succeeded at a rate of 41 per cent; and equality rights claims had a 20 per cent success rate.[117] A later study reports that interveners before the Supreme Court in the period 1994–2006 persuaded the Court of their Charter equality arguments in 41 per cent of cases in which they appeared.[118] This outcome suggests that interveners improved the odds of success, at least for equality claims. In the 11 decisions where the intervener was funded by the CCP, the intervener's Charter equality arguments were successful 45 per cent of the time.[119]

Benjamin RD Alarie and Andrew J Green's study, published in 2012, presents the most recent picture of the role played by interveners and reaches even more positive conclusions.[120] The authors studied all 674 decisions reached by the Court in the period 2000–2009, 330 of which involved some kind of intervener (including governmental agencies), with an eye to assessing whether their input was useful in terms of "accuracy" (providing accurate information to aid the Court in reaching the best decision), whether it was used for "affiliation" (providing arguments with which judges might wish to

117 James B Kelly "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982–1997" (1999) 37 Osgoode Hall LJ 625 at 648. And, as pointed out by Radha Jhappan, two of those seven successful equality rights cases were claims by men challenging the masculine language used by the *Criminal Code* to capture sexual interference with a female person under 14 years as sex discriminatory: Radha Jhappan, "Introduction" in Radha Jhappan (ed) *Women's Legal Strategies in Canada* (University of Toronto Press, Toronto, 2002) 3 at 7.

118 Salter, above n 103, at 57.

119 At 57.

120 Alarie and Green, above 9.

identify), or whether the intervention served "acceptance" (legitimating the court process by including the intervener's perspective).

The authors concluded that, on average, the interveners' positions coincided with the case outcome in 61 per cent of the 330 cases.[121] However, they noted that the correspondence rate varied considerably by the type of intervener. So, for example, religious organisations had the highest rates (94 per cent), followed by Attorneys-General (79 per cent) and environmental groups (70 per cent). Public interest groups like LEAF had lower rates of correspondence, at 64 per cent, while Indigenous groups and unions had even lower rates (54 per cent and 47 per cent respectively).[122] Recognising that simply seeing the outcome reflect one's litigation position does not necessarily measure "influence" by the intervener, the authors used multiple forms of analysis to parse their data. They concluded that liberal interveners generated a "liberal" boost in terms of decisions by individual judges of 3–4 per cent; conservative interveners contributed a conservative boost of 4–6 per cent; and neutral interveners provided a boost of 4–6 per cent as well, but to more liberal results.[123]

Turning to the specific record of feminist interveners, LEAF is one of the most prolific interveners at the Supreme Court.[124] LEAF's original focus was to follow the strategies of United States advocates who carefully planned strategic litigation in order to gradually build a body of jurisprudence favourable to women's equality rights.[125] That aspiration was quickly steamrolled by the vast number of Charter challenges by men to the constitutionality of women's legislative and political gains, such that LEAF was forced to instead try to intervene in such Charter litigation in order to defend women's gains.[126]

LEAF has since intervened at all levels of court and before administrative tribunals; it has also made submissions before judicial councils,[127] and public

121 At 397–99.

122 At 399.

123 At 408. Note, however, that interventions and decisions were described as "liberal" in the Charter context if they favoured the rights-holder over government, even where the rights-holder may have been advocating a politically conservative position that would roll back benefits or protections for others; and interventions and decisions were slotted as "conservative" in the criminal law context regardless, for example, of their impact on women.

124 See Flemming, above n 115, at 863.

125 *Equality and the Charter,* above n 8, at xviii–xxiii.

126 At xxiii.

127 Canadian Judicial Council *In the Matter of an inquiry pursuant to s 63(1) of the Judges Act regarding the Honourable Justice Robin Camp Reasons for Leave to Intervene* (26 July 2016) <www.cjc-ccm.ca>.

inquiries.[128] LEAF's prolific record of intervention can be partly attributed to its commitment to pursuing an intersectional analysis of women's oppression in its litigation efforts.[129] Many cases it has intervened in have raised intersectional issues — for example racism, poverty, disability, discrimination against immigrants and refugees, and gay and lesbian people — that are critical to women's substantive equality. In consequence, LEAF often works in coalition with other women's groups such as the Native Women's Association of Canada and the DisAbled Women's Network to strengthen the analysis and generate solidarity.[130]

LEAF has achieved considerable success in attracting support from the CCP and achieving positive outcomes in the Supreme Court of Canada. According to Vinessa Redford, "[o]ut of equality-seeking groups, LEAF was the most frequent recipient of CCP funding".[131] In fact, between 1985 and 2006, the CPP funded 10 out of 23 cases at the Supreme Court where women's equality rights were at issue.[132]

LEAF's record of success in outcomes is evidenced by both its contribution to jurisprudential development in particular areas of law,[133] and by individual cases.[134] For example, Jena McGill and Daphne Gilbert have carefully analysed LEAF's role in shaping the Court's s 15 equality rights decisions over several decades.[135] While acknowledging that LEAF has often achieved only partial

128 Institute for the Advancement of Aboriginal Women and the Women's Legal Education and Action Fund *Submission to the Independent Review of Circumstances Surrounding the Treatment of "Angela Cardinal" in R v Blanchard* (15 October 2017) <www.leaf.ca>; and Final Submissions of the Women's Legal Education and Action Fund *In the Matter of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (14 December 2018) <www.leaf.ca >.

129 For criticism of LEAF's early record for its failure to address the implications of the legal issues for racialised women, see Sherene Razack *Canadian Feminism and the Law* (Second Story Press, Toronto, 1991).

130 *Equality and the Charter*, above n 8, at xxi–xxii.

131 Vinessa Redford "The Precarious Future of Women's Equality in Canada: Access to Justice and the Court Challenges Program" (2011) 2(1) J Pub Policy, Admin & Law 29 at 31.

132 At 36–37. In seven cases the interveners were not eligible for CCP support because the legislation at issue was provincial.

133 Jena McGill and Daphne Gilbert "Of Promise and Peril: The Court and Equality Rights" (2017) 78 Sup Ct L Rev (2d) 235.

134 See for example Anna Pellatt "Equality Rights Litigation and Social Transformation: A Consideration of the Women's Legal Education and Action Fund's Intervention in *Vriend v R*" (2000) 12 Can J Women & L 117.

135 McGill and Gilbert, above n 133.

success, McGill and Gilbert emphasise that: [136]

> This short overview cannot do justice to LEAF's impact, nor do we mean to suggest that the Court only came to define section 15 as it did because of LEAF. Instead, the point of including LEAF's contributions in this retrospective is to demonstrate that section 15, the Supreme Court and LEAF are undeniably intertwined.

A recent example of LEAF's influence in an individual case can be seen in the decision of the Alberta Court of Appeal in *R v Barton*.[137] In this case, the accused was charged with murder in relation to the death of Cindy Gladue, who was found dead in a hotel bathroom, having bled to death from an 11 cm wound to her vagina. The Crown's theory, supported by expert evidence, was that her vaginal wall had been cut by a sharp object such as a knife. The defence theory was that the deceased victim, an Indigenous woman who exchanged sexual contact for money, had agreed to Barton's insertion of his entire fist into her vagina and had enjoyed his thrusting. Her injury, he testified, was accidental and her death therefore non-culpable. The jury acquitted Barton of murder, along with the included offences of manslaughter, sexual assault, and assault.

LEAF partnered with the Institute for the Advancement of Aboriginal Women in intervening before the appellate court, making submissions supporting the Crown appeal against acquittal based on a multiplicity of legal errors. These errors included the failure to apply the "rape shield" provisions, an improper jury instruction on the law of consent, the invocation of racial and sexual stereotypes without a warning to the jury, and the need to interpret the relevant legal principles in a manner consistent with women's equality rights.[138] The unanimous decision of the appeal court substantially adopted the position

136 At 236.

137 *R v Barton* 2017 ABCA 216.

138 See *Factum of the Interveners Women's Legal Education and Action Fund and the Institute for the Advancement of Aboriginal Women* (Court File 37769, filed in the Supreme Court of Canada, 12 September 2018) <www.scc-csc.ca>.

of the intervener,[139] and cited sources offered in the intervener's factum.[140] In fact, the defence apparently viewed the intervener as too influential, and on further appeal to the Supreme Court of Canada, argued that the intervener was permitted to raise new issues on appeal that persuaded the appeal court, effectively acting as a "second prosecutor".[141]

Looking broadly at larger studies that assess LEAF's impact, Radha Jhappan notes that in the period 1986–1996, LEAF intervened in 23 cases before the Supreme Court, and was on the winning side in 17.[142] Redford comments that LEAF holds the highest success rate for equality-seeking interveners before the Supreme Court of Canada in the period 1985–2006.[143]

Another LEAF study was undertaken by Christopher Manfredi, who reviewed its 36 Supreme Court interventions for 1988–2000.[144] Using the outcomes, Manfredi determined that LEAF was on the winning side in over 83.8 per cent of these cases.[145] He also looked for Supreme Court references to materials cited by LEAF and any explicit reference to its arguments. He found citations to LEAF sources in 23 of 36 cases that LEAF intervened in, and six comments on its arguments in those 23 cases.[146]

Manfredi credits LEAF with substantive success in improving the law in several areas, including sexual orientation, reproductive rights, hate speech and pornography, and the development of a concept of substantive equality. He also notes that the Supreme Court cited 108 extra-legal sources relied on by

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139 See *Factum of the Appellant Bradley David Barton* (Court File 37769, filed in the Supreme Court of Canada 30 May 2018) <www.scc-csc.ca> at [48]–[50], where the factum for Barton describes the ways in which the Court accepted the intervener's arguments [*Factum of the Appellant*].

140 For example, the appeal court cited to Elizabeth Sheehy "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Complainants" in Elizabeth Sheehy (ed) *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, Ottawa, 2012) 483.

141 Factum of the Appellant, above n 139, at [38]–[50]. The Supreme Court has since released its decision in the *Barton* case, upholding the appeal Court's decision to send *Barton* back for trial, but for manslaughter only, not murder: 2019 SCC 33. The Court found multiple errors of law justifying a re-trial, but did not directly address the question of whether the interveners overstepped, commenting only generally on the valuable role played by interveners and the prohibition against adding new issues or widening their scope on appeal: at [52]–[53].

142 Jhappan, above n 117, at 10.

143 Redford, above n 131, at 31.

144 Manfredi, above n 115.

145 At 18.

146 At 153.

LEAF in their facta,[147] thus broadening the sources used to develop law to include social science evidence.

No doubt one variable that influences the success of interveners like LEAF is the composition of the bench and individual judges' attitudes towards rights claims under the Charter,[148] as well as their openness to interveners' submissions — and particularly feminist submissions. Interviews with justices of the Supreme Court reveal disparate views.

In one study, one justice reported that interveners are not helpful because they are "too political"; a second said that interveners are "often valuable" because they bring fresh perspectives to the issues under consideration; a third said that the helpfulness of interveners "varies enormously" — sometimes they bring expertise lacking in the parties themselves.[149] Former Justice Claire L'Heureux-Dubé clearly took on LEAF's submissions in several major cases, as evidenced not only by her adoption of the arguments but also her citation to materials in the LEAF facta.[150] Former Justice Bertha Wilson is on record for saying that LEAF made "an impressive contribution to the decisions in many of the leading Charter cases", explaining that it "represented a real effort on the part of a very diligent and dedicated group of counsel to discharge the role of intervener at its highest and most challenging level".[151]

It must be acknowledged that LEAF and women's equality rights sustained big losses in three significant cases in 1988–2000.[152] Manfredi identifies another two cases involving major setbacks that were incurred by LEAF at the tail end of his study.[153] In her review of his book, Natasha Bakht described these cases as a significant portent of waning influence at the Supreme Court. In support of this theory, she describes two further major losses for women's equality

147 At 153.

148 For example Kelly, above n 117, examines individual judges' records regarding Charter claims as well as their records on support for individual rights versus state interests in criminal matters, nullification of legislation, exclusion of evidence.

149 Songer, above 97, at 125–26.

150 Constance Backhouse *Claire L'Heureux-Dubé: A Life* (UBC Press, Vancouver, 2017) at 385 and 407.

151 *Equality Rights in Canada*, above n 8, at x.

152 *R v Seaboyer* [1991] 2 SCR 577; *Thibaudeau v Canada* [1995] 2 SCR 627; and *R v O'Connor* [1995] 4 SCR 411.

153 *Boston v Boston* [2001] 2 SCR 413; and *R v Shearing* [2002] 3 SCR 33.

rights in cases decided just after Manfredi's study was published, in 2004.[154] In another review of Manfredi's book, Lise Gotell explains how his rough criteria for "success" and "failure" means that he failed to present a nuanced portrait of LEAF's work: "his exploration often misses the incompleteness and fragility of feminist 'victories'".[155]

However, even losing interventions can, in time, make positive contributions to the development of the law consistent with women's lives and equality rights. In several of the critical losses mentioned above, women's equality rights did not carry the day. Yet a strong dissenting opinion in these cases, adopting LEAF's arguments, helped to galvanise negative public reaction to these cases in a way that was so overwhelming that Parliament enacted legislation substantially adopting the position that had been advocated by LEAF.[156] Thus, the potential for feminist interveners to shape legal development extends beyond the common law to also include public education and legislative reform.

In order to illustrate more specifically the potential impact of feminist interveners, the final part now turns to a comparison of *R v JA* and *R v S*.

IV COMPARING OUTCOMES IN CANADA AND NEW ZEALAND: SEXUAL ASSAULT OF UNCONSCIOUS WOMEN

When the *JA* case came to LEAF's attention, its Legal Committee determined that a feminist intervention was crucial. *JA* involved a woman who allegedly agreed to "erotic asphyxiation" by her partner, knowing that she could be rendered unconscious. JA strangled her into unconsciousness and she awoke to find herself bound and being penetrated anally by him using a dildo. She

154 Natasha Bakht "Book Review" (2005) 36 Ottawa Law Review 378 at 380–81, referring to *Newfoundland (Treasury Board) v NAPE* 2004 SCC 66 and *Auton v British Columbia* 2004 SCC 78.

155 Lise Gotell "Book Review" (2005) 30 Queens LJ 883 at 899.

156 See the cases cited above n 152 and the corrective federal legislation that followed each decision: *Seaboyer* was followed by Bill C-49, An Act to amend the Criminal Code (prohibiting the admission of sexual history evidence), SC 1992 c 38; *Thibaudeau* was followed by Bill C-41, An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act, SC 1997, c 1; and *O'Connor* was followed by Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings),* SC 1997, c 30. Most recently, another important loss, *Shearing*, above n 153, has been repaired by Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, SC 2018, c 29, s 278.92.

did not report the sexual assault to police until several months later, when JA's threats to take her child through custody proceedings frightened her (his access to the child also alarmed the trial judge).[157]

At trial, the complainant recanted her evidence and claimed that the sexual contact was consensual, saying that they had discussed trying anal penetration sometime. Recantation in spousal abuse trials is not uncommon. However, instead of declaring the complainant a hostile witness and cross-examining her on the inconsistencies, a practice that is especially hard on women who recant out of fear of their abuser,[158] the Crown decided to rest its case on the proposition that there can be no valid consent in law when a complainant is unconscious. The trial judge convicted on this basis,[159] and sentenced JA to 18 months' incarceration. JA appealed and the Ontario Court of Appeal overturned the conviction in a 2:1 decision ruling. The appeal court held that advance consent to touching, expected to occur while unconscious, is not a novel concept given its deployment in surgical interventions,[160] and is valid in application to sexual assault law.

When the Crown appealed to the Supreme Court of Canada, the issue was focused narrowly on the abstract legal question of whether a person can consent, in advance, to sexual activity that will occur while they are unconscious. This issue arose for interpretation in the context of Canada's sexual assault legislation, which represented hard won feminist reform victories. The Criminal Code defined consent as the "voluntary agreement to the sexual activity in question".[161] It barred "voluntary agreement" where the complainant was "incapable of consent",[162] unconsciousness having been recognised by the courts as clear incapacity.[163] It also barred "voluntary agreement" where the complainant withdrew consent previously given;[164] and it stipulated that a defence of mistaken belief in consent can be advanced only where the accused

157 *R v JA* 2008 ONCJ 624, [2008] OJ No 4814 at [2].

158 In fact, the trial judge described the complainant's evidence as "typical … of a recanting complainant in a domestic matter": *R v JA* 2008 ONCJ 195 at [8].

159 At [4].

160 *R v JA* 2010 ONCA 226, (2010) 100 OR (3d) 676 at [70].

161 Criminal Code of Canada, s 273.1(1).

162 Section 273.1(2)(b).

163 *R v Esau* [1997] 2 SCR 777.

164 Criminal Code of Canada, s 273.1(2)(e).

took reasonable steps, in the circumstances known to him at the time, to ascertain the complainant's consent.[165]

Furthermore, in two cases that both involved LEAF intervention, Supreme Court jurisprudence had established that mere passivity or failure to resist does not amount to consent;[166] that an accused who mistakenly believes that silence or passivity is "consent" makes a mistake of law, not fact, which provides no defence;[167] that there is no legal doctrine of "implied consent" (that is, by the complainant's manner of dress or her behaviour), but rather consent as an *actus reus* matter is tested by asking what the complainant *in her own mind* wanted at the time of the sexual contact;[168] and that, in order to argue "mistaken belief," the accused must be able to point to words or conduct on the part of the complainant that communicated voluntary agreement.[169]

LEAF saw the potential negative implications for women that could arise out of *JA* in terms of law reform. Recognition of a doctrine of "advance consent" had the potential to undo hard-won gains. As LEAF argued in its factum, it would eviscerate the requirements that attach to voluntary agreement and consent for the specific sexual activity in question: that a complainant have "capacity" to consent, that consent be understood by reference to what is in the complainant's mind at the time of the sexual activity, and that an accused must take reasonable steps to ascertain consent in light of the circumstances known to him at the time of the sexual activity. Advance consent would also arguably resurrect "implied consent" on the basis that a complainant's advance consent would be used to infer actual consent while she is unconscious.[170]

LEAF also wanted the Court to appreciate the policy implications and impacts of allowing the possibility of "advance consent" as a defence, given the enormity of the social problem of men preying upon women who are intoxicated, drugged, asleep or otherwise unconscious.[171] Advance consent would not only open another avenue of defence to predatory men, but it

165 At s 273.2(b).

166 *R v MLM* [1994] 2 SCR 3.

167 *R v Ewanchuk* [1999] 1 SCR 330.

168 *R v Ewanchuk*, above n 167.

169 *R v Ewanchuk*, above n 167.

170 See the dissenting judgment of Justice LaForme in the Ontario Court of Appeal, *R v JA*, above n 160, at [124].

171 Janine Benedet "The Sexual Assault of Intoxicated Women" (2010) 22 Can J Women L 435; and Sheehy, above n 140.

would also reinforce a multitude of discriminatory myths that disadvantage women. These myths include: that women are in a constant state of consent; that women who are passive or unresponsive are "consenting"; that intoxicated women are uninhibited and therefore sexually indiscriminate; that drunk women are likely to forget they have consented; that women's "sexuality exists solely for the pleasure of men;"[172] and that there is no real "harm" in men's penetration of the bodies of unconscious women.[173]

LEAF resolved to bring to the attention of the Court the fact that an advance consent doctrine would have pronounced negative effects on women as a social group. LEAF argued that advance consent would be used against Indigenous women, who experience very high rates of sexual violence, including perpetration when they are asleep or unconscious. It would also disadvantage women with disabilities, particularly those with episodic disabilities and those experiencing dementia. LEAF argued that there would be a profound impact on women in relationships, whereby men have access to them when they sleep. Specifically, "advance consent" would in practice informally revive the now abolished marital rape exemption by permitting husbands and common law partners to argue "advance consent".

The *JA* case was presented in the media in a salacious manner, as the "kinky sex" or "sex slave" case, both sensationalising and individualising its significance. Furthermore, the legal issue at stake was narrowly cast by lawyers and journalists as an abstract problem to be resolved in a social, political, and legal vacuum. Media accounts failed to mention that the strangulation and sexual contact occurred in the context of a battering relationship — a factual context that is crucial to understanding the particular events at issue and therefore to the development of sound doctrine. It had earlier emerged at JA's sentencing hearing that he had 43 criminal convictions, 13 involving weapons or violence. He had been convicted of multiple charges across three separate occasions of domestic violence, two of which involved violence against this complainant. He had kicked in the door of her apartment when she left him; hit her in the head and thrown a wine bottle at her; fought with her at a

172 Janine Benedet and Isabel Grant "*R v A (J)*: Confusing Unconsciousness with Autonomy" (2010) 74 CR 6th 80 at 2.

173 *Factum of the Intervener, Women's Legal Education and Action Fund, in* R v JA (File No 33684, Supreme Court of Canada) at [27]. See also *R v Esau*, above n 163, at [39] and [95]; and *R v R (J)* (2006) 40 CR 6th 97 (ONSC) at [39] .

hospital where she had taken their child for medical care, where he verbally abused personnel and threatened and assaulted her; and screamed foul words at her.[174]

The defence also attempted to cast the issue in the case as one of women's rights to sexual autonomy, based on the complainant's allegedly valid "consent" to "erotic asphyxiation". Strangulation, however, is known to be an effective tactic of coercive control for family violence perpetrators because it immediately subdues the victim, communicates to her that he could kill her if he chose, frequently inspires terror, and yet leaves few external marks immediately afterwards.[175] It is also a highly dangerous behaviour, inevitably risking death, undetectable forms of brain injury, and amounting to a significant risk factor for intimate femicide.[176]

LEAF therefore used its factum to re-frame *JA* as not about "kinky sex", but rather the abuse of women, and to raise the alarm that "advance consent" would empower dangerous abusers. It also suggested that the rule that consent is not available as a defence to the intentional infliction of bodily harm[177] should continue to apply to sexual assault charges.[178] Accordingly, LEAF cautioned the Court against using *JA* as a springboard for the development of a new doctrine validating consent to bodily harm in the context of sexual relations.[179]

The Supreme Court ruled on LEAF's side in a 6:3 decision. The majority judgment, endorsed by all four women justices of the Court and two of the men justices, primarily relied upon the legislative schema and prior Supreme

174 *R v JA*, above n 157.

175 Law Commission *Strangulation: The Case for a New Offence* (NZLC R138, 2016) at 13–14.

176 Nancy Glass and others "Non-fatal strangulation is an important risk factor for homicide of women" (2008) 35 J Emergency Medicine 329; Jill Theresa Messing, Jacquelyn C Campbell and Carolyn Snider "Validation and adaptation of the danger assessment: A brief intimate partner violence risk assessment" (2017) 73 J Advanced Nursing 3220; Susan B Sorenso, Manisha Joshi and Elizabeth Sivitz "A Systematic Review of the Epidemiology of Nonfatal Strangulation, a Human Rights and Health Concern" 104 Am J Public Health 54; and Michelle M Patch, Jocelyn C Anderson and Jacquelyn C Campbell "Injuries of Women Surviving Intimate Partner Strangulation and Subsequent Emergency Health Care Seeking: An Integrative Evidence Review" (2018) 44 J Emergency Nursing 384.

177 *R v Jobidon* [1991] 2 SCR 714. The rule was first developed in the context of consensual fighting between two young men.

178 The rule from *Jobidon*, above n 177, was applied to sexual assault causing bodily harm in *R v Welch* (1995) 25 OR (3d) 665 (ONCA), a decision of the Ontario Court of Appeal. The issue has yet to be considered by the Supreme Court.

179 For a discussion of this doctrine in New Zealand see Julia Tolmie "Consent to Harmful Assaults: The Case for Moving Away from Category Based Decision Making" (2012) 9 Crim LR 656; and *S v R* [2017] NZCA 83.

Court jurisprudence to find advance consent as untenable in law. It ruled:[180]

> … the *Code* makes it clear that an individual must be conscious throughout the sexual activity in order to provide the requisite consent. Parliament requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation, and to ensure that individuals engaging in sexual activity are capable of asking their partners to stop at any point.
>
> …
>
> The jurisprudence has consistently interpreted consent as requiring a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act.
>
> …
>
> The jurisprudence of this Court also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred.

In response to the "suggestion that the strict approach Parliament has adopted toward consent in the context of sexual assault has no place in relationships of mutual trust, like marriage",[181] the Court said it would be inappropriate to carve out exceptions to the legislation in light of its role in "combating the stereotypes that historically have surrounded consent to sexual relations".[182] In answer to the persistent claim that terrible injustice will ensue if spouses are criminalised for bestowing a gentle kiss on a sleeping partner, the Court said that there may be cases where the law of consent is "unrealistic", but the remedy lies with either constitutional challenge or legislative reform.[183]

The three dissenting men justices emphasised that Parliament had not explicitly addressed or ruled out "advance consent", and that it was unfair to convict JA:[184]

> There is no factual or legal basis for holding that the complainant's prior consent, otherwise operative throughout, was temporarily rendered

180 *R v JA*, above n 18, at [3], [44] and [47].

181 At [64].

182 At [65].

183 At [65]. While the Crown offered the de minimis doctrine as an answer to this hypothetical, the Court did not adopt this resolution, commenting that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant": at [63].

184 At [105].

> inoperative during the few minutes of her voluntary unconsciousness. It was not suspended by the fact that she had rendered herself incapable of revoking the consent she had chosen, freely and consciously, not to revoke either immediately before or immediately after the brief interval of her unconsciousness.

Consistent with the dissenting justices' decision to frame the complainant as having agency and thus having "voluntarily" "rendered herself incapable of revoking consent", these justices also endorsed the "kinky sex" narrative over the risks to women's safety of an advance consent doctrine: [185]

> The mission [of the Code provisions] is not to "protect" women against themselves by limiting their freedom to determine autonomously when and with whom they will engage in the sexual relations of their choice. Put differently, they aim to safeguard and enhance the sexual autonomy of women, and not to make choices for them. The Crown's position, if adopted by the Court, would achieve exactly the opposite result. It would deprive women of their freedom to engage by choice in sexual adventures that involve no proven harm to them or to others.

The majority decision in *JA* can be counted as a "win" for LEAF in that the legislative and jurisprudential gains women had made in sexual assault law reform were preserved against the proposed invention of an "advance consent" doctrine. The Court accepted the argument that advance consent would be inconsistent with and undermine the legislative scheme and common law interpretations of the law of consent. As Lise Gotell has noted, it is also important that the justices refused to create an exception for spouses, thereby ensuring, at least on paper, that the law of sexual assault applies without reservation to women in relationships.[186] Nor did it endorse the minority position that women's autonomy rights demand that they be permitted "sexual adventures" that occur whilst they are unconscious and which they are therefore unable to experience. The Court refrained from weighing in on whether consent to bodily harm is valid in the context of sexual relations because the Crown had not alleged that strangulation had caused bodily harm to the complainant, and therefore interested parties had not had the opportunity to make submissions

185 At [72]–[73].

186 Lise Gotell "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R v JA*" (2012) 24 CJWL 359 at 382.

on this issue.[187]

On the negative side, while the decision preserved the status quo, it did not further advance the law for women. As Gotell argues, it — like most modern decisions — is written entirely in gender neutral language, as if sexual assault were not a deeply gendered crime.[188] The word "woman" is used only once, paired with "men", implying that both groups are equally vulnerable to sexual violence.[189] The Court did not invoke s 15 or women's equality to support its decision, nor did it name and repudiate the myths and stereotypes associated with "advance consent", apart from the vague reference to "historical" stereotypes quoted above.

Beyond stating that conscious and ongoing consent is required to prevent "sexual exploitation", the decision did not acknowledge the policy implications of allowing advance consent, such as the high incidence of perpetration against unconscious women or the potential discriminatory impacts for Indigenous women and women with disabilities. Nor did it mention wife battering. Gotell points out that the Court did not reference LEAF's intervention or its arguments, nor did it cite feminist publications on the issue of sexual assault law and consent.[190] As she observes: [191]

> *JA* can be seen as a post-feminist decision, marked by the embrace of an individualized conception of sexual autonomy that is sanitized of critical feminist claims about the connections between sexual violence, gender inequality, and sexism. The decision extends the requirements of affirmative consent into marriage, while simultaneously demonstrating the limitations of a framework that so often fetishizes agency and extracts the moment of consent from contexts that limit sexual choices.

The New Zealand High Court's decision in *S* suggests an even bleaker landscape in the New Zealand context. The complainant and S had been in a relationship for four years before they separated. They were both users of gamma hydroxybutyrate, and sexual activity between them frequently took place while they were both under the influence of this date rape drug. The

187 *JA*, above n 18, at [21].

188 Gotell, above n 186, at 383.

189 At 383.

190 At 383.

191 At 388.

complainant went to Police after the relationship ended when she found a cache of video recordings of this sexual activity on a USB stick. She reported a sexual assault comprised of one 25 minute sequence, involving six sexual acts during which she appeared to be unconscious. The complainant testified that she told S that under no circumstances was he to have intercourse with her when she was asleep or unconscious — he was to wake her up. He testified that she said he could have intercourse with her if she fell asleep as long as he woke her up before he ejaculated. The trial Judge preferred S's evidence on this point.

Section 128(3) of the Crimes Act 1961 provides that:

> (3) Person A has unlawful sexual connection with person B if person A has sexual connection with person B—
>
> (a) without person B's consent to the connection; and
>
> (b) without believing on reasonable grounds that person B consents to the connection.

