NEW ZEALAND WOMEN'S LAW JOURNAL

TE AHO KAWE KAUPAPA TURE A NGĀ WĀHINE

SPECIAL EDITION — PAPERS FROM
AUT LAW SCHOOL AND NZWLJ SYMPOSIUM
"LAW AND GENDER: BEYOND PATRIARCHY"

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Since its beginning, the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine has been more than just an academic journal. Scholarship is of course an integral part of our kaupapa, and we pride ourselves on being the only academic publication in New Zealand that is solely dedicated to publishing feminist legal scholarship aimed at helping achieve gender equity in and through the law. Over the past few years however, the Journal has expanded to be and symbolise much more than just the legal scholarship published in each edition—it is a network for people across all genders to meet, share feminist ideas, support each other and lift each other up. From law students to practitioners to academics to judges, we see the Journal as something available and accessible to all.

Advocacy has also always been at the heart of the Journal. It was only in our second year when the legal profession was rocked by the reports of sexual assault and harassment at Russell McVeagh, and the subsequent outpouring of similar stories from wāhine lawyers. We did not shy away from this, but put our challenge to the profession, that this was the time for real change and accountability. We have continued to be a platform for advocating often silenced issues and we hope that the Journal has sparked conversations and debates that must remain ongoing.

In 2022, the Journal decided to actively expand its reach. An advocacy and an outreach team was established, with members creating space for more discussion of gender justice and feminist legal issues in the legal profession, as well as advocating about these issues through submissions on Bills in Parliament.

This edition of the Journal was born out of this journey beyond just the publishing world. In February 2022, the Journal collaborated with the Auckland University of Technology Law School Te Wānanga Aronui o Tāmaki Makau Rau to hold a Symposium titled "Law and Gender: Beyond Patriarchy". As discussed by Dr Cassandra Mudgway and Dr Lida Ayoubi in the Foreword,

the Symposium sought to focus, specifically, on the many different gender and feminist issues in the law. We wanted to ensure the speakers were diverse and we looked to create a space where people felt safe to present their research and engage in discussion about gender, intersectionality and feminism.

This edition of the Journal is unique in a few ways. It is the first time the Journal is publishing more than one volume in a year. The papers were also not subject to the Journal's usual peer review process. We recognised that publishing in academic journals can be a difficult space to access for many in the legal world and we also wanted to ensure that the ideas discussed at the Symposium were accessible to people who were not able to attend. All the articles went through our usual stringent editing process and we are excited to publish some of the kōrero from the Symposium. As the Journal continues to grow, we hope this edition is one of the many special editions to come.

We want to thank the tīma who worked tirelessly to get this edition to where it is now. To the authors who inspired many presenting at the Symposium and will undoubtedly inspire more with their written words; our associate and technical editors who did all the hard work behind the scenes; the Trustees and leadership team who provided support and insight at any time of day; the typesetter for her hard work and flexibility; and our publishing partner who are always supportive of the Journal's new endeavours, ka nui te mihi ki a koutou katoa. Thank you to you all.

It is fitting to end this editorial with the whakataukī that concluded the editorial of the first ever edition of the Journal, in 2017. The founders of the Journal, and all who worked on getting that first edition published, certainly had open minds and wide visions. It is those visionaries who paved the way for this edition of the Journal to be published. We are excited to be part of the Journal's growth and we cannot wait to see where the Journal, and the wider organisation, go next in the world of gender justice and feminism.

> He rangi tā Matawhāiti, he rangi tā Matawhānui
>
> The person with a narrow vision sees a narrow horizon, the person with a wide vision sees a wide horizon

Ella Maiden and Kat Werry
Editors-in-Chief
22 May 2022

FOREWORD — KUPU WHAKATAKI

Academic conferences are integral to the process of developing and disseminating research and research-based teaching and learning which, in relation to law, can inform policy and law reform as well as judicial decision-making. Conferences are a place where researchers can exchange ideas and form collaborative networks across the discipline. However, conferences can also be dominated by certain voices (cisgender Pākehā men, for example) and be absent of others. If gender or intersectional issues are discussed, they are often lumped into one panel and placed "over there".

As young female academics with marginalised identities attending conferences, we have experienced this time and time again. Cassandra, as a neurodivergent queer woman engaging in feminist legal research, sometimes feels alienated in academic spaces like conferences. As a feminist immigrant woman of colour researching human rights law, Lida often finds herself in the minority in academia, both in her home country of Iran and elsewhere.

So, in 2018, a conference was proposed. This conference would place the intersection of gender and law front and centre. It would seek to prioritise diverse voices and provide an opportunity to present research to those who might not otherwise have had that opportunity. In addition, the conference would provide a forum for dialogue across the law profession—undergraduate and postgraduate students, practitioners and academics—as well as create space for personal and professional reflection and the sharing of our stories, thereby placing a feminist lens on the academic conference. That was the kaupapa of the Symposium on "Law and Gender: Beyond Patriarchy".

Postponed by the challenges of the pandemic and finally taking place online on 1 February 2022, the Symposium was a collaboration between the AUT Law School Te Wānanga Aronui o Tāmaki Makau Rau and New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine. Almost 200 people from around Aotearoa registered for the event, including

law academics, practitioners, students, members of various non-governmental organisations, and the general public.

On the day, twelve presentations were delivered on various issues relating to law and gender in Aotearoa. Associate Professor and Dean of AUT Law School Khylee Quince's keynote on wāhine Māori and feminism contextualised the unique nature of the law and gender debate in Aotearoa. Other presentations covered themes of judicial constructions of sexual orientation, gender identity as a prohibitive ground for discrimination, responses to sex and gender-based violence, gendered financial abuse, consent and evidence related challenges in sexual violence proceedings, and intersectional lived experiences of women lawyers in Aotearoa. The presentations were received with much interest from the audience and created some of the liveliest and engaged debate and sharing of constructive feedback we have ever witnessed at an academic event.

Of the articles presented, a few were submitted and selected for publication in this Special Edition. Using the Canterbury Earthquakes as a demonstrative example in her article, Professor Annick Masselot posits responses to natural disasters as contributors to inequality which warrant the adoption of a feminist perspective. Phoebe Moir's article canvasses the trans inclusivity of women-only safe houses in Aotearoa and advocates for more inclusive policies and perspectives. The analysis of the Property (Relationships) Act 1976 by Freya McKechnie and Emma Phelps focuses on how the law can be abused through power imbalances and gendered financial dynamics in a relationship. Nadia Murray-Ragg's article calls for revisiting the practices around the use of sexual history evidence in sexual violence trials. Finally, Alice Mander and Reina Vaai reflect on their lived experiences of belonging to marginalised minority groups while practising law in Aotearoa.

As Co-Directors of the Symposium, we are grateful for the support of AUT Law in hosting the event and the New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine for allowing an opportunity for the panellists to publish their work. Likewise, we are thankful to Ella Maiden and Kat Werry for their tireless support and diligence in putting together this wonderful collection of articles. We also have a host of others to thank for their important contributions to the Symposium, including Associate Professor and Dean of AUT Law School Khylee Quince, Blaze Leslie, Paula Ioapo, Monique van Alphen Fyfe, Paulette Benton-Greig, Christopher Whitehead, Dr Eddie Clark, and Yasmin Olsen.

Returning to the kaupapa of the Symposium, a small follow up story: during the day's discussions, panellists spoke about barriers for young women entering the legal profession, particularly for Māori and Pasifika. One such barrier was the difficulty of purchasing work clothes. A female colleague from the University of Canterbury was especially moved by these comments. After the Symposium, with the support of two others, she took up the cause with the New Zealand Law Society, whose General Manager agreed to raise the issue at the next national meeting.

This is a reminder that our stories have power to make change, legal and otherwise (albeit, a slow change). It is an illustration of the importance of kōrero that blend the academic and the personal, and that these intersectional and intergenerational conversations are part of our path to moving beyond patriarchy.

Dr Cassandra Mudgway
Senior Lecturer, University of Canterbury, Faculty of Law
Dr Lida Ayoubi
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18 May 2022

"LAW AND GENDER: BEYOND PATRIARCHY"
SYMPOSIUM – KEYNOTE SPEECH

SISTAHS IN ARMS? MANA WĀHINE AND FEMINISM

Khylee Quince*

Tēnā koutou katoa, tēnei te mihi mahana, te mihi nui ki a koutou katoa, wāhine mā. Ko Khylee Quince tōku ingoa, he uri o Ngāpuhi, Ngāti Porou me Ngāti Kahungunu hoki. Ko au te Tumuaki o Te Kura Ture ki te Wānanga Aronui o Tāmaki Makaurau. Ka nui te hari ki te kite i a koutou, nō reira, kei te mihi, kei te mihi, kei te mihi.

I INTRODUCTION

Mōrena koutou. My name is Khylee Quince and I am the Dean of AUT Law School. On behalf of the Law School and AUT more broadly, I welcome you all to this Symposium on "Law and Gender: Beyond Patriarchy", hosted by AUT and the New Zealand Women's Law Journal.

I'm going to give an overview of a wāhine Māori's perspective and reaction to the theme of today's Symposium, being Beyond the Patriarchy. I've called my kōrero "Sistahs in Arms?" and you will note that I have deliberately used the use of slang, which is generally a spelling and a term used by women of colour. And that's deliberate, because the reason for the question mark is of course, the broad question for Māori women and one that I hear many friends, colleagues and relations react to or talk about if they do talk about feminism at all, is: is feminism relevant to us at all? In other words, are we sistahs in arms? Do we have anything in common or do we have more in common than not? That's really my moot question.

I'm going to give an overview of what is Māori women's feminism. And I have a couple of things to say about this. It's really sort of a grand overview

* Dean of AUT Law School and Associate Professor. This paper is a transcript of Khylee's keynote speech given at the "Law and Gender: Beyond Patriarchy" Symposium on 2 February 2022, with minor edits for style and flow. References have been omitted.

of what was the position of wāhine Māori in te ao Māori, particularly in pre-colonial or pre-contact Māori society, how this changed, and where does that leave us in 2022. This is a really short kōrero and I'm going to leave you with a couple of questions. We have facilitators from amongst our tauira Māori to assist you to discuss really those big questions: what is the relevance of feminism for wāhine Māori? What can non-Māori feminist allies do to assist Māori women in obtaining their objectives? Those objectives may be different to the one that is sort of the premise of "beyond patriarchy". One of my big questions is he aha tēnei mea, the patriarchy? What is this thing, the patriarchy? There was no such thing in te ao Māori, there certainly is in the lives of contemporary Māori women. What can we do as a post-colonial or decolonisation strategy to reify or lift or raise the position of wāhine Māori; to improve their lives and to be Treaty compliant; to assist in addressing the breaches of equity and discrimination which are breaches of Article 3 of Te Tiriti o Waitangi; and what can we do to then use that as a platform to assist in goals of mana motuhake and tino rangatiratanga, self-determination of wāhine Māori as guaranteed by Article 2 of Te Tiriti. That might sound a lot grander than what I'm going to say, but really those are my questions. What is the relevance of feminism in te ao Māori? Does feminism resonate within te ao Māori? He aha tēnei mea? What is this thing the patriarchy? I'll answer those questions by setting up a really short overview of what are notions of gender, what was the relevance of gender, including the roles and responsibilities of wāhine Māori, in te ao Māori.

II THE RELEVANCE OF GENDER IN TE AO MĀORI

One of the core things, when I say that there was no patriarchy in te ao Māori, is that te ao Māori was not a patrilineal society traditionally, neither was it matrilineal. It was ambilineal or ambilateral. Meaning it was non-gender specific. Gender was not and never has been the core determinant of status or power within te ao Māori. Mana is. In te reo Pākehā, or in non-Māori terminology, you might say that rather than gender, class—if you were to nut it down to a broadly analogous term—was much more important in terms of mana, status and authority. Briefly, the story arc of colonisation and the introduction of Pākehā and tauiwi into Aotearoa has meant that the balance of roles and responsibilities and the place of women vis-à-vis the place of men was destroyed upon colonisation and had unique effects upon Māori women.

When I say unique effects what I mean by that is that colonisation had very, very different consequences for wāhine Māori compared with tāne Māori. One of the story arcs that we will see is that Māori men internalised much of the patriarchy of the incoming European colonisers. And why wouldn't they? Obviously, they had a lot to gain, particularly if you were a man without a lot of status or non-chiefly status. This democratisation of te ao Māori had enormous effects upon the stratification of Māori society into quite new social orderings in which gender did become the more significant determinant of status and power. Women of mana were diminished, and men without mana were raised into much more significant roles of power and responsibility. I've used that phrasing "the balance destroyed." That's in reference to Professor Ani Mikaere, one of the foremost, probably the foremost Māori feminist legal scholar, of Te Wānanga o Raukawa. That's the title of her Master's thesis from the 1990s, *The Balance Destroyed*, in reference to the balance between women and men in te ao Māori.

This is a particularly pertinent kaupapa or topic to be thinking about given the revival of what was Wai 2864, now renumbered Wai 2700—the Mana Wāhine Kaupapa Inquiry with the Waitangi Tribunal. For those of you who aren't aware, in the Waitangi Tribunal you have inquiries or claims that are specific to a particular iwi or hapū, and sometimes even smaller than that, individuals or families. Kaupapa inquiries are those that are of national significance, so they tend to be the broader topics or issues. And the Mana Wāhine claim is one of those. It was a claim that was initially filed in 1993 by 16 very prominent wāhine Māori, including Dame Mira Szaszy, whose beautiful āhua you can see on the photo in the slide. Dame Mira Szaszy, Dame Areta Koopu, Dame Whina Cooper, Dame Georgina Kirby, Dame Aroha Reriti-Crofts, Ripeka Evans, Donna Awatere Huata, and a number of other wāhine. You'll see a lot of dames there – not sure what the collective noun for a group of dames is!

In 1993 the timing of the first filing of the Mana Wāhine claim was around the removal of Dame Mira from the Fisheries Commission shortlist. In the 1990s, when I was at law school, there was a particular time of raru or conflict in the Treaty Settlement era, with a huge fight over fisheries that went all the way to the Privy Council. Part of one of the settlements involved the establishment of the Fisheries Commission, and the choice of Commissioners by the government was particularly controversial. Dame Mira Szaszy was on

the shortlist for one of these Commission roles, and her name was removed. There were no women on that initial Fisheries Commission, and the elevation of a number of male tribal leaders, many of whom received knighthoods as a result: Sir Bob Mahuta, nō Tainui, Sir Tipene O'Regan, nō Ngāi Tahu. Part of the claim was that it was part of a colonial trope—this narrative that Māori men were the tribal leaders, *they* were the people of chiefly status, *they* were the heads of industry, *they* were the people who could lead the development of contemporary Māori. These women filed a claim in opposition to that. The claim fell over in the 1990s and was refiled in 2019, so it's currently on track. In 2021 the Tūāpapa hearings began—a Tūāpapa hearing is the foundation of the claim, so setting out what the claim is about—that occurred in Kerikeri in February of last year, thankfully before lockdown. It became a much more generic claim about the discrimination faced by Māori women more broadly, post-colonisation and post Te Tiriti o Waitangi. Not just about that Fisheries Commission kaupapa, but a much broader claim. That claim is based upon this breach of the inherent mana and iho, the connecting thread of wāhine Māori, and it aims to examine the systemic discrimination, inequities and deprivation suffered by wāhine Māori in the post-colonial context, and the effect that it has had upon the positioning of contemporary wāhine Māori, not just contemporary but generations of Māori women—the negation of our mana motuhake and rangatiratanga, so leadership, self-determination, as well as status for all women. Obviously because it's a claim in the Waitangi Tribunal, the opposition if you like is the Crown, and it's about the breaches of the Treaty and how the Crown has facilitated this discrimination, and the consequential inequities and deprivation suffered by women in ways that are Treaty non-compliant. So that's the mana wāhine claim. The hearings are scheduled, Covid dependent, to continue by the end of 2022. Once that Tūāpapa evidence has been given, then there is the need to hear material and evidence about the consequences of the breach, and the end is consideration of remedies, what can we do about it, and that's something that we might want to discuss at the end of my kōrero.

If the first part of my thesis is that the position of wāhine Māori in te ao Māori was significant and equal, different but equal, to that of tāne Māori, there is plenty of evidence that tells us that this was the case. If we start right back with wāhine Māori in creation stories, and the starting point of a duotheistic, a two god creation story, with the primordial parents of tāngata

Māori, and of te ao mārama, the world of light and living in which we live, being Ranginui and Papatūānuku, the Sky Father and Earth Mother. The importance of the balance between male and female tracing right back from human whakapapa to that relationship. The first human being created by one of their children, the atua Tāne Mahuta, was a female, Hineahuone. The first piece of evidence about that normative ideal of gender balance is evident in the Māori cosmogeny and creation stories.

Within te ao Māori there are threads of normativity and notions of gender, and I'm assuming at some part of today there will also be discussion about notions of duality of gender and perhaps multiplicity of genders and sexuality. At a very basic level, this idea of te ira wāhine (the female gender) and te ira tāne (the male gender) with differing roles and responsibilities, but equally respected and contributing to the collective whole and wellbeing of whānau, hapū and iwi Māori. That was the position in pre-colonial Māori society. Now as I've said already, within that society, mana was a much more significant determinant of a person's status than gender. Everybody is born with mana. Some people are born, in terms of inherited mana, with more than others. That's that notion of, in a crude sense, class status. Are you born with chiefly status, are you born to a significant family? The notion within te ira wāhine, of women as powerful sexual beings, with inherent tapu. Tapu is that dedication of separate important status, again deriving from our whakapapa to the atua or gods. The core identity of women, not only in te ao Māori but in the female gender worldwide and across cultures, is this concept of ngā whare tangata: the houses of humanity. All human beings come from a whare tangata, come from a woman. The role and status of women as mothers, as nurturers, as carers, and of kuia or older menopausal women as repositories of knowledge. And again, there is a lot of evidence of this, in our language, in our reo, the gender-neutral pronoun terms, ia for example, gender neutral names, but also of course the place of women within pakiwaitara, purakau, tribal stories, the naming of places and important events, the naming of hapū and iwi after important and chiefly notable women.

The balance within tikanga was evident in the speaking roles ascribed to women. You're probably well aware, particularly from the annual raruraru or conflict on the Waitangi treaty grounds, of the divvying up of roles on the marae between men and women. Many would say that part of that is post-colonial practice, of women not speaking on the marae, but even in the

most conservative of iwi, women play a role in terms of kaikaranga, men as kaikōrero—formal speakers, speech markers—and then women again. There's this constant to and fro, so that often the last word is given to a woman, a kaiwaiata. Once a male, usually, has given a formal speech, it is the role of women to stand up and support, or not, what that person has said. Their choice of waiata, their choice of song, and the *way* in which they sing it, matters. Quite often in hui you will hear women very vociferously sing a song that gives the impression or sends the message that they either agree with what that man has said, or they do not. Sometimes they will sing a nonsense song which clearly gives the message that that man is not speaking for us. I've seen that many times in my own tribal setting.

III THE IMPACT OF COLONISATION ON WĀHINE MĀORI

This all changed upon colonisation, but within pre-contact te ao Māori, the legal status of wāhine Māori was very clear. There was equal citizenship to the extent that a person's mana allowed for it. There were, for want of a better equivalent term, slave people with little to no mana and little to no property, legal status, rights within the community, but the qualifying mea or thing was not their gender, but their mana. Generally speaking, women had the right to equal citizenship and legal personality, they could hold positions of political and tribal power and influence, they could contract, own land, gift or bequeath property, they had sexual and bodily autonomy, they could have multiple partners. There was not necessarily any idea that you would stay with one partner for life. You could marry for love, you could marry for alliance, and as is often the case in communities or societies based upon stratification by class, you could have a tomo or taumau, an arranged marriage by alliance for political purposes. Equally parties could separate. Upon marriage women maintained their family or whānau tribal names, their own identity and separate property. That is because the most significant aspect of te ao Māori is whakapapa. If you do not whakapapa or have a genealogical link to a place or a piece of property, then you had no rights to it. Marrying someone does not merge your property portfolios or your access to particular rights and responsibilities. The primacy of whakapapa as a means of determining legal entitlement was maintained upon marriage or coupling in traditional te ao Māori. This is really important in terms of protecting the rights and status of wāhine Māori, because the whānau remained your primary source of support. There was no severing of ties upon

marriage. This is really significant for those of you who are family lawyers or particularly engaged in, whether you are talking about family violence, intimate partner violence, or relationship property. That's really important to remember, that the whānau as a form of support and protection was always there within te ao Māori. In my view at least, and in the view of other Māori female researchers such as Kuni Jenkins, Stephanie Milroy, Leonie Pihama, the division of social ordering into the public and private spheres, and this notion of the primacy of the marital relationship over other family relationships, have been significant in the breakdown of the protective factors within traditional Māori communities. In their view, and I agree with them, the diminishment of the family and the primacy of the marital relationship has meant that it is easier for people to perpetrate intimate partner violence. It is easier for all kinds of horrors to go on and deprivation and discrimination to go on behind closed doors when your whānau no longer has automatic right of access to your marital home. Ani Mikaere, in her Master's thesis I've mentioned already, she provides numerous pieces of evidence of marriages where a woman moves away from her family community, her home community for the purposes of marriage, she maintains the link to her home community and she sends words to them when things go wrong, and the husband's community is aware that this can happen. She gives numerous instances, pieces of evidence where a married woman would send word back to her community that she has been insulted or that she has been physically harmed by someone in her husband's community or her husband himself. Her own community has the right of utu to come and generally seek muru, compensation, recompense for the harm done, because diminishment of her mana is diminishment of their mana, because of collective responsibility and identity. There was no severing of those ties upon marriage, and the maintenance of those ties was a form of protection for women and children. That is no longer the case.

Colonisation destroyed much of that balance, in making gender a primary determinant of status. In terms of Te Tiriti o Waitangi, there were at least 13 female signatories to the Treaty but of course, we don't know of the 500 plus signatories, because many Māori names are non-gender specific. Some of those signatories may be women that are unidentified. We also know of many wāhine rangatira who turned up to sign on behalf of their hapū who were turned away. Matua Moana Jackson gives a story of one of his female tupuna who was in that position, who was denied the right to sign and who then had her people

walk away. They are not signatories for that very reason, because her mana was not recognised because of her gender. We know of course that in terms of Pākehā law from the UK that the Married Women's Property Act in 1877 was the piece of legislation that gave legal status and personality to women. So, we have that early one or two generations of colonial contact where Māori women were assumed not to have legal personality. They couldn't contract, they couldn't sign the Treaty, they couldn't own property. I've mentioned that distinction between the public and private spheres and the effects that that had, the destruction of the protective capacity of the whānau. We saw the retelling of Māori cosmogony, the retelling of those stories. Possibly a controversial take and particularly within my whānau, which is wholly colonised within the Mihinare, the Māori Anglican church, in the belief and the idea of the Io, the primary monotheistic whakapapa of God. We move away from the dualistic cosmogony of Ranginui and Papatūānuku and you start to see materials referring to Io, which coincidentally sounds a lot like the Christian God, although as I say people within my whānau and others are adamant that the history of Io predates colonial times. That's another matter of controversy within Māoridom.

The new moral order of the colonial invasion also brings with it different sexuality and behaviours and mores about what is appropriate feminine behaviour. I'll mention very briefly the effect that that has had on the representational intersectionality of contemporary Māori women. Judgement about sexuality. Judgement about not being married that is represented in our laws of welfare. Media representation of women, Māori women in particular. Judgement of their choice of partner. In criminal law the law of omissions, of failure to protect children, in my view is in some way related to this imposition of this new moral order about appropriate female sexuality and behaviour.

Ani Mikaere, she's the godmother, the godfather in this area, in her constant refrain about law as colonisation's enforcer. That the law was used to enforce this new moral and legal order, and of course there is an unending number of pieces of legislation and policy that enforces this new order. Starting with the Native Land Act, its long title, its very purpose is the destruction of collectivism, and along the way the position of Māori women, wāhine Māori as landholders, as leaders of iwi hapū and whānau. The Land Act is really one of the first, probably foremost, means of the destruction of Māori women's place in our local tribal economies. Then we had the ten owner rules in the early

days of the new land tenure system, which meant that only ten owners could be named upon the title deed. The reason for that is just because the piece of paper, the deed, could only fit ten names on it, and so those names became male names. Initially it was intended that those men were kaitiaki or trustees of the wider group but they very quickly under the legal order became absolute landholders, landholders not trustees for the greater good. We quickly see the economic destruction of the role of Māori women within Māori communities.

In education, the Native Schooling Act 1867 set up a racialised and gendered education system for wāhine Māori that persisted for 100 years. I say it's racialised and gendered because the primary purpose was to set up an education system for Māori children, but within that system there were gendered pathways, so that Māori boys became fathers and farm labourers and Māori women were set up to be housewives, domestic servants, and in later decades possibly nurses or teachers. In that pathway, you see a very big internal distinction between Māori men and women and their ability particularly to access tertiary education. My tupuna Tā Apirana Ngata was the first Māori lawyer, or the first Māori to gain an LLB, and that was in the 1890s. The first Māori female lawyer was Georgina te Heuheu, who became a National Party MP, and she wasn't admitted to the bar until the 1970s, almost 100 years later. That's the gap, that internal gap, that intersectional gap between wāhine Māori and tāne Māori. There are just numerous, hundreds of pieces of legislation in which you see the differentiation on the basis of gender or race or both. Customary marriage was curtailed. I've mentioned the concept of ambilineal or ambilateral identification and succession in Māori land law. Traditionally you could succeed and identify with either of your female or male or matrilineal or patrilineal whakapapa lines, but not both. Bilineal succession under the native land tenure system meant that you had very quickly thousands of owners, as people inherited rights to land that they had no domicile connection to. Again, destruction of the internal protective factors of our own land tenure system, which was that you only inherited land and use rights to resources around whenua in places where you were living. If your father was from the Hawkes Bay and you never lived in the Hawkes Bay, you did not get rights to that land. After colonisation, the series of Native Land Acts allowed for this succession to land interest that people had no domicile connection to, in terms of their contribution to those communities. That's had again a devastating impact on the Māori economy and the usefulness of Māori land, the ability

then to mortgage and develop land, because blocks have tens of thousands of owners.

The Adoption Act, and family law, and other pieces of law in terms of things like the Administration Act. Who inherits when someone dies, who is your next of kin when you need organ donation, or you have a dispute over a tūpāpaku? Billy T James and of course the case of James Takamore of Tuhoe that went to the Supreme Court, in a dispute between his Pākehā wife and birth whānau. Again that's essentially a dispute about which is the primary relationship in a person's life – is it the marriage partnership, or is it the broader whānau?

Here we see what I call the tactics of divide and rule. We see Māori women and Māori men pitted against one another, and when we come to the contemporary position of Māori women, we see lateral violence. Men taking out their frustration and the discrimination against them, the inequities that they face, on the women in their lives, extremely dangerously. I've mentioned this briefly, and again somewhat controversially perhaps, this concept of tāne Māori as collaborators in the colonial project. In the 1990s, when that Mana Wāhine claim was tabled, there was a North American legal academic at the University of Waikato called Nan Seuffert. I think Nan might be at the University of Wollongong in Australia now. She wrote a few interesting pieces at the time about this idea of the alliance of men across race, this idea of men bonding across the patriarchy in that fisheries settlement kaupapa, that Māori men were willing to diminish the status and potential leadership of wāhine Māori in order to advance themselves. That was quite controversial at the time, and I don't think it is coincidental that we had not only a non-Māori woman making those claims safely, but also not only a Pākehā woman, but he wāhine tauiwi, a foreign woman, because she could.

So, this internalisation of Christian morality and gender hierarchies that I've flagged already, women as supporters of men, men who are the heads of nuclear families, again this internalisation of these very Victorian Pākehā social organisation demographics. The democratising of the position of men as landholders, voters, persons with social, cultural, economic, and political power. One example is the case of Meri Mangakāhia, another woman from the North, from Te Rarawa. She's significant in the women's suffrage movement, but remember at the time in the 1890s there was a separate Māori Parliament or Te Kotahitanga, and Meri Mangakāhia's husband was, at the time, elected the

premier of Te Kotahitanga, Hamiora Mangakāhia. Meri represented the Māori women's suffrage movement in asking them, the Māori Parliament, made up only of men, Māori men, to support the suffrage rights and advancement of wāhine Māori. And they closed ranks upon her. Māori women were not granted the right to the franchise within Te Kotahitanga until 1897, which of course was four years after the general suffrage right granted to women in the New Zealand Parliament. That gives you some idea of the difference and the internal discrimination faced by Māori women.

Another example is Cathy Dewes of Te Arawa, elected to the Te Arawa Māori Trust Board, again in the 1990s. Te Arawa have quite a specific tikanga or kawa around protocols around the place and position of women, probably I would say the strictest of any tribal grouping or area within New Zealand. Cathy was elected and within their protocol, and of course I may get some flak for this, but women are generally seen and not heard in their political tribal spheres. When Cathy walked into the room for the first Trust Board meeting, the men either turned their backs on her or got up and left. So, this has contemporary consequences for wāhine Māori, this internalisation of patriarchal views.

Just to finish, the contemporary position of wāhine Māori, and this is obviously the intersectional point. If we think about the core of intersectionality being that all of us all human beings have multiple points or multiple identities and some of those identifies have agendas or cultures that conflict with other aspects of our identity. The core point for women of colour is that our race or cultural ethnicity is read or responded to, so our gender is read and responded to in particular ways because of that cultural or ethnic identity. In other words, we are characterised or responded to, presented in the media and in other public forums, in different ways because we are Māori. Not just because we are women, but because we are Māori. In ways that are different to the representation of other women, non-Māori women, but also in ways that are different to Māori men. Most people I think are familiar with the classification of statistical information about health, well-being, education, justice indicators, in the aggregated or disaggregated data by gender and ethnicity. Often the hierarchy will be, in terms of wellbeing or education status etc, that Pākehā men will be best off then possibly Pākehā women, Māori men, but always Māori and Pasifika women at the bottom. That is the effect of intersectionality. In my field, in terms of criminal justice, the

most overincarcerated demographic in Aotearoa, by proportionate numbers, is wāhine Māori, and that is growing exponentially.

IV MANA WĀHINE AND INTERSECTIONALITY

So, Māori feminism then, mana wāhine, is underpinned by Te Tiriti o Waitangi and the promises of tino rangatiratanga under Article 2, and equal citizenship in Article 3. It's about the promotion of mana, the power, authority and influence of women, and the recognition of tikanga and kaupapa Māori, in our laws, our legal processes and institutional structures. The recognition of different familial structures and obligations, our roles and responsibilities in relation to whenua, territory and resources, but also political decision making and power. Mana wāhine is about the denunciation and rejection of violence and colonial gender hierarchies and the deconstruction of that public private divide that I flagged very quickly. Deconstruction of the notion of individualism and the idea of individual rights holders. We've seen this for example in the very recent Pou Matakana judicial review claim by John Tamihere and the Whānau Ora Commissioning Agencies around the Māori data request in respect of the vaccine rollout. That is a pitch for collectivism over individual data. It's about the centring of gender and race in our discourse, not one over the other.