Section 128A(3) and (4) of the Act (amended in 2005) provides that:

> (3) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.
>
> (4) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

The trial judge found that the complainant participated in one of the sex acts, leaving five counts for adjudication. Her Honour was not certain that the complainant was fully asleep or unconscious during the remaining sex acts committed by S, but did determine that she did not have the capacity to consent according to s 128A(4). The Judge also ruled that the defence could not rely on "prior consent" because precedent had established that consent must be contemporaneous with the sexual activity.[192]

However, the Judge found that the prosecutor had not disproven, beyond a reasonable doubt, that S did not have a reasonable belief in consent given his evidence. S was therefore acquitted on all counts. In support of the reasonableness of S's belief in consent, the judge referred to other facts, including that the

192 *Adams v R* [2005] NZCA 70 at [48].

two had been "in relationship for four years"; the "background and history of voluntary and excessive drug use by both the defendant and complainant, with the intention of having sexual relations"; the fact that there was no evidence that the "rigorous" sexual activity recorded on video "was any different from the sex they had had on the other many previous occasions"; the fact that "at the commencement of the incident, as the complainant engaged in oral sex, she took her G string off"; and "the sexual activity which took place on 15 October did not involve any activity that the defendant and complainant had not engaged in before including anal sex (albeit occasionally), and the use of a sex toy."[193]

In other words, reasonable belief in consent could be based on the fact that the parties were in relationship and had engaged in similar acts in the past, as well as the fact that the complainant appeared to be participating prior to the point that she lapsed into unconsciousness/semi-consciousness. Paulette Benton-Grieg points out that these grounds might form the basis for an honest belief but should not form the basis for a reasonable belief: "not only do they not withstand scrutiny, but embedded within them are the heuristics that justify and minimise sexual assault".[194]

The Solicitor-General's appeal to the High Court against the acquittal was unsuccessful. The legal issue was framed as whether:[195]

> … a person who engages in sexual activity with another person believes on reasonable grounds that the other person is consenting when that person is deemed to be unable to consent to the activity because he or she is asleep or unconscious?

The Solicitor-General argued that the policy undergirding s 128A, that "a person may only consent to sexual activity where he or she is capable of making a conscious and informed decision to engage in such activity", also applies to support the proposition that no one can reasonably believe that an unconscious person is consenting.[196]

The High Court rejected the argument, holding that the fact of non-consent (as an *actus reus* issue) and whether the defendant had no reasonable

193 *R v S*, above n 19, at [19].

194 Paulette Benton-Greig "*R v S* — Judgment" in *Feminist Judgments of Aotearoa New Zealand*, above n 2, at 445.

195 *R v S*, above n 19, at [24].

196 At [25]–[26].

grounds for their belief in consent (a *mens rea* issue) were separate proof obligations on the Crown. It said that: [197]

> The practical effect of the Solicitor-General's argument, however, is that the Crown could prove a charge under s 128 merely by establishing that the defendant had engaged in sexual activity with a person who was asleep or unconscious.

The High Court went on to say that Parliament could have abrogated the obligation on the Crown to prove an absence of reasonable belief by the defendant in consent, for those cases where s 128A applied, but had not.[198] The removal of the mistaken belief defence regarding the age of a child who has not reached 12, under s 132, was interpreted as demonstrating that Parliament was alive to the fact that it could remove defences and chose not to do so here.[199] Rather incoherently, the Court also said: [200]

> We also consider there is no logical reason why the Crown should be required to prove the third element in a case involving a complainant who makes an informed decision not to consent to sexual activity, but not in cases where the complainant is deemed not to be capable of consenting. Logic suggests that the same elements need to be proved in both types of case.

The High Court's final point in rejecting the appeal was that the reasonable belief in consent defence would rarely be available in future cases: [201]

> It will probably only be available in unusual circumstances such as the present, where the particular nature of the relationship between the parties means that they have had cause to discuss and reach agreement about what should occur if either of them should fall asleep or become unconscious during sexual activity.

The High Court thus affirmed a legal rule that has very negative implications for the safety and autonomy of New Zealand women. The Court's inability to see the difference between ruling out reasonable mistaken belief as a defence in those cases where women have not in their own minds consented

197 At [32].
198 At [33].
199 At [34].
200 At [36].
201 At [37].

and those cases where men have sexual intercourse with women who are, *to their knowledge*, unconscious, preserves male privilege and sexual access to the bodies of incapacitated women. The description of the facts in *S* as unusual and unlikely to ground future defences ignores the fact that the ruling offers the reasonable mistake defence to all men in relationships, who can easily allege "prior agreement" and claim that their sleeping partners agreed in advance, particularly where counsel is free to call upon the past sexual relationship in all its titillating detail to lend credence to the claimed "reasonable belief". In fact, the complainant in *S* asserted no such agreement — and thus ultimately what the decision does is give to men who penetrate women whom they know to be unconscious yet another avenue to challenge women's credibility — a contest that women very rarely win in rape prosecutions.

This ruling also fails to reflect the principle, set out in s 25 of the Crimes Act, that ignorance of the law cannot be an excuse for criminal offending. In Canada, feminist interveners and law reformers have long taken the position that most defendants in sexual assault cases are not labouring under a factual misperception of what the complainant did or said, but rather they are mistaken as to the legal import of the woman's words or conduct — in other words, they are mistaken about the legal boundaries of consent.[202] Considerable progress has been made in this regard both through statutory reform and judicial interpretation, recognising that many claimed mistakes of fact are actually mistakes of law. For example, a man's claim to mistaken belief in consent based on a woman's passivity is now precluded by common law as a mistake of law.[203]

Contrary to what was said by the High Court, on the facts in *S*, the Crown would still have to prove *mens rea* on the part of the defendant by proving that he knew that his sexual partner was asleep or unconscious. However, once this knowledge is established any further mistake is not one of fact but of law — in other words, it is a mistaken belief that an unconscious person can provide

202 See Lucinda Vandervort "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987–1988) 2 CJWL 233 at 295–300. As argued elsewhere: "These are not mistakes about what a woman said or did; these are not perceptual mistakes caused by bad vision, poor hearing, language barriers, or other conditions that impair communication. Rather, the defence involves interpretive conflict. The man claims that her words or her bodily movement or her passivity or her sexual past meant to him that she consented, even if she did not. His 'error,' as pointed out by Lucinda Vandervort, is as to our legal norms—what predatory conduct can he get away with?": Sheehy, above n 140, at 490–491.

203 *R v Ewanchuk*, above n 167, at [51].

legally valid advance consent. Applying s 25, S's belief that his unconscious partner consented in advance cannot form the basis for a claim that he had reasonable grounds for believing that valid consent was provided.[204]

Ultimately, although it cannot be proven that feminist interveners would have changed the outcome in *R v S*, it seems clear that they would have asked the High Court to consider the importance of ensuring that it is consent to sex *on this particular occasion* that matters. Feminist interveners also would have raised the implications of allowing a "reasonable mistake" defence for the evisceration of the legal principle in s 128A, for the boost such an interpretation would give to defence "mining" of women's previous sexual history, for the immunity the defence provides for men who target unconscious women for predation, and for women's safety and security. Even if the Court had not taken up any of these points, the judges may have been persuaded by the more doctrinal argument that S's claimed "mistake" was one of law, not fact.

The "Feminist Judgments" project in New Zealand, and particularly the re-written feminist judgment for *R v S*, manifest how feminist analysis can produce both a different analytical path and outcome.[205] Certainly, one can contrast the judgments in *R v S* with those in *Ruka*[206] and *Z v Z (No 2)*[207] where feminist interventions were made. In the latter cases the outcome was arrived at after the majority explicitly engaged with the gender equality aims of the legislation that it was interpreting and the actual impact on women's lives.

While it remains possible that feminist interveners could not have influenced either the analysis or outcome in *S*, they would have put on record that judicial choice in interpretation was possible, providing a grounding for public education, protest, and law reform regarding how the law responds to the sexual assault of unconscious women.

V CONCLUSION

In this article we have drawn on the experience in Canada to demonstrate the important role that feminist third-party interventions can play in supporting the common law to develop in a manner that is consistent with women's

204 A position supported by the remarks of Justices McGrath, Glazebrook and Arnold in *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [53]–[57].

205 See Paulette Benton-Greig, above n 194, at 425 and 432.

206 *Ruka,* above n 47.

207 *Z v Z (No 2),* above n 62.

equality rights. This is even so where these interventions on their own are insufficient to achieve this goal.

While acknowledging that LEAF's "wins" have often been "equivocal",[208] it cannot be denied that LEAF has helped change the course of the Canadian Supreme Court's rulings in at least some cases that matter to women's equality rights. LEAF has supported the "winning side" with additional information and arguments, been cited by the Court, and seen its sources reproduced in Supreme Court judgments. In the area of sexual assault law in particular, LEAF has found a listening ear in at least one Justice of the Supreme Court, whose jurisprudence has in turn pushed the Court towards an equality-based understanding of sexual assault law.[209] By way of contrast, in the few sexual assault cases litigated at the Supreme Court where LEAF has not intervened, the Court has delivered decisions with very negative implications for women.[210]

Beyond the question of direct impact on the course of judicial decision-making, feminist interveners have made incalculable contributions to the women's equality agenda more broadly. LEAF as an organisation has galvanised women; brought lawyers, academics and grassroots groups into coalition; and has facilitated an intersectional analysis of women's oppression in light of racism, colonialism, disability discrimination, poverty, and lesbophobia. Feminist interveners have educated women lawyers and law students on how to conceptualise and argue for women's equality rights, given hope and inspiration to the women's legal community and beyond, and generated a data bank of brilliant facta as resources to be used in future litigation.

Feminist interveners have also educated the public about women's equality issues. As Miriam Smith observes, some litigating groups "may view legal defeats as political victories or legal victories as partial, incomplete, or even as a defeats".[211] Supreme Court justices in dissent have at critical moments adopted

208 Diana Majury "The Charter, Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall LJ 297.

209 Elizabeth Sheehy and Christine Boyle "Justice L'Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape" in *Adding Feminism to Law*, above n 5, at 247.

210 LEAF did not intervene in *R v Osolin* [1993] 4 SCR 595 and *R v Daviault* [1994] 3 SCR 63. Both were devastating decisions for women in the area of sexual assault law. *Daviault* was reversed by legislation in Bill C-72, An act to amend the Criminal Code (self-induced intoxication), 1995, now Criminal Code s 33.1. Most recently see also *R v Morrison* 2019 SCC 15, discussed by Janine Benedet and Isabel Grant "Unreasonable Steps: Trying to Make Sense of *R v Morrison*" (2019) 67 Crim LQ 14.

211 Miriam Smith "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science" (2002) 35 Can J Political Sci at 8.

LEAF's analysis. In turn, these powerful dissents have galvanised LEAF's work in public education and movement-building, and spurred incendiary public reactions to these negative majority decisions, ultimately leading to law reforms that have overturned court decisions.

New Zealand's own feminist interventions, though few in number and ad hoc, also support the value of such interventions in the common law development. Of course there are important differences between Canada and New Zealand, in that the courts in Canada have a broader constitutional role in relation to legislation than the courts in New Zealand.[212] It is also the case that s 15(1) of the Canadian Charter of Rights and Freedoms contains a positive equality right. It provides that "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination" based on sex. By way of contrast, s 19 of the New Zealand Bill of Rights Act 1990 creates a less aspirational right — the negative right to "freedom from discrimination" on the grounds of sex. However, neither of these differences remove the role of the New Zealand courts in interpreting legal principles in a manner that gives expression to the equality rights for women contained in the Bill of Rights Act and the international human rights instruments that New Zealand is a signatory to. It follows that neither difference removes the value that feminist interveners can add to this process.

The current challenge in New Zealand is how to develop and support effective use of such a mechanism so that the benefits can be actualised. The Canadian experience suggests that feminist interventions in New Zealand would be assisted by the establishment and funding of an organisation similar to LEAF, a process for the systematic screening of cases to identify those that raise broader equality issues for women, a critical mass of academics and lawyers to contribute their expertise to the work, and judges who are receptive. Importantly, such interventions would also require an understanding of critical race and intersectional feminism because, as in Canada, the most pressing legal and social injustices in New Zealand are those currently experienced by Māori women, racialised women and women experiencing other intersecting oppressions.

212 See the discussion in *IA v R*, above n 29, at [20].

REDUCING THE RISKS FROM HIGH-COST SHORT-TERM LENDING AND PROTECTING VULNERABLE CONSUMERS

Victoria Stace*

There is evidence of significant harm being caused in New Zealand by the high-cost short-term lending product known as payday lending. Women appear to be disproportionately affected. New Zealand's approach to regulation to date has focused on responsible lending obligations for lenders. A recent Ministry of Business, Innovation and Employment review has revealed there are significant levels of non-compliance with those obligations. Enhancements to the existing law are proposed in the Credit Contracts Legislation Amendment Bill, currently before the Parliament in New Zealand. This article argues that more needs to be done to address the harm caused by high-cost lending. This article suggests some additional measures that could encourage more responsible lending, including an interest rate cap, a protected earnings cap, and a general statutory prohibition.

I INTRODUCTION

A paper published in 2012 by two public health researchers reported that there had been rapid growth in the high-cost lending market in New Zealand in the previous two decades.[1] The paper found that: high-cost lenders target and

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1 Louise Signal, Tolotea Lanumata and Sharron Bowers "Punching Loan Sharks on the Nose: Effective Interventions to Reduce Financial Hardship in New Zealand" (2012) 23 Health Promot J Aust 108 at 108.

thrive in low income communities; Māori, Pacific people, women and families with children are more severely affected by problem debt; and large numbers of consumers are dependent on high-cost lenders for everyday expenses.[2] That situation still exists,[3] notwithstanding the introduction in 2015 of responsible lending obligations into New Zealand's consumer credit law.[4] A recent Ministry of Business, Innovation and Employment (MBIE) review of consumer credit regulation in New Zealand (the MBIE Consumer Credit Review) found that "about 12% of households report not having enough money to meet their everyday needs, and 1 in 4 households report having only just enough money".[5] MBIE reported that "[t]hose affected are primarily Māori and Pacific peoples, solo parents, children, and people with disabilities",[6] and that the use of high-cost short-term loans is normalised in low income communities.[7]

High-cost lenders claim their product is justifiable as it enables borrowers to meet financial emergencies.[8] However, a survey conducted by the Justice Innovation Centre in December 2018 of 76 budgeting agencies around New Zealand (the Justice Innovation Centre Survey) shows that the majority of high-cost loans are taken out to meet ordinary living costs rather than special or emergency events that arise unexpectedly.[9] The 2012 study Caught Short — Exploring the Role of Small, Short-Term Loans in the Lives of Australians (Caught Short Report) also found that one of the major reasons reported by

2 At 108.

3 See for example Ministry of Business, Innovation and Employment *Discussion Paper: Review of Consumer Credit Regulation* (June 2018).

4 Credit Contracts and Consumer Finance Act 2003, pt 1A.

5 Ministry of Business, Innovation and Employment, above n 3, at 7.

6 At 7.

7 At 10.

8 See Cash Converters *Submission on Discussion Document: Consumer Credit Regulation Review* (August 2018); and Save My Bacon Ltd *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018). See also Senate Economics References Committee *Credit and Hardship: Report of the Senate Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (February 2019) at 37; Paul Ali, Cosima McRae and Ian Ramsay "The Politics of Payday Lending Regulation in Australia" (2013) 39 Mon LR 411 at 417; and Marcus Banks and others *Caught Short: Exploring the Role of Small, Short-Term Loans in the Lives of Australians* (Social Policy Unit, University of Queensland, August 2012) at 32.

9 Liz Gordon and others *Research Report: Survey of Financial Mentoring and Budgeting Services in Aotearoa on High Cost Loans, Debt Collection and Other Consumer Credit Issues* (FinCap, February 2019) at 16-17.

respondents for taking out loans was insufficient income to meet basic living expenses.[10]

Some high-cost lenders claim that their product facilitates financial inclusion, in particular for those unable to obtain credit from more mainstream sources.[11] Research supports the assertion that high-cost borrowers tend to be excluded from other options.[12] The Justice Innovation Centre Survey found: [13]

> Most people who take out high-cost loans do so because they are unable to obtain credit in other ways, and/or because these loans are accessible and convenient and can be processe[d] quickly …

However, because of the repeated use of these products, what commonly results is not financial inclusion but financial exclusion as the borrower becomes committed to paying off their high-cost loans, often in priority to household expenses. Research from Australia and the United Kingdom confirms that repeat borrowing is both common and integral to the lender's profitability.[14] The problem is exacerbated if the amount repayable increases due to the addition of penalty charges or additional interest that become payable when the borrower defaults.

New Zealand is a long way behind Australia,[15] the United Kingdom,[16]

10 Banks and others, above n 8, at 32. For further evidence that these types of loans are predominantly used to meet basic house expenses, see Senate Economics References Committee, above n 8, at 37; Marcus Banks, Ashton de Silva and Roslyn Russell *Trends in the Australian Small Loans Market* (Australian Centre for Financial Studies, October 2015) at 25-26; and Andrew Serpell "Protecting the Desperate: The Regulation of Payday Lending" (2015) 43 F L Rev 147 at 147-148.

11 For example, see Cash Converters, above n 8; and Thorn Group Financial Services Ltd *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018).

12 Gordon and others, above n 9, at 5.

13 At 5.

14 Australian Government Treasury *Review of the Small Amount Credit Contract Laws: Interim Report* (December 2015) [*Interim Report*] at 11-17. See also Banks, de Silva and Russell, above n 10, at 26 and 36; Banks and others, above n 8, at 65-66; and Ali, McRae and Ramsay, above n 8, at 425-426, 441 and 444.

15 In 2013, Australia introduced reforms to address the harm caused by high-cost lending. The reforms included an interest rate cap on short-term, high-cost loans. See the Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth).

16 The United Kingdom introduced a cap on high-cost, short-term credit in 2015. See further Victoria Stace and Jeremy Finn *Working Towards a Fairer Consumer Credit Market: A Study of the Issues in New Zealand's Consumer Credit Market and Proposals for Reform* (FinCap, 2019) at 14.

Canada[17] and the United States[18] in its regulation of high-cost lending. Since 2015, New Zealand consumer credit law has included responsible lending obligations.[19] However, as explained below, it is evident that there are high levels of non-compliance with these obligations. There is currently (as at May 2019) no other specific regulation of high-cost lending. Interest rates of 600 per cent per annum are common and an MBIE review revealed rates of up to 803 per cent per annum.[20] The Credit Contracts Legislation Amendment Bill, introduced in April 2019, (the CCLA Bill) includes some limited reforms, most particularly a total repayment limit that is intended to prevent debt spirals caused by borrowers incurring penalty or additional interest on default, leading to debt levels increasing rapidly.[21] The proposed reforms will also facilitate some prescription around what is required to meet responsible lending obligations (through regulations).[22] Based on the experience in Australia, where regulation of this nature has been in effect for several years, the New Zealand reforms contained in the Bill as introduced appear unlikely to significantly curb irresponsible lending. One reason for the high levels of non-compliance, as explained later in this article, may be that the high-cost lenders' business model would seem to incentivise lenders to be less than scrupulous about who they lend to, in the interests of getting repeat business, even if that entails non-compliant lending.

It is necessary to identify the goal of regulation in this area carefully

17 Payday loans in Canada are permitted under s 347.1 of the Criminal Code, so long as the borrower's province has enacted sufficient provincial legislation concerning the provisioning of payday loans. In the event that no such provincial legislation exists (as is the case in Newfoundland and Labrador) payday loans are limited by usury laws, with any effective (compound) rate of interest charged above 60 per cent per annum considered criminal. Most provinces have enacted interest rate cap regimes. See further Stace and Finn, above n 16, at 25.

18 Payday lending is legal in most states of the United States, but many of these states impose a maximum loan amount, and an interest rate cap. See Stace and Finn, above n 16, at 21.

19 Credit Contracts and Consumer Finance Act, pt 1A.

20 Ministry of Business, Innovation and Employment *Review of Consumer Credit Regulation: Additional Information to Support the Discussion Paper* (June 2018) at 12. Many high-cost lenders charge compounding interest, meaning that the true rate of interest is a lot higher than 800 per cent per annum. For example, if interest is charged at one per cent per day, the simple rate is 365 per cent per annum. Compounding daily, it is in the order of 3780 per cent per annum. Rates of 1.2-1.7 per cent a day are common in the New Zealand high-cost lending market. See further National Building Financial Capability Charitable Trust "Submission to the Finance and Expenditure Select Committee on the Credit Contracts Legislation Amendment Bill 2019".

21 Credit Contracts Legislation Amendment Bill 2019 (131-1).

22 Clause 43.

before designing reforms that have any chance of meeting that goal. One goal might be to remove (legal) short-term high-cost lenders from the marketplace. This could be done by prohibiting the provision of consumer credit at an interest rate in excess of a set rate (for example, 50 per cent per annum) where it becomes uneconomic for short-term high-cost lenders to operate. Whether such an approach might lead to an increase in illegal lending, as some lenders suggest,[23] is difficult to predict. The review that considered the impact of the interest rate cap in the United Kingdom (set at 0.8 per cent a day) found no evidence of an increase in illegal lending.[24] Alternatively, the goal might be to allow short-term high-cost lending, but attempt to minimise the potential for harm caused by the product. This could be done by increasing the incentives on lenders to comply with responsible lending obligations and by targeting predatory lending practices, such as using aggressive sales tactics and targeting consumers under financial pressure or who have low financial literacy. Measures aimed at reducing repeated use of short-term high-cost loans could also be considered.

This article first explains why high-cost lending is a gendered issue. It then focuses on the use of responsible lending obligations as a tool to facilitate "responsible lending", meaning only lending in circumstances where the payment obligations are not likely to cause significant hardship to the borrower. Responsible lending obligations require the lender to assess whether the borrower can afford the contracted payments. This is the primary regulatory mechanism utilised in New Zealand today to regulate the high-cost lending product. This article considers the reasons why the statutory responsible lending obligations have failed to protect consumers in general and suggests improvements that could be made, including specific measures relevant to female consumers.

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23 For example, see Moola.co.nz Ltd *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018); and Rapid Loans NZ Ltd *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018).

24 Financial Conduct Authority *High-Cost Credit: Including Review of the High-Cost Short-Term Credit Price Cap* (Feedback Statement FS17/2, July 2017) at [1.17]. The Revised Explanatory Memorandum that accompanied the Consumer Credit Legislation Amendment (Enhancements) Bill when that Bill was introduced in Australia in 2011 contains references to other earlier research that supports the argument that introduction of a cap is unlikely to lead to an increase in illegal lending. See Consumer Credit Legislation Amendment (Enhancement) Bill 2012 (130) (revised explanatory memorandum) (Cth) [Revised Explanatory Memorandum] at [11.147]-[11.149].

II HIGH-COST LENDING IS A GENDERED ISSUE

Studies conducted in the United States have shown that a disproportionate percentage of consumers using high-cost lending products (commonly referred to as payday loans) are female.[25] Schmitz, in a paper produced in 2014, refers to several studies of the use of payday lending products which show a predominance of women among payday loan consumers.[26] The United States-based PEW Charitable Trust conducted research in 2011 which found that "most payday loan borrowers are white, female, and are 25 to 44 years old".[27] Australian research has also revealed that women are the main users of these types of loans.[28] The 2012 Caught Short Report found that more women (58 per cent) than men (42 per cent) used payday lenders.[29] The report compared the results of that study with two earlier Australian studies (one in 2002[30] and one in 2010[31]) conducted by Consumer Law Action which had found that in 2002, women made up 52 per cent of those using payday loans,[32] and in 2008, women made up 55 per cent.[33] In the United Kingdom, a 2005 Parliamentary report found that the typical customers of home credit (that is, providers of small, short-term, unsecured cash loans) "tend to have low incomes and low socio-economic status".[34] Home credit use was "more prevalent among women … cohabiting couples and people who have experienced marital breakdown".[35] Schmitz also notes that research conducted in the United Kingdom shows the predominance of female payday loan customers in the United Kingdom,

25 Amy J Schmitz "Females on the Fringe: Considering Gender in Payday Lending Policy" (2014) 89 Chi Kent L Rev 65 at 67 and 74.

26 At 74-76.

27 The PEW Charitable Trusts *Payday Lending in America: Who Borrows, Where They Borrow and Why* (2012) at 4.

28 Banks and others, above n 8, at 22.

29 At 22.

30 Dean Wilson *Payday Lending in Victoria — A Research Report* (Consumer Law Centre Victoria, July 2002).

31 Zac Gillam *Payday Loans: Helping Hand or Quicksand? Examining the Growth of High-Cost Short-Term Lending in Australia, 2002-2010* (Consumer Action Law Centre, September 2010).

32 Wilson, above n 30, at 53.

33 Gillam, above n 31, at 45.

34 The Griffiths Commission on Personal Debt *What Price Credit?* (March 2005) at 50.

35 At 50.

referring to research conducted in 2012 that suggests marketing of these types of loans is targeted at women.[36]

Research conducted in New Zealand since the MBIE Consumer Credit Review also suggests that the majority of those facing issues with unmanageable debt in New Zealand are women. The Justice Innovation Centre Survey shows that women make up more than half of those seeking help from budgeting services.[37]

Schmitz identified a number of possible reasons for women being disproportionately affected.[38] One of them is the gender pay gap.[39] Women, as a group, earn less than men. There is still a gender pay gap in New Zealand,[40] and reasons for the gender pay gap have been identified as including:[41] that women are more likely to be clustered in a narrow range of occupations and at the bottom or middle of an organisation; the value put on women's jobs in that the skills and knowledge that women contribute in female-dominated occupations may not be recognised or valued appropriately in comparison to other jobs;[42] and work arrangements and caring responsibilities, with more women combining primary care giving with part-time work, which tends to be more readily available in lower paid occupations and positions. This limits women's access to better paying occupations and positions.

Another reason suggested by Schmitz for the predominance of women as users of high-cost credit was that women may be faced with fewer alternatives for credit, because of poor or limited credit histories and lower salaries.[43] In particular, women who work inside the home or lack independent credit histories may have difficulty qualifying for a credit card.[44] Further, women may

36 Schmitz, above n 25, at 67–68.

37 Gordon and others, above n 9, at 5 and 10.

38 Schmitz, above n 25, at 78–85.

39 At 78.

40 In September 2019, Westpac revealed that its gender pay gap is just over 30 per cent. See Rob Stock "Westpac's gender pay gap is 30.3 per cent, says chief executive" (18 September 2019) Stuff <www.stuff.co.nz>.

41 Ministry of Business, Innovation and Employment "Gender Pay Gap" Employment New Zealand <www.employment.govt.nz>.

42 The Equal Pay Amendment Bill, which will improve the process for employees to resolve pay equity claims, is still making its way through Parliament.

43 Schmitz, above n 25, at 80–81.

44 At 81.

be less inclined to negotiate and instead place more importance on managing relationships and putting the needs of others above their own, meaning that they may be inclined to accept less attractive loan contracts without questioning the terms or seeking better alternatives.[45]

She also suggested that online lending may encourage women borrowers more than men because of the anonymity.[46] Online lending avoids the embarrassment of having to discuss one's debt situation in person and also protects the borrower from the shame of rejection face to face if a loan application falls through.[47] There is also evidence that lenders and, in particular, online lenders target women by, for example, promoting lending for shopping, raising children and caring for the elderly.[48] The fact that women tend to carry the primary responsibility for family and child care is also relevant. Schmitz suggests that families and "women in particular, desperate to care for their children, will take out payday loans at any cost, even when they know the costs are exorbitant".[49]

These factors suggest that particular thought should be given to how regulation can address the issues faced by women in the context of high-cost lending. Some suggestions are made at the end of this article.

III THE FAILURE OF THE LENDER RESPONSIBILITY PRINCIPLES

In 2015, the Credit Contracts and Consumer Finance Act 2003 (CCCFA) was amended to introduce lender responsibility principles (the Principles) to apply to consumer credit contracts.[50] At the time, MBIE stated the objective of the Principles:[51]

> … is to reinforce and set good lending practices in order to protect consumers, and to promote informed choice and effective competition in

45 At 83.

46 At 84.

47 At 84.

48 At 84-85.

49 At 105.

50 The Credit Contracts and Consumer Finance Amendment Act 2014 inserted pt 1A into the Credit Contracts and Consumer Finance Act 2003. Part 1A contains the lender responsibility principles and came into effect on 6 June 2015.

51 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Responsible Lending Code* (March 2015) at [5].

> consumer credit markets. The responsible lending obligations target the practices of unscrupulous lenders, and are aimed at preventing unaffordable or otherwise inappropriate lending, and misconduct by those lenders.

New Zealand was following an international trend in introducing responsible lending obligations. In 2008, a Consumer Credit Directive issued by the European Commission required member states to pass consumer credit legislation which included responsible lending obligations, and Australia introduced responsible lending obligations in the National Consumer Credit Protection Act 2009 (which came into effect in 2010).

The Principles, as introduced in New Zealand in 2015, are expressed at a high level. Lenders under a consumer credit contract must (among other obligations) make reasonable enquiries before entering into a loan to be satisfied both that the credit provided will meet the borrower's requirements and objectives (in other words, be suitable for the borrower) and that the borrower will be able to make the payments under the loan without suffering substantial hardship (in other words, be affordable for the borrower).[52] Lenders must also "exercise the care, diligence and skill of a responsible lender".[53] Behind the Principles sits the Responsible Lending Code (the Code) which elaborates on the Principles and provides guidance as to how lenders can comply with the Principles.[54] The Code is non-binding, and there are no consequences for non-compliance with the Code.[55]

Evidence gathered in the MBIE Consumer Credit Review of how the Principles are operating in practice in the consumer credit market has revealed high levels of non-compliance. By way of background, in December 2017 the Government commissioned MBIE to conduct a review to assess whether the amendments to the CCCFA, which introduced the Principles, had been effective in protecting vulnerable consumers. A key finding from the review, as

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52 Credit Contracts and Consumer Finance Act 2003, ss 9C(2) and 9C(3)(a). "Consumer credit contract" is defined in s 11.