To use Professor Kimberlé Crenshaw's framework, intersectionality has reference to three different aspects of our race and gender identities as women of colour. It's about the structural – so what is the narrative that has set us up in terms of that contemporary position, in terms of our health, our wellbeing, our life expectancy, our education, our access to housing etc. That's our structural position. The political position is about the inconsistency and the competition between those competing agendas of our race and gender. That comes to the fore of course in Professor Crenshaw's work in terms of intimate partner violence. We know that Māori men and men of colour are particularly poorly treated, if we think about the Black Lives Matter movement, by the police and justice agencies. But we also know that women of colour are the victims of their private violence. The dilemma for those women of colour is: do I prioritise my race over my gender? Do I prioritise my own and the safety of my children against the safety of my man by handing him over to the authorities where he may be harmed, or killed, or at least one of the many thousands of men of colour incarcerated? That is political intersectionality. Then there's the representational aspect of the way in which wāhine Māori are presented in the

media compared with Māori men or compared with Pākehā women or other demographics. I've just got a couple of examples of two Māori women, Nicola Daly Paki, mother of Moko Rangitoheriheri, killed by caregivers, and Macsyna King, whose partner Chris Kahui was acquitted of the murder of their babies. Neither of these women, these Māori mothers, neither of them were suspected of harming their children. Yet they were the ones vilified in the media, for their choices of partner, for their choice of activity in terms of sexuality and behaviour, for going out, in the case of Nicola Paki, leaving their children with caregivers so she could speak medical help and treatment for one of her other tamariki. That is a form of representational intersectionality. The New Zealand Herald at the time had a headline that referred to Macsyna King as "the worst mother in New Zealand." Neither of these mothers had harmed, or were even suspected of harming, their children.

V CONCLUSION

I want to finish with a story, the story of Meri Ngaroto, another wahine Rangatira, a chiefly woman from Te Aupōuri, one of the five tribes of Muriwhenua in the Far Far North, who lived in the early 19th century. Now Meri Ngaroto, her father was a significant chief, and they were at their marae in Ōhaki near Ninety Mile Beach when they heard that a group of visitors were coming who were unwelcome. There was talk about slaughtering them or offering her up to marry the visitors. Two different forms of traditional dispute resolution strategies in te ao Māori, you either marry the people that you have conflict with, or you just wipe them out. A decision was made to wipe them out. Meri Ngaroto pled with her father and the other chiefs of her hapū for the lives of these manuhiri who were going to be slaughtered. She did so in a metaphorical way, which was also a very Māori way of doing such a thing. In doing so, this is one of these most famous and in my view overused whakatauāki, misunderstood quotations of famous Māori speeches if you like. She made the plea in this way:

> Hutia te rito o te harakeke
> Kei hea to komako e ko?
> Ki mai ki ahau
> He aha te mea nui o tea o?
> Maku e ki atu

He tangata, he tangata, he tangata
If you pluck out the centre shoot of the flax
Where will the bellbird sing?
If you ask me
What is the most important thing in the world?
I will reply
It is people, it is people, it is people

Her metaphor was one about the health and ecosystem of the flax bush as a metaphor for a healthy functioning Māori whānau, hapū or iwi unit. The rito is the centre shoot that she refers to and it is where the bellbird, the komako sits and sings and is part of a healthy functioning ecosystem. She says if you take the child out of that flax bush where the child is the centre and the parents and grandparents are the shoots that wrap around and provide nurturing support, love, awhi and tautoko to that child, the whole ecosystem falls apart. What she is saying is that if you kill these people then you will kill not only the living people amongst them, but also their ability to procreate, and the people that they are connected to will be affected. So, when she says the most important thing is people, it's not people in the Western sense of individual human beings. She means the most important thing is *whakapapa*. It is our connection to one another, our connection to whenua, our connection to place, people and the broader universe. It's not about human beings at all, it's about connectivity. That's what she meant in that whakatauāki. In relation to the place of wāhine, wāhine are part of a functioning ecosystem within that flax bush, along with men, along with grandparents, along with the wider community. That's what mana wāhine means.

Kua mutu tāku kōrero i tēnei wā, kia ora koutou mō tō koutou whakarongo mai, thank you very much for listening, and I've left a couple of questions for discussion for you. The first is, is mana wāhine compatible with feminism, and do the schools of thought have common goals or objectives? What is the relationship? Are we sistahs in arms? The second is the question of allyship. What can a good ally do? How can Pākehā and tauiwi, non-Māori feminists, assist and contribute to the goals of wāhine Māori? What is your role as a non-Māori person? That's a very common question that's asked and it's a very good one. And my final question for you is this, is that Matua

Moana Jackson, one of the best Māori feminists I know, he tane Māori, has described colonisation as the process of replacing one house with another. The colonisers came, and they established a house. Every society's house has a similar foundation as being a place to live, as providing sustenance, as being built upon particular values, but each house is organised according to the cultural beliefs, history, environment and resources of that society. It is also adorned with its art, traditions, etiquette, and music. My final question is the decolonisation one: how can we reconstruct the whare Māori, the Māori house in Jackson's metaphor, and why should we? Where does our impetus or desire to do so come from? And of course, the big question is what would that involve for wāhine Māori, and with what potential impact? What are the resources that we need to tell the truth of our past? What are the resources that we need to rebuild the capacity of whānau, hapū and iwi Māori so that we can properly access the promise of Te Tiriti o Waitangi? Of equality and equity in Article 3, being a platform for tino rangatiratanga, mana Motuhake in Article 2? I've spoken for far longer than I've intended to e wāhine mā, I hope that wasn't too basic an introduction or reader to Māori feminism and the story arc or narrative of the role or place of wāhine Māori within te ao Māori and contemporary Aotearoa. But again, I thank you very much for listening and coming today.

Kia pai tō rā koutou, have a great day today, once again enjoy the Symposium, I hope to catch you all in person sometime soon. Kia ora rā koutou. Ka kite.

FEMINIST PERSPECTIVE ON NATURAL DISASTERS RESPONSES: LESSONS FROM THE CANTERBURY EARTHQUAKES

Annick Masselot*

What do earthquakes have to do with gender? Quite a lot. Based on the experience of the Canterbury earthquakes, this article argues that disaster emergency management and responses must necessarily be underpinned by considerations of gender equality. Earthquakes take place in the context of structural inequalities. The gender impact of natural disasters leads to unequal gender outcomes which, in turn, are further amplified by disaster emergency responses. Fundamental values, such as gender equality, are typically compromised during disaster emergency management and recovery. Gender equality is frequently dismissed as a luxury for times of plenty, while efficiency and cost are often raised as objections to including gender considerations into emergency responses. This article argues that gender-based decisions contribute to strengthened emergency response outcomes. More importantly, humanity's very way of life, and potentially existence, depends fundamentally on the ability to make gender-based decisions at all times, including in times of natural disaster emergencies.

I INTRODUCTION

Humanity is roughly represented by men and women in equal proportion. Yet earthquakes, and many other disasters, are more likely to kill or harm women in disproportionate numbers compared to men. In the 2011 Canterbury earthquake, 185 people lost their lives, and 123 of these were women.[1] This

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1 New Zealand Police "Christchurch earthquake — List of deceased" <www.police.govt.nz>. The list provided by the police is made of names, some of which are assigned a gender, for others, there is no designation. I have inferred the gender of victims according to their name. For example, I have extrapolated that John stands for a man and Mary for a woman.

means that the mortality rate for women was 81 per cent higher than for men.[2] This disparate number of fatalities can be explained on the basis that a large number of individuals lost their life in the collapse of the CTV building, which hosted a television studio, a nursing school, a language school and a health clinic. As the education and healthcare sectors are female dominated industries in Aotearoa, it is unsurprising that the majority of people working at the CTV building were women.[3] The Canterbury earthquake, however, is not an outlier, with other disasters showing women are more likely than men to be killed during a seismic event. The Kobe earthquake in 1995 killed 1.5 times as many women as men, because a large number of elderly single women were concentrated in poor residential areas susceptible to damage and fire.[4] The 2011 Tōhoku 9.1 magnitude earthquake and tsunami in Japan also killed women in greater numbers than men.[5] Following the 2015 Gorkha earthquake, the government of Nepal reported that the seismic event had a more devastating impact on women than on men. Approximately 55 per cent of fatalities in the Gorkha earthquake were identified as female.[6] Of the 228 deaths in the 2017 Mexico City earthquake, 90 were men (39.5 per cent) and 138 were women (60.5 per cent).[7] In the 2009 L'Aquila earthquake, on average 43 men died to every 50 women.[8]

A 2007 study conducted by Eric Neumayer and Thomas Plümper of 141 countries between 1981 and 2002 showed that natural disasters contributed to lowering the life expectancy of women drastically more than that of men.[9]

2 Shannon Abeling and others "Patterns of earthquake-related mortality at a whole-country level: New Zealand, 1840-2017" (2020) 36(1) Earthq Spectra 138 at 155.

3 See Statistics New Zealand W*omen at Work 1991–2013* (October 2015). Women generally make up a higher proportion of staff at these places.

4 Eric Neumayer and Thomas Plümper "The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002" (2007) 97(3) Annals of the Association of American Geographers 551 at 555.

5 A Ishiguro and E Yano "Tsunami inundation after the Great East Japan Earthquake and mortality of affected communities" (2015) 129 Public Health 1390 at 1392–1393.

6 Kay Standing, Sara Parker and Sapana Bista "'It's breaking quite big social taboos' violence against women and girls and self-defence training in Nepal" (2017) 64 Women's Stud Int Forum 51 at 51; and Devi Gurung "Through Women's Eyes: A Study of Vulnerability in 2015 Earthquake" (2019) 13 Dhaulagiri Journal of Sociology and Anthropology 76 at 78.

7 Jorge Alberto Álvarez-Díaz "Género, desastres y mortalidad: Sismo en Ciudad de México, 19/septiembre/2017" (2020) 25(7) Ciência & Saúde Coletiva 2831 at 2832–2833 (translation: "Gender, disasters and mortality: Earthquake in Mexico City, September 19th, 2017").

8 D Alexander "Mortality and Morbidity Risk in the L'Aquila, Italy Earthquake of 6 April 2009 and Lessons to be Learned" in Robin Spence, Emily So and Charles Scawthorn (eds) *Human Casualties in Earthquakes* (Springer, London, 2011) 185 at 188.

9 Neumayer and Plümper, above n 4.

However, an increase in the socio-economic status of women tends to reduce this effect. In other words, greater status of women in society is correlated with reduced relative reduction in life expectancy.[10] This pattern was evident in the Canterbury earthquakes. Women typically have a higher life expectancy than men, but the gap between men and women has been reducing. The earthquakes contributed by accelerating the reduction in this gap. The territorial authorities not directly affected by the Canterbury earthquakes saw a reduction in the life expectancy gap between men and women of 5.2 per cent on average. Whereas the three territorial authorities directly affected saw a larger reduction, namely 6.67 per cent.[11] A similar pattern emerged with the Kaikoura earthquakes; those territorial authorities not directly affected by the Kaikoura earthquakes experienced a reduction in the life expectancy gap of 6.5 per cent between 2013 and 2018, whereas the Kaikoura District experienced a reduction in the life expectancy gap of 8.33 per cent.

In addition to killing women more often than men, earthquakes tend to also injure women in disproportionate numbers. In the 2010 Canterbury earthquake, 1,453 females (64 per cent) were reported to have suffered injuries, compared to 803 males (34 per cent).[12] In the 24 hours after the 2011 Canterbury earthquake, the number of injured people was 6,659, which was made of 2,032 men (31 per cent) compared to 4,627 women (69 per cent).[13] Thus, almost twice as many women compared to men were hurt in both the September 2010 and February 2011 earthquakes in Christchurch.[14] This contrasts significantly to the number of injuries reported in normal times, where men represent the majority of people attending the Christchurch emergency department on any given Tuesday in February.[15] Again, these figures are not outliers, as studies have shown that women, children, and the elderly typically represent the highest

10 Neumayer and Plümper, above n 4.

11 These figures were calculated by Tim Wilson (PHD candidate, Victoria University of Wellington) (research forthcoming) based on the data set out in "Growth in life expectancy slows" (20 April 2021) Stats NZ <www.stats.govt.nz>.

12 David Johnston and others "The 2010/2011 Canterbury earthquakes: Context and cause of injury" (2014) 73 Natural Hazards 627 at 632.

13 Michael Ardagh and others "The Initial Health-system Response to the Earthquake in Christchurch, New Zealand, in February, 2011" (2012) 379 The Lancet 2109 at 2112.

14 Johnston and others, above n 12, at 631.

15 Michael Ardagh and others "A Sex Disparity Among Earthquake Victims" (2015) 10(1) Disaster Medicine and Public Health Preparedness 67 at 72.

number of disaster victims.[16] As discussed by Ying Cao and Nabil Kamel in their study on the role of gender and age in the 2008 Whenchuan earthquake:[17]

> … studies found that more women were injured in the 1994 Northridge, the 1989 Loma Prieta, and the 1987 Whittier Narrows earthquakes in the United States, the 1995 Hanshin earthquake in Japan, the 2002 Afyon earthquake in Turkey, the 2001 Gujarat earthquake in India, the 1990 Luzon earthquake in the Philippines, the 1988 Armenian earthquake, and the 1976 earthquake in Guatemala.

Direct impacts such as high mortality rates, reduced life expectancy and disproportionate injuries only represent one aspect of the gender impact of earthquakes. Other gender impacts include the disproportionate negative economic and social outcomes in all areas, including employment, education, care of dependents, financial situations, housing and access to infrastructure and resources.

In addition, violence against women and girls increases after disasters, and earthquakes are no exception:[18]

> Disasters are known to have direct and indirect impacts on gender-based violence, particularly against women and girls, revealing a pattern of heightened violence and vulnerability in their aftermath.

Statistics show an increase of 53 per cent in family violence offences over the first four days in those areas affected by the 2010 Canterbury earthquake.[19] In addition to increased incidents following the September 2010 earthquake, New Zealand Police reported an increase of 20 per cent in domestic violence in the weeks immediately following the 2011 Christchurch earthquake.[20] Reported cases of domestic abuse only represent about 18 per cent of the total number of incidents of domestic abuse, according to the Police.[21] Subsequent reports by

16 Ying Cao and Nabil Kamel "The Role of Gender and Age in Fracture Distribution Following the 2008 Wenchuan Earthquake" (2011) 59(3) Natural Hazards 1357 at 1358.

17 At 1358–1359.

18 Jacqui True "Gendered violence in natural disasters: Learning from New Orleans, Haiti and Christchurch" (2013) 25(2) Aotearoa New Zealand Social Work 78.

19 Debra Parkinson, Cath Lancaster and Anna Stewart "A numbers game: lack of gendered data impedes prevention of disaster-related family violence" (2011) 22 Health Promotion Journal of Australia 42 at 43.

20 True, above n 18, at 82.

21 At 82.

women's refuge groups confirmed the spike in domestic abuse. Christchurch Women's Refuge noted the severity of incidents and the increase in young women entering safehouses.[22]

Negative impacts on women do not end with the seismic event. Disaster management (response and recovery) tend to further disproportionately disadvantage and ignore women. This further contributes to gender blindness, reinforcing or increasing inequalities and harmful gender stereotypes, ultimately, contributing to female death and injuries.[23] Indeed:[24]

> Sex and gender are never automatically the primary social facts on the ground nor are these ever in play in isolation from other facts of life. But gender is also never irrelevant and must always be examined and reflected in practice, for men and boy as much as women and girls.

Why are earthquakes more likely to kill and harm women compared to men, and what can be done about it to reduce this disparity? This article explores these questions and posits that the disproportionate negative impact of earthquakes on women is directly linked to the patriarchy. Simply put, the more vulnerable a population is, the more likely it is to be killed or injured in a seismic disaster. As women are, on average, more vulnerable than men in a patriarchal society, they are therefore more likely to be killed or harmed as a result of an earthquake.

In order to address these issues, this article is divided into three sections. The first section discusses the idea that earthquakes should be conceptualised as "social disasters" rather than natural disasters because they amplify existing inequalities and oppressions within the existing social structures.[25] Section two considers the relationship between seismic disasters and gender. It contends that the patriarchy contributes directly to producing and reproducing gender inequalities and oppression. Finally, a way forward is considered in the last section, which explores how to frame legal responses of disaster preparedness and planning with a gender-sensitive lens. This last section focuses particularly on the availability of gender-sensitive legal instruments.

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22 At 82.

23 Ilan Kelman *Disaster by Choice: How our Actions Turn Natural Hazards into Catastrophes* (1st ed, Oxford University Press, Oxford, 2020); and True, above n 18.

24 Elaine Enarson "Preface" in Elaine Enarson and PG Dhar Chakrabarti (eds) *Women, gender and disaster: global issues and initiatives* (eBook ed, SAGE Publications, India, 2009) xvi at xvi.