53 Section 9C(2).

54 The Responsible Lending Code was issued by the Minister of Commerce and Consumer Affairs under s 9G of the Credit Contracts and Consumer Finance Act 2003 and came into force on 6 June 2015. The current (as at May 2019) version of the Responsible Lending Code was amended by the Minister of Commerce and Consumer Affairs under s 9I of the Credit Contracts and Consumer Finance Act 2003 and came into force on 6 July 2017.

55 The Code expressly states that lenders may comply with the lender responsibility principles in ways other than those outlined in the Code.

reported in MBIE's subsequent report,[56] was that there is evidence of continued irresponsible lending.

MBIE reported:[57]

> Across credit markets, there are inconsistent levels of compliance, and continued irresponsible lending by some lenders. Specific areas of significant non-compliance were in carrying out affordability assessments and in advertising practices.

In other words, notwithstanding the introduction of the Principles in 2015, there is evidence that loans continue to be made in circumstances where the borrower could not realistically afford the repayments. Consumer groups, regulators, dispute resolution schemes and some lenders reported that it was "common for some lenders to perform only superficial testing of loan affordability" and take income and expense information provided to them by borrowers without proper questioning or verification, "even where it is plainly incomplete or incorrect".[58] This view is borne out, said MBIE, by Commerce Commission complaint statistics.[59]

The MBIE Consumer Credit Review resulted in MBIE publishing the Review of Consumer Credit Regulation (the June 2018 Discussion Paper) and a call for submissions, which attracted 86 submissions.[60] Financial capability and budgeting services and other bodies that provide assistance and support for consumers in financial difficulty,[61] said that they are seeing clients daily in an unmanageable debt situation. In many cases it appeared to these submitters that the client should not have been given a loan, because they could not afford it. High-cost lending was seen a significant source of problems.[62]

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56 Ministry of Business, Innovation and Employment, above n 3.

57 At 10.

58 At 17.

59 Ministry of Business, Innovation and Employment *Review of Consumer Credit Regulation: Additional Information to Support the Discussion Paper*, above n 20, at 15.

60 Ministry of Business, Innovation and Employment, above n 3. The submissions are available from Ministry of Business, Innovation and Employment "Document Library — Consumer Credit Regulation Review" <www.mbie.govt.nz>.

61 These are services that offer a free service of assisting people who come to them for help in developing a manageable budget, forming a personal financial plan of action and advocating with those to whom they owe money.

62 For example, see National Building Financial Capability Charitable Trust *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018).

The Commerce Commission, which is responsible for enforcement of the CCCFA, has acknowledged there are problems with compliance with the Principles. The Commission's lengthy submission to the June 2018 Discussion Paper stated that the Commission was "aware of evidence supporting the issues identified in the Discussion Paper under the heading of continued irresponsible lending and other non-compliance".[63] The Commission said: "It is apparent from our responsible lending investigations to date that lenders make differing levels of inquiries and take very different approaches to affordability assessments."[64]

A Low levels of compliance with responsible lending obligations was a factor in the reforms introduced in the United Kingdom and Australia

Responsible lending obligations are part of consumer credit regulation in both Australia (and have been since 2010)[65] and the United Kingdom (since 2006).[66] In both those jurisdictions, as explained below, poor compliance was a factor in deciding to introduce tighter regulation of high-cost lenders, including an interest rate cap.

In 2013, the United Kingdom Government decided the responsible lending obligations were not sufficient to regulate high-cost lending. Regulation of consumer credit in the United Kingdom had been the responsibility of the Office of Fair Trading (OFT) until 2014, when responsibility was transferred to the Financial Conduct Authority (FCA). The OFT had developed guidance as to what was irresponsible lending for the purposes of assessing a credit provider's suitability to be licenced.[67] From 2014, consumer credit providers

63 Commerce Commission *Submission on Discussion Document: Consumer Credit Regulation* (August 2018) at [60].

64 At [124].

65 Under the National Consumer Credit Protection Act 2009 (Cth).

66 The reforms introduced by the Consumer Credit Protection Act 2006 (UK) included adding s 25(2B) to the Consumer Credit Act 1974 (UK) which made it explicit that amongst the business practices which the Office of Fair Trading (OFT) could consider to be deceitful or oppressive or otherwise unfair or improper, for the purposes of the s 25 test, were "practices in the carrying on of a consumer credit business that appears to the OFT to involve irresponsible lending". Provisions relating to licensing of credit businesses are now within the FCA's jurisdiction and the rules on responsible lending are contained in the Handbook, *Consumer Credit sourcebook* (August 2019), CONC 5.

67 United Kingdom Office of Fair Trading *Irresponsible lending — OFT guidance for creditors* (March 2010, updated February 2011).

became subject to the FCA's consumer credit protection rules (now in Chapter 5 of the Consumer Credit sourcebook).[68] The FCA issued conduct rules, many of which were carried across from the Consumer Credit Act 1974 and the OFT guidance, plus some additional rules for high-cost short-term credit lenders and debt management firms.

An OFT compliance review that reported in 2013 found widespread irresponsible lending in the high-cost lending market and gave 50 payday lenders, accounting for 90 per cent of the payday market, 12 weeks to change their business practices or risk losing their licences.[69] The FCA then introduced a cap on roll-overs and restrictions on the use of continuous payment authorities (effective from July 2014), intended to curb harmful practices in the high-cost short-term lending market.[70] The FCA considered "more actively supervising and enforcing current affordability requirements without introducing further rules", but rejected that option.[71] Given the limits to the FCA's ability to "monitor firms and the evidence of significant non-compliance with existing rules" in the OFT compliance review, the FCA concluded that more active supervision and enforcement (even with the risk warning) "would not sufficiently improve consumer outcomes".[72]

In December 2013, the FCA was given a statutory duty to introduce an interest rate cap. This followed an intensive campaign for tighter regulation of the high-cost lending industry led primarily by Labour MP Stella Creasy. The body of evidence that the payday lending market was failing to produce good outcomes for borrowers was "so large and so compelling that the FCA has been given a 'duty' to cap the total cost of credit in this market".[73]

In 2011, the Australian Government decided that responsible lending obligations were not sufficient to regulate high-cost short-term loans. In that year, the Consumer Credit and Corporations Legislation (Enhancements) Bill 2011 (the Enhancements Bill) was introduced during Phase Two of national

68 *Consumer Credit sourcebook* (August 2019), above n 66.

69 Office of Fair Trading *Payday Lending: Compliance Review Final Report* (OFT1481, March 2013).

70 Financial Conduct Authority *Detailed Proposals for the FCA Regime for Consumer Credit* (Consultation Paper CP13/10, October 2013) at 52.

71 At [6.86]–[6.87].

72 At [8.86].

73 Sarah Beddows and Mick McAteer *Payday Lending: Fixing a Broken Market* (Association of Chartered Certified Accountants, May 2014) at 54.

consumer credit reforms. The Council of Australian Governments had earlier identified that Commonwealth intervention into the cost of short-term lending should be considered.[74] The reforms were "intended to balance consumer protection with industry stability".[75] The Enhancements Bill resulted in the SACC (small amount credit contract) reforms that came into effect in 2013.[76]

The Enhancements Bill was introduced only shortly after the responsible lending obligations had become law. Lenders argued in submissions to the Enhancements Bill that the responsible lending laws already in force were effective to regulate industry lending practices.[77] The Government, however, rejected those arguments. The Government stated that there did not appear to have been any significant changes to high-cost lenders' practices.[78] There was also evidence of short-term credit providers more generally engaging in practices that were intended to take advantage of borrowers.[79] Three specific reasons were given, in addition to concerns about poor and non-complaint lender behaviour, for not relying on responsible lending obligations alone. These were identified in the Regulation Impact Statement.[80]

First, the responsible lending obligations required the credit provider to assess whether or not the consumer could afford the repayments under the contract without substantial hardship, but did not directly impact on the cost of credit. Credit providers therefore could not set the repayments at a level the consumer could not afford to repay. In some situations, this may have resulted in the consumer having to meet lower repayments than would otherwise be the case. However, this would apply on an individual basis, and did not provide a comprehensive response in the same way that an upfront limitation on costs would. Secondly, the responsible lending obligations required each contract to be considered in isolation. In the case of repeat borrowings this would mean that it was not possible to consider the cumulative effect of a series of contracts with the same lender. Finally, there were practical limitations in establishing

74 See Revised Explanatory Memorandum, above n 24, at [11.1]–[11.2].

75 Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011* (December 2011) at [5.7].

76 Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth).

77 At 87.

78 Revised Explanatory Memorandum, above n 24, at [11.109].

79 At [11.101]–[11.103].

80 At [11.108]-[11.111].

whether or not a consumer could afford the repayments under short-term contracts. For these consumers, it depended on being able to precisely establish what their living expenses were, and this could be difficult in practice.

The reforms introduced in Australia in 2013 included an interest rate cap on short-term, high-cost loans.[81] This was in addition to responsible lending obligations that have been part of Australian consumer credit law since 2010.[82] An Australian Government-commissioned review of the 2013 reforms (reporting its interim findings in 2015) found that the cost of high-cost short-term loans had reduced but not the volume of funds lent, which actually increased in the wake of the reforms.[83] A recent Australian Senate inquiry found continuing high levels of irresponsible lending in the high-cost lending market: loans continue to be made where the borrower cannot afford it, notwithstanding responsible lending obligations and the existence of an interest rate cap.[84]

B Analysis of the business model suggests high-cost lenders have incentives to not comply with the law

One possible explanation for the failure of responsible lending obligations (in New Zealand and elsewhere) is that there may be a misalignment of incentives. In other words, lenders have incentives not to comply with those obligations and these conflict with their incentives to be law-abiding.

There are many products in the marketplace that can cause harm to consumers. The law's response might be to require disclosure of the risks, restrict sales to only those over a certain age, or ban the sale of that product altogether. Some products are dangerous if used in the wrong way, like many over-the-counter medicines. There is often law regulating the sale of these types of products that requires disclosure of the risks associated with their use. The risk that the product will be misused and cause harm is left with the consumer, who has been informed. Cigarettes and alcohol are examples of products where the potential for harm to consumers is assessed to be such that the law requires more than just disclosure. In recognition of the potential

81 Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth).

82 National Consumer Credit Protection Act 2009 (Cth), ch 3.

83 *Interim Report*, above n 14, at 7. Three publicly listed companies in Australia with a significant presence in the high-cost lending market showed continued growth after the cap came into operation: see Banks, de Silva and Russell, above n 10, at 38.

84 Senate Economics References Committee, above n 8, at [1.25].

for harm, the law imposes an obligation on the seller to assess the age of the purchaser and not sell to those under a certain age (as well as other rules, for example around advertising).[85] The risks of providing the product to persons under that age outweigh any possible benefits of allowing sale. Other products are so dangerous that the sale of those products is banned, for example heroin (or under recent law changes, certain prohibited firearms).[86] The risks of using such products are considered to be so great that no amount of disclosure is sufficient. There is no age limit at which the consumer is considered as being responsible enough to use the product without it posing a serious risk of harm, and that risk of harm outweighs any social good that might come from allowing the product to be sold to the public.

Responsible lending obligations take a different approach. The 2015 amendments to the CCCFA impose a legal obligation on the seller (the lender) to assess whether the product is likely to do harm to the buyer (borrower). The lender is required to assess whether the product is suitable for the borrower. Clearly there are problems with this approach. It conflicts with the seller's desire to sell the product, meaning there is an incentive to ignore or minimise compliance with the law.

Analysis by the Association of Chartered Certified Accountants in 2014 (the ACCA Study) on the online payday lending market in the United Kingdom prior to the introduction of the interest rate cap regime in 2015 found that lenders' incentives to, on the one hand, lend responsibly and, on the other, make profits, are not aligned.[87] This research looked into the business model of payday lenders, with a focus in particular on online lenders.

The ACCA Study found that the key costs of an online high-cost lending business were customer acquisition costs and loss rates.[88] High customer acquisition costs (including, for example, advertising and processing costs, and

85 See the Sale and Supply of Alcohol Act 2012 and the Smoke-free Environments Act 1990.

86 See the Misuse of Drugs Act 1975 and the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019.

87 Beddows and McAteer, above n 73, at 38.

88 At 15.

potentially lead generator costs)[89] mean repeat lending is more profitable than new customers.[90] The study found:[91]

> [A high interest rate] makes it harder for the borrower to repay in full, but, coupled with low financial capability it makes the borrower more likely either to roll over or return for another loan within a relatively short timeframe.

The research stated that "profitability is dependent on repeat lending".[92]

The ACCA Study asked:[93]

> Why is a business which takes on only new borrowers with a high probability of repayment not automatically more profitable than one which takes on new borrowers with a low probability of repayment? The answer seems to lie in the tradeoff between incurring the costs associated with performing meaningful Affordability Assessments and incurring the costs of higher defaults on small first loans.

The ACCA Study noted that it makes perfect business sense to lend to people who will not pay back as long as lenders do not keep on lending to them. If a subset of repeat borrowers are "generating the lion's share of the loans" (and paying an extremely high total cost of credit as a result), it would be possible to operate profitably while taking on new borrowers with "very high default probabilities".[94] "The cost of defaults is borne ultimately not by lenders who operate profitably, but by borrowers in the form of high charges and fees."[95]

The ACCA Study found that lenders' and borrowers' incentives are not aligned:[96]

> If, as the evidence suggests, repeat lending is disproportionately profitable, lenders will be better off if the borrower takes a further loan rather than repays in full and on time. … The lender's Affordability Assessment has failed, but

89 Lead generators are third parties who source borrowers' details and sell them to the highest bidder.

90 Beddows and McAteer, above n 73, at 12 and 27.

91 At 39.

92 At 21. The importance of repeat borrowing was also recorded in an Australian study done in 2015 (Banks, de Silva and Russell, above n 10, at 36), which stated, "[p]rofits are overwhelmingly derived from chronic borrowers and the international industry is built around maximising repeat business."

93 Beddows and McAteer, above n 73, at 37.

94 At 37.

95 At 25.

96 At 56.

> this represents no cost to the lender; in fact, the evidence presented in this report regarding [continuous payment authorities] suggests that this is the profitable part of their business.

Automatic payment authorities, under which high-cost loan repayments are taken out of a borrower's income before the borrower gets to decide what to spend their income on, are common in New Zealand and are a matter of concern to consumer groups.[97]

The concerns with misalignment of incentives are even greater where loans are originated via "lead generators". These are third parties, essentially credit brokers, who source borrowers' details and sell them to the highest bidder, and who are paid per loan written. "Lead generators have no 'skin in the game' — they get paid regardless of whether or not the loan is eventually repaid."[98] There is evidence that lead generators operate in the high-cost lending market in New Zealand but they have not yet been the target of regulatory scrutiny.[99]

The ACCA Study suggested that an interest rate cap would help because:[100]

> Imposing a cap on the total cost of credit, assuming it is at least high enough to cover the operating costs of making loans, implies imposing a cap on losses due to default. A cap on the total cost of credit places an upper bound on the amount of underwriting risk a lender can take in a much clearer and more straightforward way than a vague requirement to "assess affordability". A cap at the right level will also make loans affordable, enabling more borrowers to successfully repay in full and on time.

C Low levels of enforcement may be part of the problem

Another possible reason for the low levels of compliance with responsible lending obligations may be that the laws are not adequately enforced, meaning there is no real risk of penalty if the law is breached. In the four years since the insertion of the Principles into the CCCFA in June 2015 (to date of writing, May 2019), the Commerce Commission has sent out two warning letters to

97 For example, see National Building Financial Capability Charitable Trust, above n 62, at 39. See also Serpell, above n 10, at 154; and Ali, McRae and Ramsay, above n 8, at 424.

98 Beddows and McAteer, above n 73, at 54.

99 See Save My Bacon Ltd *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018); and Moola.co.nz Ltd, above n 23. Both of these lenders wanted lead generators regulated.

100 Beddows and McAteer, above n 73, at 39.

lenders,[101] and commenced one set of proceedings. Proceedings were filed against Ferratum New Zealand Ltd on 1 June 2018 alleging breaches of the Principles. No settlements have been entered into or other prosecutions taken by the Commerce Commission against lenders for breaches of the Principles to date of writing.[102]

Several submitters to the June 2018 Discussion Paper pointed to under-enforcement as the real issue.[103] Possible reasons for this lack of action include lack of resources, lack of prioritisation and lack of enforcement tools. At present, the Commerce Commission only has the statutory duty of care in s 9C(2) of the CCCFA, or breach of the broadly worded Principles to attach an action to. There are no civil pecuniary penalties imposed for breach and loss has to be established. Some of these issues are addressed in the CCLA Bill. The CCLA Bill contains certain reforms aimed at improving enforcement of the Principles.[104] In particular, civil pecuniary penalties and statutory damages

101 The first warning letter issued to deal with a likely breach of the lender responsibility principles was issued on 19 March 2018 to Dealer Finance Ltd (DFL). The likely breach was that DFL did not make reasonable inquiries before entering into agreements with borrowers, so as to be satisfied that it was likely that the borrowers would make payments under the agreements without suffering substantial hardship. The second warning letter issued to deal with a likely breach of the lender responsibility principles was issued on 9 October 2018 to Rapid Loans NZ Limited (RLL). The likely breach was, similarly to DFL, that RLL did not make reasonable inquiries before entering into consumer credit contracts with a vulnerable borrower, in April and September 2016, so as to be satisfied that it was likely that the borrower would make payments under the agreement without suffering substantial hardship. See Letter from Commerce Commission New Zealand to Dealer Finance Ltd regarding the Credit Contracts and Consumer Finance Act 2003: Warning (19 March 2018); and Letter from Commerce Commission New Zealand to Rapid Loans NZ Ltd regarding the Credit Contracts and Consumer Finance Act 2003: Warning (9 October 2018).

102 MBIE has suggested reasons for the low level of enforcement include the relative complexity of bringing cases relating to irresponsible lending, the lack of penalties for irresponsible lending, and the priority placed by the Commerce Commission on taking action quickly to stop harm — particularly in the mobile trader sector over this period. See Ministry of Business, Innovation and Employment, above n 20, at 44.

103 For example, see Rapid Loans NZ Ltd, above n 23; Thorn Group Financial Services Ltd, above n 11; and Financial Services Federation *Discussion Paper: Review of Consumer Credit Regulation June 2018* (September 2018).

104 The reforms aimed at improving enforcement included in the CCLA Bill are: civil pecuniary penalties and statutory damages will be introduced for breaches of the Principles; lenders will have to substantiate their affordability and suitability assessments and supply a copy on request to the borrower or the Commerce Commission; mandatory minimum standards would be introduced (by regulation) for some or all types of lenders and loans to assess affordability and suitability of loans in accordance with a defined procedure; s 9C(7) (which permits the lender to rely on information provided by the borrower for affordability assessments unless they have reasonable grounds to believe the information is not reliable) will be repealed meaning lenders would need to obtain more objective verification of key borrower information; it will be mandatory for high-cost lenders to include a warning about

will be introduced for breaches of the Principles, and mandatory minimum standards will be introduced (by regulation) for some or all types of lenders and loans to assess affordability and suitability of loans in accordance with a defined procedure. The chances that the reforms contained in that Bill will have a significant effect on levels of compliance are low, based on the experience of responsible lending obligations in Australia.

In Australia, the regulator has had a broad range of enforcement tools available (under the National Consumer Credit Protection Act 2009 (Cth)) to address irresponsible lending, including civil and criminal financial penalties, banning and disqualification orders and orders for corrective disclosure. There are also prescriptive requirements for assessing affordability of high-cost loans (such as obtaining recent bank account statements) and a presumption that a loan is unsuitable if, at the time of the preliminary assessment, the consumer is a debtor under another small amount high-cost loan and the consumer is in default in payment of an amount under that other contract, or if, in the 90-day period before the time of the preliminary assessment, the consumer has been a debtor under two or more other small amount high-cost loans. The regulator has also taken a number of cases to court.[105] However, the recent Australian Senate Inquiry into Credit and Hardship found there are still high levels of non-compliance with responsible lending obligations.[106]

The reforms proposed for New Zealand are not in any significant respect more onerous on high-cost lenders than the law that currently applies in Australia. They could be described as more relaxed that Australia's, given the lack of an interest rate cap and no presumption of unsuitability.

high-cost credit and for lenders to advertise their annual interest rate; and disclosure statements will have to be provided in the language that the borrower is most comfortable communicating in, if the lender advertised in that language.

105 Relevant cases include *Australian Securities & Investments Commission v The Cash Store Pty Ltd (in liq)* [2014] FCA 926; *Australian Securities & Investments Commission v Channic Pty Ltd (No 4)* [2016] FCA 1174; *Australian Securities & Investments Commission v Channic Pty Ltd (No 5)* [2017] FCA 363; *Australian Securities & Investments Commission v Financial Circle Pty Ltd* [2018] FCA 1644; *Australian Securities & Investments Commission v Australia and New Zealand Banking Group Ltd* [2018] FCA 155; and *Australian Securities & Investments Commission v Kobelt* [2016] FCA 1327.

106 See Senate Economics References Committee, above n 8.

IV INTEREST RATE CAPS AS A WAY OF ENCOURAGING RESPONSIBLE LENDING

There are ways to attempt to make lenders comply with the responsible lending obligations. One is to introduce an interest rate cap. Depending on the level of the cap, it can offer a real incentive to lend responsibly, because it puts a ceiling on the level of defaults that the lender can accommodate and still operate profitably. Without any cap, the chances that a certain percentage of borrowers will never pay back the money (or will only partially repay) can be incorporated into the costs of business and factored into the rate at which all borrowers are charged for credit. If that cannot happen or is restricted because the rate of interest is capped, the lender will be forced to be more careful about to whom it lends.[107]

Many countries have chosen to include an interest rate cap as part of their regime to address the harm caused by high-cost lending. A World Bank paper released in 2014 found that 76 countries around the world have interest rate caps on payday lending as part of their consumer protection laws.[108] Both the United Kingdom and Australia have introduced an interest rate cap on high-cost short-term loans in the last ten years (Australia in 2013 and the United Kingdom in 2015).[109] The United Kingdom regime caps the daily rate of interest that may be charged at 0.8 per cent a day. Under the Australian regime, no interest as such may be charged, but a 20 per cent establishment fee can be charged plus a 4 per cent monthly administration fee.[110]

Both the United Kingdom's and Australia's regimes have been subject to official review.[111] After introducing the cap on high-cost lending, in both

107 Other reasons for introducing an interest rate cap include addressing excessive interest rates, and replacing vague principles with bright line, more easily enforceable, regulation.

108 Samuel Munzele Maimbo and Claudia Alejandro Henriquez Gallegos *Interest Rate Caps Around the World: Still Popular, but a Blunt Instrument* (World Bank Group, Policy Research Working Paper 7070, October 2014) at 6.

109 For Australia, see the National Consumer Credit Protection Act 2009 (Cth) as amended by the Consumer Credit Legislation Amendment (Enhancements) Act 2012 (Cth). For the United Kingdom, see the Consumer Credit Act 1974 (UK); and the FCA's Handbook rules, in particular, the Consumer Credit sourcebook (CONC). The FCA was given a statutory duty in December 2013 to cap the price of high-cost short-term loans in order to protect borrowers from excessive charges. The price cap came into force on 2 January 2015.

110 National Consumer Credit Protection Act 2009 (Cth), sch 1 (National Credit Code), cl 31A.

111 For Australia, see Australian Government Treasury *Interim Report*, above n 14; and Australian Government Treasury *Review of the Small Amount Credit Contract Laws: Final Report* (March 2016)

countries the high-cost lending market contracted as some lenders found they could not afford to offer loans within the cap. Research from the United Kingdom suggests that the introduction of an interest rate cap has resulted in lenders that remained in the market being more cautious about who they lend to, so that some of the worst risk creditors no longer have access to a payday loan.[112] Both countries still have an active payday lending market. In Australia, the volume of funds lent grew after the introduction of the cap.[113] This suggests that the design of the cap is crucial and that, while there are economic harmonisation benefits to having a cap of the same type as Australia, New Zealand should consider other designs or additional features to support a cap. A recent Australian Senate inquiry has recommended further reforms to the regulation of high-cost lending in Australia, including a protected earnings cap, discussed below.[114]

The CCLA Bill does not include an interest rate cap at date of writing. It does include a limit on the total amount that a borrower of a high-cost loan can be required to pay back.[115] This total repayment limit is intended to prevent debt spirals caused by lenders adding on default interest and penalties when a borrower defaults.[116] It does not address excessive interest rates and will not provide the same incentive to lenders to lend responsibly as a well-designed interest rate cap would. Both the United Kingdom's and Australia's regimes

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[*Final Report*]. For the United Kingdom, see Financial Conduct Authority, above n 24.

112 See Financial Conduct Authority, above n 24; and Consumer Finance Association *Impact of Regulation on High Cost Short Term Credit: How the Functioning of the HCSTC Market Has Evolved* (March 2017) at 10.

113 The Australian Government Treasury *Interim Report*, above n 14, found that while the volume of small amount credit loans had increased since the 2013 reforms, the number of industry participants had fallen, suggesting the sector has consolidated. The Senate Economics References Committee, above n 8, suggested that the increase in volume of funds lent may be explained by an increase in the average loan size. The Senate Economics References Committee stated at 31–32: "Research for the National Credit Providers Association (NCPA) finds that the market for SACCs is dominated by Cash Converters, Money3 and Nimble, who make up an estimated 70 per cent of the industry's revenue. NCPA notes that the number of SACC loans approved has fallen since [the 2013 reforms]. In 2016–17, 1.4 million applications for SACCs were received by payday lenders of which 39 per cent were approved. This compares with nearly 2 million applications with a 67 per cent approval rate in 2014–15. However, the fall of 57 per cent in the number of loans approved was not matched by the fall in the amount lent. In 2014–15 it was $667 million, and in 2016–17 it was $538.5 million, a fall of less than 20 per cent. Thus the average loan size rose from $502 to $948."

114 Senate Economics References Committee, above n 8.

115 Credit Contracts Legislation Amendment Bill 2019 (131-1), cl 22.

116 Ministry of Business, Innovation and Employment *Impact Statement: Consumer Credit Regulation Review* (September 2018) at 20.

include a total repayment limit as part of their cap. The FCA stated in its detailed rules document that each element of the United Kingdom cap was considered necessary and played a different role in protecting consumers.[117] Specifically, the interest rate cap of 0.8 per cent per day protects all borrowers from excessive charges, including those who pay back on time, those who refinance and those who default. The total cost cap (equivalent to the total repayment limit included in the CCLA Bill) limits escalating interest, fees and charges, and getting into debt spirals.

V WHY NOT JUST BAN THE PRODUCT?

Some submitters to the MBIE June 2018 Discussion Paper asked that an interest rate cap be introduced at a rate that would have the effect of removing high-cost lenders from the marketplace.[118] The Justice Innovation Centre Survey found that 90 per cent of participant agencies believed that clients were worse off overall (not just financially) by taking out a high-cost loan.[119] Similarly, in a survey of Australian Financial Counsellors done in 2011, 79 per cent of respondents thought that payday lending "never" helped to improve their clients' financial situation.[120] The Australian Senate Inquiry heard evidence from financial counselling organisations that generally clients end up worse off for having taken out a high-cost loan.[121]

On the other hand, the Caught Short Report found that:[122]

> Many borrowers did not like needing to take out loans but also felt if the loans did not exist they would have far fewer options. Only a minority of participants — less than one-fifth of the sample — thought the short-term

117 See Financial Conduct Authority *Detailed Rules for the Price Cap on High-Cost Short-Term Credit: Including Feedback on CP14/10 and Final Rules* (Policy Statement PS14/16, November 2014) at 25–26.

118 For example see National Building Financial Capability Charitable Trust, above n 62; Christians Against Poverty *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018); Christian Budgeting New Zealand Inc *Submission on Discussion Document: Consumer Credit Regulation Review* (August 2018); and New Zealand Council of Christian Social Services *Review of Consumer Credit Regulation* (July 2018).

119 Gordon and others, above n 9, at 21. A further question moderated that finding, noting that some were better off with such loans.

120 Financial Counselling Australia *What Financial Counsellors Say About Payday Lending* (October 2011) at 8.

121 Senate Economics References Committee, above n 8, at 36.

122 Banks and others, above n 8, at vii.

lending industry should be abolished. Most people had ambivalent and conflicting opinions.

A typical story from the Caught Short report is this one:[123]

> G, a Brisbane disability pensioner in her 60s, was a registered nurse. Severe back and leg injuries due to the constant work of lifting and showering patients caused her to retire by her mid-50s and take a Disability Pension. Struggling with depression and alcoholism for most of her life, G also had to deal with two recent bouts of cancer. She utilised a wide range of resources "when things get tough": food parcels (from "St Vinnies"); vouchers (from the Salvation Army); the services available through the Home Assist and Blue Care agencies. G has no credit or store cards ("the bank's not going to help me at all, with no resources and being on a pension"), hasn't had a drink for over a year and does not smoke. She spent $166 on food last payday "and I got home and I was wondering where all the food is". For the last seven years, after "sliding through the little bit of super that I had", G has had an "ongoing" relationship with one small payday lender for the "daily expenses of life", usually borrowing $200 and making four $65 repayments ($260). The lender has been "wonderful security, especially this year" …
>
> I would not have been able to even access Brisbane Private Hospital when I fractured my foot, if it wasn't him lending me the money to pay the $250 to go in on the excess … and all the extra medications that I was put on for pain my bills that would be no more than $50 or $60 a month [are] now of over $200 at the pharmacy.
>
> The payday loans have been "a lifesaver" …
>
> As long as you don't miss your payments, which you don't want to anyway because the bank will charge you $45 if it didn't go through and then [small lender] would charge $30 … As a Christian, I just pray that his business survives for people like me, to give me the security. I know, in the coming year if something comes up, that I can just pick up the phone and [staff member] is there and I don't have to worry where the money's coming from.

Products that are banned from sale in New Zealand are those where the risks from use are so great that no purchasers are considered responsible enough in any circumstances to allow the sale of that product (for example, certain guns and certain drugs). There is insufficient evidence to date to

123 At 55.

conclusively find that the high-cost lending product available in New Zealand falls within that category. An interest rate cap should therefore be set at a level that prohibits the charging of excessive interest and effectively encourages responsible lending. The potential for serious harm would remain, in particular for vulnerable consumers, especially those on low incomes who are unable to meet the cost of essential items from savings or income.[124] This suggests there is a need to supplement an interest rate cap with further measures.

Responsible lending obligations appear to be failing to protect vulnerable consumers.[125] Introducing obligations on lenders that are bright line rather than expressed as general principles would assist in addressing the risks for vulnerable consumers. Bright line obligations would also assist in enforcement. One of these could be a protected earnings cap. Another option is a general statutory prohibition on irresponsible lending.

VI PROTECTED EARNINGS CAP

Under Australian law, for borrowers whose predominant source of income is Centrelink payments (in New Zealand terminology, beneficiaries), the total payable under all high-cost loans due and not repaid cannot exceed 20 per cent of the borrower's gross income. The report that reviewed the operation of the 2013 Australian reforms recommended that the 20 per cent limit be replaced with a 10 per cent limit of the borrower's net income and apply to all borrowers of high-cost short-term loans, not just those in receipt of a benefit.[126] This recommendation was accepted by the Australian Government in its response

124 "A person who needs money to pay for essential items, who is on a low income, and who does not have the necessary savings to pay for those items, can be regarded as disadvantaged and vulnerable, especially if the need for funds is urgent, if they are financially excluded, if they already have other payday loans, or if their understanding of English and financial matters is poor." See Serpell, above n 10, at 149.

125 In Serpell, above n 10, at 162–163, these reasons are suggested to explain why responsible lending obligations are inadequate to protect vulnerable consumers: information proved to the lender may not be accurate either because the borrower deliberately misleads or is confused, what is required to comply is vague and there is flexibility in interpretation, and the financial position of the borrower can change quickly. In addition, enforcement relies on complaints or the regulator being proactive in its investigations.

126 Australian Government Treasury *Final Report*, above n 111, at vii.

to the report,[127] and endorsed by the recent Senate Inquiry.[128] The Government response noted that:[129]

> … it is unusual to have such prescriptive requirements regarding the amount that a consumer can devote to a particular form of finance; however, the panel's report highlighted the vulnerable customer base of [SACCs]. The panel noted that the principles based responsible lending obligations appear insufficient alone to prevent observed harm; a more strict affordability test is warranted. The Government accepts this proposal.

A protected earnings cap would draw a firm line, which would enable lenders to comply with the Principles and in doing so would protect borrowers and assist in enforcement. Its effectiveness would be increased if there was some way of verifying all high-cost loans under which the borrower was currently indebted. A lender will only have first-hand knowledge of the loan history of any particular borrower with that lender, and will only have the borrower's information on what other loans the borrower has. A national database of high-cost loans, as operates in Oklahoma and certain other states in the United States,[130] or mandatory comprehensive credit reporting, as is being currently introduced in Australia,[131] could be considered as measures to assist in the effectiveness of a protected earnings cap.

VII A GENERAL PROHIBITION ON IRRESPONSIBLE LENDING

This article suggests that a general statutory prohibition on irresponsible lending, coupled with increased mechanisms to assist claims to get to court,[132] could assist in reducing irresponsible lending. Such a prohibition could be

127 See Australian Government Treasury "Government Response to the Final Report of the Review of the Small Amount Credit Contract Laws" (media release, 28 November 2016).

128 Senate Economics References Committee, above n 8, at [3.99].

129 Australian Government Treasury, above n 126.

130 See Serpell, above n 10, at 170, for discussion of the issues around establishing a database of loans.

131 See the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 (Cth). As of 1 July 2018, the major banks are required to share 50 per cent of customers' credit data with credit bureaus. This will be increased to 100 per cent on 1 July 2019.

132 These are discussed later in this article, and relate to the involvement of a financial mentor before a borrower takes out a loan (where that borrower is in a category considered vulnerable) and the lender having an obligation to notify the relevant dispute resolution scheme if a borrower defaults in a certain period after taking out the loan.

similar to the general prohibition on misleading conduct in s 9 of the Fair Trading Act 1986. Under s 9, there is a general prohibition on misleading or deceptive conduct in trade. Breach of s 9 only attracts civil consequences.[133] Any person who has suffered loss by reason of the conduct has the ability to bring an action for breach (the Commerce Commission and rival traders can also bring a claim). If breach is established, and that involves looking at case law to determine the tests for when conduct is misleading or deceptive, then a claimant seeking compensation has to establish that the defendant's conduct was the, or an, effective cause of their loss. That then gives the court access to a range of orders.[134] Injunctive relief is also available, so for example a rival trader could bring a claim for breach of s 9 without having to establish any loss.

A prohibition in the CCCFA could work in a similar way. It could be a broadly-worded prohibition on irresponsible lending, for example, "no person shall, in connection with a consumer credit contract, engage in irresponsible lending". The phrase "irresponsible lending" would not be defined but left to the courts to establish tests for determining if that threshold had been met, guided by the Responsible Lending Code.[135] Any person, including the Commerce Commission or a borrower, could bring an action for breach, and breach could lead to the award of a pecuniary penalty or order for compensation. Criminal liability could also be a possibility.

Enforcing the Principles relies on the borrowers complaining or the regulator being proactive in its investigations. Research shows that high-cost borrowers are generally unlikely to take action to enforce responsible lending obligations.[136] Possible reasons for this include that they are not aware of their rights, are ashamed to admit that they have taken out a high-cost loan, or do not wish to damage a relationship with a lender that they see as a lifeline for support in desperate circumstances. It is often the consumer advocate that will enter into discussions with a lender on behalf of a borrower. Introduction of a

133 Breach of the more specific misrepresentation prohibitions in ss 10, 11, 12 or 13 of the Fair Trading Act 1986 can lead to criminal action.

134 Fair Trading Act 1986, s 43.

135 It is acknowledged that the concept of irresponsible lending may be more difficult for the courts to work with than the concept of misleading conduct. However, given that there is law around what is responsible lending, it should be possible to determine when lending falls outside of the standard of "responsible".

136 See Senate Economics References Committee, above n 8, at 4; Banks and others, above n 8, at 78; and Gillam, above n 31, at 212–213.

general prohibition on irresponsible lending could be coupled with measures aimed at assisting borrowers and the Commerce Commission to get an action to court. Involving a financial mentor or the lender's dispute resolution scheme might assist in this regard.

One suggestion for inclusion in the CCLA Bill, which came through the submissions to the June 2018 Discussion Paper, was that a borrower should have to see a consumer advocate (such as a financial mentor) before taking out a high-cost loan. The suggestion was limited to borrowers that met certain criteria designed to identify more vulnerable consumers (for example, a beneficiary, someone already in default under a high-cost loan, or someone that had taken out a certain number of high-cost loans in the last 12 months).[137] A requirement such as this would get the consumer advocate involved at an earlier stage, could assist the borrower to consider other options, and could provide the advocate with the opportunity to alert the Commerce Commission to potential breaches of the Principles. Another party that could get involved to assist with enforcement is the dispute resolution scheme to which the lender belongs. All high-cost lenders are required to be a member of a dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008. The schemes that are available to high-cost lenders are: Financial Services Complaints Ltd; Financial Dispute Resolution; and the Insurance and Financial Services Ombudsman. Another suggestion that came from submissions was that a lender should have to refer the matter to their dispute resolution scheme if a borrower was in default on a loan within the first three months after the loan was made.[138] The scheme would then have the opportunity to review the situation, to let the borrower know their rights, and to alert the Commerce Commission to any breaches.[139]

This article suggests both of these reforms should be considered for inclusion in the law. There are other options that could also be investigated, for example some form of "financial health" certification that would operate similarly to proof of age in sales of alcohol. This might be achieved through

137 For example see Waahi Whaanui Trust *Submission on Discussion Document: Consumer Credit Regulation Review* (September 2018).

138 See Financial Services Complaints Ltd *Review of Consumer Credit Regulation* (July 2018).

139 This reform would likely require an amendment to the Financial Service Providers (Registration and Dispute Resolution) Act 2008 to ensure that all the schemes are required to include this as a term of participation (otherwise lenders could opt for a scheme that does not require this).

mandatory comprehensive credit reporting, enabling lenders to access a borrower's credit score before deciding whether to lend.

VIII A GENDERED RESPONSE

Given the discussion earlier in this paper that suggests women are disproportionately represented in the ranks of those using high-cost credit products, in addition to the reforms suggested above, thought should be given to addressing the particular issues that may be driving women to high-cost lenders. Schmitz states that "desperation and the ease of obtaining payday loans lure in consumers".[140] Reforms aimed at improving the financial situation of women generally are required. More specifically, easily accessible, safe alternative credit options should be readily available. This would suggest encouraging banks (and others) to provide more funding for existing micro finance providers and making the application process user friendly. It is also important that knowledge is spread about the availability of safe, affordable credit alternatives. Financial education programmes targeted at women could assist, in an effort to improve understanding of the risks of high-cost loans and alternative options. Some more creative solutions suggested by Schmitz include requiring high-cost lenders to contribute to community funds set up to assist families that are struggling to meet financial demands.[141]

IX WHAT HAPPENS TO PERSONS DENIED A HIGH-COST LOAN?

MBIE's main reason for not recommending the introduction of an interest rate cap in New Zealand was that there was not enough information available on which to assess the likely impact to borrowers of a cap, given that a cap will have the effect of restricting access to credit.[142] A protected earnings cap and potentially a general prohibition could also impact the availability of credit. Based on research undertaken in the United Kingdom, described below, it would appear that the need for funds does not disappear, and many borrowers turn to other sources, notably family and friends. The research did not show that borrowers turned to illegal money lenders.

140 Schmitz, above n 25, at 72.

141 At 106. See generally at 103–111 for other creative solutions proposed.

142 Ministry of Business, Innovation and Employment, above n 116, at 19.

Introducing an interest rate cap and other reforms in the United Kingdom resulted in some consumers being unable to access high-cost loans, as lenders were forced to be more responsible in their lending.[143] A recent (2018) study done in the United Kingdom found that while the FCA originally predicted that 60 per cent of borrowers with no access to high-cost credit would no longer borrow at all, a significant proportion of the people denied loans were still looking for borrowing options.[144] Participants were more likely to seek credit from another source (either an alternative formal lending route or friends and family) than "go without".[145] The most common step that an individual took after being declined a loan was to access credit from friends and family. The research interrogated this type of borrowing further and found that borrowing from friends and family can sometimes have its own hidden costs.[146] Interestingly, participants were overwhelmingly unaware of fair, ethical alternative sources of credit.[147] Because the demand for credit from those that were declined a payday loan was still significant, the researchers recommended that it would be preferable to see an increased supply of alternatives to

143 A briefing paper to the House of Commons written in 2018 stated that "the FCA were very comfortable with the expectation that the new rules would result in a much smaller industry and that some people (people who previously only just qualified for loans) might no longer have access to credit but that, in economic welfare terms, they would be better off without it": Tim Edmonds *High Cost Consumer Credit: The New Regulatory Regime* (House of Commons, Briefing Paper CBP-07978, May 2018) at 3. What happened, as reported in the FCA's 2017 review of the high-cost credit caps, is that the high-cost loan market contracted after the introduction of these caps. The scale of contraction in the market was beyond what the FCA predicted. There was a significant drop in the number of applications for loans, a decrease in loan acceptance rates, and a drop in the number of firms offering high-cost loans. Profitably of the firms that remained decreased, as did default rates on loans: see Financial Conduct Authority, above n 24. A 2017 paper prepared by the United Kingdom industry body for short-term lenders (the Consumer Finance Association) reported on research done to assess how the high-cost short-term market in the United Kingdom had evolved since the introduction of the cap: see Consumer Finance Association, above n 112, at 10. This article, on pages 10–13, reported that the cost of credit had come down by around a third, default rates had roughly halved, lenders had been incentivised to offer affordable loans and were offering longer term loans (with the opportunity to repay early). Whereas previously lenders had been generating significant revenue from late fees, extending loans and relending, the report estimated that lenders were now receiving more than 80 per cent of revenue from the contracted interest payments. However, access to credit had significantly reduced, to a larger degree than the FCA expected.

144 Lindsey Appleyard, Carl Packman and Jordan Lazell *Payday Denied: Exploring the Lived Experience of Declined Payday Loan Applicants* (Carnegie UK Trust, 2018).

145 At 19.

146 The study found that the "human cost to families, relationships, dignity and respect is significant": at 4 and 26.

147 At 21.

high-cost loans as well as ways to help households reduce credit usage.[148] They recommended developing more affordable borrowing options for those for whom borrowing is manageable.[149] The study stated that the research results gave no reason to contradict the FCA's view that the cap on the cost of a payday loan would not "increase levels of borrowing among informal creditors undertaking criminal activity".[150]

A Consumer Finance Association paper produced in 2017 references another survey of consumers (also done in the United Kingdom) which asked high-cost borrowers what they would have done if the loan had not been available. The most popular answer given (over 35 per cent) was that they would have borrowed from family or friends, with the second most popular answer being that they would have gone without the daily essentials.[151]

The United Kingdom charity StepChange also undertook a survey in 2016 to find out what happened to consumers denied a payday loan.[152] Some borrowed from other lenders, including other high-cost providers, credit card, overdraft or home credit loans.[153] Many missed an essential bill or another loan payment or borrowed from friends and family.[154] The report stated:[155]

> These households are facing seriously constrained choices between taking out high cost credit, missing a household bill payment or not having enough money to pay for essentials like feeding their family. This confirms that as our research has previously shown, certain households are struggling to get by without borrowing or getting into arrears, and there is still a significant gap in the market for accessible, affordable credit.

One of the key recommendations of the StepChange report was:[156]

> [The] government needs to look at new ways to provide greater access to more affordable credit safety nets for the most financially vulnerable,

148 At 31.
149 At 31.
150 At 32.
151 Consumer Finance Association, above n 112, at 17.
152 StepChange Debt Charity *Payday Loans: The Next Generation* (2017).
153 At 20–21.
154 At 18.
155 At 3.
156 At 4.

including looking at international examples of no and low interest loan schemes.

A 2012 study by United States-based Pew Charitable Trusts found that if faced with a cash shortfall, and a payday loan was unavailable, 81 per cent of borrowers said they would cut back on expenses. Many said they would delay paying the bills, rely on friends and family or sell personal possessions. Borrowing from friends and family was the third most popular option chosen.[157]

A study in 2016 in Arkansas looked at the experiences of former payday loan borrowers, seven years after the Supreme Court banned usurious payday lending rates.[158] The study surveyed 100 former payday loan borrowers on their experiences since the state began enforcing the constitutional interest rate cap. The state constitution effectively banned payday lending by prohibiting interest rates higher than 17 per cent per annum and also limited fees. However, a typical interest rate for a payday loan was 391 per cent per annum or more. In 2009, payday loan stores closed for business after the Supreme Court declared payday lending unconstitutional.

The study's findings included that the majority of borrowers said they were better off in the wake of the industry departure (nearly 90 per cent in total said they were better off (59 per cent) or the same (29 per cent) after the payday lenders left).[159] Borrowers acknowledged they were "industry targets and want[ed] strong consumer protections".[160] Borrowers used a number of safe, non-credit options to address financial shortfalls. The most popular alternative was turn to family or friends for money.[161]

There is no research that has been done in New Zealand on what might happen to borrowers denied a high-cost loan in the wake of tighter regulation forcing lenders to be more responsible about to whom they lend. There are other credit providers outside the scope of the reforms contained in the CCLA Bill, including pawnbrokers and mobile traders, to which borrowers could

157 Pew Charitable Trust *Payday Lending in America: Who borrows, Where They borrow, and Why* (July 2012).

158 Southern Bancorp Community Partners *Into the Light: A Survey of Arkansas Borrowers Seven Years after State Supreme Court Bans Usurious Payday Lending Rates* (Policy Points, Volume 43, April 2016).

159 At 6.

160 At 2.

161 At 7.

turn. Both of those particular forms of credit warrant investigation (and possibly tighter regulation).[162]

Work and Income offers a range of grants and interest free loans to those in need. There are also a range of not-for-profit organisations offering no or low interest rate loans in New Zealand, the largest being Ngā Tāngata Microfinance Trust and Good Shepherd.[163] However, one of the issues with expecting microfinance providers to fill the gap if high-cost lenders become more constrained in who they lend to is that microfinance providers take their responsible lending obligations seriously. A loan will not be offered unless the microfinance organisation is confident that the applicant can safely repay. This is at least in part because Kiwibank (which funds the provider Ngā Tāngata Microfinance Trust) and BNZ (which funds the provider Good Shepherd) expect a low default rate (that is, less than 10 per cent). This means these are not products of last resort for poor credit risk borrowers.[164]

The Government (through the Ministry of Social Development) has set up a working group to look at ways to improve access to safe credit for low income and vulnerable New Zealanders.[165] Stakeholders have been invited to discuss the issues that arise, at a series of workshops. No official report or strategy has been made publicly available to date of writing.

X CONCLUSION

There is evidence that the high-cost short-term lending product, commonly known as payday lending, is harming New Zealand consumers, in particular consumers in low income communities. The evidence also suggests that women may be among the highest users of the product. There is clearly a bigger issue to be discussed, which is how to address the fact that there are many people in our community who are not able to meet day-to-day expenses on their

162 Mobile traders have already been the subject of a Commerce Commission investigation. See Commerce Commission New Zealand *Mobile Trader 2014/2015 Project* (August 2015).

163 See further Stace and Finn, above n 16, at 34.

164 There is also evidence that some borrowers prefer the anonymity and ease of access of the high-cost loan over the microfinance product. The report by Banks, de Silva and Russell, above n 10, at 24 and 27, referred to research that found that that many low-income consumers prefer the anonymity of payday loans. Fast access to cash and the relatively low emotional or psychological cost to the borrower also are features that attract borrowers to high-cost lenders over the microfinance options.

165 See Ministry of Social Development "Building Financial Capability: Sector Update" (14 February 2018) <www.msd.govt.nz>.

available income. Tightening the rules for high-cost lenders will likely mean some of these people do not have the option of going to a high-cost lender. Any reforms to consumer credit law should be considered in conjunction with measures aimed at addressing the income needs of this group in our community, in particular women.

The reforms that have been proposed to consumer credit law aim to strengthen the Commerce Commission's powers to enforce the lender responsibility principles and to make some of the guidance in the Responsible Lending Code mandatory. The proposed total repayment limit is aimed at addressing the harm caused by debt increasing due to the addition of penalties and default interest after a borrower has defaulted. At the time of writing, there is no proposal to include an interest rate cap on high-cost loans. That may change at the Select Committee stage of the CCLA Bill.

Arguments that New Zealand should adopt a cap that effectively removes high-cost lenders from the market can be countered with arguments that the product is not one where the risks of harm are so great that they overwhelm the potential for the product to serve a useful purpose. However, there is a middle ground where a cap could be set at a rate that allows the high-cost lending market to continue, but both reduces costs of borrowing and requires lenders to be more responsible. Additional measures should also be adopted to assist in meeting the goal of requiring high-cost lenders to be responsible lenders, including a protected earnings cap and a general prohibition on irresponsible lending in connection with a consumer credit contract. Specifically, thought should be given to addressing the issue of why women are over represented as users of these products and whether there are specific measures that can be taken to address the reasons why women in particular seem to be turning to these products as a credit option.

XI POSTSCRIPT

Since the date of writing this article (May 2019), the Commerce Commission has announced that it has commenced proceedings against two high-cost lenders (Moola[166] and Pretty Penny[167]) for breaches of the lender responsibility

166 Commerce Commission "Commission alleges irresponsible lending by Moola" (8 July 2019) <www.comcom.govt.nz>.

167 Commerce Commission "Commission alleges irresponsible lending by Pretty Penny" (12 August 2019) <www.comcom.govt.nz>.

principles. This appears to signal a decision by the Commission to resource and prioritise enforcement activity in relation to high-cost lenders, which is to be welcomed. The Commission had received 76 complaints or enquiries about Pretty Penny since March 2017. The Commission's investigation in relation to Moola was initiated following a referral from a Christchurch budget advisory service and relief sought relates to 50 identified borrowers.

Also since the date of writing, on 3 September 2019, the Minister of Commerce and Consumer Affairs, Hon Kris Faafoi, announced that an interest rate cap of 0.8 per cent a day will be included in the Credit Contracts Legislation Amendment Bill currently before Parliament.[168] This is the same level of cap that operates in the United Kingdom. It will allow annual simple interest rates of 292 per cent and much higher annual rates if interest compounds (most high-cost lenders in New Zealand currently offer credit on a compounding basis). The decision to introduce a cap was in response to submissions to the Select Committee that the Bill did not go far enough to protect vulnerable borrowers. Details of the proposed cap were not released.

168 Radio New Zealand "Govt announces extra protection against loan sharks"(3 September 2019) <www.rnz.co.nz>.

COMMENTARY — HE PITO KŌRERO

SEX WORK IN NEW ZEALAND
A case for repeal of section 19 of the Prostitution Reform Act 2003

Kade Cory-Wright*

The Prostitution Reform Act 2003 provided sex workers in New Zealand with protection from exploitation. As enacted, s 19 of that Act limited these protections to New Zealand citizens and residents on the basis that New Zealand would otherwise become vulnerable to sex trafficking. In the 16 years since reform, s 19 has created a disparity between empowered citizen or resident sex workers, and vulnerable migrant sex workers. This commentary argues that s 19 discriminates against the latter group by excluding them from access to legal rights and protections. There is no evidence that this exclusion can be justified on the basis that it reduces the risk of sex trafficking. On the other hand, the Act puts migrant sex workers at real risk by failing to afford them the same protections as other workers. Consistent with the recommendations of the New Zealand Prostitutes Collective and the United Nations, this commentary advocates for decriminalising migrant sex work in New Zealand through repeal of s 19.

I INTRODUCTION

New Zealand enacted the Prostitution Reform Act (PRA) in 2003.[1] The day the legislation passed marked another historic first for our small nation: we became the first country in the world to decriminalise sex work.[2] Moreover, the PRA introduced health and safety requirements for operators of businesses involved with sex work, sex workers and clients, and provided protections against inducing persons to provide commercial sexual services. The PRA also included a provision for sex workers to refuse or withdraw consent to provide commercial sexual services. Studies in the years following the PRA's introduction have measured the effect of reform on the sex industry and its participants.[3] They show the range of positive outcomes reported by sex workers.

However, the protections provided by the PRA cannot be effectively accessed by all sex workers in New Zealand. Temporary visa holders such as international students, visitors and workers are unable to access many of the rights or protections of the PRA.[4] Section 19 of the PRA prevents a person being granted a visa if the person has provided, or intends to provide, commercial sexual services, meaning workers must conceal their sex work, and any harms that may be associated with it, for fear of jeopardising their visa status. If an immigration officer believes on reasonable grounds that a visa holder is engaged in commercial sexual services, the visa holder will be liable for deportation.[5]

Section 19 was introduced to combat the perceived risk of an increase in sex trafficking caused by the decriminalisation of sex work.[6] However, this has

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* LLB/BA. Legal Officer, Immigration Centre. All opinions in this article are my own and not necessarily those of my employer. I would like to thank Dame Catherine Healy and Mary Brennan for sharing their insights and the peer reviewers for their commentary.

1 Ruby Macandrew "Flashback: New Zealand Parliament votes in favour of prostitution reform" *Stuff* (New Zealand, 30 June 2018).

2 Gillian Abel, Lisa Fitzgerald, Catherine Healy with Aline Taylor (eds) *Taking the crime out of sex work — New Zealand sex workers' fight for decriminalisation* (Policy Press, Bristol, 2010) at 1, as cited in Parliamentary Library *Prostitution Law Reform in New Zealand* (New Zealand Parliament, Parliamentary Library Research Paper 2012/05, July 2012) at 1.

3 Outlined below at IV.

4 Prostitution Reform Act 2003, s 19.

5 Section 19(3).

6 "Call to legalise sex work by migrants" *Radio New Zealand* (New Zealand, 1 September 2018).

created a population of sex workers in New Zealand who are prevented from reporting work-related harms for fear of deportation. This article therefore rejects the notion that s 19 results in positive outcomes for migrant sex workers by preventing trafficking, and argues that, if anything, s 19 creates conditions that make those sex workers more vulnerable to trafficking. It considers and elaborates upon concerns that s 19 has negative impacts on migrant sex workers and argues that the section effectively prevents migrant sex workers from accessing the rights and protections provided by the PRA, leaving them vulnerable to mistreatment and exploitation.

II BUILDING THE LANDMARK LEGISLATION

Politicians, sex workers, religious groups, and the general public hold differing perspectives on women's rights and ethical issues surrounding sex work. These differences in views came to a head when the New Zealand Police announced in the late 1990's that the previous statute, the Massage Parlours Act 1978, allowed commercial sex work in some situations.[7] Calls for clearer legislative guidance were quickly divided between two opposing approaches: support for full decriminalisation and support for various methods of re-criminalisation. These approaches were probed and examined by Parliament for over two years before the PRA was passed.[8]

A The push for change

The New Zealand Prostitutes Collective (NZPC) was one of the key parties that pushed sex work into the public and political debate alongside groups such as the National Council of Women of New Zealand and the National Collective of Independent Women's Refuges.[9] The NZPC originally formed in 1987 as a small group of sex workers who campaigned for sex worker rights.[10] They drafted the original Prostitution Reform Bill.[11] The NZPC also represented

7 Fraser Crichton "Decriminalising sex work in New Zealand: its history and impact" (21 August 2015) Open Democracy <www.opendemocracy.net>.

8 The Prostitution Reform Act 2003 originated from a Private Members' Bill introduced by Tim Barnett on 21 September 2000: Prostitution Reform Bill 2000 (66–1).

9 Crichton, above n 7.

10 Dr Lynzi Armstrong "Almost legal: migrant sex work in New Zealand" (6 June 2018) Open Democracy <www.opendemocracy.net>.

11 Catherine Healy, Ahi Wi-Hongi and Chanel Hati "It's work, it's working: The integration of sex workers and sex work in Aotearoa/New Zealand" (2017) 31(2) Women's Studies Journal 50 at 50.

sex workers in discussions and debates about the proposed law as it progressed through Parliament.[12] There were a variety of issues that the NZPC advocated to solve with the Bill, but two central issues are summarised below.

The first issue was health outcomes. Sex workers in New Zealand at the time had no legal basis on which to insist on the use of condoms.[13] Some workers reported that employers or managers demanded free, unprotected sexual services.[14] Sex workers typically felt unable to report these issues to Police, as fears of detection and arrest often overrode concerns for their health and safety.[15] Only 48 per cent of sex workers pre-2003 felt able to disclose their work to their doctor; limiting access to health education and resources.[16]

The second issue was that the policing and operation of the sex work industry had become a method of discrimination. The fact of a person carrying condoms was often used as evidence to prosecute sex workers for soliciting.[17] Māori sex workers were more likely to be employed in high-risk, low-paid venues,[18] and Māori sex workers represented approximately 55 per cent of all soliciting convictions.[19] Together with Pasifika sex workers, from 1997 to 2000 they represented approximately three quarters of all convictions, despite making up less than half of the total estimated sex worker population.[20]

B Opposition to reform

Dame Catherine Healy, coordinator of the NZPC, believes that s 19 stemmed from a fear that international sex trafficking would explode in New Zealand.[21]

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12 Parliamentary Library, above n 2, at 3.

13 Gillian M Abel "A decade of decriminalisation: Sex work 'down under' but not underground" (2014) 14 Criminology and Criminal Justice 580 at 587.

14 Jan Jordan *The Sex Industry in New Zealand: A Literature Review* (Ministry of Justice, March 2005) at 68.

15 Gillian Abel, Lisa Fitzgerald and Cheryl Brunton *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers: Report to the Prostitution Law Review Committee* (Department of Public Health and General Practice, University of Otago, November 2007) at 18.

16 Jordan, above n 14, at 65.

17 New Zealand Prostitutes Collective "Submission to the Local Government and Environment Select Committee on the Manukau City Council (Regulation of Prostitution in Specified Places) Bill" at 5.

18 Jordan, above n 14, at 33.

19 At 34.

20 Healy, Wi-Hongi and Hati, above n 11, at 51.

21 Interview with Dame Catherine Healy, Coordinator of the New Zealand Prostitutes' Collective (the author, Wellington, 15 April 2019).

Groups opposing the Bill included New Zealand representatives of the Coalition Against Trafficking in Women; members of the ACT, New Zealand National and New Zealand First political parties; and some evangelical Christian groups.[22] There were predictions that reform would create a flood of new sex workers,[23] that brothels would open on every street corner,[24] that underage women would be encouraged into the industry to cope with the increase in demand,[25] and that there would be an influx of commercial sex workers into New Zealand, particularly victims of sex trafficking. These concerns were repeatedly raised, yet no evidence or other foundation was provided.

The school of thought underpinning these assertions appears to have been that sex work was naturally an immoral practice and that there is no place in modern society for sex work.[26] Opponents additionally tended to conflate trafficking and sex work, leading to the conclusion that criminalisation of sex work was the only way to effectively regulate trafficking, and that decriminalisation legitimises prostitution by "[getting] rid of pimps and [turning] them into managers".[27]

III THE PROSTITUTION REFORM ACT 2003

A Protections afforded by the Prostitution Reform Act 2003

In 2003, the Bill passed its third reading 60 to 59 with one abstention, and was considered a victory for sex workers, sex work advocates and the NZPC.[28] In addition to decriminalisation, the PRA's purposes include safeguarding sex workers' human rights, protecting against exploitation, and promoting welfare and occupational health and safety.[29]

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22 Crichton, above n 7.