25 True, above n 18, at 79–80.

II CONCEPTUALISING EARTHQUAKES AS SOCIAL DISASTERS THAT MAGNIFY EXISTING INEQUALITIES AND OPPRESSIONS WITHIN THE SOCIAL STRUCTURES

Earthquakes are typically classified as "natural" disasters. Yet in the field of disaster studies, there are increasing contests over the classification of disasters as natural versus human or man-made.[26] A natural disaster is a major adverse event that results from natural processes of the Earth.[27] Earthquakes, along with other disasters such as volcanic eruptions, tsunamis, landslides, extreme weather, floods, droughts and wildfires, are typically classified as natural disasters. The qualification of "natural disaster" however is somewhat artificial and slightly incorrect. In particular, the lines between natural, man-made and man-accelerated disasters are increasingly difficult to draw, given the impact humans have on the environment through their choices in architecture, fire and resource management.[28] Man-made climate change effects can further potentially play a role in increasing the number, or worsening the impact, of disasters. While seismic events could be classified as natural, the choice made by humans to settle and build in earthquake-prone zones, and to use unsuitable material and building techniques, contributes to the resulting disaster being essentially man-made when an earthquake strikes.[29]

Both natural and man-made disasters can cause loss of life and property as well as economic damages. The severity of the impact of any given disaster will depend on the affected population's resilience and on the infrastructure available. This is reflected in the definition of disaster by the International Federation of Red Cross and Red Crescent Societies: [30]

> … serious disruptions to the functioning of a community that exceed its capacity to cope using its own resources. Disasters can be caused by natural,

26 Ksenia Chmutina and Jason von Meding "A Dilemma of Language: "Natural Disasters" in Academic Literature" (2019) 10(3) International Journal of Disaster Risk Science 283.

27 "Natural disaster" (18 April 2022) Wikipedia <en.wikipedia.org>.

28 "Natural disaster", above n 27.

29 See generally, RW Perry "Definitions and the Development of a Theoretical Superstructure for Disaster Research" in EL Quarantelli (ed) *What Is a Disaster? Perspectives on the Question* (Routledge, New York, 1998) 197.

30 International Federation of Red Cross and Red Crescent Societies (IFRC) "What is a disaster?" <www.ifrc.org>.

> man-made and technological hazards, as well as various factors that influence the exposure and vulnerability of a community.

The understanding today is that there is no such thing as a "natural" disaster.[31] Natural and other disasters are disasters only because they affect human lives.[32] The cause of the disaster—natural or man-made—appears therefore to be irrelevant in the face of the impact on human lives. The outcomes of earthquakes and other so-called natural disasters are therefore not so different to those of economic, social or political disasters or crises such as Brexit, financial or market failure or war.[33] Thus, the distinction between natural and man-made disasters is a false one. It is the scale of a disaster that is important, and that scale is defined by its impact on human lives. Large disasters reflect their ability to affect a large number of people.

While the raw number of people affected is important to assess the severity of any disaster, it is equally important to consider the impact a disaster has on different groups (by age, gender, sex, sexuality, race, ethnicity, first language, or ability) and by what proportion each group is affected:[34]

> Natural disasters do not affect people equally as if by an arbitrary stroke of nature. Instead, the disaster impact is contingent on the vulnerability of affected people, which can and often does systematically differ across economic class, ethnicity, gender, and other factors.

Generally, the more vulnerable the population, the more likely it is to suffer from any given disaster.[35] The scale of the impact of a disaster is a function of how we, collectively and our leaders, individually make decisions.[36] Ilan Kelman argues that while we know how to build infrastructures to withstand most disasters, we choose selectively to ignore this knowledge, which in turn results in injury and death to human beings as well as damage and destruction

31 True, above n 18, at 79.

32 See generally, Daniel A Farber "Disaster Law and Inequality" (2007) 25(2) Law & Ineq 297.

33 Helena Molin Valdés "A Gender Perspective on Disaster Risk Reduction" in Enarson and Chakrabarti, above n 24, at 18–28. See also Heather MacRae, Roberta Guerrina and Annick Masselot "A Crisis is a Terrible Thing to Waste: Feminist Reflections on the EU's Crisis Responses" (2021) 58(2) International Studies 184; and Annick Masselot "The EU childcare strategy in times of austerity" 37(3) J Soc Welf Fam Law 345–355.

34 Neumayer and Plümper, above n 4, at 561.

35 True, above n 18, at 80.

36 True, above n 18, at 79–80; see also generally, Niall Ferguson *Doom: The Politics of Catastrophe* (ebook, Penguin Press, United States of America, 2021) at 297–357.

of homes and infrastructure.[37] These selective applications of human knowledge is a result of:[38]

> …actions, behaviours, values, decisions, and choices—not just our own, but also of those with the power and resources to decide for others, with or without their awareness and consent.

These decisions reflect long-term societal organisations and structures, which determine governance, distribution of wealth and decision-making as well as implementation. Ultimately, these wide-ranging actions and values affect the treatment of various groups,[39] and create what is referred to in disaster studies as "vulnerability".[40]

Disasters typically negatively affect groups with lesser capabilities, resources and opportunities.[41] As Jacqui True has explained, "[t]hese negative effects are multiplied for some vulnerable groups and minimised for other, usually better-resourced, groups".[42] Moreover, disaster and vulnerability feed each other. Lack of resources tends to deprive people from choices that, if acted on, would contribute to moderate their vulnerability.[43] Indeed:[44]

> Results of several empirical studies suggest that, generally, disasters reinforce gender stereotypes or even revert to traditional roles of earlier times, as people feel the need to rely on very distinctive and distinct roles in order to face severe challenges and risks. Unfortunately, often this becomes a very stereotyped gender image, where men are expected to protect, while women are expected to set aside their own needs and desires, sacrificing first their right to work. (citations omitted)

Thus, the implementation of law and policies underpinned by principles of

37 Kelman, above n 23, at 43.

38 At 43, citing Kenneth Hewitt (ed) *Interpretations of Calamity from the Viewpoint of Human Ecology* (Allen & Unwin, Winchester, MA, 1983).

39 For example, groups based on class, gender, race, ethnicity, religious affiliation, age, physical and mental health conditions, immigration status: B Wisner, JC Gaillard and I Kelman "Framing Disaster: Theories and Stories Seeking to Understand Hazards, Vulnerability and Risk" in B Wisner, JC Gaillard and I Kelman (eds) *The Routledge Handbook of Hazards and Disaster Risk Reduction* (Routledge, Abingdon, 2012) 15 at 18–19

40 Kelman, above n 23, at 43–44.

41 Neumayer and Plümper, above n 4, at 551.

42 True, above n 18, at 80.

43 Kelman, above n 23, at 78.

44 Teresa Galanti and Michela Cortini "Work as a recovery factor after earthquake; a mixed-method study on female workers" (2019) 28(4) Disaster Prev and Manag 487 at 489.

diversity and equality in society is critical in order to increase resilience and reduce vulnerabilities in times of disasters.

III THE GENDER IMPACT OF SEISMIC DISASTER IN THE CONTEXT OF THE PATRIARCHY

Conjecture as to the reasons why women are more frequently killed and injured in earthquake disasters requires an explanation of female physiological characteristics. Do women's biological make-up put them at a disadvantage compared to men in a disaster? Neumayer and Plümper note that "biological and physiological differences between men and women may at times disadvantage women in their immediate response to a disaster".[45] For example, they might not run as fast as men, or lack strength to pull themselves up on top of a structure. Studies have shown, however, that more often "social norms and role behaviors are important factors that increase the vulnerability of women".[46] For instance, women disproportionately care for others and protect children in the family, in turn limiting their ability to save themselves. Thus, women are "less capable of reacting during crisis situations, not because of factors inherent to being female, but because of the ways in which they are expected to live as females".[47] Vulnerability is therefore less likely to be created and perpetuated by physical factors, but is actually imposed by society through inextricably deep cultural, religious, and social traditions generating norms and expectations.[48]

In other words, while biology might play a role, vulnerability is less reliant on biological than on socio-economic and gender attributes. On average, and in all societies, regardless of their level of development, women are more vulnerable than men. Unequal power dynamics between women and men are historically entrenched and place women in positions of subordination to men in all institutions, including the family, religion, social groups, workplaces, the judiciary and the government.[49] Perceived biological differences, cultural construction of gender and gender roles within the family and within society more generally are codified in legal frameworks, reproduced by social and

45 Neumayer and Plümper, above n 4, at 533.
46 Cao and Kamel, above n 16, at 1358.
47 Kelman, above n 23, at 64–65.
48 At 68.
49 Pam Morris *Literature and Feminism* (1st ed, Wiley-Blackwell, London, 1993).

cultural practices and reinforced by male violence against women.[50] This power structure which overtly subordinates women to men and pervades every aspect of society[51] is referred to as the "patriarchy"[52] and provides an essential analytical tool in feminist scholarship.[53]

While women's vulnerability is shaped by the patriarchal structure, which in turn directly affects women disproportionately during seismic disasters, the degree of harmful effect of a disaster is impacted by the level of pre-disaster inequalities.[54] As noted by True, "as pre-disaster gender inequalities increase so too does the number of women compared with men likely to be killed in a disaster".[55] Further, as stated by Jenny Moreno and Duncan Shaw, "disasters do not cause major social changes but accelerate pre-existing patterns of women's vulnerability".[56] Pre-disaster gender inequity disproportionately increases the harmful effect of a disaster on women. In other words, the more gender unequal a society is, the more likely women are to be killed or harmed in an earthquake. Conversely, "where there is greater gender equality, the gap between men's and women's expected mortality is less".[57] Thus, disasters magnify existing inequalities and oppressions within social structures.[58] Natural, including seismic, disasters reinforce vulnerability and "exacerbate existing patterns of [gender] discrimination that render females more vulnerable to the fatal impact of disasters".[59] The severity of the impact of any earthquake disaster therefore reflects the political, legal and economic conditions of women in society.

This pattern is worse for women who are at the intersection of multiple

50 Catharine MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge, 1989).

51 Morris, above n 49.

52 Sylvia Walby "Theorising Patriarchy" (1989) 23(2) Sociology 213.

53 Cassandra Mudgway "Can International Human Rights Law Smash the Patriarchy? A Review of 'Patriarchy' According to United Nations Treaty Bodies and Special Procedures" (2021) 29 Fem Leg Stud 67 at 69.

54 The patriarchy affects men too in some disasters, principally relating to floods and boating accidents. See Kelman, above n 23, at 67 who describes "[a] macho culture and the mentality that men should sacrifice themselves for women, as in 'women and children first' when ships sink, seem to increase the number of men dying in floods in the USA".

55 True, above n 18, at 80.

56 Jenny Moreno and Duncan Shaw "Women's empowerment following disaster: a longitudinal study of social change" (2018) 92 Natural Hazards 205.

57 True, above n 18, at 80.

58 True, above n 18, at 79 and 83.

59 Neumayer and Plümper, above n 4, at 562.

vulnerabilities.[60] An intersectional understanding of patriarchy recognises that women experience male oppression differently according to the form of hierarchy, and the place where individual women each operate within that hierarchy. This reflects the complex and multifaceted reality of the oppression of women globally. Disasters, including earthquakes, disproportionately affect marginalised women.[61] Men and women are impacted differently by disasters, in a way that compounds women's vulnerability as they are still economically, socially and politically unequal to men. Examples of this in the areas of reproductive health and violence against women are detailed below.

A Reproductive health

Pregnancy and reproductive health constitute a good example to examine the dichotomy between biological and societal factors contributing to increased vulnerability during earthquakes. As stated by Rolina Dhital and others, "an estimated 60 per cent of preventable maternal deaths take place in disaster settings".[62] It is questionable whether pregnancy represents a biological difference between men and women leading to disproportionately harmful outcomes, or whether this is another gender factor. Pregnancy contributes to changing a woman's body by inhibiting mobility, arguably in a way that limits women's physical abilities under stress. Does pregnancy therefore represent an unavoidable and inherent female vulnerability based on a biological trait? Or, on the contrary, is the real cause of vulnerability a societal deficit in relation to care and support for pregnant women?

Access to healthcare may typically be restricted following seismic disasters, and therefore affect women's use of contraception and health care by shifting institutional medical priorities away from reproductive health and toward emergency relief.[63] Pressure on the healthcare system means that women's risk of pregnancy complications and death during childbirth, already common in poor countries, can become heightened when health infrastructure is

60 Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43(6) Stanford Law Review 1241.

61 Shubhda Arora "Intersectional vulnerability in post-disaster contexts: lived experiences of Dalit women after the Nepal earthquake, 2015" (2020) 46(2) Disasters 329.

62 Rolina Dhital and others "Assessing knowledge and behavioural changes on maternal and newborn health among mothers following post-earthquake health promotion in Nepal" (2019) 14(7) PLoS ONE at 2.

63 Julia A Behrman and Abigail Weitzman "Effects of the 2010 Haiti Earthquake on Women's Reproductive Health" (2016) 47(1) Studies in Family Planning 3 at 5.

damaged.[64] In these circumstances, "obstetrical care is often reduced, the number of miscarriages increases, as does maternal and infant mortality".[65] At the same time, increases in pregnancies following earthquake disasters have been observed. Increases in fertility rates have been documented following the 2004 Indian Ocean tsunami, and following high-mortality earthquakes in Turkey, India and Pakistan.[66] Following the 2010 Haiti Earthquake, a lower pregnancy rate was expected because fewer women wanted to have children, however, the opposite happened; pregnancies rates increased.[67] Societal neglect around issues of pregnancy and reproductive health lead to higher female vulnerability.

B Violence against women

Violence against women, including sexual violence, is a further factor which aggravates women's vulnerability in earthquake disasters. Based on data from the Canterbury and Haiti earthquakes and the New Orleans flooding, True shows that sexual violence against women and girls increases during and after disasters.[68] She demonstrates the direct link between the increased fear of and experiences of sexual violence against women during and after disaster on the one hand, and patriarchal structures on the other. Societal factors likely to increase female vulnerabilities include the exclusion of females from groups unconnected to their family or their reliance on male protection. Examples of increased female vulnerabilities are the lack of adequate consideration for women's needs (including health) and safety considerations along evacuation routes or in disaster shelters. Indeed, in many cultures, women, especially if unmarried, are prevented from sleeping near men. Also, menstruation remains a factor of temporary exclusion for many women who are then unable to seek and remain in safe places when they have their period. The objectification of women's bodies, a patriarchal fear of women's anatomy and bodily processes, and the normalisation of psychological, physical, and sexual violence against women, represent examples of rampant and ingrained sexism and misogyny which substantially increase females' vulnerability in disasters. Moreover, these

64 At 5.
65 Neumayer and Plümper, above n 4, at 554.
66 Behrman and Weitzman, above n 63, at 4.
67 At 13.
68 True, above n 18, at 80.

"factors are not well evidenced for disasters, even though they are known for other areas of life".[69]

IV FRAMING THE LEGAL RESPONSE WITH A GENDER SENSITIVE LENS: PREPAREDNESS, PLANNING AND DISASTER MANAGEMENT

What can the law do to contribute to gender equality outcomes following seismic disasters? Can feminist legal thinking make a difference? Short of "smashing the patriarchy",[70] which would involve the transformation of gender power dynamics across all levels of society, there are a number of legal recommendations that can be put forward. If the level of equality in a society pre-disaster directly affects women's vulnerability during and in the aftermath of earthquakes, then strongly embedding equality and care values in the legal framework of a country is likely to set the tone for actions and decisions in relation to disaster preparedness, planning and management. In other words, raising gender equality in society represents the first step towards equality in disaster preparedness and mitigating the loss of life and harm of women.

There is little research in the area of the gendered impact of disasters, particularly with reference to the law. Achieving a more equal legal framework requires a set of feminist legal methods and instruments established with a gender sensitive lens. This section will discuss the application of four such feminist legal methods and instruments, namely adopting gender data collection, achieving gender-balanced representation in decision-making, applying substantive equality and implementing gender mainstreaming strategy.

A Where are the women?

Cynthia Enloe encourages us to start our feminist enquiry by asking a "simple" question: where are the women?[71] It is a simple enough question, although it requires a number of shifts in legal methodology. The essential starting point is an assessment of women's situations. While this might sound like an innocuous step, Kelman points out that little data exists on gender factors in relation to disasters because "they have not been fully accepted as relevant or as important

69 Kelman, above n 23, at 65–66.

70 Mudgway, above n 53.

71 Cynthia Enloe *Bananas, Beaches and Bases* (2nd ed, University of California Press, Oakland, 2014) at 25.

research topics".[72] Systematic sex disaggregated data is lacking across all areas of disasters from prevention to recovery.[73] Yet collection of gender-disaggregated data is indispensable to understand how disaster intersects with gender and to start reflecting on a feminist legal response. Katharine Bartlett's key feminist legal methods of "asking the "woman question"" cannot take place without data.[74] In order to examine and highlight "the gender implications of rules and practices which might otherwise appear to be neutral or objective",[75] one must point to where women are situated in society.

B Gender balance representation

The question of "where are the women?" also highlights the importance of representation and the involvement of women in planning and responding to disasters. The first question to ask is whether women are represented in decision-making positions. Despite calls and commitments from various national and international institutions for increasing women's involvement in disaster risk reduction,[76] men continue to control most of the leadership positions in the formal risk reduction sector, including in governmental agencies, academia and response organisations.[77] Women are still marginalised in decision-making relating to disaster issues, even though the United Nation's International Strategy for Disaster Reduction has, for over two decades, stressed the importance of consideration of gender equality in disaster reduction policies and the need to adopt measures designed to promote women in leadership, management and decision-making as well as recognising women's position in their community and the larger society.[78] Yet without representation, women's experiences and perspectives are likely to remain invisible.

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72 Kelman, above n 23, at 66.

73 Valdés, above n 33, at 20.

74 Katharine T Bartlett "Feminist Legal Methods" (1990) 103(4) Harvard Law Review 829 at 831.

75 At 837.

76 See for example Maria Caterina Ciampi and others "Gender and Disaster Risk Reduction: A training pack" (eBook ed, Oxfam GB, Oxford, 2011); United Nation Women "Disaster risk reduction" <www.unwomen.org>; United Nations Office for Disaster Risk Reduction "Women's leadership in risk-resilient development: good practices and lessons learned" (2015) <www.undrr.org>; and United Nations Office for Disaster Risk Reduction Regional Office for Asia and Pacific "Women's International Network on Disaster Risk Reduction: Promoting women's leadership in the Asia-Pacific Region" (2021) <www.undrr.org>.

77 Cheryl L Anderson "Organising for Risk Reduction: The Honolulu Call to Action" in Enarson and Chakrabarti (eds), above n 24, at 44.

78 Valdés, above n 33, at 24.

If full, equal gender participation is required to mitigate disasters, reduce social vulnerabilities and rebuild more sustainable, just and resilient communities, a word of caution is nevertheless required here.[79] Placing women in decision-making power is only the beginning and cannot guarantee that any women in a position of power will make a difference for women in disasters. If the main goal of liberal feminism is to increase women in positions of power, it lacks much reflection on what women could and should do when they reach such positions. Including women in public institutions does not in itself guarantee transformative decision-making, rather, as discussed by Hunter:[80]

> These assumptions about the difference that women in power would make, however, now appear at best naïve and at worst essentialist.

Further, there might be temptation to think of women as a homogeneous group when in fact they might have divergent needs and interests in the context of disasters. Relief workers and victims of a disaster might share the same gender and yet have contradictory views of the way forward.

C Substantive equality

The concept of equality is complex and not always adequate to create a situation of gender equality. Gender-neutral or formal equality policies and laws do not necessarily produce gender-neutral outcomes. The main difficulty with applying a formal equality approach is that it is based on the male benchmark. The male norms are not only the norm but they are also considered to be neutral. As a result, anti-discrimination provisions too often neglect to address structures which perpetuate disadvantages for vulnerable groups. Indeed, White and Greive note within the context of natural disasters:[81]

> [Although] the Government of New Zealand has applied a non-discrimination model to the recovery efforts, ensuring as far as possible that measures taken extend to all people on an equal basis. However, …

79 Anderson, above n 77, at 42.

80 Rosemary Hunter "Can feminist judges make a difference?" (2008) 15 Int J Leg Prof 7 at 7. On Liberal feminism, see Vanessa Munro *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart Publishing, Oxford, 2007).

81 Michael JV White and Andrew Grieve "Human Rights and Dignity: Lessons from the Canterbury Rebuild and Recovery Effort" in Simon Butt, Hitoshi Nasu and Luke Nottage (eds) *Asia-Pacific Disaster Management: Comparative and Socio-legal Perspectives* (Springer, Berlin, 2014) 245 at 262.

> equal treatment in the wake of natural disasters can lead to unequal results. Vulnerable groups continue to be disadvantaged.

In contrast, the application of substantive equality has an obligation to produce results, especially in situations where a particular group is vulnerable. Implementing substantive equality policies would include specific policy related to violence and reproductive health. Arguably, as argued by Hunter, disaster planning should systematically promote: [82]

> … a substantive view of equality—one which seeks to accommodate women's differences, to take account of historic and systemic disadvantages, and to revise norms and standards to incorporate women's positions and experiences.

In reality, such an approach is rare. The New Zealand Human Rights Commission noted the lack of an appropriate gender-sensitive policy designed to tackle the impacts of the Christchurch earthquakes on women.[83] In contrast, following the health crisis of the COVID-19 pandemic, the government adopted a recovery programme which, at least in part, recognises that disasters come with gender specific impacts, and in particular, a rise in violence against women.[84] Challenging traditional gender assumptions and building on existing work, a range of measures was adopted to tackle violence against women in the midst of the pandemic crisis. Such measures include the allocation of substantive funding towards the support of services for victims or survivors of family violence[85] and services for perpetrators to ensure safer and healthier homes.[86]

D Gender mainstreaming

Recording and accounting for where women are, and making sure that women are represented in positions of decision-making power, are initial key steps

82 Hunter, above n 80, at 14.

83 Human Rights Commission *New Zealand Human Rights Commission's Report to the Committee on the Elimination of Discrimination Against Women (CEDAW)* (July 2012).

84 See for example, Annick Masselot and Maria Hayes "Exposing Gender Inequalities: Impacts of Covid-19 on Aotearoa | New Zealand Employment" (2020) 45(2) New Zealand Journal of Employment Relations 57 at 58.

85 "Funding for family violence services through Budget 2020" (11 May 2020) Ministry of Social Development <www.msd.govt.nz>.

86 Hon Poto Williams and Jan Logie "Next steps to end family and sexual violence: Budget 2020" (press release, 11 May 2020).

toward more equal disaster outcomes and responses. This should be completed with basic changes in education, and mainstreaming gender equality in all policies, including mitigating and reducing social vulnerabilities. This approach should be completed with a gender mainstreaming strategy.[87] A gender mainstreaming strategy ensures that "attention to gender perspectives is an integral part of interventions in all areas of societal development".[88] It involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men and combating discrimination.[89] As set out by UN Women:[90]

> … Mainstreaming is not an end solution in itself but a strategy, an approach, a means to achieve the goal of gender equality. Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities – policy development, research, advocacy/ dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.

The purpose of the strategy is to overcome gender-neutral practices and procedures. It requires integrating a gender equality objective into all policies and actions by state actors. Such a strategy requires some concepts to be reconsidered with a gender-sensitive lens. For example, infrastructures, which at present are understood to strictly mean transport, building, and energy, could be interpreted in a broader and gender-inclusive way to include the care of others, health and education.

Overall, New Zealand does not practice gender mainstreaming in disaster planning or recovery. As pointed out by Solnit and others, leadership and government response to disasters often fall short of meeting people's post-disaster needs, resulting in an exacerbation of vulnerability.[91] Further, Yumarni and Amaratunga argue that ""gender-blind" reconstruction policies and programs can only lead to an increase in women's vulnerability, a widening of

87 "Gender Mainstreaming" UN Women <www.un.org>.
88 "Intergovernmental mandates on gender mainstreaming" UN Women <www.un.org>.
89 "Gender Mainstreaming", above n 87.
90 "Gender Mainstreaming", above n 87.
91 R Solnit *A paradise built in hell: The extraordinary communities that arise in disasters* (Penguin, London, 2009), cited in Ruth McManus "Women's voices: Solace and social innovation in the aftermath of the 2010 Christchurch earthquakes" (2015) 29 Women's Studies Journal 22 at 31.

gender disparities and the creation of unsustainable development in affected communities".[92] Post-disaster reconstruction policies and programs that neglect to take a gender sensitive approach, decrease opportunities for the development of resilient and sustainable community reconstruction.[93]

The experience of the Canterbury earthquake shows that gender was not incorporated in the recovery strategy: [94]

> Surprisingly, however, there was no systematic, gender-sensitive disaster planning in place in New Zealand, despite the country's high ranking on all gender equality indicators, and despite the fact that poor, single, battered women, typically with children, were extremely vulnerable to further marginalisation and violence in the aftermath of the Christchurch earthquake.

Gender was not a factor considered in the 2012 report by the Canterbury Earthquake Recovery Authority "Recovery Strategy for Greater Christchurch"—the only mention of gender is on page 17, where it notes that an assessment of the Strategy was to be measured through indicators. For example, social recovery indicators may be analysed in terms of age, ethnicity, employment status and gender.[95] Reflecting on the experience of the Canterbury earthquake, a number of reports have stated the need to implement gender mainstreaming in relation to preparedness, planning and disaster management. For instance, recommendation 52 of the New Zealand's National Plan of Action (Mahere Rautaki ā-Motu) states that policies should be considered "in relation to gender mainstreaming, adequacy of housing and access to buildings for persons with disabilities in the post-recovery efforts of the Canterbury earthquakes".[96] The Humans Rights Commission also made a similar recommendation in June 2012:[97]

> The Commission requests the Committee to recommend to New Zealand that gender mainstreaming is essential in the development of government

92 Tri Yumarni and Dilanthi Amaratunga "Gender Mainstreaming as a Strategy to Achieve Sustainable Post-Disaster Reconstruction" (2018) 8(5) Built Environment Project and Asset Management 544 at 544.

93 at 544.

94 True, above n 18, at 84.

95 Canterbury Earthquake Recovery Authority "Recovery Strategy for Greater Christchurch Mahere Haumanutanga o Waitaha" (May 2012) <www.cera.govt.nz>.

96 *Recommendation 52* 18 UPR Cycle 2 (31 January 2014).

97 At 23.

> policies and interventions relating to the Canterbury earthquake recovery process, and that monitoring and evaluation of policies and practices includes gender disaggregation and analysis of gender impacts.

V CONCLUSIONS

Earthquakes and other disasters have a disproportionate impact on women because of increased female vulnerabilities in patriarchal structures. Strengthened gender equality reduces such vulnerabilities. As Kelman states, "[w]e have the abilities and assets to reduce vulnerability and to prevent a disaster … It is a choice—someone's choice—whether or not to do so".[98] Adopting disaggregated gender data collection, achieving gender-balance representation in decision-making, applying substantive equality and implementing gender mainstreaming strategy represent four instruments developed through feminist legal methods to increase equality.

Why would we want to change the system and improve female outcomes following seismic disasters? The lack of gender consideration in disaster planning and management not only has a negative impact on women, but also impacts a wide range of stakeholders in society. Where women are affected, the whole of society is affected. In the bigger picture, these local earthquakes and other disasters are relatively small and contribute to our training for the largest human challenge that is the Anthropocene,[99] including human-induced climate change. The repeated failure to embed gender equality principles into disaster planning and recovery policy will be increasingly significant as more and larger crises are looming. Disasters contribute to a reduction in resources, which in turn leads to political choices about fair distribution. The COVID-19 pandemic is indicative of coming life and death choices that society will be faced with. In times of more serious disasters in the future, lack of equality risks privileging saving lives based on male norms, resulting in uniformity and ultimately unfertile humanity. Without entrenched fundamental principles of gender equality, political choices are likely to become biased in a way that could precipitate human extinction.

98 Kelman, above n 23, at 82.

99 The Anthropocene, or the age of humans, is the widely popularised term referring to the most recent geological epoch, which marks the commencement of significant human impacts on Earth's geology and ecosystems.

TRANSFORMING WOMEN-ONLY SPACES: LAW, POLICIES AND REALITIES OF TRANS INCLUSION IN WOMEN-ONLY SAFE HOUSES IN AOTEAROA NEW ZEALAND

Phoebe Ellen McHardy Moir*

Women-only spaces such as safe houses (or women's shelters) have always been places of safety and freedom for women to come together and empower each other without the influence of men. Recently, there has been a movement to exclude trans women from such spaces. While safe houses in Aotearoa New Zealand are generally inclusive of trans women, there are further practical measures which can be implemented to better support this inclusion.

This paper begins by discussing the law in Aotearoa New Zealand relating to trans rights and comparing this to the law in the United Kingdom, then analyses arguments against trans inclusion and explains why they do not stand under scrutiny. This paper then analyses how to support inclusive policies with practical measures, and how inclusive policies have generally been applied in Aotearoa New Zealand. This paper concludes that inclusive policies benefit everyone, including vulnerable minorities such as trans women.

Trans survivors of IPV should know with certainty, the same as every other survivor, that there are services available to support them should they need it. Trans women are a marginalised and vulnerable group, whose interests have been absent from public consideration for far too long. The analysis in this article reveals that it is time for us to question how we can better serve trans women, because we can do better. All we need to do is open our minds to the fact that our current system is not perfect.

Key Words: *"trans women"; "transgender"; "women-only spaces"; "Intimate Partner Violence"; "inclusion"*

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I INTRODUCTION

Women-only spaces have always been intended to be places of safety and freedom for women to come together and empower each other without the influence of men. Safe houses, or women's shelters,[1] are especially so as they provide a safe place for women and their families to recover, usually from Intimate Partner Violence (IPV),[2] away from their perpetrators.

Recently, there has been a movement to exclude trans women from women-only spaces,[3] seen most prominently in women-only sports, with 36 distinct anti-transgender student athletics bills introduced in the United States in 2021 alone.[4] This article will analyse the law, policy arguments and realities of trans inclusion in women-only spaces such as safe houses, using a comparative analysis between New Zealand and the United Kingdom. Analysis will demonstrate that trans exclusion is unjustified and inclusion should be supported and implemented with practical measures.

While safe houses in Aotearoa New Zealand are generally inclusive of trans women, this article argues that there are further practical measures which can be implemented to better support this inclusion. These measures include partnership with Rainbow and trans communities and proactive advertisement of inclusive policies.

Furthermore, it is argued that there is a need for legal reform for trans rights, both in simplifying the process of legal transition and in better preventing discrimination, including within the IPV sphere. This is unlikely to have a practical impact for most safe houses in Aotearoa New Zealand, but it will remove loopholes which may be used by some organisations to exclude

1 "Safe house" is commonly used in Aotearoa to describe organisations providing safe housing or shelters for women affected by IPV. Overseas, it is more common to see the term "women's shelters", (Email from Philippa (Wellington Women's Refuge) to the author regarding this paper (27 May 2021)).

2 "Intimate partner violence" or "IPV" is used in place of domestic violence or similar terms, as it encompasses a broader range of relationships. This explicitly includes gender-based violence, which is violence for the purpose of enforcing gendered power structures, see Michael Munson *Sheltering Transgender Women: Providing Welcoming Services* (National Resource Centre on Domestic Violence and Force, Technical Assistance Guidance, September 2014) at 2; and Scottish Women's Aid *Guidance For Supporting Trans Women For Women's Aid Groups in Scotland* (May 2015) at 3.

3 "Trans woman" is used to refer to an individual who identifies as a woman, but was assigned male sex at birth. This paper will use gender identity or an individual's internal sense of gender as a marker of transition. Conversely, "cis" or "cisgender" is used where someone's sex at birth conforms with their internal sense of gender. See Munson, above n 2, at 2.

4 "Transgender Exclusion in Sports" (March 2021) American Psychological Association <www.apa.org>.

trans women from women-only spaces. The planned legal reform currently being undertaken will resolve some of these issues.