23 Gillian M Abel, Lisa J Fitzgerald and Cheryl Brunton "The impact of decriminalisation on the number of sex workers in New Zealand" (2009) 38 Journal of Social Policy 515 at 528.

24 Mary Brennan and Eleanor Black *Some Kind of Fantasy* (David Bateman Publishing, Auckland, 2015) at 182.

25 At 182.

26 Bridie Sweetman "Reflection from the Field: The judicial system and sex work in New Zealand" (2017) 31(2) Women's Studies Journal 61 at 66.

27 Carisa R Showden "From Human Rights to Law and Order: The Changing Relationship between Trafficking and Prostitution in Aotearoa/New Zealand Policy Discourse" (2017) 31(1) Women's Studies Journal 5 at 8–9.

28 Abel, above n 13, at 583.

29 Prostitution Reform Act 2003, s 3.

New Zealand sex workers can now operate without fear of prosecution. They have access to protections under the Human Rights Act 1993, the Employment Relations Act 2000, and the Health and Safety at Work Act 2015.[30] A number of the provisions of the PRA also extend specific protections to commercial sex workers in New Zealand. These are:

i) **Contractual protections:** s 7 provides that no contract for the provision of commercial sexual services is illegal or void on public policy or similar grounds. However, s 17(1) provides that despite anything in a contract for the provision of commercial sexual services, a person may at any time refuse to provide, or continue to provide, a commercial sexual service to any other person.

ii) **Health and safety protections:** ss 8 and 9 require operators of businesses of prostitution, sex workers, and clients to adopt safer sex practices, including, for example, requiring all reasonable steps to be taken to ensure that no commercial sexual services are supplied unless a condom or other appropriate barrier is used,[31] and taking all other reasonable steps to minimise the risk of sex workers or clients acquiring or transmitting sexually transmissible infections.[32] In addition, the Health and Safety at Work Act is stipulated to apply to a sex worker.[33]

iii) **Further protection:** s 16 provides that no person may explicitly or impliedly threaten or promise that they will:

(a) improperly use any power or authority arising out of any occupational or vocational position or relationship;

(b) commit an imprisonable offence; or

(c) make an accusation or disclosure of any offence or other misconduct committed by a person or that a person is unlawfully in New Zealand

(d) to induce or compel another person to provide commercial

30 Human Rights Act 1993, s 62; Employment Relations Act 2000, s 108; and Prostitution Reform Act 2003, s 10.

31 Sections 8(1)(a) and 9(1).

32 Sections 8(1)(e) and 9(3).

33 Section 10.

> sexual services to any person.[34] Such an act done with intent to induce or compel sexual service is punishable with imprisonment of a maximum term of 14 years.[35]

B Positive effects of the Prostitution Reform Act

The PRA has reduced the stigma of sex work in some areas and it is important that these positive changes be extended to migrant sex workers. Sex workers supported by the PRA now feel that they have more rights and are more likely to report incidents to Police than before 2003.[36] They also feel more powerful in negotiations with clients and management,[37] and have greater ability to discuss services and safety with clients.[38]

An example of the positive effect of the PRA is illustrated by the fact that, in 2014 the Human Rights Review Tribunal found in favour of a sex worker who had been sexually harassed by her employer.[39] The Tribunal noted that the defendant believed that he had "license to observe neither personal nor professional boundaries" with sex workers, and that he "enjoy[ed] controlling women and at times humiliating them".[40] The Tribunal swiftly dismissed these as unjustifiable positions to hold regarding sex worker employees. The Tribunal found a breach of the sexual harassment provisions in the Human Rights Act and issued a collection of remedies including $25,000 in damages and an order requiring the defendant to undergo sexual harassment training.[41]

While deconstruction of the stigma of sex work is far from complete, conditions for most sex workers have improved. However, while most of the provisions of the PRA offered to protect and empower New Zealand sex workers, one late addition prevented an already vulnerable group from accessing these new-found rights: s 19.

C Section 19 of the Prostitution Reform Act

Section 19 of the PRA was added by a Supplementary Order Paper in the final

34 Sections 16(1) and 16(2).

35 Section 16(3).

36 Abel, Fitzgerald and Brunton, above n 15, at 13 and 15.

37 At 173.

38 Healy, Wi-Hongi and Hati, above n 11, at 56.

39 *DML v Montgomery* [2014] NZHRRT 6, (2014) 11 NZELR 673.

40 At [92].

41 At [137] and [148].

months before the Bill's third reading.[42] The proposal did not have the benefit of scrutiny by a Select Committee, nor did the Select Committee touch on the need, or otherwise, to extend the protections of the PRA to migrant workers.[43] Parliament introduced s 19 with the goal of "suppressing the trade of women and children for the purposes of prostitution".[44]

The amendment provided that no temporary visa could be granted where the applicant would be involved in the commercial sexual service industry.[45] Section 19 provides:

> **19 Application of Immigration Act 2009**
>
> (1) No visa may be granted under the Immigration Act 2009 to a person on the basis that the person—
>
> (a) has provided, or intends to provide, commercial sexual services; or
>
> (b) has acted, or intends to act, as an operator of a business of prostitution; or
>
> (c) has invested, or intends to invest, in a business of prostitution.
>
> (2) It is a condition of every temporary entry class visa granted under the Immigration Act 2009 that the holder of the visa may not, while in New Zealand,—
>
> (a) provide commercial sexual services; or
>
> (b) act as an operator of a New Zealand business of prostitution; or
>
> (c) invest in a New Zealand business of prostitution.
>
> (3) It is sufficient reason for the Minister of Immigration or an immigration officer to determine that a temporary entry class visa holder is liable for deportation under section 157 of the Immigration Act 2009 if the Minister or the officer believes,

42 Dr Lynzi Armstrong "Decriminalisation and the rights of migrant sex workers in Aotearoa/New Zealand: Making a case for change" (2017) 31(2) Women's Studies Journal 69 at 71.

43 Prostitution Reform Bill 2000 (66-2) (select committee report) at 17 and 52.

44 Supplementary Order Paper 2003 (69) Prostitution Reform Bill 2000 (66-2) (explanatory note) at 2.

45 Prostitution Reform Act 2003, s 19.

on reasonable grounds, that the holder is engaged in any of the things listed in subsection (2)(a) to (c) of this section.

(4) Any conditions of a resident visa are deemed not to have been met and the resident is liable for deportation under section 159 of the Immigration Act 2009 if the Minister of Immigration or an immigration officer determines that the holder of a resident visa acts as an operator of, or invests in, a New Zealand business of prostitution.

(5) This section applies to all visas and permits held and all requirements and conditions imposed under the Immigration Act 1987 or the Immigration Act 2009, whether granted or imposed before or after the commencement of this section.

Temporary visas include those on working holidays, visitor visas, student visas, or any work visa. No person can apply for a work visa in the sex industry, and people visiting from countries that do not need to apply for New Zealand visas, such as the United Kingdom, cannot engage in sex work.[46] Therefore, only citizens or people granted New Zealand residency can legally enter the industry.

IV THE CASE FOR REPEAL

A Section 19 leads to more harm than good

Section 4 of the PRA provides that "sex worker" means "a person who provides commercial sexual services". On the face of the definition, temporary visa holders are not excluded. However, s 19(2) then provides that the holder of any temporary entry class visa may not provide commercial sexual services without breaching their visa conditions. Therefore, a migrant sex worker can only rely on the protections provided in the PRA, by exposing themselves to a demonstrable risk of deportation as a result of s 19(3).

Section 19 therefore creates the perfect conditions for exploitation. Employers of sex workers, clients, managers and sex workers themselves are all led to believe that, unless a sex worker is a citizen or resident, they have no rights.[47] Growing evidence suggests that s 19 facilitates conditions that are

46 Immigration New Zealand *Operational Manual* (July 2019) at [E2.1].

47 See Global Alliance Against Traffic in Women "Sex Workers Organising for Change: Self-Representation, community mobilisation, and working conditions" (2018) at 73–96.

conducive to exploitation of migrant sex workers,[48] a point echoed by the United Nations Committee on the Elimination of Discrimination against Women.[49] New Zealand workplaces have reportedly told migrant sex workers they cannot decline clients,[50] and have restricted access to the migrant sex workers' passports.[51] The net result is that s 19 of the PRA silences migrant sex workers rather than protecting them, and in doing so dehumanises them, leading to a "discourse of disposability".[52]

B The Prostitution Reform Act did not lead to an increase in the number of sex workers

Opponents of the PRA and s 19 reform argue that the PRA is the primary reason sex trafficking exists in New Zealand.[53] They accuse the NZPC of misrepresenting the way sex work occurs in New Zealand and that, together with the PRA, they have created a fully-fledged sex work industry in New Zealand.[54]

By 2005, news outlets reported up to 40 per cent increases in sex worker numbers. They were however using data sets that were found to be incomparable.[55] Forty one per cent of reporting from June 2003 until November 2006 announced that sex worker numbers were increasing, but could only cite political anecdotes as evidence of these claims.[56]

The PRA established a Prostitution Law Review Committee (PLRC) and released a report in April 2005, which estimated that over 5,900 sex workers were operating in New Zealand, mainly in Auckland.[57] However, that research

48 Interview with Dr Lynzi Armstrong, Victoria University academic (James Borrowdale, Vice, 5 October 2018) transcript provided by Vice Zealandia.

49 Committee on the Elimination of Discrimination against Women *Concluding observations on the eighth periodic report of New Zealand* UN Doc CEDAW/C/NZL/CO/8 (25 July 2018) at 27 and 28.

50 Armstrong, above n 42, at 72.

51 At 72. See also Prostitution Law Review Committee *The Nature and Extent of the Sex Industry in New Zealand: An Estimation* (Ministry of Justice, April 2005) at 38.

52 Armstrong, above n 42, at 74.

53 Renee Gerlich "Proposal to decriminalise sex trafficking must be challenged" (22 March 2018) Scoop <www.scoop.co.nz>.

54 Janice Raymond "Gatekeeping decriminalisation of prostitution: The ubiquitous influence of the New Zealand Prostitutes' Collective" (2018) 3(2) Dignity: A journal on sexual exploitation and violence 1 at 3.

55 Abel, Fitzgerald and Brunton, above n 23, at 517.

56 At 517.

57 Prostitution Law Review Committee, above n 51, at 12.

suffered from poor and inconsistent reporting rates and was not able to clearly state the impact of the PRA on sex worker numbers.

In the 16 years since reform, most research has found that no such increases have occurred. For example, academic studies in 2007 and 2009 aimed at assessing New Zealand sex worker numbers concluded that decriminalisation has had little impact on sex worker numbers in New Zealand.[58] The legality of sex work has even been reported as one of the least important factors in informing workers' decisions to enter the industry.[59]

Estimating the actual impact of the PRA on sex trafficking is difficult due to a lack of data, particularly given migrant sex workers' hesitance to participate in research for fear of repercussions.[60] However, some tentative conclusions about sex trafficking in New Zealand can be drawn from the above data. If the body of research now indicates that the PRA has not impacted the number of sex workers or their reasons for entering the industry, there is little room to suggest that there are more incentives for sex trafficking now than there were in 2003.

C The risk of trafficking can be addressed in other ways

Section 19 of the PRA is not the only framework in New Zealand that addresses human trafficking. The Crimes Act 1961 contains a human trafficking provision that could be used to address any perceived or real increase in trafficking of sex workers.[61] In 2015, the Crimes Act was amended to provide broader protections against trafficking.[62] This has since resulted in New Zealand's first convictions for human trafficking in which the defendant faced 57 charges and was sentenced to nine years and 6 months' imprisonment for financial and labour exploitation of Fijian workers.[63]

Other anti-trafficking measures introduced include the Organised Crime and Anti-Corruption Legislation Bill which amended several Acts in order to

58 Abel, Fitzgerald and Brunton, above n 15, at 39; and Abel, Fitzgerald and Brunton, above n 23, at 517.

59 Abel, Fitzgerald and Brunton, above n 23, at 529.

60 Joel Ineson "Calls for legal migrant prostitution after research finds some exploited" *Stuff* (New Zealand, 10 October 2018).

61 Crimes Act 1961, s 98D.

62 Section 5 of the Crimes Amendment Act 2015 widened the offence of trafficking in persons to include internal trafficking and trafficking for the purposes of forced labour.

63 *R v Ali* [2016] NZHC 3077 (sentencing notes).

strengthen anti-corruption practices,[64] and an Inter-Agency Working Group tasked with preventing and prosecuting human trafficking and supporting victims.[65]

It is hard to predict the legislative landscape if s 19 was repealed, but it is important to understand that the feared "flood" of trafficked sex workers would still need to funnel through the immigration system. Even in the case of a simple repeal, New Zealand generally requires a high threshold be met before a visa is issued.

It is likely that a full review of the visa options for migrant sex workers would be conducted to ensure only specific and safe avenues are available. This could include tighter regulation on conditions for nationals from visa-waiver countries, who are not required to apply for visas. Anyone applying for a visa to enter New Zealand with the intention of becoming a sex worker would likely need a job offer from a licensed sex work employer, proof they have legally acquired experience as a sex worker and evidence that there are no suitable New Zealanders applying for the job.[66] If applied to the sex work industry, recent changes announced by Immigration New Zealand to be introduced by 2021 would also require the employer of any migrant sex worker to be formally accredited, and potentially be subject to industry specific regulations.[67] As a result, most migrants who wished to practice sex work would need to have their employment verified by Immigration New Zealand. New Zealand, therefore, has a robust immigration and justice system that could be reviewed before any repeal of s 19 to ensure that any rise in sex trafficking, imagined or real, could be managed appropriately.

V CONCLUSION

In 2003, the PRA was the first step in helping sex workers gain rights, protections and access to justice. Sixteen years later, research has shown that reform was a successful way to improve the health and safety of New Zealand's sex workers.

64 Organised Crime and Anti-corruption Legislation Bill 2014 (219-2).

65 Ministry of Foreign Affairs and Trade "People smuggling and human trafficking" <www.mfat.govt.nz>.

66 Immigration New Zealand *Operational Manual* (Ministry of Business, Innovation and Employment) updated 1 July 2019 at WK 3.10 and WK 3.5; and "Unit Group 4518 Other Personal Service Workers" (29 March 2016) Australia and New Zealand Standard Classification of Occupations <www.abs.gov.au>.

67 Immigration New Zealand "Temporary work visas changing for employers and workers" (press release, 17 September 2019).

However, migrant sex workers continue to endure a variety of harms as a result of s 19, the necessity of which is unsupported by evidence. If migrant workers are going to come to New Zealand to engage in sex work, alone or trafficked, as has been the case both before and after passing the PRA, then our primary obligation should be to ensure they have rights and are safe. Section 19 stands in the way of providing protections to migrant sex workers and, after 16 years, repeal is long overdue.

COMMENTARY — HE PITO KŌRERO

THE ABORTION LEGISLATION BILL
Welcome if overdue reforms

Danielle Houghton*

No woman can call herself free who does not own and control her body.

—Margaret Sanger

I INTRODUCTION

The existing law which criminalises abortion in New Zealand is 42 years old. When it was enacted in 1977 there were a total of four women Members of Parliament.[1] At the time, a man could legally have sex with his wife whether she wanted to or not.[2] He was also entitled to "administer moderate physical correction" to her.[3] Almost half a century later, those laws were long since updated. New Zealand's abortion legislation was not. Finally, however, in August 2019 an Abortion Legislation Bill passed its first reading in the House. The Bill proposes changes that would decriminalise abortion and treat it primarily as a health issue.

This commentary provides an overview of the existing law and the case for reform. It then outlines the options for legislative change put forward by

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1 (8 August 2019) 740 NZPD 13072 (Abortion Legislation Bill – First Reading).

2 Jan Logie, above n 1, at 13075.

3 At 13075.

the Law Commission before discussing the Bill that has been introduced. While aspects of the Bill need to be clarified, this commentary argues that the proposed reforms would represent a significant step forward, both in recognising the fundamental rights of those needing access to abortion services, and in removing significant disparities in access to abortion as a form of health care.

II THE EXISTING LAW

Abortion is dealt with in both the Crimes Act 1961 and the Contraception, Sterilisation, and Abortion Act 1977 (CSA Act). Sections 183–187 of the Crimes Act make it an offence to procure or supply the means to procure an abortion unless the criteria in s 187A are met. In the case of a gestation period of 20 weeks or less, these criteria are that the person performing the act believes that:

i) continuing the pregnancy would result in serious danger to the life, or to the physical or mental health, of the woman (not being danger normally attendant upon childbirth);

ii) there is a substantial risk that the child, if born, would be "so physically or mentally abnormal as to be seriously handicapped";

iii) the pregnancy is the result of incest or sexual intercourse with a dependent family member; or

iv) the woman is "severely subnormal".

The fact that the pregnancy may have resulted from rape, as well as the fact that the person[4] seeking an abortion may be near the beginning or end of their usual childbearing years, are matters that may be taken into account. However, they are expressly "not in themselves grounds" for an abortion.[5] After 20 weeks gestation the only exception is that the person doing the act believes the "miscarriage is necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health".[6]

4 Acknowledging that some people who become pregnant do not identify as women, this commentary adopts gender-neutral language unless quoting or referring to another source that specifically uses gendered terms.

5 Crimes Act 1961, s 187A(2).

6 Section 187A(3).

In a departure from the pre-1977 position, the person seeking the abortion cannot be prosecuted under the Crimes Act.[7] However, it is an offence under s 44 of the CSA Act to "unlawfully" obtain an abortion. A person who breaches this provision can be fined but not otherwise punished.

The CSA Act also sets out the regulatory framework for abortion services and establishes the Abortion Supervisory Committee to oversee this system.[8] In particular, under the CSA Act abortions can only be carried out if they have been approved by two, and in some cases three,[9] consulting physicians[10] and must occur in an institution licensed by the Committee.[11]

III THE CASE FOR REFORM

Much more can be (and has been) said on the importance of abortion law reform than can be captured in this commentary. However, a number of the key arguments for reform are discussed below.

A Human rights

First, legal restrictions on abortion impose serious limits on a number of fundamental rights. Most notably, the right to bodily integrity recognises that each person is entitled to self-governance over their own body without external influence or coercion. The right to bodily integrity is central to medical law,[12] and has been described by the Lady Hale in the England and Wales Court of Appeal as "the most important of civil rights",[13] and "the first and most important of the interests protected by the law of torts".[14] It is also closely linked with other fundamental concepts such as liberty, dignity, self-determination, the right to be free from cruel and degrading treatment, and the right to privacy. The right to privacy in particular embodies the idea that "an

7 Section 183(2).

8 Contraception, Sterilisation and Abortion Act 1977 (CSA Act), s 10.

9 Section 33(3) of the CSA Act provides that if the first two certifying consultants disagree they shall refer the case to a third certified consultant. Under s 32(2) a woman may also need to see her GP as well as two certifying consultants.

10 Section 29.

11 Section 18.

12 Jonathan Herring and Jesse Wall "The Nature and Significance of the Right to Bodily Integrity" (2017) 76(3) CLJ 566 at 567.

13 *R (West) v The Parole Board* [2002] EWCA Civ 1641, [2003] 1 WLR 705 at [49].

14 *Parkinson v St James NHS Trust* [2001] EWCA 530, [2002] QB 226.

individual belongs to themselves and not to others or to society as a whole".[15] This has been held to be of central importance to reproductive rights in other jurisdictions. For example, in addition to underpinning the decision of the United States Supreme Court in *Roe v Wade*,[16] privacy was relied on by the Supreme Court of Canada to decriminalise abortion in *R v Morgentaler*.[17] The Canadian Court held that laws that criminalised abortion placed a woman's decision of a private and intimate nature in the hands of others, and therefore deprived women of the right to liberty.[18]

Restrictions on access to abortion also raise issues in terms of the right to be free from discrimination on the basis of sex. As the Minister of Justice noted during the first reading of the Bill, those seeking an abortion have to go through a bureaucratic set of processes that no other person seeking medical treatment has to go through.[19] The United Nations Committee on the Elimination of Discrimination Against Women has also stated that responsibilities to bear and raise children affect other rights, including the right to access education and employment, and place an inequitable burden on women and their physical and mental health.[20] The decision whether or not to have children must not therefore be limited by government.[21]

Finally, the right to life is likely to be central to debate on law reform. The right to life is often relied on by opponents of abortion, and the reforms will need to engage with some of the concerns underpinning those arguments. However, asserting a *legal* right to life for a foetus is misguided. No such right exists. By contrast, the right to life in art 6 of the International Covenant on Civil and Political Rights has been interpreted by the United Nations Human Rights Committee as supporting the provision of safe access to contraception

15 Law Commission *Alternative Approaches to Abortion Law: Ministerial Briefing Paper* (NZLC MB4, 2018) at [3.13].

16 *Roe v Wade* 410 US 113 (1973).

17 *R v Morgentaler* [1988] 1 SCR 30.

18 At 166–167.

19 Andrew Little, above n 1, at 13072.

20 United Nations Committee on the Elimination of Discrimination Against Women *General Recommendation No. 21: Equality in Marriage and Family Relations* UN Doc A/49/38 (1994) at [21]–[22].

21 At [21]–[22].

and abortion to protect the life and health of the pregnant person.[22] The flexible interpretation of the criteria for abortion in New Zealand has prevented abortion related deaths in recent years. However, it is worth noting that the World Health Organisation estimates approximately 47,000 people die globally each year from unsafe abortions and a further five million suffer disability.[23] Viewed in this context, the right to life must weigh in favour of legislation that supports timely and safe access to abortion services.

B The stigmatising effect of criminal sanctions

Criminalising abortion creates significant stigma. The traditional purposes of the criminal law include to punish, to deter and to publicly denounce conduct that society considers blameworthy. Criminalisation thus adds stigma to a process that will already be very difficult for many people. While the prospect of facing prosecution is very low, stigma may also affect medical professionals carrying out a procedure which, if not properly authorised, carries a maximum penalty of 14 years imprisonment.[24]

C Timely availability of abortions

Abortion is a highly time sensitive process. Delay can result in additional distress, the need for surgical — as opposed to medical — intervention,[25] and an increased risk of health complications.[26] Yet, those seeking an abortion in New Zealand generally make up to four visits to a health professional before attending an abortion provider.[27] At each stage, there is potential for delay, paperwork and costs.[28] A New Zealand study completed in 2010 found there was an average wait of 25 days between the first appointment with a referring

22 United Nations Human Rights Committee *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)* UN Doc CCPR/21/Rev.1/Add.10 (29 March 2000) at [10].

23 Law Commission, above n 15, at [2.7]; citing World Health Organization *Unsafe Abortion: global and regional estimates of the incidence of unsafe abortion and associated mortality in 2008* (6th ed, Geneva, 2011) at 27–28.

24 For comparison, this is the same maximum penalty that is prescribed for wounding with intent to cause grievous bodily harm (s 188 Crimes Act) or engaging in sexual conduct with a child under 12 (s 132 Crimes Act).

25 For context, medical abortions are carried out by a person taking medication that causes a miscarriage. A surgical abortion requires a surgical procedure, which is usually carried out by vacuum aspiration.

26 Law Commission, above n 15, at [2.10]–[2.13].

27 Jackie Edmond and Erica Burke "It's Time for Abortion Law Reform in New Zealand" [2017] 1 NZWLJ 200 at 202.

28 At 202.

doctor and the procedure.[29] Despite, these delays, statistics in New Zealand indicate that persons who need an abortion are attempting to access services as quickly as possible. In 2017, 89.4 per cent of abortions occurred in the first trimester.[30] Only 0.5 per cent occurred after 20 weeks, with the Abortion Supervisory Committee advising the Law Commission that virtually all of those related to wanted pregnancies and occurred due to a serious foetal abnormality or risk to the pregnant person.[31]

However, when it comes to the percentage of abortions that are performed within the first 10 weeks, the statistics for New Zealand are significantly lower than in other comparable countries. For example, in New Zealand 59 per cent of abortions in 2017 occurred before the tenth week of pregnancy, compared with 77 per cent in England and Wales.[32] Medical abortions in New Zealand also account for a relatively small minority (approximately 20 per cent in 2017).[33] In England and Wales 65.2 per cent of all abortions performed in 2017 were medical abortions.[34] The Law Commission has attributed this both to delays (medical abortions must be performed early) as well as the requirement under the CSA Act that all abortions occur on licensed premises.[35] Because medical abortions involve two doses of medication taken 24 to 48 hours apart, this requires two separate visits to the provider. Further, women who live any distance from the provider are at risk of the abortion commencing while travelling home.

D Equitable access to health care

These barriers to access also have a disproportionately severe impact on those living in rural areas, and on Māori communities in particular. The Ministry of Justice Regulatory Impact Statement on Abortion Law Reform to Cabinet noted the results of a 2008 geographic study that found one in six New Zealand women had difficulty accessing abortion services because of a lack of providers

29 Martha Silva, Rob McNeill and Toni Ashton "Ladies in Waiting: the Timeliness of First Trimester Services in New Zealand" (2010) 7 Reprod Health 1 at 1.

30 Law Commission, above n 15, at [2.11].

31 At [2.16].

32 At [2.12].

33 Abortion Supervisory Committee *Report of the Supervisory Committee 2018* (2018) at 22. Medical abortions may be undertaken until approximately the ninth week of pregnancy.

34 Law Commission, above n 15, at [2.83].

35 At [2.84] and [2.85].

in their region.[36] The average distance people from these communities had to travel was 221 km one way.[37] The study also recorded that three of the five regions in which abortion services were not available had a higher than average Māori population.[38]

In addition, the Statement noted that:[39]

> … Māori adults are more likely to have an unmet need for a General Practitioner or after-hours health services due to barriers to access such as cost, lack of transport, lack of childcare and being unable to get to a medical centre.

A lack of information and access to culturally appropriate reproductive services was also identified as a significant problem for young Māori women in particular.[40]

E Disconnect between legal test and law in practice

Finally, it is worth noting that there is a significant disparity between the strictness of the legal test and its application in practice. Approximately 97 per cent of the 13,000 abortions performed each year in New Zealand are approved on the basis that continuing with the pregnancy would result in "serious danger to the woman's mental health".[41] This flexible application of the legal test has been the saving grace for access to abortion services in New Zealand. However, as noted by the Minister of Justice during the first reading of the Bill, it requires thousands of women to maintain a fiction as to their mental health.[42] The disconnect between the legal test and its application also creates problems from a rule of law perspective. Laws ought to be applied according to their text and purpose. A law that cannot be so applied without causing serious harm and injustice is a bad law. No one should be "dependent on the

36 Ministry of Justice *Regulatory Impact Statement — Abortion Law Reform* (August 2019) at 8.

37 At 11.

38 At 11.

39 At 11.

40 Beverley Lawton and others "E Hine: Access to Contraception for Indigenous Māori Teenage Mothers" (2016) 8(1) J Prim Health Care 52 at 53.

41 Abortion Supervisory Committee *Report of the Supervisory Committee 2016* (2016) at 23.

42 Andrew Little, above n 1, at 13072.

benevolent interpretation of a rule which nullifies their autonomy".[43]

IV OPTIONS FOR LEGISLATIVE CHANGE

The 2018 Law Commission Briefing Paper on *Alternative Approaches to Abortion Law* set out three options for reform. All included proposals to repeal the criminal provisions and remove the need for two certifying consultants.

A Model A

Model A would not require a statutory test to be satisfied before an abortion could be performed. The Law Commission noted that safeguards against unqualified medical treatment already exist under both the Crimes Act and the health practitioners disciplinary regime. Interestingly, the wide range of health practitioners and professional medical bodies that the Law Commission consulted were almost unanimous in supporting Model A.[44]

B Model B

Under Model B, a statutory test would apply right throughout the pregnancy. The health practitioner intending to perform the abortion would need to reasonably believe the abortion is appropriate in the circumstances having regard to the woman's physical and mental health and wellbeing. The Law Commission noted that this was the most restrictive of the three options.[45] It considered that the test would provide some continuity with the current criteria, while being broader and directed towards health considerations rather than legal considerations.[46] The ultimate decision about whether an abortion is appropriate would reside with the medical professional rather than the woman herself.

C Model C

Model C is a hybrid. There would be no statutory test for pregnancies up to 22 weeks gestation. For pregnancies after that, the CSA Act would require the health practitioner intending to perform the abortion to reasonably believe

43 *Concluding Observations of the Committee on the Elimination of Discrimination against Women: New Zealand* UN Doc CEDAW/C/NZL/CO/7 (6 August 2012) at [34].

44 Law Commission, above n 15, at [4.7].

45 At [4.26].

46 At [4.45].

the abortion is appropriate in the circumstances having regard to the woman's physical and mental health and wellbeing. The Law Commission noted that this model reflected a view that the medical procedure and the reasons an abortion is sought can be more complex as a pregnancy progresses. While there is no clear medical consensus on the issue, the Law Commission recorded that a limit of 22 weeks gestation was thought by medical professionals to be a point before which a foetus was unlikely to be viable.[47] Finally, the Law Commission noted that laws in a number of comparable jurisdictions have a gestational limit after which a statutory test becomes applicable.[48]

V THE ABORTION LEGISLATION BILL

The Abortion Legislation Bill passed its first reading on 8 August 2019 with 94 votes in favour and 23 against. The Bill decriminalises abortion and adopts a modified version of Model C. There will be no statutory test for abortion during the first 20 weeks of pregnancy.[49] After 20 weeks a health practitioner may only provide abortion services if they "reasonably believ[e] [it] is appropriate in the circumstances".[50] Practitioners are directed to consider the woman's physical health, mental health and wellbeing.[51]

Neither the Ministerial Report to Cabinet nor the Explanatory Note provide a detailed explanation of the rationale for the statutory test or for why 20 weeks has been chosen. However, it appears that the gestational limit relates to potential foetal viability with a "buffer" for future medical advances.[52] In particular the Minister for Justice, while making clear that he rejected any "extravagant" notions of "killing", said during the first reading of the Bill that:[53]

> … foetal viability is a relevant consideration in setting up a legal framework for abortions and that a gestational threshold at which different considerations apply is appropriate as a matter of public policy.