A Scope and outline

Scholarship has emphasised the importance of including trans voices in conversations regarding trans issues.[5] This article was adapted from an individual research paper, and so it was not possible to work alongside trans individuals in the writing process. However, where possible, I have centred articles written by or involving consultation with trans individuals to balance my own cisgender experiences.

This article chooses to focus on trans women due to the amount of discussion around inclusion of trans women in women-only spaces.[6] While trans men and non-binary individuals may face similar issues, this is not the focus of this article. These important demographics require specific consideration of their own.

This article begins by discussing the law in Aotearoa New Zealand relating to trans rights compared with the law in the United Kingdom. That is followed with an analysis of the arguments against trans inclusion and an explanation of why they do not stand under scrutiny. The article then examines how inclusive policies can be supported by practical measures and how inclusive policies have generally been applied in Aotearoa New Zealand. The concluding section summarises the main points of this analysis—that inclusive policies benefit everyone, including vulnerable minorities. Therefore, this article argues that organisations should support their inclusive policies with practical measures and work with trans individuals and representative organisations to ensure that women-only services are accessible to all women.

II THE LEGAL POSITION IN AOTEAROA NEW ZEALAND COMPARED WITH THE UNITED KINGDOM

A Protection from discrimination

The current legal position in Aotearoa New Zealand towards inclusion of trans women in women-only spaces is vague. Sex is included as a prohibited ground

5 Stonewall and nfpSynergy *Supporting trans women in domestic and sexual violence services: Interviews with professionals in the sector* (Stonewall, 2018) at 2.

6 See P Dunne "(Trans)forming single gender services and communal accommodations" (2017) 26(5) Soc Leg Stud 537 at 539.

of discrimination within New Zealand's Human Rights Act 1993 (HRA).[7] The New Zealand Bill of Rights Act 1990 (BORA) additionally provides the right to freedom from discrimination.[8] Under the HRA this right applies specifically to land, housing and other accommodation.[9]

However, the law also provides exceptions to freedom from discrimination. Section 19(2) of BORA states that "[m]easures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination… do not constitute discrimination". Similarly, s 55 of the HRA provides an exception regarding hostels, institutions and other similar establishments where accommodation is provided only for persons of the same sex. This means, for example, that it would be legal for a women-only safe house to deny accommodation to a man based on sex.

It is not entirely clear where trans women fit within this scenario, particularly as the HRA uses "sex" rather than "gender". The position is especially blurry for trans women who have not "legally transitioned", that is, have not had the sex on their birth certificate altered to match their gender.

However, a recent Cabinet paper recommended the explicit inclusion of gender identity, gender expression, sex characteristics and intersex status in the prohibited grounds of discrimination in the HRA, alongside the primary purpose of the reform, which was to move hate speech protections from the HRA to the Crimes Act 1961.[10] While the Government "has long maintained that transgender and gender-diverse people are covered by the Human Rights Act", explicit inclusion would strengthen the protections and ensure the inclusion of trans women within women-only safe houses.[11]

Explicit inclusion would address the ambiguity of whether trans people are protected under the definition of "sex" in the HRA.[12] According to *Mazengarb's Employment Law*, the Human Rights Commission's suggestion to include "gender", during the passage of the Bill, was not accepted.[13] Instead, "sexual

7 Human Rights Act 1993, s 21(1)(a).
8 New Zealand Bill of Rights Act 1990, s 19(1).
9 Human Rights Act, s 53.
10 Cabinet paper "Proposed changes to the incitement provisions in the Human Rights Act 1993" (13 April 2021) CO (18) 4 at [45]–[50].
11 Marc Daadler "Up to three years in prison for hate speech under reforms" *Newsroom* (online ed, New Zealand, 16 April 2021).
12 *Mazengarb's Employment Law (NZ)* (online ed, Lexis Advance) at [4021.10].
13 At [4021.10].

orientation" was included.[14] This fails to recognise the distinction between gender diversity and sexual orientation. The Solicitor-General provided an opinion stating that discrimination on the grounds of gender identity is already included within the HRA,[15] though where or how is not certain.

In contrast, the United Kingdom Equality Act 2010 currently protects trans people against discrimination who have the characteristic of "gender reassignment", rather than "sex".[16] The Act also clarifies that single-sex services must allow access for trans people in line with their "acquired gender", without needing any legal affirmation of their gender.[17] However, it is legal for single-sex services in the United Kingdom to provide a different service or deny services to trans people if doing so achieves a "legitimate aim", which is similar to the position in Aotearoa New Zealand.[18] According to the Rainbow rights charity Stonewall, safe houses in the United Kingdom do not often use this exception and whether it is useful as a safeguard is debatable.[19] Leaving loopholes like this allows possible discrimination against trans women when they approach safe houses, which fosters uncertainty in a vulnerable climate.

B Legal change of sex

Similar to protection from discrimination, the current process for legal change of sex in Aotearoa New Zealand has recently been reviewed. The Births, Deaths, Marriages, and Relationships Registration Act 2021 received Royal assent on 15 December 2021. This reform will allow trans women to change their legal sex more easily, which will create greater ease of access to women-only spaces by removing any potential for exclusion on the basis of sex.[20]

The previous process for legal change of sex came under ss 28–33 of the Births, Deaths, Marriages, and Relationships Registration Act 1995. Under s 28(3)(c)(i), this was determined by medical transition, often requiring surgical reassignment surgery, either at the time or at a future date.[21] *"Michael" v Registrar-General of Births, Deaths and Marriages* affirmed that some degree of

14 At [4021.10].

15 At [4021.10]; and Opinion letter from Cheryl Gwyn (Acting Solicitor-General) to the Attorney-General regarding the Human Rights (Gender Identity) Amendment Bill (2 August 2006).

16 United Kingdom Equality Act 2010, s 7.

17 Stonewall and nfpSynergy, above n 5, at 19.

18 United Kingdom Equality Act, sched 3, s 28; and Stonewall and nfpSynergy, above n 5, at 19.

19 At 9.

20 Eva Corlett "New Zealand passes law making it easier to change sex on birth certificates" *The Guardian* (online ed, New Zealand, 9 December 2021).

21 See Annabel Markham "Transgender ideology and the law" [2019] NZLJ 14 at 15.

permanent physical change was required, although full gender reassignment surgery would not be required in all cases.[22] The new process does not require medical evidence, which will hopefully establish a more equitable and less costly system.[23] Individuals will be able to apply directly to the Registrar-General with a statutory declaration rather than needing to apply to the Family Court, as was required under the 1995 Act.[24]

These changes were a long time coming, since although the proposed Births, Deaths, Marriages, and Relationships Registration Bill was introduced in August 2017, it was deferred on 25 February 2019. This delay was primarily due to issues around the Governance and Administration Committee adding gender self-identification to the Bill.[25] These changes were too significant and controversial to forego public consultation for, and the Minister also cited issues with the clarity of the changes.[26] There was no update on the progress of the Bill until March 2021 when Minister for Women and Internal Affairs Jan Tinetti committed to getting the Bill moved into law.[27] Now that the new law is in place, this will allow trans women easier access to women-only spaces and reduce the potential opportunities for discrimination.

Adjusting Aotearoa New Zealand's sex-change process to allow for self-identification has brought us in line with the law in the United Kingdom. Under the United Kingdom Gender Recognition Act 2004, a trans person may be issued a Gender Recognition Certificate if they can show that they have gender dysphoria, have lived in their acquired gender for at least two years and intend for this to be permanent.[28] This process for legally changing one's gender does not require any medical or surgical procedures and at the time it was enacted, the United Kingdom was ostensibly the first state to employ such a liberal scheme.[29] Self-identification regimes sever "the link between

22 *"Michael" v Registrar-General of Births, Deaths and Marriages* [2008] 27 FRNZ 58 at [113]; and Markham, above n 21, at 15.

23 Births, Deaths, Marriages, and Relationships Registration Act 2021, ss 23–29; and Corlett, above n 20.

24 Births, Deaths, Marriages, and Relationships Registration Act 1995, s 30; and Department of Internal Affairs *The Births, Deaths, Marriages, and Relationships Registration Bill* (16 December 2021).

25 Hon Tracey Martin MP "Government reduces barriers to changing birth registration" (press release, 1 August 2019).

26 Martin, above n 25.

27 Jason Walls "Mothballed gender self-ID law back as a 'priority' for Govt – will pass this year, Minister says" *The New Zealand Herald* (online ed, New Zealand, 14 March 2021).

28 United Kingdom Gender Recognition Act 2004, s 2.

29 Andrew N Sharpe "A Critique of the Gender Recognition Act 2004" (2007) 4 J Bioeth Inq 33 at 33.

sexed status and the physical body".[30] This is, however, by no means a perfect solution and issues remain with the permanence of the change, the binary structure of the Act and the categorisation of trans status as a mental illness.[31]

In summary, the United Kingdom's law is broader and more fluid when compared to Aotearoa New Zealand's law, and even more so when compared to the previous law. The United Kingdom has removed major barriers to transitioning, such as medical costs, and explicitly protected trans people. However, the United Kingdom's law still allows some room for discrimination against trans people under the Equality Act, regardless of whether they have gained legal recognition of their gender or not. While this exception is not often used, it remains an issue for trans inclusion in women-only spaces.

The current position of Aotearoa New Zealand's law is murky and vague, particularly when contrasted against other legal systems with more robust laws around gender identity.[32] While recent reform has provided some clarity, more is needed. This would give women-only spaces certainty on who is legally included in their services and trans women certainty on where they fit in these services. With some legal reform established and the rest appearing inevitable, all that remains is for planned reform to be followed through, both with enactment and practical implementation.

III ANALYSIS OF ARGUMENTS AGAINST INCLUSION AND REBUTTALS

Since the law is murky as to whether trans women are included in women-only spaces, the default position for services should be inclusion, as supported by the current legal reform. This is especially so as the loophole for same-sex services to discriminate on the basis of sex allows individuals to apply their own prejudices, including against trans people. Arguments for inclusion aim to negate this prejudicial discretion, though there remain some who argue in opposition. Those who argue against inclusion often refer to themselves as "gender-critical".[33] Other terms used in literature include "transphobic", "trans-exclusionary" and "radical feminists". This article will largely use the

30 At 37.

31 At 38–39.

32 World Health Organization *Transgender People and HIV* WHO/HIV/2015.17 (July 2015) at 9.

33 Charlotte Jones and Jen Slater "The toilet debate: Stalling trans possibilities and defending 'women's protected spaces'" (2020) The Sociological Review 68(4) 834 at 835.

phrase "those opposing inclusion", as it is descriptive without importing value judgements.

Arguments made by those opposing inclusion span a variety of topics, which can broadly be broken into: the definition of "woman", the purpose of segregated spaces, cisgender discomfort and privacy, enabling violent men access to women-only spaces, resource shortages and segregation. These arguments are analysed in detail below. All interlink and largely centre around who is included in the definition of "woman". Those opposing inclusion hope that by excluding trans women from the definition of "woman", trans women will also be excluded from women-only spaces.

It is worth noting the pertinence of this debate within the IPV sphere, particularly when there is a potential legal loophole for discrimination by safe houses should they choose to oppose inclusion. The area of IPV is inherently gendered and services are often built on the story of "the stronger/bigger man controlling the weaker/smaller woman".[34] Inclusion of trans women is challenging to the normative gender binary that defines IPV spaces. The following section outlines and rebuts the arguments posed by those opposing inclusion.

A Definition of "woman"

Arguments against inclusion of trans women in women-only spaces tend to centre on the idea that trans women are not "real women". Such arguments are based on the fact that trans women are socialised as male and they have different biology.[35] Aleardo Zanghellini suggests that defining "woman" solely by biology is a political choice and it misconstrues the distinction between gender and sex.[36]

With trans activists now arguing that trans women can live as women without any medical intervention, the idea of determining "women" based on

34 Julia K. Walker "Investigating Trans People's Vulnerabilities to Intimate Partner Violence/Abuse" (2015) Partner Abuse 6(1) 107 at 107.

35 Scottish Government *Potential impacts of GRA reform for cisgender women: trans women's inclusion in women-only spaces and services (GRA EQIA Literature Search)* (Document 5, November 2019) at 5; Scottish Women's Aid, above n 2, at 8; and Jennifer Earles "The "Penis Police": Lesbian and Feminist Spaces, Trans Women, and the Maintenance of the Sex/Gender/Sexuality System" (2019) 23(2) J Lesbian Stud 243 at 245.

36 Aleardo Zanghellini "Philosophical Problems With the Gender-Critical Feminist Argument Against Trans Inclusion" (2020) 10(2) Sage Publications at 3.

biology is increasingly problematic.[37] "Transitioning" means different things to different people, with Michael Munson identifying three forms of gender transition: social, medical and legal.[38] Individuals will prioritise different forms of transition based on their values, experiences and culture, meaning that the traditional concept of medical transition is only part of the picture, or may not be part of the picture at all.[39] Furthermore, defining "transition" by medical intervention fails to recognise the prohibitive financial barrier of medical transition, as only a small number of transitional surgeries in Aotearoa New Zealand are publicly funded.[40]

This changing definition of "woman" challenges societal ideas of gender roles and those who uphold them. But there are many different ways to be a woman, even if you were assigned male sex at birth.[41] Surely, if feminism is about opposing the oppression of women, widening the definition of "woman" furthers the goal of liberation and, conversely, restricting the definition of "woman" only furthers the goals of the patriarchy.[42] Jennifer Earles affirms that breaking down gender barriers is a direct challenge to the patriarchal framework of gender and furthers the feminist agenda.[43] All women benefit from a society where there is less prescription and expectation of how they should act and appear.

Furthermore, trans women are oppressed under the same system as cis women, they engage with others as women and they may have legal recognition of their status as women.[44] Excluding trans women on the basis of biology is out of step with the law in jurisdictions such as the United Kingdom and will be out of step in Aotearoa New Zealand if the promised reform is undertaken. While trans women experience different types of gender-based oppression and are socialised differently, they are harmed by the same system that harms cis women and they belong in women-only spaces.[45]

37 Belinda Sweeney "Trans-ending women's rights: The politics of trans-inclusion in the age of gender" (2004) 27(1) Women's Studies International Forum 75 at 79.

38 Munson, above n 2, at 14.

39 At 14; and Paula Manners "Trans Inclusion in Women-Only Spaces" (2019) 10(1) CONCEPT at 1.

40 "Health care for transgender New Zealanders" (28 September 2021) Ministry of Health <www.health.govt.nz>.

41 Sweeney, above n 37.

42 Talia Mae Bettcher "Trans Feminism: Recent Philosophical Developments" (2017) 12(11) Philosophy Compass at 2.

43 Earles, above n 35, at 244 and 248.

44 Dunne, above n 6, at 544.

45 Bettcher, above n 42, at 8.

Restriction and prescription of the definition of "woman" leads to exclusion of trans women from women-only spaces. Those who oppose inclusion do not include trans women in their definition of "woman" and therefore equate opening women-only spaces to trans women to "welcoming cisgender males".[46] This has been criticised as it imputes that trans women are men, which is not correct.[47]

A widening definition of "woman" can be seen generally reflected within the IPV sector. Traditionally, many safe houses were designed in a cisnormative, "white, Eurocentric, middle class way".[48] This is now being challenged and the availability of services is being widened. For example, Scottish Women's Aid argues that cis women who step outside gender norms still identify as women and are perceived to be women, but the same courtesy is not extended to trans women.[49] This demonstrates how the IPV sector has expanded their definition of "woman", but there is some work still to be done regarding the inclusion of trans women.

Opening women-only spaces to trans women is challenging to strict definitions of "woman" and requires un-learning of societal and patriarchal expectations. However, reframing of the definition is benefiting and liberating to all women. If we aim to live in a society where we are not defined by what another person thinks a woman ought to be, then it is not appropriate for us to prescribe a strict definition on others. As put by Paula Manners: [50]

> …if those oppressed under patriarchy are busy fighting each other, then we will not have the strength or the resources left to tackle the roots of our oppression at its source…Why must we accept this discourse as it is presented to us?

It is also noteworthy that extending women-only spaces to trans women is only enlarging the definition of "woman" to approximately an additional 1.2 per cent of Aotearoa New Zealand's population.[51]

46 Dunne, above n 6, at 551.
47 Bettcher, above n 42, at 6.
48 Stonewall and nfpSyngery, above n 5, at 27.
49 Scottish Women's Aid, above n 2, at 8.
50 Manners, above n 39, at 12.
51 "Number of Trans People in NZ" (2012) Gender Minorities Aotearoa <https://genderminorities.com>.

B Purpose of segregated spaces

Those who oppose inclusion build on excluding trans women from the definition of "woman" by arguing that inclusion of trans women defeats the purpose of women-only spaces. Women-only spaces were built on "consciousness raising".[52] Women were able to come together and discuss how gender impacted them, without the influence of men. It enabled discussion of rape, IPV, abortion and other gendered issues, which led to a deeper understanding of how the patriarchy oppresses women.[53] Women-only spaces are "a fundamental challenge to the structure of power".[54] Since their conception, these spaces have transformed and grown, with many now being state-funded.[55] Safe houses have become a natural extension of what were initially meeting spaces.[56] While women-only spaces were founded as places of togetherness and consciousness-raising, it is possible for women to be conscious of their own oppression and remain blind to how they privilege from the oppression of others, such as trans women.[57]

Those who oppose inclusion argue that trans women cannot empathise with the experiences of cisgender women, who have been socialised as submissive within a patriarchal society.[58] However, campaigners for trans inclusion argue that trans women are oppressed under the same system of patriarchy for the same reasons as cis women and therefore have a place within the discussion.[59] Relating specifically to safe houses, trans women who are survivors of IPV need the use of safe houses in the same manner that cis women do. If anything, trans women who experience IPV are more oppressed under our patriarchal society as an intersection between two minority identities.[60]

Trans women being socialised for less time as women should not displace them from women-only spaces, in the same manner that girls and young women are not excluded from women-only spaces simply because they have

52 Manners, above n 39, at 3.
53 At 3.
54 Marilyn Frye *The Politics of Reality: Essays in Feminist* Theory (Crossing Press, New York, 1983) at 103 (as cited in Manners, above n 39, at 6).
55 Lorene Hannelore Gottschalk "Transgendering women's space: A feminist analysis of perspectives from Australian women's services" (2009) 32(3) Womens Stud Int Forum 167 at 168.
56 Sweeney, above n 37, at 81.
57 Manners, above n 39, at 4.
58 Sweeney, above n 37, at 82.
59 Manners, above n 39, at 4.
60 Walker, above n 34, at 111.

been socialised as women for less time. Furthermore, the fact that trans women do not identify as male and have deliberately undertaken an often-difficult social transition can be expected to undermine any male socialisation they may have received.[61]

Lorene Hannelore Gottschalk uses her perception of trans women as men to argue that the presence of men prevents women from opening up in women-only spaces.[62] A similar argument could be used to exclude any woman who is not perceived to conform to traditional forms of gender expression. It is not the fault of a trans woman if others perceive her as a man and she should not be removed from a space that she has a right to be in due to the bias of others. This could be compared to if a person with red hair attempted to access a safe house and was asked to leave by someone who did not feel comfortable opening up around a person with red hair. The person in this situation would be confused and think it was unfair.

In this kind of situation, it is possible for accommodations to be made for both parties without either being excluded from the space. For example, one of the safe house providers interviewed by Stonewall explained that they would "support and educate" anyone who expressed an issue with sharing a space with a trans woman, as they would with any equality issue.[63] Women-only spaces can be shared by all women without oppressing trans women.

C Cisgender discomfort

Alongside the purpose of segregated spaces, perhaps one of the most common issues raised by those opposing inclusion is cisgender discomfort, or "privacy" for cis women. Peter Dunne explains how this is perceived: "A trans woman, who accesses her preferred gendered-space, is considered a male interloper whose presence inappropriately subjects occupants to the 'male gaze'".[64]

Trans inclusive scholars have responded to privacy concerns by pointing out that trans users of women-only facilities do not invade privacy more than anyone else who uses the facility.[65] In fact, it would be absurd to force trans people to use gendered facilities according to their sex at birth. This was demonstrated by a social media movement following a trans exclusionary

61 Zanghellini, above n 36, at 9.
62 Gottschalk, above n 55, at 177.
63 Stonewall and nfpSyngery, above n 5, at 15.
64 Dunne, above n 6, at 543.
65 At 543.

bathroom policy in the United States, which showed bearded trans men showering in women-only facilities.[66]

The Scottish Government suggests that cisgender discomfort stems from a feeling of violation of privacy and from potential exposure to "unnatural" bodies.[67] Dunne adds that we do not exclude people who have bodily diversity unless they are transgender. For example, men with gynecomastia (breast tissue) are still men, intersex women are still women and women who have had a double mastectomy are still women.[68] Dunne also explains that trans bodies are "rarely, if ever, visible" due to clothing and cubicles.[69] Dunne recommends that privacy concerns can be addressed by service providers enhancing privacy options for all users, rather than excluding trans women.[70] Cisgender women are equally able to make use of privacy measures such as cubicles in bathrooms and changing rooms, which should alleviate any privacy concerns they may have.

A particular fear raised within the IPV sphere is that a cis woman who has survived IPV by a man may be triggered by the presence of a trans woman if she perceives her to be a man.[71] In response to this argument, Manners points out that this concern could lead to the exclusion of cis lesbians or anyone else who does not conform to one survivor's expectations of what a woman should look like.[72] Imagine if we critically assessed all those who accessed women-only IPV services to check if they appeared "sufficiently woman-like".[73] This would doubtlessly seem subjective and arbitrary and no different to historical patriarchal standards for women, such as not allowing a woman in a church without a dress. In this situation, we are so worried about being subjected to the male gaze that we become its enforcers.

If there is concern about a particular survivor being triggered by her perception of a trans woman as a man, this highlights the need for individual risk assessments within IPV services to respond to the triggers of individual survivors, as will be illustrated in detail later in this article.[74] Manners analogises

66 At 544.
67 Scottish Government, above n 35, at 5.
68 Dunne, above n 6, at 547.
69 At 545.
70 At 539.
71 At 548.
72 Manners, above n 39, at 8.
73 At 8.
74 Scottish Government, above n 35, at 6.

that if a survivor found a particular accent triggering, they would not exclude all people with that accent from their service. Instead, the service provider would "develop bespoke services" to meet the survivor's needs.[75]

Cisgender discomfort or privacy concerns can be sufficiently mitigated by enhanced privacy provision for all users of a service and individual risk assessments. There is no need to exclude users from a service simply because they may make some users uncomfortable. Service providers should instead encourage open-mindedness and inclusion of bodily diversity. Exclusion of trans women based on potential discomfort for some users is a slippery slope to exclusion of others, including those who do not conform with traditional expectations of women.

We would never imagine excluding a queer woman from a safe house because some IPV survivors may only consider heterosexual women to be "true women"; or a woman who wears a head covering like a hijab, or a woman who is infertile, or a woman with a disability. The prejudices of humanity are, unfortunately, boundless and if we are constantly building our systems around potential discomfort based on prejudice, we will ourselves become discriminatory. One person's discomfort is not grounds for another person's exclusion.

D Eroding protection from violent men

Another of the key arguments used by those opposing inclusion is that allowing trans inclusion in women-only services would erode gender boundaries and compromise the integrity of gendered spaces, providing violent men access.[76] This argument is used to oppose law reform that allows self-declaration of gender, as there is fear that violent men will be able to obtain fraudulent recognition as women to gain access into women-only spaces to perpetrate violence.[77]

This argument ignores the fact that many IPV services, including safe houses, have robust risk assessment procedures.[78] Many IPV services report that they have never had a perpetrator of IPV attempt to access their services to continue perpetrating IPV, but they are confident their risk assessment procedures would prevent this from happening.[79]

75 Manners, above n 39, at 8–9.
76 Stonewall and nfpSyngery, above n 5, at 2.
77 Scottish Government, above n 35, at 8; and Zanghellini, above n 36, at 2.
78 Stonewall and nfpSyngery, above n 5, at 18.
79 At 22.

This argument is also linked to the "transgender menace" myth, namely that trans women themselves are a threat to the safety of cis women.[80] These arguments are again based on the misgendering of trans women as men. Dunne explains that those opposing inclusion think that by allowing trans women access to women-only spaces, it will inevitably lead to sexual intercourse, both consensual and non-consensual. This is based on the premise that a man and a woman in an intimate space together will inevitably have sex.[81] Gottschalk argues that "[t]rans-inclusion… is one of the greatest threats faced by women".[82] Dunne disagrees, arguing this view reflects a "deeply engrained social prejudice".[83]

The idea that a trans woman and a cis woman together in a private space will inevitably have sex is profoundly heteronormative. If cis women who are attracted to women can be trusted to share a space together, which they can, then so too should trans women.[84] People are diverse and have diverse sexualities, regardless of their sex and gender. This argument also overlooks that most people when accessing women-only services have other things on their mind aside from sexual intercourse. This is particularly so for IPV services.

The idea that a person with a penis is inherently a sexual predator is therefore sexist and heterosexist.[85] Biology does not define exclusion in any other respect, yet it is used as justification for excluding trans women. While we know men are more likely to pose a risk of sexual assault towards children, we allow them to work in jobs where they come into contact with children because we recognise that only some men pose a real risk, and we can largely identify these men through risk assessments.[86]

Arguments based on the idea that eroding gender boundaries will allow for violent men to gain access to women-only spaces do not stand up under scrutiny because trans women are not men. In fact, they have undertaken a difficult social and sometimes medical and legal transition to *not be* men. This argument also over-exaggerates the extent to which gender boundaries need to be eroded to allow for trans women to access women-only spaces since

80 Dunne, above n 6, at 539.
81 At 550.
82 Gottschalk, above n 55, at 178.
83 Dunne, above n 6, at 551.
84 At 552.
85 At 552.
86 Zanghellini, above n 36, at 6.

trans women are a statistically small minority. Trans inclusion does not erode gender boundaries, it simply broadens them by broadening the category of woman, as discussed above. Additionally, "violent men" arguments ignore the fact that trans women themselves face great risk of sexual assault and require the protection of women-only spaces.[87]

Trans women should not be excluded from services because of the violence of cisgender men, especially when they are survivors of violence themselves. Trans women do not pose an inherent risk to cis women. However, if trans women pose a risk within a safe house environment, this can be established through an individual risk assessment procedure, as is done for every other woman who accesses the service.

E Scarcity of IPV resources

Another concern held by some who oppose inclusion is that allowing trans women into women-only services, particularly IPV services, will drain scarce resources necessary to provide services to cis women or necessitate difficult logistical arrangements. However, Munson argues that often "very minor adjustments" can be made to accommodate trans IPV survivors.[88]

Some who oppose inclusion argue that separate services should be created, or supported, for trans women.[89] However, Stonewall discusses how specialist Rainbow IPV services are at particular risk of funding cuts, meaning that they have limited capacity and resources to support trans women in comparison to "mainstream" women-only IPV services.[90] It is also worth noting that, while specialist Rainbow IPV services exist in some countries, they are often small and cannot keep up with demand. Manners describes the idea of segregated services as a "facetious suggestion [that] ignores the fundamental difficulties of setting up a specialist service for such a statistically small percentage of society".[91]

Perhaps the most problematic part of this argument is the idea raised by Gottschalk that trans women should have separate services and spaces because, while trans women have a right to be free from discrimination, "these rights should not transcend the rights of women born and raised female".[92] This

87 Scottish Women's Aid, above n 2, at 12–13.
88 Munson, above n 2, at 11.
89 Zanghellini, above n 36, at 6.
90 Stonewall and nfpSyngery, above n 5, at 25.
91 Manners, above n 39, at 12.
92 Gottschalk, above n 55, at 170.

discriminates against trans women, no matter how it is worded, and it enforces a social hierarchy in which trans women are at the bottom. The idea that trans women should have separate services because they cannot be equal with cis women is incredibly problematic and it is at odds with the morals of a free and democratic society. This can be analogised to similar "separate-but-equal" programs, which we have learned by now are never equal.[93] Additionally, trans women existing without discrimination does not erode the right of cis women to be born and raised female. In fact, it has very minimal impact on cis women at all.

Trans women must be included in women-only services. Not only is it the most practical approach, it is also the most equal and fair one.[94] Trans women are women; they suffer from similar discrimination and oppression and have the same need for the services provided in women-only centres, such as IPV services.

F Summary

This outline of arguments is not exhaustive, and there are many arguments and rebuttals not within the scope of this article. However, this coverage of some of the key arguments should generally demonstrate how arguments against inclusion are significantly flawed. As put by Jess Phillips MP (UK), it is important that we can have a conversation about this topic, rather than a fight.[95]

IPV organisations are adaptive services that always cater to individual needs. There is room for the necessary adjustments to include trans women in women-only services, and there is no justification for such an exclusion of a vulnerable minority group.[96] The arguments in favour of inclusion are not only more reasoned than those for exclusion, but they also present inclusion as more pragmatic and feasible. It costs cis women minimally to include trans women in women-only spaces and benefits society in general by extending women-only services to most people who are affected by their status as a gender minority. Not only this, but denial of women-only spaces to trans women is a denial of their humanity and is "ipso facto harmful".[97] Further, as the next

93 Zanghellini, above n 38, at 6.
94 At 6 and 12.
95 Stonewall and nfpSyngery, above n 5, at 4.
96 Scottish Government, above n 35, at 1, Dunne, above n 6, at 556; and Manners, above n 39, at 13.
97 Zanghellini, above n 36, at 9.

section discusses, it is entirely possible to implement inclusive policies in these spaces which accommodate both cis and trans women.

IV IMPLEMENTATION OF INCLUSIVE POLICIES

Arguments made by those opposing inclusion tend to ignore that trans women seeking access to women-only services have a very real need for the services provided. This is especially the case for access to IPV services such as safe houses. Munson suggests that "every survivor is a person first" and denying trans survivors' access to services is unprofessional and unethical.[98]

The last thing that trans women need, when seeking help for IPV and abuse, is further questioning of their identities by the people in services intended to help them.[99] "Like all victims of violence, transgender victims want and need to be respected, heard, supported and believed."[100] In particular, trans women may be prevented from expressing themselves as a woman due to IPV, which makes any kind of visual or biological requirements inappropriate.[101]

While there is undisputed need for trans women to have access to IPV services, the statistics for trans women affected by IPV differ greatly to the statistics for cis women.[102] Stonewall suggests that, while 7.5 per cent of all women experience IPV, 16 per cent of trans women experience it.[103] Additionally, 24 per cent of those do not tell anyone about the IPV they are experiencing.[104] Scottish Women's Aid suggests that even as many as 50 per cent of trans women might experience IPV.[105] Sid Jordan, Gita Mehrotra and Kiyomi Fujikawa break this down into 54 per cent of trans women experiencing IPV, 24 per cent experiencing severe physical IPV and 47 per cent experiencing sexual violence.[106] Though the numbers in this area differ, it is clear that trans

98 M Munson and L Cook-Daniels "Transgender Individuals' Knowledge of and Willingness to use Sexual Assault Programs" (unpublished paper, Milwaukee WI, 2011), as cited in Munson, above n 2, at 1.

99 Stonewall and nfpSyngery, above n 5, at 2 and 24.

100 "Resources for supporting transgender victims of relationship violence and sexual assault" (2 October 2014) New Zealand Family Violence Clearinghouse <https://nzfvc.org.nz>.

101 Scottish Women's Aid, above n 2, at 12–13.

102 Sid P Jordan, Gita R Mehrotra and Kiyomi A Fujikawa "Mandating Inclusion: Critical Trans Perspectives on Domestic and Sexual Violence Advocacy" (2019) 26(6–7) Violence Against Women 531 at 533; and Walker, above n 34.