47 At [4.68]–[4.71].

48 Law Commission, above n 15, at [4.66]. For example, the gestational limits in Tasmania and Victoria are 16 and 24 weeks respectively: see the Reproductive Health (Access to Terminations) Act 2013 (Tas) and the Abortion Law Reform Act 2008 (Vic).

49 Abortion Legislation Bill 2019 (164-1), cl 7.

50 Clause 7.

51 Clause 7.

52 Ministry of Justice *Abortion Legislation Bill — Consistency with the New Zealand Bill of Rights Act* (5 August 2019) at [21].

53 Andrew Little, above n 1, at 13072.

The Attorney-General's opinion on New Zealand Bill of Rights Act 1990 compliance doubted whether foetal viability should be a determinative factor, emphasising the concern that access to abortion may then need to be progressively limited as technology develops.[54] However, even taking the view that the 20 week limit was to some extent arbitrary, the Attorney-General nevertheless considered that the proposed restrictions could be justified based on a broad societal interest in the preservation of human life.[55] In reaching this conclusion the Attorney-General emphasised that there would be legally unimpeded access to abortion for the first 20 weeks and that restrictions after 20 weeks would not amount to a prohibition.[56]

There are potentially good arguments for this position. Issues of competing interests (if not competing rights) do come to the fore as a foetus approaches viability. It may therefore be that Parliament considers more detailed review by a health practitioner after 20 weeks to be a justified limit on bodily integrity, freedom from discrimination and the related rights discussed above. However, given that only 0.5 per cent of abortions occur after 20 weeks and that these are almost invariably due to serious issues with the pregnancy, there is a strong argument that a statutory test is unnecessary. The fact that the health sector was almost uniformly in favour of treating abortion as a health issue without any specific regulation is also telling. It will therefore be disappointing to some that Parliament seems on track to retain legal restrictions when there is little to suggest these are needed.

Further, if Parliament does intend to regulate abortion post 20 weeks on public policy grounds the legislation needs to create a clear standard. The test as currently drafted is vague in its wording and intent. Ostensibly, the language of the test suggests that the primary aim is to ensure the pregnant person's welfare for abortions later in gestation which may have greater risks of complications. However, existing health care law plainly requires all medical practitioners to consider whether a procedure is appropriate having regard to its complexity and the health of the patient or consumer.[57] The suggestion that the test is aimed at protecting the person seeking an abortion is thus relatively cynical.

54 Ministry of Justice, above n 52, at [22].

55 At [23].

56 At [24]–[26].

57 See Law Commission, above n 15, at 64–75.

If the real intent of the section is to capture public policy issues around abortions that occur later in a pregnancy, then a more transparent framework should be developed. The current vagueness of the section leaves health practitioners with a potentially wide discretion to take public policy into account without providing any guidance on how Parliament intends that to occur. This places a potentially unfair burden on health practitioners. More importantly it creates a risk of inconsistent application and uncertainty for those needing to access services. As the Supreme Court of Canada noted in *R v Morgentaler*, "forcing a woman … to carry a foetus to term unless she meets certain criteria entirely unrelated to her own priorities and aspirations, is a profound interference".[58] Especially in circumstances where the gestational limit is to some extent arbitrary, further work is needed to ensure that the test creates as few restrictions as are necessary to protect the interest at which it is aimed. To do that the test must be clearly and carefully defined.

All of that said, the Bill is a vast improvement on the current law. In this regard the Bill also proposes a number of reforms designed to address issues around delay and barriers to access. These include:

i) Allowing women to self-refer to abortion providers or to be referred by any health practitioner. Under the current law women are required to have a referral from their GP or another doctor.

ii) Removing the requirement for all abortion services to be provided at an institution licensed by the Committee. Significantly, this would allow early medical abortions to occur at home.

iii) Amending the law around conscientious objection. The Bill would require health practitioners who do not wish to provide abortion services to advise the person seeking the abortion of the objection at the earliest opportunity, and to tell them how to access a list of providers which will be maintained by the Director General of Health. Under the current law conscientious objectors are required to inform the person seeking the abortion of their objection and advise them that services may be obtained elsewhere, but are not required to

58 *R v Morgentaler*, above n 17, at 56–57.

provide any further assistance or information.

iv) Creating a regulatory power to set up safe areas around particular abortion providers on a case by case basis if necessary. These would prohibit actions such as intimidating, obstructing or recording persons seeking an abortion or health practitioners in a manner intended to cause distress.[59]

VI CONCLUSION

There are aspects of the Abortion Legislation Bill that require clarification. However, what the Bill does in terms of decriminalisation and removing all legal restrictions on abortion for the first 20 weeks of pregnancy would be a major step forward for reproductive rights. The other reforms aimed at increasing access to services would also be a significant improvement in starting to address the inequity of access to health care for many people in rural and minority communities. These reforms are welcome if long overdue.

59 Interestingly, the Law Commission did not see the need for a regulatory power to create safe areas based on the current experience of abortion providers. However, as argued in Crown Law's advice to the Attorney General, there is good reason to believe that anti-abortion demonstrations may become more prevalent and intrusive following the introduction of the Act. Certainly this has been the experience in some other jurisdictions. Further, abortion providers under the current regulatory regime typically operate from major hospitals that can be accessed with relative anonymity and which have some level of security. The new legislation would hope to see providers operating from a wider variety of clinics and primary health care locations, which are unlikely to have the physical and security boundaries of a major hospital. As such the ability to create safe zones has the potential to be a significant tool in ensuring that those seeking abortions can access health services with adequate privacy and dignity: Crown Law Office *Advice to Attorney General on the Abortion Legislation Bill* (1 August 2019) at [38.1].

COMMENTARY — HE PITO KŌRERO

"I'M HERE, I'M ALIVE, I'M TELLING YOU"†

The deferment of sex self-identification in the Births, Deaths, Marriages, and Relationships Registration Act 1995

Taylor Mitchell*

I INTRODUCTION

On 25 February 2019, the Minister of Internal Affairs, Hon Tracey Martin announced the deferment of the Births, Deaths, Marriages and Relationships Registration Bill (Bill).[1] The Bill, as deferred, would allow for a process of self-identification when applying for changes to the sex recorded on birth certificates.[2] As is currently the case when changing the recorded sex on a passport or driver licence, a person wishing to change their recorded sex would make a statutory declaration that they live, and intend to continue to live, as their chosen sex. This proposed a significant shift from the current system for birth certificate changes, which requires an application for a Family Court declaration, with evidence as to psychological and medical "proof" of transition by the applicant.

The Minister's decision to defer the Bill came as a blow to New Zealand's

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† Jess Mio in Susan Strongman "Sex self-identification debate a 'cesspool of harmful stereotypes'" Radio New Zealand (online ed, New Zealand, 8 February 2019).

1 Tracey Martin (Minister of Internal Affairs) "Births, Deaths, Marriages, and Relationships Registration Bill to be deferred" (press release, 25 February 2019).

2 Note, references to the Bill in this commentary include the recommendations of the Government and Administration Select Committee as reported by the Committee prior to a second reading of the Bill. Formal inclusion of the amendments into the Bill requires support from the House of Representatives in a second reading of the Bill, meaning they were never formally incorporated into the Bill.

gender diverse[3] community, who had petitioned and submitted for the change of New Zealand's provisions for sex identification on birth certificates over the past several years. The Minister's argument for deferment was that the proposed changes had received inadequate public consultation and therefore posed significant legal challenges and uncertainty. This article argues that those justifications for deferment were largely overstated, and ignore the harm that deferring the Bill, or opening it up to further public consultation, may cause to gender diverse New Zealanders.

II SEX SELF-IDENTIFICATION AND THE BIRTHS, DEATHS, MARRIAGES, AND RELATIONSHIPS REGISTRATION ACT

In a practical sense, self-identification is the means by which most gender diverse people experience and express their sex and gender. When a person transitions, or otherwise expresses their gender identity, in the majority of legal and social circumstances they are not required to provide any "proof" to society beyond the way they self-identify and a declaration of how they wish society to view them.

In legal terms, a self-identification process provides that a person can declare their sex for the purposes of the law.[4] This is opposed to a medical or biological process that ties the legal recognition of sex to physical or medical characteristics of a person. Self-identification has been adopted in several countries, including Ireland, Malta, Portugal, Norway, Denmark and Argentina,[5] and is being

3 "Gender diverse" is used throughout this commentary as an umbrella term including a range of identities affected by the Bill. For more discussion on the specific identities this term encompasses, see Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (January 2008) [HRC] at 13.

4 This article uses the terms "sex" and "gender" interchangeably, recognising that the definitions are contested and have been both distinguished and amalgamated by the law and trans people in different contexts. I predominantly refer to the term "sex" because this is the term recorded on New Zealand birth certificates, although I acknowledge that gender is more commonly used for these concepts outside of the law. While a full discussion of sex and gender's interrelation is beyond the scope of this article, a useful summary of legal and theoretical positions on this debate is Laura Grenfell "Making sex: law's narratives of sex, gender and identity" (2003) 23 LS 66 at 91–100. A further, trans, perspective outlining a rejection of ongoing distinction between the terms is Dylan Vade "Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People" (2005) 11 MIJGL 253 at 278–284.

5 Nick Duffy "Portugal passes law to let trans people self-identify their legal gender" (13 April 2018) *Pink News* <www.pinknews.co.uk>.

proposed under current reforms to the United Kingdom's Gender Recognition Act 2004 (UKGRA).[6] It is also the process already in place for New Zealand passports and driver licences. [7]

A Why the current system needs to change

1 Importance of birth certificates

Birth certificates are a common form of identification used in New Zealand. People have been required to produce birth certificates to letting agencies, prospective employers, and in scholarship applications to verify their identity.[8] Birth certificates are also a means to correct the sex classification of a person (where it was previously incorrect) for banks, hospitals and universities.[9] When individuals are required to produce a document where their recorded sex is not consistent with their current presentation or other identity documents, they can face not only administrative hurdles, but discrimination and loss of dignity.[10]

Birth certificates also provide rights that passports and driver licences cannot. Current Department of Corrections regulations mandate prisoners must be held in prisons of the sex specified on the birth certificate of that person.[11] While transgender inmates without updated birth certificates can apply to be transferred to a prison that reflects their gender, they will be initially incarcerated according to the sex on their birth certificate, and decisions on such applications are discretionary.[12]

Additionally, the recorded sex of a parent on their child's birth certificate flows from the sex recorded on the parent's birth certificate.[13] As such, while a gender diverse parent without a correct certificate may for all intents and

6 United Kingdom Equalities Office "Reform of the Gender Recognition Act 2004 — Consultation" (19 October 2018) <www.gov.uk>.

7 New Zealand Transport Agency "Statutory declaration for change of gender" <www.nzta.govt.nz>; Te Mata Uruwhenua "Information about Changing Sex / Gender Identity" (19 May 2019) <www.passports.govt.nz>.

8 HRC, above n 3, at [3.30] and [3.45]; Susan Strongman "Person with wrong sex on birth certificate 'feels like a fraud'" *Radio New Zealand* (online ed, New Zealand, 8 February 2019).

9 HRC, above n 3, at [3.30].

10 At [6.2].

11 Department of Corrections "Prison Operations Manual" at [M.03.05.01.2].

12 At [M.03.05].

13 HRC, above n 3, at [4.12].

purposes be the mother or father of a child, their child's birth certificate would record the opposite. For non-binary parents, there is no mechanism for gender-neutral roles like 'parent' to be recorded on their child's certificate. The impact of this is considerable: having the correct gender on the birth certification of a parent's child is an important affirmation of the role they have in their children's life.

Gender diverse people also gain intangible validation and benefit from having the recorded sex on their birth certificate match the gender they identify with. As noted by the Human Rights Commission (HRC) in its comprehensive Transgender Report:[14]

> Official documents have a particular significance for trans people. Firstly, such documents can affirm a trans person's gender identity. Secondly, changes to official documents usually form an important part of the process of transitioning. Thirdly, incorrect documents provide a constant reminder that a trans person's sex and gender identity are seen as incongruent, undermining their identity. Fourthly, trans people can experience discrimination when such documents are not congruent with how they physically present. It follows that these documents provide trans people with protection from discrimination and establish a basis for asserting respect for dignity and equality.

2 *Failings of the current system*

In New Zealand, only a small number of people who transition are in the position where they must, or are able to, amend their birth certificate.[15] This is because the current system in New Zealand makes it difficult for gender diverse people to access changes to their birth certificates.

The Births, Deaths, Marriages, and Relationships Registration Act 1995 (the Act) requires a declaration by the Family Court for recorded sex to be changed. Applicants must show a current and ongoing intention to maintain the gender identity of the sex sought, and provide expert medical evidence supporting this intention and affirming they have undergone medical

14 At [6.2].

15 Between 1995 and 2013, 219 people in New Zealand made applications under the Births, Deaths, Marriages, and Relationships Registration Act 1995 to amend their sex on their birth certificate: Emily Blincoe "Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification" (2015) 46 VUWLR 57 at 71.

treatment to maintain this identity.[16] While the first element relies on self-identification, the second element relies on the opinion of a medical expert and proof of sufficient medical treatment. Section 28(3)(c)(i)(B) clarifies the standard of medical treatment required:

> … as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person of the nominated sex …

The specific treatments and surgeries required to meet this standard remained unclear until Judge Fitzgerald's 2008 decision in *"Michael" v Registrar-General of Births, Deaths and Marriages*.[17] In Michael, the applicant was a trans man who had received psychological counselling, continuous hormonal treatment over four years and a bilateral mastectomy, which Judge Fitzgerald found sufficient to meet the s 28(3)(c)(i)(B) test. While Judge Fitzgerald rejected a consistent surgical "threshold", his Honour's decision indicated some degree of surgery was necessary.

While Michael provided some clarity as to what may be sufficient for trans men, uncertainty remains for other genders. Judicial treatment has been inconsistent; the HRC is aware of cases where trans women have been required to show evidence of full sex-reassignment surgery.[18] Four subsequent cases were noted by Emily Blincoe in her article "Sex Markers on Birth Certificates" where surgery was not required for trans women.[19] However, two of the applicants could not afford surgery, one was on the public waiting list, and one was about to undergo surgical treatment.[20] As Blincoe notes, "these cases suggest that desire for surgery, if not actual plans for it, is considered to be a relevant factor".[21]

However, even for individuals seeking surgical treatment, access and cost is often prohibitive. Currently, the waiting list for publicly funded gender

16 Births, Deaths, Marriages, and Relationships Registration Act 1995, s 28.

17 "*Michael" v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC) [*Michael*].

18 Human Rights Commission *Human Rights in New Zealand: Ngā Tangata O Aotearoa* (2010) at 319.

19 Blincoe, above n 15, at 70.

20 At 70. The cases referred to are *Basinger v Registrar-General* [2013] NZFC 3562; *MMT v R-GBDM* [2012] NZFC 3533; *DAC v Registrar General Births Deaths & Marriages* [2013] NZFC 1998 and *H v Registrar-General of Births, Deaths and Marriages* FC Waitakere FAM-2009-090-002000, 21 September 2010.

21 Blincoe, above n 15, at 71.

affirming surgery in New Zealand spans over 50 years.[22] The cost of travelling overseas to receive these surgeries earlier can be prohibitively expensive.[23] Some people may be restricted from hormonal or surgical treatment due to medical risk factors.[24]

Moreover, the focus on at least partial surgical intervention to evidence "legitimate" transition reflects a binary understanding of sex and gender identities that not all gender diverse people subscribe to. For many trans women, access to hormones and privately funded permanent hair removal allows them to live as the sex they identify with.[25] Some non-binary people may wish to only seek a single surgical option, but not have hormonal treatment, or vice versa. The binary understanding of gender diverse identities also reflects a Western understanding of gender. Many of New Zealand's gender diverse community are fa'afafine or whakawahine, identities culturally specific to the Pacific that recognise a third, non-binary gender identity. Many who identify this way do not anticipate ever having medical treatment because they are able to express their gender identity without such procedures.[26] These examples show how the varied experiences and intentions of gender diverse people in relation to medical treatment clash with a system predicated on medical intervention to confirm identity.

B The Bill's proposed changes

1 Provisions to change the medical process

The amendments to the Bill, recommended by the Government and Administration Select Committee, sought to change the medical process. Under cl 22B, an eligible person aged 16 or over would make a statutory declaration in order to change their registered sex on their birth certificate. This change could be made only once, except where the Registrar-General was satisfied special reasons to justify an exception existed. The Committee recommended that any reference to requisite medical treatment, evidence, physical confirmation or sex assignment be removed from the Bill. The statutory declaration would

22 Thomas Coughlan "Gender affirmation surgery cap lifted" *Newsroom* (online ed, New Zealand, 23 October 2018).

23 HRC, above n 3, at [5.45].

24 At [5.23].

25 At [5.33].

26 At [8.23].

instead require the applicant to verify that they:[27]

i) identify as a person of the nominated sex;

ii) intend to continue to identify as a person of the nominated sex;

iii) wish for the nominated sex to appear on their birth certificate; and

iv) understand the consequences of the application.

2 Provisions for non-binary people

Under the existing Act, an individual can only nominate a change to the opposite sex (either female or male). The Bill proposes to allow the options of both intersex and X (unspecified) sex identities for certificates in order to recognise non-binary sex and gender identities.[28] It also contains further provisions for the affirmation of non-binary parents in birth certificates for new children. The insertion of cl 12(2A) would allow a parent to choose their status as either mother, father or parent, recognising the identities of non-binary parents whose gender is not reflected in the titles of mother or father.

3 Provisions for children and young people

The Bill has more restrictive provisions for children and young people. While 16 and 17-year-olds can apply by statutory declaration to change their sex, they will also have to provide written consent from their guardian,[29] and the recommendation of a health professional (being a medical practitioner, psychologist, nurse, counsellor or social worker) confirming that the young person understands the consequences of the application and that the change is in their best interests.[30]

For children under the age of 16, the application could only be made by statutory declaration of the guardian of the child directly, verifying:[31]

i) the child identifies as a person of the nominated sex;

27 Births, Deaths, Marriages, and Relationships Registration Bill 2017 (296-2), cl 22B(2)(a).

28 Births, Deaths, Marriages, and Relationships Registration Bill 2017 (296-2) (select committee report), cl 22B(2)(a).

29 Clause 22B(3)(a).

30 Clauses 22B(3)(b) and 22A.

31 Clause 22C(2)(b).

ii) the guardian believes the child will continue to identify this way;

iii) the guardian wishes for the nominated sex to appear on the child's birth certificate;

iv) the guardian believes the change is in the child's best interests; and

v) the guardian understands the child must confirm the change on turning 18.

This application must also include the recommendation of a health professional per the provisions applying to 16 and 17-year-olds. Within six months of the child's eighteenth birthday, the child must then provide a statutory declaration to the Registrar-General, either affirming or seeking to withdraw the changed certificate.[32]

4 Appeal mechanisms

The Bill retains the involvement of the Family Court in relation to appeals against a Registrar-General's decision.[33] The Committee identified two circumstances where appeals would be most likely sought.[34] First, when an individual has applied to change their nominated sex a second or subsequent time and has been refused by the Registrar-General. Second, disputes between guardians enabled under the Care of Children Act 2004, which would include the refusal of consent for an eligible child or young person's application.

III REASONS FOR DEFERMENT: AN ANALYSIS

A Inadequate public consultation

At its initial introduction in August 2017, the Bill did not propose any changes to the provisions relating to recorded sex on birth certificates.[35] The Bill was the result of a review of the Act that began in January 2015, largely related to

32 Clause 22E.

33 Clause 23.

34 Births, Deaths, Marriages, and Relationships Registration Bill 2017 (296-2) (select committee report) at 3.

35 Births, Deaths, Marriages, and Relationships Registration Bill 2017 (296-1) (Bills Digest No 2533) at 2–3.

modernising public access to Department of Internal Affairs (DIA) records.[36] In addition to this process, the Law Commission was also undertaking a review of New Zealand's burial and cremation law, and elements of this review were incorporated into the Bill.[37] The specific provisions for self-identification were added to the Bill as a result of the Select Committee consultation and review process.

Central to the Minister's justifications for deferment was a concern that amendments recommended at the Select Committee stage had received inadequate public consultation, which the Minister described as a "fundamental legal issue".[38] This suggests the Government believed the Committee was unable to recommend a new substantive change following the Committee's consultation process, as the broader public were not alerted to the potential for this change when the Bill went to Committee and submissions were first heard. This article argues the Committee was, however, empowered to recommend substantive amendments to the Bill following the consultation that was undertaken by the Committee.

The Minister also cited the four-month submission period that occurred in England and Wales (for the recent Bill seeking amendments to the UKGRA) as an example of adequate consultation for a self-identification law change. This suggests the Minister believed this kind of legislative change triggered a requirement for more extensive public consultation. This article further argues the opposite is true; local legal commentary regarding minority rights and the international examples indicate a more limited consultation process is to be preferred.

1 Select Committee process

There is some merit to the Minister's concerns as to reduced consultation. The self-identification sections received less consultation compared to the clauses of the Bill relating to access provisions and burial and cremation law that had two rounds of initial public consultation.[39] This preceded the first draft of the

36 At 1.

37 At 1; New Zealand Law Commission *Death, Burial and Cremation: a new law for contemporary New Zealand* (NZLC R134, 2015).

38 Martin, above n 1.

39 Department of Internal Affairs *Access to the registers: births, deaths, marriages, civil unions and name changes – have your say!* (23 March 2016) at i.

Bill as introduced, with a further opportunity for public consultation at the Select Committee stage. Some groups opposing the self-identification reform argue that, by recommending the self-identification amendments in its report to Parliament prior to a second reading, the Select Committee has shut out the public from consultation on those elements of the Bill.[40]

This argument is somewhat negated by the nature of submissions the Committee received across the two-and-a-half-month submission period.[41] The prompt for submissions did not reference changes to the sex identification provisions, however, 532 submissions were received on that topic, including 64 direct submissions and 468 submissions organised by the Green Party. The direct submissions included 24 from organisations such as Family Planning, OUTline and Family First, and a detailed submission from the HRC.[42] The vast majority of submissions addressed changes to the process for sex identification on birth certificates; of the 64 direct submissions, only 13 related to other matters. Of those relating to sex identification, 29 direct submissions supported self-identification, along with the further 468 Green Party-collated submissions. Twenty-two direct submissions argued against any changes being made to sex identification, and supported an ongoing distinction between sex and gender in New Zealand law.

For reasons discussed below, a significant portion of the public saw the Bill as an opportunity to address sex identification provisions for birth certificates, despite those amendments not being included in the Bill as introduced. Women's rights organisations, LGBTIQA+ organisations and many gender diverse people themselves provided their opinions on the Bill's impact on trans rights and self-identification. The breadth and number of these submissions may have been more extensive had the Bill included provisions for self-identification at its first reading, but it is difficult to know the significance that further submissions would have had on what the Committee heard and the recommendations it made.

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40 Speak Up for Women "Campaign calls for a halt to sex self-ID" (press release, 14 January 2019).

41 The period for public submissions at the Select Committee stage spanned from 13 December 2017 – 2 March 2018: select committee report, above n 34, at 9.

42 The statistics on submissions have been compiled from the submissions published at: New Zealand Parliament "Births, Deaths, Marriages, and Relationships Registration Bill – Submissions and Advice" <www.parliament.nz>; see also Department of Internal Affairs *Report to the Governance and Administration Committee on the Births, Deaths, Marriages, and Relationships Registration Bill* (11 June 2018) at 2.

2 *Obligations under the Standing Orders*

The Minister's assertion that the inadequacy of consultation gives rise to a "fundamental legal issue" raises further questions about the legal legitimacy of the consultative process. The benefits of consultation are well known. As the Legislation Advisory Committee guidelines set out:[43]

> Public consultation can help to better identify the nature of the policy problem and more effective solutions for that problem. It also contributes to the legitimacy of the legislation in the eyes of the public and those affected. An effective consultation programme can increase public acceptance of the legislation, increase compliance with it, and lower the administration costs of implementing and enforcing it.

Consultation is seen to uphold the democratic principles of Parliament, by allowing the public to submit on issues that affect them. For the most part, consultation is seen as a process to improve legislation after receiving submissions and advice from stakeholders, officials and experts.[44]

The expression of Parliament's consultative requirements is largely found in the Standing Orders of the House of Representatives. The Standing Orders are the primary rules of the House and provide for the conduct of its proceedings and exercise of its powers. They aren't intended to diminish or restrict the rights, privileges, immunities or powers of the House, but they do regulate and moderate the exercise of legislative power, and as such are seen as akin to constitutional rules.[45]

a Scope of Select Committee recommendations

The Orders do not provide prescriptive rules for the nature or extent of public consultation required in the select committee process. Furthermore, while Order 292 restricts the scope of select committee recommendations to the subject matter, principles and objects of a bill, where the bill is a Statute Amendment Bill, committees may recommend substantive amendments beyond those

43 Legislation Design and Advisory Committee *Legislation Guidelines: 2018 Edition* (last updated March 2018) at [2.5].

44 Mai Chen "New Zealand Parliament's love affair with fast lawmaking and urgency" *NZ Lawyer* (Auckland, 6 May 2011) at 11.

45 Mary Harris and David Wilson (eds) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 12; Standing Orders Committee *Review of Standing Orders* (21 July 2014) [2011–2014] AJHR I.18A at 4.

originally introduced.[46] The Bill in question here was a Statute Amendment Bill, seeking republication of the Act in its entirety with amendments made throughout. As such, Order 292 suggests the Committee was acting within the scope of its powers and abilities to recommend amendments in addition to those originally introduced.

b Instruction by first reading speech

Order 287 addresses the role of the Member moving the first reading of a Bill. It suggests the moving speech by the Member responsible for a Bill can be used as an indication and instruction for the select committee as to their consideration of a Bill.[47]

Following the introduction of the Bill, and before its first reading, the Committee reported to the House on the Petition of Allyson Hamblett, which called for the Minister of Internal Affairs to allow for self-identification for the purposes of official documentation.[48] This petition had been presented to Parliament in October 2016, and over the following year the Committee had consulted with the DIA and the HRC as to the implications of this petition, and the necessary legislative change that would need to arise from it. On the basis of that consultation, the Committee recommended to the Government that s 28 of the Act be reviewed with the intention of introducing a process of self-identification.[49]

In the Minister's speech during the first reading, she specifically noted the Committee's report on the petition, and signalled that the Government would present a response to this report "in due course".[50] Further, in relation to the Hamblett petition, she said she was "pleased the Bill and the upcoming select committee process will provide a timely opportunity to fully test the law, in line with the committee's recommendation". Arguably, this indicated an intention and instruction by the Government that the Select Committee process would provide an opportunity for these further points to be discussed, and if appropriate, amalgamated into the Bill.

While the Bill as introduced did not reflect the changes to sex identification

46 Standing Orders of the House of Representatives 2017, SO 292(3).

47 Standing Order 287(1)(b).

48 Government Administration Committee *Petition 2014/86 of Allyson Hamblett* (11 August 2017).

49 At 2.

50 (30 November 2017) 725 NZPD 638.

provisions to come, the Minister's comments on the petition at the first reading of the Bill were built on in the following months. In February 2018, the Government released its response to the Committee's report on the petition.[51] In this response, the Government noted: [52]

> … the upcoming select committee process for the Bill provides a timely opportunity to review current legislative and policy settings in relation to the transgender and gender diverse community's call for a change to the law.

The Committee was effectively directed to include the proposed changes for self-identification raised by the petition in the Bill.

The Standing Orders set out a responsibility to ensure amendments remain within the scope of the legislative process. Yet the nature of the Bill as a Statute Amendment Bill, and the direction by the Government to the Committee in relation to the petition, create some uncertainty as to whether the Committee's recommended amendments complied with this responsibility. In light of this uncertainty, it is difficult to argue this consultation process gave rise to "fundamental legal issues" as suggested by the Minister.

B Consultative considerations in the case of minority rights

Academic discussion regarding the effect of public consultation in the context of legal reform that affects minority rights further negates the Minister's argument. Legal academic Claire Charters examined the impact of public debate and feedback on Māori property rights in relation to the Foreshore and Seabed Act.[53] She argued the non-Māori majority "manipulated its conception of justice in its own favour",[54] and its own interest to access the beach as a right above the Māori minority's freedom from racial discrimination, expectation for due process and right to property.[55] This exemplifies the often precarious place minority rights can have in society. Much of Charters' argument is relevant to the debate surrounding self-identification. She described the non-Māori majority as possibly acting on fear of loss of their own rights, in

51 *Government Response to Report of Government Administration Committee on Petition 2014/86 of Allyson Hamblett* (15 February 2018).

52 At [15].

53 Claire Charters "Responding to Waldron's Defence of Legislatures: Why New Zealand's Parliament Does Not Protect Rights in Hard Cases" (2006) NZ L Rev 621.

54 At 653.

55 At 653.

ignorance of the broader issues discussed, and with prejudice against Māori.[56] Similarly, groups against self-identification often frame the issue as fear of loss of their sex-restricted spaces.[57] Their arguments are often based in ignorance of the experience of gender diverse people. The debate also tends to express underlying prejudices against LGBTIQA+ people.[58]

Charters has questioned "to what extent an institution representative of all New Zealand citizens should be deciding on what is at heart an issue about Māori property rights".[59] This proposition, that minority rights or protections should lie within the hands of minorities themselves, has also been discussed in the context of Māori seats in Parliament. When considering the future of the seats, the Constitutional Advisory Panel established by the government in 2011, argued it is inappropriate for minority rights to be removed simply because the minority is outnumbered.[60] The Panel rejected the large number of non-Māori submissions that the seats should be removed, and similarly did not support the proposition of a general referendum to decide the fate of the seats. Instead it argued for "a more nuanced decision-making tool that takes account of minority views" and that the decision "should remain in the hands of Māori".[61]

Assessing the standard and extent of consultation required to adequately address the issues, to incorporate the concerns and experience of relevant communities, and to have regard to the rights and vulnerabilities of minorities is a difficult balance. Clearly, consultation can provide a useful and important democratic foundation for legislative amendment. However, it also provides opportunity for the majority opinion to override minority rights and concerns. The standard of adequate public consultation needs to have regard to this tension, and where possible reflect the position taken by Charters and the Constitutional Advisory Panel that in some cases self-determination of a minority group is more appropriate than broad consultation.

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56 At 653–654.

57 Speak Up for Women, above n 40.

58 BBC World Service "Chief executive, Stonewall – Ruth Hunt" (podcast, 14 May 2019) HARDtalk <www.bbc.co.uk>.

59 Charters, above n 53, at 662.

60 Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (November 2013) at 41.

61 At 42.

C *Impact of extensive public consultation on LGBTIQA+ communities*

The broader outcomes of public consultation on the LGBTIQA+ community must also be considered. Legal developments over the last decade regarding LGBTIQA+ rights that have received widespread public attention and input have also seen severe negative backlash against LGBTIQA+ communities. In particular, this has been seen in public referendums held for marriage equality campaigns in Australia and Ireland, and in the recent consultation for changes to the UKGRA.

1 UKGRA amendment proposal

The changes proposed to the UKGRA similarly sought to introduce self-identification provisions for birth certificates in the United Kingdom. The three and a half month consultation period in 2018 prompted a vast public debate, over 53,000 submissions, and significant backlash towards the United Kingdom transgender community.[62] This backlash was widely validated in mainstream media under the guise of allowing a debate from "both sides", with several publications positioning the reform as a threat to women's rights.[63] According to Ruth Hunt, CEO of leading UK LGBTIQA+ charity Stonewall, this debate exhibited "an extraordinary degree of toxicity […] in a way that [Stonewall and its supporters] haven't seen in 30 years".[64] Near the end of the consultation process, as media interest reached fever pitch, the United Kingdom Government was forced to publish a response urging against misinformation spread by anti-reform groups on how the reform would affect gender protections.[65]

2 Marriage equality referendums

Studies into the wellbeing of LGBTIQA+ people following marriage equality referendums also exhibit the negative impacts that overtly public legislative change has had on LGBTIQA+ lives and mental wellbeing. A survey of 1,657

62 United Kingdom Equalities Office, above n 6.

63 Samantha Allen "Inside the Poisonous British Fight Over Transgender Acceptance" (19 October 2018) *The Daily Beast* <www.thedailybeast.com>.

64 BBC, above n 58.

65 United Kingdom Equalities Office "Facts about the Gender Recognition Act consultation" (14 October 2018) <www.gov.uk>.

Irish LGBTIQA+ people following the marriage equality referendum found 71 per cent feeling often or always negative about the process, and two-thirds feeling anxious and distressed by the anti-equality events.[66] Negative messaging was encountered in all areas of their lives and social relationships, and resulted in some respondents facing damaged or broken relationships with family, friends, workplaces and their community, as well as feeling degraded, invalidated, attacked, traumatised and suicidal.[67] Young people and people in rural areas experienced the most significant negative outcomes.[68]

A similar study of 9,500 LGBTIQA+ Australians and their loved ones found more than 90 per cent of the respondents saw the Australian postal vote for marriage equality as having some degree of negative impact.[69] Several incidents of physical violence were reported against LGBTIQA+ people around Australia during the campaign, including rocks thrown through the windows of houses decorated with rainbow flags, homophobic graffiti painted on homes and public spaces, and physical attacks on individuals.[70] These impacts were ongoing, LGBTIQA+ experiences of verbal and physical assault more than doubled in the three months following the postal vote results.[71] The director of the National LGBTI Health Alliance, Rebecca Reynolds, said the debate on:[72]

> … the equality of our bodies, relationships and feelings has been exhausting and frequently painful … These aspects of who we are should never have been the subject of public discussion, rather they should be celebrated in everyday life.

3 New Zealand context

New Zealand is not immune from this kind of backlash. Conservative groups openly campaigned against the New Zealand Marriage Equality

66 Sharon Dane, Liz Short and Gráinne Healy *Swimming with Sharks: The negative social and psychological impacts of Ireland's marriage equality referendum 'NO' campaign* (University of Queensland School of Psychology, 7 October 2016) at 5.

67 At 7.

68 At 5–6.

69 Paul Karp "Marriage equality survey marred by doubling in reported assaults" *The Guardian* (online ed, United Kingdom, 4 December 2017).

70 Melissa Davey "Rocks thrown through windows amid spate of homophobic attacks" *The Guardian* (online ed, United Kingdom, 26 September 2017).

71 Karp, above n 69.

72 Karp, above n 69.

Bill, publishing brochures against the Bill and holding public vigils outside Parliament.[73] Recently, public figures such as Israel Folau have been unabashed in condemning LGBTIQA+ communities, including transgender children, in public forums.[74] Gender diverse people in New Zealand face discrimination at work, in public and in gendered places like bathrooms, risking violence and harassment.[75] Media coverage of the proposed reforms to be included in the Bill has already recognised a growing toxicity between those opposing and defending it.[76] Groups established to oppose the progress of the Bill have pivoted to other campaigns focused on limiting the rights of gender diverse people, including transgender athletes.[77] These factors all suggest the violence and harassment of international examples could easily occur in New Zealand. While Parliament needs to ensure proper process and adequate inclusion of public opinion and concern, the questions of what constitutes an adequate consultation process, and to what extent the lives and wellbeing of vulnerable communities should be protected within that process, remain.

D Legal uncertainty (the Crown Law criticisms)

Alongside the concerns raised as to adequate public consultation, the Minister's press release also attached and relied upon a legal opinion by the Crown Law Office, in the form of a letter from the Solicitor-General to the Deputy Chief Legal Advisor of the DIA, outlining what it identified as ongoing legal uncertainties and issues raised by the amendments.[78]

1 Corrections

Crown Law identified only one direct legal consequence flowing from sex

73 Isaac Davidson "Shock poll over gay marriage bill" *New Zealand Herald* (online ed, Auckland, 26 March 2013).

74 Nick Duffy "Israel Folau: The devil is to blame for transgender children" (16 June 2019) *Pink News* <www.pinknews.co.uk>.

75 HRC, above n 3, at [4.49], [4.52] and [4.89].

76 Susan Strongman "Sex self-identification debate a 'cesspool of harmful stereotypes'" (8 February 2019) *Radio New Zealand* <www.rnz.co.nz>.

77 Speak Up for Women "Feminists launch campaign to defend women's sport" (press release, 29 July 2019).

78 Letter from Una Jagose QC (Solicitor-General) to Tim Whiteley (Deputy Chief Legal Advisor, Department of Internal Affairs) regarding the Births, Deaths, Marriages, and Relationships Registration Bill 2017 (296-2): Self-identification of sex (20 February 2019).

identification on a person's birth certificate.[79] This related to the Corrections Regulations that require Corrections to place prisoners in gendered prisons that accord with the sex recorded on their birth certificate.[80] Crown Law suggested that Corrections may wish to consider, at a minimum, whether these Regulations would need to be modified should the process change to one of self-identification.[81]

The DIA had addressed this issue in a report prepared for the Committee, analysing the current policy for gender diverse prisoners and how it may be affected.[82] Currently, 24 prisoners[83] are caught by this policy, which sets out a detailed process for placement based on risk assessments and includes requirements for solitary bunking of gender diverse prisoners.[84] DIA also assessed the experience of other jurisdictions in relation to prisoner placement following a move to self-identification laws, particularly looking to a cross-jurisdiction report by the European Commission:[85]

> Countries that have put in place legal gender recognition measures based on self determination overwhelmingly found that the fears and hesitations surrounding this area of law- and policy-making are unfounded and usually exaggerated. Concerns about security (including an oft-cited theoretical question about a bank robber that would change their identity documents to escape criminal conviction; concerns about prison inmates' security; or about airport security) did not resist rational examination. Discussions highlighted that these concerns are exclusively rhetorical, and pragmatic solutions were always found through discussion. As one participant put it, "In the end, no one attempts to game the system."

The DIA report concluded local Corrections processes and international evidence negated security concerns raised in other jurisdictions.[86] Further advice to the Committee indicated that DIA and Corrections had consulted

79 At [7].

80 Corrections Regulations 2005, rr 65(1)(3).

81 Jagose, above n 78, at [31].

82 Department of Internal Affairs, above n 42, at [205]–[220].

83 At [210].

84 Department of Corrections *Prison Operations Manual — Management of transgender prisoners* (2018) at section 1.08.10.

85 European Commission *Legislation and policies on gender identity and sex characteristics* (27 October 2016) at 4 (emphasis in the original).

86 Department of Internal Affairs, above n 42, at [219].

on this issue further.[87] Amendments were suggested to allow exceptions to be made to privacy elements of the Bill, whereby the Registrar-General could share prior sex information about prisoners if requested by Corrections.[88] In addition, Corrections advised that should the Bill pass, parallel amendments to Corrections Regulations would be discussed and supported by Corrections.[89] While the Crown Law opinion raised a valid conflict between current Corrections policy and the changes proposed under the Bill, this consultative history suggests that Corrections processes and Regulations could have, and were prepared to, adapt should the Bill be passed.

2 Conflict of sections

The primary discussion in the Crown Law opinion related to the impact that the sex recorded on a person's birth certificate would have on the law's understanding and treatment of their sex. In particular, it highlighted the conflict between cl 80 and cl 22I of the proposed Bill.[90] These sections were carried over from ss 71 and 33 in the current Act respectively. They introduce a conflict between the use of birth certificates as evidence of sex, and sex as determined by the general law of New Zealand. Specifically, cl 80 provides:

> **80 Certificates as evidence**
>
> A certificate issued under this Act is admissible as evidence in any legal proceedings, and the information contained in it is presumed to be true in the absence of evidence to the contrary.

Crown Law noted on the face of this clause, its effect is that a birth certificate would be used as prima facie evidence for the purposes of determining a person's sex under the law, and the associated rights and obligations this would impose. However, cl 22I provides:

> **22I New information not to affect general law**
>
> Despite sections 22B to 22G and section 23, the sex of every person must continue to be determined by reference to the general law of New Zealand.

87 Department of Internal Affairs *Supplementary advice to Government Administration Committee (No 4)* (3 August 2018) at 1.

88 At 1.

89 At 2.

90 Jagose, above n 78, at [11].

Crown Law undertook a review of the general law of New Zealand as to the determination of sex. This does not rely solely on the information contained within a person's birth certificate or other identity documents. Following discussion of the case law on this point, Crown Law concluded:[91]

> Accordingly, in our view, it is likely that a court asked in 2019 to determine sex by reference to the general law of New Zealand for the purposes of a person's access to reserved entitlements, facilities, services, roles or opportunities, or their rights and obligations under the law, would apply a multi-factor assessment. The factors identified in Corbett (including psychological factors — how the individual perceives themselves) would likely still be relevant. However the court would also likely take into account social factors — how society perceives the individual. These factors may no doubt be informed by the sex recorded on the person's birth certificate and other identity documents (as evidence that the person perceives themselves to be of particular sex or gender, and that at least some of the institutions of government recognise them in that sex or gender).

Clause 22I would maintain the application of this general law in New Zealand. That is, the law may continue to separate a person's registered sex (and the sex recorded on identity documents) from a person's sex for the purposes of accessing reserved entitlements, facilities, services, roles, opportunities and obligations under the law. Crown Law identified that it was unclear whether the intent of the Government was to continue this distinction.[92]

Crown Law's concern that the Bill is unclear as to whether it wishes to conflate a person's registered sex, and a person's sex for the purposes of accessing various entitlements and rights in society is valid. However, it is difficult to imagine a simple solution. The discussion of cl 22I relates to the nature and use of birth certificates in New Zealand law. Unlike many countries, New Zealand does not have any official identity documents.[93] Birth certificates, alongside other identity documents (eg passports or driver licences) act as evidence of a person's identity but do not reflect a centralised, government confirmation of identity. As such, no single document acts as the final say on the legally recognised sex of a person for the sake of the general law of New Zealand. To

91 At [20].

92 At [26].

93 HRC, above n 3, at [6.4].

fully address Crown Law's concern about cl 22I, this approach would need to change, and birth certificates (or another document) would need to become the primary, official identity document as to sex under the law. The other solution proposed by Crown Law, to declare how the courts should determine a person's sex under the general law of New Zealand, would entrench a court-reliant process, rather than move away from it. Further, specified provisions for how a person's sex may be determined risk being prescriptive and exclusionary of the differing identities and complexities within the gender diverse community.[94]

Legal certainty is important should gender diverse people be challenged on their sex and a court be required to determine their sex in accordance with the general law of New Zealand. While the concerns raised by Crown Law on this conflict are legitimate, it is perhaps too much to ask of the Bill to solidify this area of the law, when the same is not asked of the status quo. For this to be a justification for the deferment of the Bill ignores the immediate benefits the Bill would provide for gender diverse people as detailed above, and the practical ways in which sex is currently assessed in sex-specific spaces without the existence of primary, official documents as to sex.

3 Impact on sex-specific spaces

The core impact of the conflict identified by Crown Law relates to the way society continues to extend entitlements, facilities, services, roles and opportunities exclusively to persons of a particular sex or gender. While Crown Law notes it would be a substantial undertaking to identify all settings where a person's sex is relevant to such entitlements, it specifies several examples.[95] These include single-sex schools, women's refuges, counselling and health services, religious orders and sporting competitions. It also identified differences in law, including adoption laws predicated on sex and criminal offences (such as male assaults female). These considerations are commonly raised by those in opposition to self-identification laws, often in concern for women's safety.[96]

The reality is that, in many of these circumstances, documentation (be it passports, driver licences or birth certificates) will not be the only proof a gender diverse person would need to access sex-specific spaces. Organisations such as the New Zealand Women's Refuge have robust processes around deciding

94 Jagose, above n 78, at [28].

95 At [9].

96 Speak Up for Women, above n 40.

who gets into safe houses, and have allowed transgender women into refuge spaces for years without issue.[97] In the case of single-sex schools, several have openly included transitioning students or worked with families to allow them to stay in single-sex schools, even if their preferred sex is outside of the usual student body.[98] The Education Act 1989 allows for small numbers of students outside of the predominant sex of single-sex schools to attend, meaning schools do not face legal issues by including gender diverse students.[99] Guidance from the Ministry of Education discussed how state and state-integrated schools are required to provide a safe physical and emotional environment for all students, highlighting that including and supporting transgender students falls under these responsibilities.[100]

Furthermore, protections for gender diverse people to access spaces that accord with their identified gender exist in human rights provisions. The Human Rights Act 1993 includes sex amongst its list of prohibited grounds for discrimination.[101] The government's position is that gender identity is included in this ground, which has been the position since a 2006 Crown Law report responding to Georgina Beyer's Human Rights (Gender Identity) Amendment Bill concluded there was "currently no reason to suppose that 'sex discrimination' would be construed narrowly to deprive transgender people of protection."[102] While it is the intention of the current Government to amend the HRA for more explicit protection, this position has not been revoked,[103] nor is there evidence that this protection relies on the recorded sex of a person on their birth certificate. As such, gender diverse people are protected to seek the access of entitlements and spaces based on their lived sex, as restricting them from doing so is discrimination on the basis of sex. This has been the

97 Strongman, above n 76.

98 Tom Kitchin "Transgender student gets backing to stay at all-boys Christ's College as a female" *Stuff* (online ed, New Zealand, 27 June 2019) <www.stuff.co.nz>.

99 Education Act 1989, s 146A.

100 Ministry of Education "Including gay, lesbian, bisexual and transgender students" (28 August 2019) <www.education.govt.nz>.

101 Human Rights Act 1993, s 21.

102 Crown Law Office *Opinion on the Human Rights (Gender Identity) Bill to the Attorney-General* (2 August 2006) at [30].

103 Sarah Murphy "NZ told to improve human rights of LGBTQI people" (22 January 2019) *Radio New Zealand* <www.rnz.co.nz>.

approach of the HRC since the 2006 report.[104]

IV REFLECTION

This article argues that the reasons given for deferring the Bill are not as clear cut as has been suggested by the Minister or parties opposed to change. Public consultation requirements are central to the role of select committees in Parliament, and reflect important principles of democracy for those affected by legislative change to have their voices heard. However, the Committee received 64 direct submissions and 468 Green Party collated submissions, the majority of which were in reference to the self-identification changes proposed. This suggests the public were able to recognise this Bill was an opportunity for sex identification reform, and submitted in reflection of this. Moreover, legal commentary regarding minority rights and the international examples indicate a more limited consultation process is to be preferred in consideration of issues involving minority rights.

The Crown Law opinion reflected that departmental consultation had taken place, as did advice provided to the Committee by the DIA and Corrections. Crown Law's opinion raised legitimate and central criticisms and questions for the Bill, which would benefit from being addressed further. However, at times the opinion carries unreasonable expectations for the ability of the Bill to codify and clarify complex and debated societal concepts of sex and gender, and failed to fully consider the practical outcomes of these legal concepts: both if the Bill were to proceed and in the case of its deferment.

On 1 August 2019, the Minister provided an update. Promisingly, she announced the waiving of DIA fees to deposit a Family Court Declaration as to sex; for issuing an updated birth certificate; and for courier of the birth certificate within New Zealand.[105] In addition, the Minister announced a working group has been established, consisting of seven representatives of the transgender and intersex community as well as medical and legal experts with experience in transgender issues. The Working Group has been tasked with providing advice on how to further reduce barriers to changing registered sex via the current Family Court process, scheduled to report back in early 2020.

While this is making further progress than the six months of silence that

105 Tracey Martin (Minister of Internal Affairs) "Government reduces barriers to changing birth registration" (press release, 1 August 2019).

preceded it, the August announcement provides little genuine change. The waived fees amount to $95 per person, and do not include the costs associated with obtaining a Family Court Declaration as to sex — Court fees, legal representation, doctor or psychologist appointments, and transition-related procedures including surgery and hormonal treatment required as evidential support. As well as considerable cost, these matters can take years of time and effort for gender diverse people, as well as subject them to significant and ongoing mental stress. While the working group aims to lessen the burden of the current system, their scope is strictly limited to what support can be provided without changes being made to the system itself.[106] In fact, new information released with the announcement states that "it is too early to say if there will be changes to the legislation", promising updates "when possible" in reliance on "further work on the legal issues".[107] Considering that the Working Group will not report back on how to provide support under the current system until early 2020, this statement suggests it may take years for an updated Bill to be progressed, if it is progressed at all.

Meanwhile, the current provisions are expensive, distressing, and at times dehumanising for gender diverse individuals. They are forced to defend and justify a fundamental element of their identity to the State with deeply personal medical information, rather than being trusted with defining their own gender identity. While mechanisms to support gender diverse people through this process are welcomed, they are unable to reflect and provide for non-binary identities, including culturally specific gender diverse identities like fa'afafine, as the Bill would have if passed with the amendments proposed by the Committee. For these reasons, the need for legislative change to the Act remains present and pressing, and should remain the priority of the Government if concerned for the rights of the gender diverse community.

When the opportunity for legislative action on self-identification provisions re-emerges, some points are important to consider. Guidance needs to be taken from the experiences of other jurisdictions on the effects that extensive public debate can have on vulnerable minorities like gender diverse individuals in New Zealand. The Government needs to support the gender diverse community through what may be damaging public debate on their

106 Department of Internal Affairs "Working Group for reducing barriers to changing registered sex" (1 August 2019) <www.dia.govt.nz>.

lives and identities. It also needs to consider whether there are some areas of the law, particularly in the case of minority rights, which warrant a more careful balance between public consultation and the people at the centre of such debates. While public consultation on legislative change is important, it should not come at the expense of the wellbeing and safety of the community the amendment seeks to support.

COMMENTARY — HE PITO KŌRERO

TESTOSTERONE MAKETH THE MAN OR WOMAN
Slowing down Caster Semenya

Michelle Byczkow[*] and Kirsty Thompson[**]

I INTRODUCTION

In August 2009, South African runner Caster Semenya won gold in the women's 800m International Association of Athletics Federations (IAAF) World Athletic Championships. Following her win, Semenya's eligibility to compete as a woman was challenged.[1] She was subjected to numerous tests to determine her eligibility to compete in women's athletics, including gynaecological, genetic and endocrine "gender verification" testing.[2] Additionally, she was subjected to the media describing her "muscular build", "deep voice", and "man-like style of running" in news reports.[3] Semenya's

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The views expressed are those of the authors and not of their employer.

1 The authors would like to flag a key issue to the readers from the outset: There is a clear distinction between the terms "female" and "woman". The words have different meanings. "Female" is a scientific term associated with the sex of any species, and even this is not a binary category. A "woman" on the other hand brings in notions of gender, which stems from a social role and/or self-identification. Throughout this article, the authors have been conscious to use inclusive language, however much of the use of the aforementioned terms reflect language used in various sources used, or the DSD Regulations themselves.

2 Amanda Lock Swarr, Sally Gross and Liesl Theron "South African Intersex Activism: Caster Semenya's Impact and Import" (2009) 35 Feminist Studies 657 at 657.

3 David Smith "Caster Semenya row: 'Who are white people to question the makeup of an African girl? It is racism'" *The Guardian* (online ed, London, 23 August 2009); and Mike Hitchen "Sport: Caster Semenya given new house" (1 September 2009) Mike Hitchen Online: i On Global Trends <www.ionglobaltrends.com>.

"gender testing" reportedly concluded that she was intersex.[4]

On 9 March 2018, the IAAF informed the Court of Arbitration of Sport (CAS) that it intended to withdraw and replace its "Hyperandrogenism Regulations" with the "Difference of Sexual Development Regulations" (DSD Regulations). The key and noteworthy point here is that these regulations are only applicable to women.[5] The DSD Regulations established new rules relating to "women with certain differences in sex development and levels of endogenous testosterone above 5nmol/L" and their eligibility to participate in eight women's events at international athletics competitions (the Restricted Events).[6] Semenya regularly participates in three Restricted Events (being the 400m, 800m and 1500m races) at the international DSD level.[7]

The DSD Regulations were due to come into force on 1 November 2018. Before that date, Semenya and Athletics South Africa (ASA) commenced arbitral proceedings before the CAS against the IAAF, challenging the validity of the DSD Regulations and seeking declarations that the regulations were unlawful.[8] Semenya and ASA claimed that the DSD Regulations discriminate against athletes on the basis of sex and/or gender because they only apply to female athletes, and they only apply to certain female athletes having particular physiological traits. They also asserted the DSD Regulations lack a strong evidential basis and are unnecessary to ensure fair competition within the female classification. They ultimately argued that the regulations are likely to cause serious, unjustified and severe harm to female athletes.[9]

The enforcement of the IAAF's DSD Regulations was delayed pending the result of the challenge. Semenya and ASA were ultimately unsuccessful before the CAS; however, the CAS did express concern with how the DSD Regulations would work in practice. Throughout the CAS decision, Semenya

4 Swarr, Gross and Theron, above n 2, at 657. See also the Collins English Dictionary Definition of intersex: "An intersex person has genitals or other sexual characteristics that do not clearly fit the usual definition for a male or female body." Collins English Dictionary "Definition of 'intersex'" <www.collinsdictionary.com>.

5 *Semenya v International Association of Athletics Federations (Award)* CAS 2018/O/5794 30 April 2019 [*Semenya v IAAF*] at [12].

6 At [12]; and Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) 2019 (International Association of Athletics Federations) [DSD Regulations], reg 2.2.

7 *Semenya v IAAF,* above n 5, at [12].

8 At [13]–[15].

9 At [50]–[66].

and ASA contended that the DSD Regulations infringed fundamental human rights. While the DSD Regulations are not legislative provisions, they are rules imposed by a sport's governing body and therefore should not have the ability to infringe human rights. Regardless of this, the CAS Panel concluded that the DSD Regulations are reasonable, necessary and proportionate and, in the authors' view, skirted around the human rights issue entirely.

On 3 June 2019, the Federal Supreme Court of Switzerland[10] temporarily suspended the DSD Regulations with immediate effect until the Court issued a ruling on the substance of Semenya's appeal. Due to the suspension of the DSD Regulations, Semenya was expected to defend her 800m title in Doha at the World Athletic Championships in September 2019. However, the Federal Supreme Court of Switzerland subsequently overturned its own decision and the DSD Regulations are now back in force. [11] Due to this decision, Semenya has been blocked from competing in the 2019 IAAF World Athletic Championships.[12]

Throughout this commentary, we will provide a legal and ethical critique of the implications and issues in sport uncovered by the legal proceedings for Semenya. We intend to consider the legal issues raised in the CAS decision and critically assess Semenya's legal arguments as to why the DSD Regulations are discriminatory and unnecessary. Each issue provides a complex discussion that will leave many questions unanswered, including issues of racial discrimination, which are at play here. ASA compared the decisions to the repressive and racist apartheid system in South Africa that ended 25 years ago.[13] We recognise the importance of these issues, but cannot do justice to them within the space allowed and therefore do not propose to explore them in this commentary.

Instead, we explore the evidential basis of the DSD Regulations, the legal proceedings and their implications for female athletes, and then offer a legal and ethical critique of the discriminatory nature of the DSD Regulations

10 The Court of Arbitration of Sport (CAS) is an international court of arbitration based in the western Swiss city of Lausanne. It therefore falls under Swiss law and its decisions can be appealed to Switzerland's Supreme Court. Sibilla Bondolfi "Why Swiss judges ruled on the Caster Semenya case" (4 June 2019) swissinfo.ch <www.swissinfo.ch/eng>.

11 Paul MacInnes "Caster Semenya blocked from competing at world championships" *The Guardian* (online ed, London, 30 July 2019).

12 MacInnes, above n 11.

13 Jason Burke "Caster Semeya ruling 'tramples on dignity' of athletes, South African says" *The Guardian* (online ed, London, 30 July 2019).

by considering whether it achieves "fairness", and how they limit the bodily autonomy of women competing in sport.

II TESTOSTERONE AND DISORDERS OF SEX DEVELOPMENT

Testosterone is a typically male sex hormone and anabolic steroid. Testosterone is also produced in small amounts in women, in the ovaries and adrenal glands. Reference ranges for testosterone found in the blood range from 10–30nmol/L in males and 0.7–2.8nmol/L in females.[14]

Blood acts to transport hormones, including testosterone, around the human body. To respond to any hormone, the cells need the respective receptor molecule that detects and processes that hormone. The body therefore has two ways of regulating hormones: altering the amount secreted by the glands, and altering the amount or sensitivity of the corresponding receptor. Therefore, measuring levels of testosterone in the blood alone gives incomplete information about the way a person's body utilises the hormone.[15]

Differences in sexual development (DSDs) are caused by a variety of issues during development including atypical sex hormone levels, the absence or presence of specific genes and sex chromosome complementation.[16] DSDs associated with elevated androgen levels in women, such as testosterone in Semenya's case, may benefit the woman as an athlete, but not every female athlete with "higher than average" levels of testosterone will automatically have a sporting advantage.[17] Some DSDs can inhibit athletic ability by resulting in stunted growth, muscular atrophy and heart defects.[18] Testosterone levels in the blood, in isolation of other biological and external factors, therefore cannot be taken as providing a conclusive advantage in athletes.[19] Applying this to Semenya's case, it is clear that her higher than average levels of testosterone alone cannot be the primary factor in her athletic success.

It is typically uncommon for women with DSD to cross into the male

14 South Tees Hospitals NHS Foundation Trust "Testosterone" <www.southtees.nhs.uk>.

15 Joe Herbert *Testosterone: sex, power and the will to win* (Oxford University Press, Oxford, 2015) at 22.

16 Francisco J Sànchez, María José Martínez-Patiño and Eric Vilain "The New Policy on Hyperandrogenism in Elite Female Athletes is Not About 'Sex Testing'" (2013) 50 Journal of Sex Research 112 at 114.

17 At 114.

18 At 114.

19 At 114.

range of testosterone levels, even in women with hyperandrogenism.[20] A woman with "testosterone levels three times of the 'average' woman", which would be approximately 5.25nmol/L, would remain well below the lower levels of testosterone in men.[21] Semenya's medical results have been kept confidential, so her testosterone levels as tested are unknown.

III THE LEGAL PROCEEDINGS AND THEIR IMPLICATIONS

A IAAF and the DSD regulations

The DSD Regulations are premised upon the idea that "high levels of endogenous testosterone circulating in [female] athletes with … DSDs can significantly enhance their sporting performance".[22] Therefore, these women have an unfair advantage should they race against other women who do not have those levels of testosterone.[23] The IAAF claims that there is a "broad medical and scientific consensus" on this point.[24] However, this remains scientifically contested as there is little to no evidence of a "significant performance difference between women with different testosterone levels. The harm to women with lower testosterone levels is perceived rather than actual".[25]

The DSD Regulations set out that a female athlete will only fall within the scope of the DSD Regulations where she has:[26]

i) one of a number of specific DSDs;

ii) an endogenous testosterone level of 5nmol/L or above; and

iii) sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect.

An athlete that falls within the scope of the DSD Regulations will then only be able to compete in a Restricted Event where she:[27]

20 At 114.

21 At 114 (citations omitted).

22 DSD Regulations, above n 6, reg 1.1(d).

23 Reg 1.1(d).

24 Reg 1.1(d).

25 Katrina Karkazis and Morgan Carpenter "Impossible 'Choices': The Inherent Harms of Regulating Women's Testosterone in Sport" (2018) 15 Journal of Bioethical Inquiry 579 at 580.

26 Reg 2.2(a).

27 Reg 2.3.

i) is recognised at law as female or intersex or equivalent;

ii) reduces her blood testosterone to below 5nmol/L for a continuous period of at least six months, by, for example, using hormonal contraceptives; and maintains that level of testosterone both in and out of competition.

With the IAAF seeking to apply the DSD Regulations to Semenya, one can fairly assume that she is considered to meet the criteria set out above and therefore is required to reduce her blood testosterone levels to below 5nmol/L for at least six months in order to compete internationally in a Restricted Event. As stated earlier, it is important to bear in mind that testing a person's blood testosterone levels provides incomplete information about the way a women's body actually processes and uses testosterone.

Semenya refused to take medication to change her hormone levels and sought to challenge the DSD Regulations at the CAS.[28] In seeking "fairness" through the DSD Regulations, the IAAF is at risk of imposing and enforcing discriminatory and unfair regulations by punishing women with characteristics that, while natural, fall outside what is deemed "normal" for women's bodies.

B The CAS decision

Semenya and ASA sought judgment from the CAS declaring the DSD Regulations to be unlawful and preventing the DSD Regulations from coming into force, including on the basis that the regulations are unfairly discriminatory, arbitrary and disproportionate.[29] They stated that the DSD Regulations violate the IAAF Constitution, the Olympic Charter, the laws of jurisdictions in which international athletics competitions are held, as well as universally recognised fundamental human rights. Semenya and ASA submitted that the DSD Regulations:[30]

i) unfairly discriminate against athletes on the basis of sex and/or gender because they only apply to female athletes and to female athletes having certain physiological traits;

ii) lack sound scientific basis;

28 MacInnes, above n 11.

29 *Semenya v IAAF*, above n 5, at [50]–[66].

30 At [50]–[56] and [224]–[235].

iii) are not necessary to ensure fair competition within the female classification; and

iv) are likely to cause grave, unjustified and irreparable harm to affected female athletes.

In response, the IAAF submitted the DSD Regulations:[31]

i) are based on a strong scientific, legal and ethical foundation;

ii) establish a framework governing the eligibility of DSD athletes to compete in the female category that is logical, rational, and fully respects the requirements that like cases should be treated alike and different cases should be treated differently; and

iii) respect the gender identity and dignity of affected athletes while simultaneously protecting the right of female athletes to fair and meaningful competition.

The CAS Panel stipulated that it was "not possible to give effect to … one set of rights without restricting the other set of rights".[32] It continued that, "[p]ut simply, on one hand is the right of every athlete to compete in sport, have their legal sex and gender identity respected, and be free from … discrimination".[33] Conversely, the Panel also pointed to the "right of female athletes, who are relevantly biologically disadvantaged vis-à-vis male athletes, to be able to compete against other female athletes and achieve the benefits of athletic success".[34] The decision is also constrained by the accepted binary division of competitive athletics into male and female events, when in nature there is no such binary division of the modern homo sapiens.[35]

The Panel dismissed the applications for arbitration as Semenya and ASA could not establish that the DSD Regulations were invalid. The Panel concluded by a majority that the DSD Regulations are discriminatory but that, on the basis of the evidence submitted by the parties, such discrimination is a "necessary, reasonable and proportionate means of achieving the legitimate objective of ensuring fair competition in female athletics" in certain events,

31 At [286].

32 At [460].

33 At [460].

34 At [460].

35 At [457].

and upholds the "protected class"[36] of female athletes in those events.[37]

The CAS decision concluded that the IAAF had succeeded in establishing that the DSD Regulations were necessary,[38] and more specifically, that if elevated testosterone levels in female athletes with DSD gives such athletes a significant performance advantage over other female athletes then it is "legitimate to regulate participation in the 'protected' category of … events by reference to those characteristics".[39] This conclusion is likely to be a source of controversy among experts in the field, given that it is not universally accepted that DSDs give female athletes a significant performance advantage.

However, the CAS did express a number of concerns about how the DSD Regulations would operate in practice,[40] including the following:

i) There can be significant side effects to hormonal treatment.[41]

ii) While the DSD Regulations imposed strict liability on athletes, athletes may inadvertently be unable to consistently maintain a natural testosterone level below 5nmol/L.[42]

iii) There was a lack of concrete evidence of actual and significant athletic advantage by a sufficient number of DSD athletes in both the 1500m and one mile events. The CAS cautioned the IAAF against applying the regulations to those events until further evidence became available.[43]

The DSD Regulations came into effect on 8 May 2019 after the CAS decision was issued, dismissing Semenya and ASA's applications.

C Federal Supreme Court of Switzerland

Following the CAS decision, the IAAF successfully defended the DSD Regulations in Semenya and ASA's appeal before the Federal Supreme Court

36 The "protected class" of female athletes means women with female chromosomes XX who produce testosterone in the blood of the normal female range of between 0.6-1.68nmol/L, in comparison to the male range (XY chromosomes) producing 7.7-29.4nmol/L.

37 At [626].

38 At [589].

39 At [564].

40 At [620]–[624].

41 At [595]–[596].

42 At [617].

43 At [609].

of Switzerland. While Semenya was temporarily exempt from the Regulations pending appeal, that exemption is no longer in place. Semenya has now been blocked from competing in the 2019 IAAF World Athletic Championships.[44]

IV THE DSD REGULATIONS: A LEGAL AND ETHICAL CRITIQUE

A Fairness in Sports

The purpose of the DSD Regulations is to "ensure fair and meaningful competition in the sport of athletics" by making sure that competition is "organised within categories that create a level playing field".[45] However, it can be argued that by trying to ensure "fair and meaningful competition" and create "a level playing field", the DSD Regulations themselves are inherently unfair and discriminatory.

Rules regulate sport, and it is these rules that define the nature of the sport and provide for comparisons of individuals, thus creating competition.[46] However, in order to create and promote meaningful competition, the competition must be fair. When seeking to achieve fair competition, sports' governing bodies and decision makers within sporting organisations must balance a range of interests held by athletes. Regulations intended to achieve fairness on the playing field must be fair off the field. Regulations should not be discriminatory.[47] They should not infringe on fundamental human rights. Ultimately, rules and regulations should not cause harm (physical or otherwise) to the athlete. In seeking to achieve fairness between competitors, the rules and regulations themselves must be fair and justified.

In the general sense, fairness can be understood as an obligation arising for individuals to voluntarily engage in rule-based practices. A number of people engaging in a mutually beneficial venture, subject to rules, places limits on their liberties and freedoms in a way that becomes advantageous to all involved.[48] One of the main objectives in sport is to compare and rank competitors based

44 MacInnes, above n 11.

45 DSD Regulations, above n 6, reg 1.1(a).

46 Julian Savulescu "Justice, Fairness, and Enhancement" (2006) 1092 Annals New York Academy of Sciences 321 at 329.

47 Whether on the basis of sex/gender, race (including colour, nationality, ethnicity and ethnic origin), genetic and/or physiological traits, physical appearance, age, or otherwise.

48 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge (Mass), 1971) at 209.

on performance. Challenges to fairness in sport come in all forms, including challenges to rule adherence through cheating and rule violations, and through inequalities in external (and perhaps even internal) conditions.[49]

In seeking to achieve fair and meaningful competition, the DSD Regulations themselves are at risk of being inherently unfair in that they place limitations and restrictions on women who are natural, yet deemed "abnormal". The IAAF and CAS Decision justifies these limits and restrictions, claiming the DSD Regulations will ensure "fair and meaningful competition" on a "level playing field".

Athletes such as Semenya are perceived, whether correctly or incorrectly, to have a significant advantage over fellow "normal" competitors, which is arguably unfair. First, as explained above, this "significant advantage" is not easily quantifiable,[50] and secondly, women with DSDs are singled out, with their triumphs challenged, questioned and belittled, which is discriminatory. Semenya and ASA state that the DSD Regulations are unnecessary and that in an effort to ensure fair competition, the DSD Regulations discriminate based on DSDs within the female category.[51] They argue that there are numerous genetic and environmental factors that lead to success in elite sports. The significant role of genetics in determining sporting superiority suggests that sport is already fundamentally not fair, and we tend to agree.

Compare American swimmer Michael Phelps, who has been described favourably in the past as a "biomechanical freak of nature".[52] With double-jointed ankles and elbows, unusually long arms, and limited lactic acid production, Phelps repeatedly blew his competition out of the water over the course of his international career. While Phelps was deemed a sporting hero, praised for his performance and various natural advantages over competitors, Semenya has spent the majority of her sporting career having her performance

49 Thomas H Murray, Karen J Maschke and Angela A Wasunna (eds) *Performance-Enhancing Technologies in Sports: Ethical, Conceptual and Scientific Issues* (Johns Hopkins University Press, Baltimore, 2009) at 162–164.

50 *Semenya v IAAF*, above n 5, at [53]. One of Semenya's arguments is that the DSD Regulations had no sensible basis for distinguishing between DSDs and other genetic variations that improve athletic performance. This highlights a further element of discrimination against female athletes with DSDs, and a bias towards male superiority which is often integrally associated with genetic variations that lead to superior sporting performance.

51 *Semenya v IAAF*, above n 5, at [52].

52 Valerie Siebert "Michael Phelps: The man who was built to be a swimmer" *The Telegraph* (online ed, London, 25 April 2014).

and, more crucially, her very identity, scrutinised for the same reason. So why is it fair that Phelps is able to compete in his natural state, while Semenya must take medication to bring her testosterone levels within the deemed "normal" female range, or compete against men, if she is to compete at all? Is it because Phelps, a male, conforms with orthodox societal expectations of masculinity, whereas Semenya, a female, does not conform with orthodox societal expectations of femininity?

The Collins English dictionary defines "masculinity" as "the qualities that are considered to be typical of men". It lists synonyms including "virility, strength, toughness, manliness, robustness, ruggedness and muscularity". Similarly, "femininity" is defined as "the qualities that are considered to be typical of women". The synonyms listed include "womanliness, delicacy, softness, womanhood, gentleness and muliebrity".[53]

There is an argument that the DSD Regulations draw on society's notions of masculinity and femininity. With the inherent bias towards masculine superiority and female inferiority in sports, the DSD Regulations could be seen as reducing women to a more subordinate status within sport. As Semenya claims, the DSD Regulations "discriminate against female athletes on the basis of birth or natural, physical, genetic or biological traits" and also "discriminate on the basis of physical appearance".[54] Semenya and other female athletes who defy these imposed gender differences and challenge the assumption of female frailty have become subject to discriminatory and unfair regulations.[55]

The way in which unfair advantages in sport are regulated is also inconsistent. The term "unfair advantage" must be defined to be policed. Clearly, Phelps has an advantage over his other male competitors due to his physical advantages. He races against men who are smaller, lack double-jointed ankles and elbows and who produce lactic acid at a "normal" rate. Is this fair? A plethora of "unfair advantages" across the sporting world are tolerated by sport-governing bodies, with inequalities accepted and generally ignored.[56] Yet here, we find a talented women of African descent banned from racing against other women because a governing body has deemed her natural advantage to be unacceptable. Again, this further supports the argument that the DSD Regulations are drawing on society's notions of masculinity and femininity,

56 Cheryl Cooky and Shari L Dworkin "Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy" (2013) 50 Journal of Sex Research 103 at 107.

and gendered assumptions and norms.

Sex segregation in athletics reaffirms the erroneous assumption that there are two universal and mutually exclusive sexes that match with a stable gender identity and behaviour. Women and men are regularly "sport-typed" into different activities and events, which continues to reaffirm notions of natural male physical superiority and female physical inferiority.[57] Success in sport typically relies on traditionally masculine concepts, such as muscular and explosive physical performances, which are often not associated with traditionally feminine concepts. Women who excel in such physical performances may thus have their biology called into question. Inherent in such inquiries is the assumption that success in sport is masculine. It is thus not uncommon to see superior female athletes masculinised,[58] told they are not "real women", or even, similar to Semenya's situation, recast as men and required to compete as such.[59] As both Semenya and Serena Williams are women born of African descent, both are arguably subject to increased levels of scrutiny over their bodies.[60]

As previously discussed, one of Semenya and ASA's main assertions in the CAS proceeding was that the DSD Regulations are discriminatory on the basis of sex and/or gender because they only apply to female athletes. This formed the basis of Semenya's claim that the DSD Regulations are discriminatory in that they "impose thresholds and burdens (such as screening for high testosterone, invasive medical examinations, and eligibility restrictions) on female athletes, while no equivalent requirements are applied to male athletes".[61] If the need for testing levels of testosterone in women is based on the need to ensure a level playing field, as bodies like the IAAF claim and the CAS decision stands for, why is there no inquiry into male athletes whose testosterone levels

57 Shari L Dworkin, Amanda Lock Swarr and Cheryl Cooky "(In)Justice in Sport: The Treatment of South African Track Star Caster Semenya" (2013) 39 Feminist Studies 40 at 43.

58 Take Serena Williams for example, who is constantly body shamed and labelled as "manly" due to her muscular physique and power on the tennis court. Lydia Slater "Queen Serena: The power and the glory" *Harper's Bazaar UK* (online ed, 30 May 2018).

59 Shari L Dworkin, Amanda Lock Swarr and Cheryl Cooky , above n 58, at 43.

60 While this commentary is not intended to explore notions of racial discrimination among athletes, Kareem Adbul-Jabbar, a six-time NBA Champion wrote an exceptional article exploring racial inequalities among female athletes: Kareem Abdul-Jabbar "Body Shaming Black Female Athletes Is Not Just About Race" *Time* (online ed, 20 July 2015). See further Swarr, Gross and Theron, above n 2, at 657.

61 *Semenya v IAAF*, above n 5, at [51].

exceed the "normal range" for men? Should such men also be required to take testosterone-levelling medication to ensure they are not unduly advantaged vis-à-vis "normal" men? To the contrary, it appears that superior performance in male athletes is simply deemed natural talent, or due to hard work and dedication. Men's sporting excellence is praised and embraced, whereas women's is questioned and demeaned.[62] Like Phelps, Semenya's genetic gift should be celebrated rather than regulated. Natural advantages should not be deemed to challenge fairness in sports, but rather be part and parcel of natural competition.

Is such discrimination necessary, reasonable and proportionate to preserve the integrity of female athletics, as the IAAF claims? A similar argument has been made prior to Semenya's fight. The Olympic Charter provides that "the practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit".[63] Dutee Chand is an Indian sprinter whose legal action persuaded CAS to suspend the IAAF's Hyperandrogenism Regulations for two years in 2015. Chand submitted that the Hyperandrogenism Regulations discriminate unlawfully against female athletes who naturally produced more testosterone.[64] Chand further submitted that any performance advantage enjoyed by those athletes is the product of a natural genetic gift, which should not be viewed differently from other natural advantages derived from exceptional biological variation.[65] Unfortunately, the IAAF's Hyperandrogenism Regulations were subsequently replaced with the DSD Regulations.

In sport, the starting premise is that everyone starts from a level playing field:[66]

> Sport's governing bodies exist to ensure that athletes arrive at the starting line with a fair chance. They seek to enforce fair play with a system of rules. And yet, this role of the enforcer is increasingly problematic, particularly in relation to women and sport.

62 Cooky and Dworkin, above n 57, at 108.

63 *Dutee Chand v Athletics Federation of India (AFI) & IAAF* CAS 2014/A/3759 25 July 2015 [*Chand v AFI & IAAF*] at [39].

64 At [113].

65 At [114].

66 Anna Kessel "The unequal battle: Privilege, genes, gender and power" (2018) 59 Griffith Review 242 at 242.

In seeking to define the boundaries of womanhood — our genetics, our apparel, our most intimate parts and experiences — women are being policed. Worryingly, the very rules designed to protect women are becoming their oppressors. Things have gone wrong not in the genetics of these sportswomen, but in their treatment by major organisations and governing bodies, despite an apparent outward commitment to sporting value, fair play and ethics.

In deciding what is deemed to be "normal" and acceptable for the female body, and then imposing harsh regulations and limits of women who fall outside this arbitrary range, the IAAF is discriminating against women who do not conform to mainstream notions of femininity, as previously discussed within this commentary. The rules are also discriminatory in that they single out women exhibiting genetic and/or physiological abnormalities, and essentially punishes them by preventing them from competing in their chosen (and identified) categories.

Semenya submitted that the DSD Regulations would cause harm and rights violations "of a magnitude that is unprecedented in sport" and rejected the IAAF's claim that the DSD Regulations are "modest in nature".[67] Article 3 of the IAAF's constitution states that it has a commitment to human rights, yet the IAAF drafts, enacts, defends and enforces the DSD Regulations that arguably infringe even the most basic human rights, namely the right to be free from discrimination. Human rights recognise our freedom to make choices about our lives and to control how we develop as human beings.

Discrimination is defined as "the practice of treating one person or group of people less fairly than other people or groups".[68] The Universal Declaration of Human Rights (UDHR) enforces this.[69] Article 1 states:

> … all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 continues:

> … everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin,

67 *Semenya v IAAF*, above n 5, at [65].

68 Collins English Dictionary "Definition of 'discrimination'" <www.collinsdictionary.com>.

69 *Universal Declaration of Human Rights* GA Res 217A (1948).

> property, birth or other status.

Furthermore, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) that states:[70]

> … all persons are equal before the law and are entitled without any discrimination to the equal protection of law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.

Taking into account the UDHR and ICCPR text, it seems difficult for the IAAF to reconcile the DSD Regulations with international human rights laws. In fact, a pertinent point to note is that Switzerland has implemented the ICCPR and the Convention on the Elimination of All Forms of Discrimination against Women.[71] Yet the Federal Supreme Court of Switzerland upheld the CAS Decision. For reasons previously outlined in this commentary, it appears to be clear that the DSD Regulations violate a number of fundamental human rights.

However, human rights are not absolute and, under New Zealand law and international law,[72] can be limited by legislation where demonstrably justified, by other rights or in the interests of the community. When imposing limits, the need must be of sufficient importance to justify doing so.[73] Obviously,

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70 United Nations General Assembly *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

71 The *Convention on the Elimination of All Forms of Discrimination against Women* GA Res 34/180 was adopted on 18 December 1979, by the United Nations General Assembly and states in its introduction: "Among the international human rights treaties, the Convention takes an important place in bringing the female half of humanity into the focus of human rights concerns. The spirit of the Convention is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."

72 For example, under art 18 of the ICCPR the freedom to manifest one's religion or beliefs may be subject only to such limitations as a prescribed by law and are necessary to protect public safety, order, health or morals of the fundamental rights and freedoms of others. Under art 36 of the Constitution of the Republic of South Africa, 1996, rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

73 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 sets out the approach to be taken when viewing a provision in consideration of the New Zealand Bill of Rights Act 1990 [NZBORA]. First, consider

the DSD Regulations are not legislative provisions; they are rules imposed by a sport's governing body and therefore should have no ability to justifiably infringe human rights.

Within the CAS decision, it was argued that enforcement of the DSD Regulations by UK Athletics (the governing body for athletics in the United Kingdom) would be open to legal challenges in the English courts as they breach the Equality Act 2010 (UK) and the European Union Equal treatment legislation.[74] It was stated that:[75]

> … to the extent that it is legally possible to justify direct discrimination, UK Athletics is likely to be able to establish a legitimate aim ([in] seeking to preserve a level playing field for athletics competitions within the female category).

However, should an athlete challenge the DSD Regulations, the athlete would have good prospects of demonstrating that the discrimination within the DSD Regulations cannot be justified due to the serious implications for her individual rights.[76]

It was also opined that courts in the United States would conclude that the DSD Regulations are invalid and unenforceable in that they are arbitrary and capricious, and contrary to the Civil Rights Act of 1964.[77] We agree with this argument, and accept the same could probably said for most countries who have ratified international human rights conventions.[78]

In response, the IAAF claimed that the "very narrow" restrictions

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Parliament's intended meaning and determine whether there are inconsistencies between that meaning and any right found in the NZBORA. If there are inconsistencies, look to whether the apparent inconsistency can be justifiably limited under section 5 NZBORA. In *R v Oakes* [1986] 1 SCR 103 (Canada), the two-stage approach looks at whether the objective is of sufficient importance to warrant overriding a right or freedom. If a sufficient objective is recognised it must be shown that the means are reasonable and demonstrably justified. In doing so, three things must be taken into consideration. First, the measure adopted must be rationally connected with the objective — it cannot be arbitrary, unfair or irrational. Second, the means should impair as little as possible the right or freedom in question. Third, there must be proportionality between the effects of the measures responsible for limiting the right, and the objective.

74 *Semenya v IAAF*, above n 5, at [215].

75 At [217].

76 At [217].

77 At [208].

78 Also at [222], where Dr Garland stated that there is international consensus with many human rights authorities that discrimination against individuals with DSDs is contrary to international law. Authorities have argued for legal restrictions against such discrimination.

imposed by the DSD Regulations do not exceed what is necessary to achieve equality of opportunity between female and male athletes, and are therefore proportionate.[79] The IAAF claimed that both civil and common law legal systems allow sports bodies a significant margin in determining what is necessary and proportionate to achieve their legitimate objectives. It claimed that as a sporting body, it must decide what is necessary and proportionate to achieve its aims on the basis of an honest and good faith view. If this test is met, it argued that it is then irrelevant that others disagree with its view.[80]

In reaching its conclusion, the CAS Panel concluded that the case involved "a collision of scientific, ethical and legal conundrums" and stated it was "not possible to give effect to, or endorse, one set of rights without restricting the other set of rights".[81] The Panel concluded that while the DSD Regulations are prima facie discriminatory, this is only the starting point and not the end.[82]

After considering the reasons for the DSD Regulations and their compatibility with various domestic and international human rights laws, the Panel decided that the Regulations are necessary[83] and reasonable.[84] The Panel's main difficulty was establishing whether the DSD regulations are proportionate.[85] Despite the panel having "grave concerns" as to the future practical application of the DSD Regulations, the Panel concluded the regulations are reasonable and proportionate on their face.[86] The conclusion only briefly touches on the infringement of human rights, stating:[87]

> The Panel does not consider that it is able to undertake an assessment of the likely impact of the DSD Regulations on wider society, which would require an analysis of multifaceted sociological issues which are not amenable to judicial resolution by an arbitral tribunal that is tasked with determining the validity of rules that govern eligibility to participate in sporting competitions.

79 At [302].

80 At [303].

81 At [406].

82 At [548].

83 At [580] where the majority of the Panel accepts that the IAAF has discharged its burden of establishing that the DSD Regulations are necessary to maintain fair competition in female athletes.

84 At [583] the Panel affirm the DSD Regulations are reasonable for the same reasons in determining they are necessary.

85 The Panel considers the arguments at [587]–[619].

86 At [620].

87 At [588].

The IAAF's reasons for implementing these regulations and limiting women's rights is to ensure a "fair" competition, yet it is unfair to discriminate against women who exhibit genetic/physiological traits that are considered outside the norm, limit a women's right to refuse medical intervention,[88] and inhibit an individual's fundamental right to choose. The CAS Panel has skirted around what we believe to be one of the most fundamental issues of this matter. Regardless of the CAS Panel's decision, we believe that the DSD Regulations are an unjustifiable attempt to infringe the rights of women with DSDs who wish to compete at an international level.

With these factors in mind, it is clear that the DSD Regulations are not, in fact, reasonable and proportionate. In trying to preserve the integrity of female athletics, the regulations unfairly discriminate against women with DSDs, and impose unequal limitations on female athletes without placing similar parameters on male athletes. The IAAF's imposition of the DSD Regulations is an example of the body attempting to control the female body.

B Authenticity and autonomy

Under the DSD Regulations, the only way for a female athlete with high blood testosterone levels to continue competing against other females is to lower her testosterone by artificial means,[89] which is otherwise a medically unnecessary intervention. Testosterone levels can be lowered both pharmacologically and surgically,[90] but the Regulations state that surgical anatomical changes are not required.[91] The side-effects of pharmacologically lowering testosterone are wide-ranging, and include diuretic effects creating electrolyte imbalances, the disruption of carbohydrate metabolism, headaches, hot flushes, nausea, fatigue and liver toxicity.[92]

The central ideal of authenticity and human rights is the freedom to make choices about our own lives. A woman is authentic when she is in possession of or exhibits what is most her own. When separated from what is essentially her

88 Especially in this instance where medical intervention is unnecessary and involves a range of unpleasant side effects.

89 DSD Regulations, above n 6, reg 2.3. See also reg 2.6 for options available to those who do not meet the eligibility criteria, which include competing in the male classification for Restricted Events.

90 Karkazis and Carpenter, above n 25, at 583.

91 Reg 2.4.

92 Rebecca Jordan-Young, Peter Sönksen,and Katrina Karkazis "Sex, health, and athletes" (2014) 348(7957) British Medical Journal 20 at 21.

own, she plunges into a state of alienation.[93] Requiring affected female athletes to adhere to these rules and alter their natural physiological state challenges the very nature of "authenticity". Authenticity ties in with the fundamental rights and freedoms we have as humans.[94] The IAAF regulations separate the hyperandrogenous female from her true self, from what is most her own. Forcing female DSD athletes to undergo otherwise unnecessary medical treatment in order to compete in a sport to which they have devoted their lives is not only unwarranted, but also challenges the right to refuse to undergo medical treatment. Semenya either accepts the rules and takes medication to reduce her testosterone levels, races with men, or does not race at all. Her options are severely restricted and her right to decline medical treatment severely infringed, as she is faced with the ultimatum: "take medication, or do not race".

Fairness can be achieved by limiting liberties and freedoms. Yet, conversely, there is also no greater value to humanity than freedom. Concepts of autonomy differ, but they all have the underlying theme that autonomy is the deliberate self-rule — to have the capability to self-legislate. Making decisions and choosing how to live our lives makes our lives our own.[95] In requiring female DSD athletes to undergo hormonal therapy, the IAAF infringes upon a female's fundamental right to choose.[96] It also brings the validity of informed consent in medical terms into question. If a female athlete's eligibility to compete within the female category is dependent on agreeing to hormone therapy, the distinction between consent and coercion becomes blurred.

There must be strong justification to restrict athletes' freedoms and in doing so limit their autonomy. Nevertheless, while maximum freedom is the pinnacle of autonomy, it would not be reasonable to allow athletes to go about their training and competitions with absolute, unrestricted freedom. It is essential

93 Erik Parens "Authenticity and Ambivalence: Toward Understanding the Enhancement Debate" (2005) 35(3) Hastings Center Report 34 at 35.

94 Such as the right to refuse to undergo medical treatment (NZBORA, s 11), the right to not to be subject to torture or cruel treatment (NZBORA,s 9) and freedom from discrimination (NZBORA, s 19) to name but a few.

95 Tom L Beauchamp and James F Childress *Principles of Biomedical Ethics* (5th ed, Oxford University Press, New York, 2001) at 57–68.

96 One cannot ignore recent anti-abortion laws in the United States that only permit abortions if the foetus cannot survive or where the mother's life is at risk. These are the only exceptions and do not extend to cases of incest or rape. See, for example, Tara Law "Here Are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana and Elsewhere" *Time* (online ed, New York, 18 May 2019).

that a value be placed on regulations, as they "enhance our freedom[s]".[97] For example, bans on doping not only promote fair competition, but also support the notion of authenticity while ultimately restricting autonomy. This restriction comes in the form of preventing harm. As well as being anti-competitive, steroid and illicit supplementation poses health risks to athletes, which justifies this restriction. However, the imposition of hormone therapy cannot be similarly justified, given the detrimental side effects such treatment causes.

A distinction must also be drawn between being autonomous, and being appreciated and respected as an autonomous agent. Respecting an autonomous agent means acknowledging an individual's right to make their own decisions and have their own thoughts. This goes beyond just a respectful attitude to involve respectful action. It also requires an obligation to not interfere or inhibit the life of another in a way that will disrupt their autonomy.[98] In requiring female DSD athletes to take medication to alter their physiological makeup in order for them to compete, the IAAF limits those athletes' autonomous decision-making processes, restricting them from living their lives the way they want, and further, as discussed above, subjecting them to the side effects of the treatment involved.

V CONCLUSION

The DSD Regulations, and the CAS decision upholding them, stem from contestable medical evidence that female athletes with high blood levels of testosterone have a significant advantage over female athletes who fall within the "normal" spectrum for women. The analysis applied in the CAS decision is weakened by the fact that an athlete's sensitivity to circulating testosterone is unknown, and there is no evidence to support the assertion that female DSD athletes are advantaged.

In trying to achieve fairness, the DSD Regulations themselves arguably create further injustice. The DSD Regulations appear to reinforce the erroneous and patriarchal expectations of women and punish those who do not conform to society's antiquated notions of femininity. The DSD Regulations are blatantly unfair in that they unjustifiably infringe fundamental human rights and limit a women's ability to make her own decisions and live her most authentic life.

97 Fritz Allhoff and others "Ethics of Human Enhancement: 25 Questions & Answers" (2010) 4(1) Studies in Ethics, Law and Technology 1 at 18.

98 Beauchamp and Childress, above n 99, at 57–68.

There is no clear answer to Semenya's situation. Trying to address key issues raises more questions and leads us down a legal, medical and ethical minefield. Some measures are required to ensure a level playing field within athletics, for both women and men. However, any regulation that requires a woman to alter her natural physiological state in order to compete in sport with other women should be treated with caution. Banning Semenya and other female DSD athletes from competing unless they take androgen inhibitors infringes their fundamental human rights when compared to the unobtainable outcome it seeks to achieve.

What is clear is that fairness in sport is not being achieved.