103 Stonewall and nfpSyngery, above n 5, at 6.

104 At 6.

105 Scottish Women's Aid, above n 2, at 4.

106 Jordan, Mehrotra and Fujikawa, above n 102, at 533.

women are particularly vulnerable to IPV, which should be the most persuasive argument for their inclusion.[107]

Trans women also experience a different kind of abuse specific to their trans status. Some ways in which trans abusers may hold power over trans people include:

i) withholding gender-affirming medication;

ii) refusing to use the trans woman's correct pronouns and name;

iii) convincing the trans woman that no one would believe her trans status;[108]

iv) joking about the trans woman's appearance;

v) touching parts of the trans woman's body she is not comfortable being touched; and

vi) isolating the trans woman from her friends and family.[109]

In the United Kingdom, it is also easier for partners of trans women to perpetrate abuse because under the Gender Recognition Act 2004, trans people who married before their transition must get either their partner's consent or a divorce before they are able to obtain legal recognition of their gender.[110] Walker adds that sexual abuse is especially "taboo" for trans people because many suffer from body dysmorphia and fear physical investigations into sexual abuse.[111]

Even for trans-inclusive safe houses, there is more they can do to connect with trans communities and train their staff in inclusive policies.[112] Manners identifies that many trans women "remain unsure if services are willing and able to provide them with the support that they need".[113] Jordan, Mehrotra and Fujikawa also note that safe houses need to be aware of the difficult relationship between the trans community and the Police, which deters trans women from seeking help for IPV.[114]

It is also important to acknowledge that, while safe houses and IPV services

107 Dunne, above n 6, at 549.
108 Stonewall and nfpSyngery, above n 5, at 6.
109 Scottish Women's Aid, above n 2, at 4.
110 Gender Recognition Act 2004, s 4A; and Stonewall and nfpSyngery, above n 5, at 6.
111 Walker, above n 34, at 111.
112 Stonewall and nfpSyngery, above n 5, at 23.
113 Manners, above n 39, at 9.
114 Jordan, Mehrotra and Fujikawa, above n 102, at 534.

often try to be inclusive, their services are inherently cisnormative.[115] Jake Pyne suggests that this is exacerbated by the lack of trans content within the social work curriculum:[116] "Under the assumption of the universality of cis experience, no information is collected or imparted about trans communities."[117] Trans women are marked as outsiders from the moment they enter the cisnormative spheres of women-only spaces, whether this comes from deliberate transphobia or passive cisnormativity.[118] This highlights the importance of producing information about trans people and integrating such resources into social services.[119] It is important that we examine not only discrimination, but also passive exclusion.[120]

This may leave some service providers questioning how they may displace an assumption of cisnormativity and explicitly open their service to trans users. Munson has suggested the following in relation to interacting with trans individuals:

i) using gender neutral terminology when addressing individuals using their services if their pronouns are unknown;[121]

ii) asking individuals using their services for their preferred name and pronouns when meeting them;[122]

iii) requiring the same legal documents from everyone, regardless of their gender history and regardless of whether their preferred name and gender match their legal information;[123]

iv) keeping all personal information confidential, including gender histories;[124] and

v) implementing and upholding an anti-discrimination policy in relation to gender identity and communicating the policy to all service users.[125]

115 Jake Pyne "UNSUITABLE BODIES: Trans People and Cisnormativity in Shelter Services" 28(1) (2011) CSWR 129 at 131.
116 At 131.
117 At 133.
118 At 133.
119 At 133.
120 At 134.
121 Munson, above n 2, at 6.
122 At 6.
123 At 4.
124 At 6.
125 At 12.

In addition, Munson has suggested that safe houses should also implement:

i) private spaces for dressing and washing for all individuals residing in a safe house;[126]

ii) at least one gender-neutral or all-gender bathroom on site;[127]

iii) recognition of the essential nature of gender-affirming interventions to some individuals and helping them to access these interventions where necessary and possible;[128]

iv) explicit communications about their trans inclusive policy in promotional or online material;[129]

v) a clear anti-discrimination policy in relation to sexual orientation and gender identity;[130]

vi) efforts to ensure local LGBT communities and organisations are aware of their inclusivity policy, including;

- undertaking staff training with LGBT specialist organisations; and
- developing relationships and partnerships with LGBT specialist organisations;[131] and

vii) staff training within their inclusivity policy and ensuring that all staff are confident and capable of applying the measures to uphold it.[132]

Manners emphasises that these measures are particularly important because "a majority of LGBT people assume that [safe houses] are not for them…It is therefore incumbent on services to be proactive".[133] Manners adds that it is crucial to work with trans people when constructing inclusive environments.[134]

Stonewall reaffirms that "trans voices need to be at the heart of these initiatives".[135] This avoids making assumptions about the needs and wants of trans people and ensures that the result is effective. Munson adds that this will

126 At 10.
127 At 10.
128 At 13.
129 At 4.
130 At 12.
131 At 11.
132 At 12.
133 Manners, above n 39, at 11.
134 At 14.
135 Stonewall and nfpSyngery, above n 5, at 9.

raise awareness among potential trans users of IPV services that the relevant safe house is welcoming and can be trusted.[136] All this works towards a relationship of trust, respect and empowerment, which is essential within an IPV or safe house service.[137]

It is noteworthy that a lot of safe houses and IPV services have long histories of supporting and working with trans women, even if they do not have an official policy relating to trans statuses. This was supported by Stonewall's survey of IPV services in the United Kingdom.[138] Stonewall has suggested that legal reform often has minimal impact on the running of safe houses since such services carry out thorough risk assessments for every woman who accesses their services, to ensure every woman gets the support she needs in her individual circumstances.[139] Jess Phillips MP (UK) describes:[140]

> I know from my time working at a refuge that every woman who comes through your door will need personalised support. One day you might be helping a woman with uncertain immigration status and no recourse to public funds. Another day you might be supporting a woman whose partner is threatening to make her trans history public if she leaves.

Trans women have a particular set of risks and needs, though nearly every woman who accesses a safe house receives attention for their individual needs; whether they stem from culture, religion, sexual orientation or anything else.[141]

As set out above, risk assessments can be used to address many of the worst fears of those who oppose inclusion. It is difficult to find a template for these robust risk assessments online, due to their personal nature, but all of Stonewall's data suggests that a risk assessment would be more than enough to protect users of a service in a situation such as the following example.[142]

Let us imagine the worst fears of those who oppose inclusion. Bob has been physically abusing his wife, Jane. Jane uses a safe house to escape the situation and Bob finds out from a friend which safe house. He has heard of a new law which means he could get into the safe house if he dresses up as a

136 Munson, above n 2, at 11.
137 New Zealand Family Violence Clearinghouse, above n 100.
138 Stonewall and nfpSyngery, above n 5, at 2.
139 At 2.
140 At 4.
141 At 15.
142 At 2.

woman. So, he dresses up as a woman and approaches the safe house, saying his partner has been abusing him and he is a trans woman. The safe house looks into his records and finds:

i) Bob is financially well-off and could afford to pay for his accommodation. There are other women needing the service who cannot afford to pay for accommodation, so Bob is of low priority.

ii) Bob's name appears on Jane's record as her abuser. The safe house knows they cannot be housed together and Bob is likely to be a threat to other women.

iii) Bob's Police check comes back and they find he has been arrested twice for domestic assault in the last year.

The safe house chooses to deny Bob the service because he is not in financial need and is likely to pose a risk to the women using the service, particularly Jane. They may alternatively help him to access a different service or house him separately from other service users.

This is simply an example of the kinds of risk assessment procedures that safe house services may use. In this example it becomes clear that Bob's ruse would not succeed due to the robust nature of safe house risk assessment procedures.

Alongside the existing risk assessment procedures, implementation of inclusive policies is crucial. It is not enough to simply have inclusive policies; they must be advertised to the people they are there to support. Staff must know about them and be trained to apply them. The policy should be visible and searchable for people wanting to access the service.

Trans survivors of IPV have been through enough and they should not need to be hesitant about whether a service is inclusive to them or not. They should know, with the same certainty as anyone else, that there is a service there to support them and keep them safe.

V APPLICATION IN AOTEAROA NEW ZEALAND

While the laws and policies of trans inclusion in women-only services are clear, it is important to also understand the realities of their application within the Aotearoa New Zealand context. Overseas, there has been extensive consultation with safe houses and IPV services about their trans-inclusive policies and how

they work in reality.[143] A similar study has not been conducted in Aotearoa New Zealand, perhaps because overseas studies were largely triggered by law reform discussions, which have been stalled in Aotearoa New Zealand.

For this article, I emailed a range of safe houses and women-only services across Aotearoa New Zealand to inquire as to their trans-inclusive policies. I could not find any easily accessible information for any of the shelters as to their inclusion policy. This survey was by no means formal and many of the contacted services did not respond. It was simply used to gain policy information that could not be found anywhere else.

Before responses may be analysed, it is important to note how different shelters in Aotearoa New Zealand relate to each other. Most of the safe houses come under the umbrella of the National Collective of Independent Women's Refuges (NCIWR, otherwise known as Women's Refuge). Thirty-eight safe houses are affiliated with NCIWR and about 20 are un-affiliated.[144] All safe houses are non-profit registered charities managed by a trust and they are not completely funded by the government. NCIWR is only 60 per cent funded.[145] The politics of safe houses in Aotearoa New Zealand are not within the scope of this essay, but there is some competition and disagreement between affiliated and non-affiliated organisations.[146]

NCIWR replied to my email by saying:[147]

> In answer to your question we are all inclusive here at women's refuge we welcome all women into our safe houses – including transgender women.

Waitomo Women's Refuge (NCIWR affiliated), answered:[148]

> At our Refuge if you identify as a woman and meet our other criteria then you can be admitted to our safehouse. This includes transgender women.

They also added that if it is not appropriate to admit a woman to their safe

143 See for example Stonewall and nfpSyngery, above n 5.

144 "How Women's Refuges in NZ Operate – and Why Your Local Refuge Needs Your Support" (1 August 2017) The Aunties; and Email from Philippa, above n 1.

145 The Aunties, above n 144.

146 Phone call from Jackie (The Aunties) to the author regarding this paper (21 May 2021).

147 Email from Casey (National Collective of Independent Women's Refuges) to the author regarding this paper (28 May 2021).

148 Email from Wendy (Waitomo Waipa Women's Refuge) to the author regarding this paper (1 June 2021).

house, then they will find an alternative solution such as WINZ emergency accommodation, a different safe house or a motel.[149]

Wellington Women's Refuge (NCIWR affiliated), sent me a copy of their relevant policy:[150]

> WWR understand that gender identity can be non-binary and is open to providing services to cis women, transgender, gender queer, intersex or people who choose to live with a more fluid gender identity.

They added that most safe houses have been supporting all who identify as women for many years. Their representative also noted that "legislation could be overkill and an unusual approach towards a not-for-profit charitable social service" since they are already working hard to ensure inclusivity within NCIWR safe houses.[151]

The Aunties, a non-safe-house IPV service, noted that organisations independent from NCIWR tend to have more freedom to develop their own inclusive policies. Their representative also noted that the safe house system in general was designed for cis Pākehā women and this is reflected in policies and their implementation.[152]

YWCA Christchurch (unaffiliated) has a slightly different approach due to their housing being solely in the form of family units, which was a change implemented in 2021. Due to this structure, YWCA will either house a trans woman with her whānau or in a separate unit depending on the woman's preference. YWCA's representative noted that they have "grown and changed" as an organisation and their policies affirm that trans women are included in women-only services.[153]

Tauranga Women's Refuge (unaffiliated) affirmed they have been providing safe housing for trans women for years.[154]

Women's Centre New Plymouth, an unaffiliated non-safe-house service, is developing a gender policy at the time of writing this article. They have always

149 Email from Wendy, above n 148.
150 Email from Phillipa, above n 1.
151 Email from Phillipa, above n 1.
152 Phone call from Jackie, above n 149. This is refuted by Philippa from Wellington Women's Refuge, who noted that the New Zealand safe house movement has involved Māori women who in the early 1980s set up their own 'by Māori for Māori' safehouses under a parallel development model (Email from Philippa (Wellington Women's Refuge) to the author regarding this paper (2 May 2022)).
153 Email from Tania (YWCA Christchurch) to the author regarding this paper (28 April 2022).
154 Email from Hazel (Tauranga Women's Refuge) to the author regarding this paper (27 May 2021).

operated on "social inclusion with no judgment" and are currently developing policy that affirms their status quo.[155]

From this brief survey, it would appear that safe houses in Aotearoa New Zealand generally affirm the status of trans women as women and include them in their services. However, there is always more that can be done, should the relevant service have the resources to do so. From this informal survey, I suggest that safe houses and IPV services in Aotearoa New Zealand should focus on implementing their inclusive policies in practice. While it is amazing to see that most services are welcoming to trans women, it would be better if this was publicly visible to trans women themselves, as every service needed to be emailed to access this information.

As stated earlier, there are many different ways to implement inclusive policies and most of them take up very few resources. The most important of these implementation mechanisms is working with trans and Rainbow advocacy services to ask what they actually want and need from an IPV service.

VI CONCLUSIONS

Trans inclusion should be encouraged and implemented in safe houses and IPV services. While the law in Aotearoa New Zealand is not particularly friendly to trans individuals, safe houses have largely taken matters into their own hands to ensure inclusion within the IPV sector. Hopefully, the planned legal reform, which appears inevitable, will provide a stronger legal mandate to support the current status quo.

It is gratifying to see that trans-exclusionary myths and arguments have not significantly affected the IPV sector in Aotearoa New Zealand. However, there is always more that safe houses in Aotearoa New Zealand could do to implement their inclusive policies. Safe houses strive to make their users feel safe, supported and welcome. This can best be done proactively by connecting with trans and Rainbow communities to enhance their feeling of inclusion. An example of this could be involving trans people in the development of policies and procedures. Laws are nothing if they are not followed and policies are nothing if they are not implemented.

I also argue that the planned legal reform will be useful within the IPV sector, because it would provide a guarantee of anti-discrimination and remove discretion from individuals who may apply their own prejudices. Safe houses

155 Email from Angela (New Plymouth Women's Centre) to the author regarding this paper (10 June 2021).

and IPV services do great work for women, including trans women. Legal reform would not change what most services do on a daily basis, but it would change things for the minority who continue to apply exclusionary practices.

The status quo of trans inclusion in women-only services in Aotearoa New Zealand should be affirmed by legal reform and services should focus their energy on implementing their already inclusive policies.

Trans survivors of IPV should know with certainty, the same as every other survivor, that there are services available to support them should they need it. If they need to access an IPV service, they should know they will be welcomed and supported from the moment they enter the door.

Trans women are a marginalised and vulnerable group whose interests have been absent from public consideration for far too long. This article has analysed the law, policies and realities of trans inclusion in women only safe-houses, but it is individuals within our IPV services and wider society who can cause meaningful change. It is time for us to look at ourselves and our society and reflect on how we may improve and better serve our trans communities. All we need to do is open our minds to the fact that our current system is not perfect.

RECOGNISING AND UNDERSTANDING FINANCIAL ABUSE: ADDRESSING HOW RELATIONSHIP PROPERTY AGREEMENTS CAN ACT AS A MECHANISM FOR FINANCIAL ABUSE

Freya McKechnie[*] and Emma Phelps[**]

Intimate partner violence is sadly prevalent in New Zealand and can come in many different forms. Often the focus of academia and policy is on the physical, sexual and psychological forms of intimate partner violence. However, there are also other, less-recognised, forms of intimate partner violence, including financial abuse. This article focuses on how relationship property laws that enable people to contract out of default rules for property sharing may be used to perpetrate financial abuse. It then discusses the legal framework and considers the potential for change in this area.

I INTRODUCTION

In 2013, financial abuse was recognised as a form of family violence in legislation. Financial abuse is a form of psychological abuse by way of social entrapment for primary victims of intimate partner violence (**IPV**).[1] The perpetrator of financial abuse uses money or assets to control their partner's actions and freedom of choice. A recent study assessing how often women from Aotearoa experience IPV found that women's experiences of economic abuse had doubled from 4.5 per cent in 2003 to 8.9 per cent in 2019.[2] However, few studies have documented how abusers restrict their partner's finances, ability to work and

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1 Mark Henaghan and Siobhan Reynolds "The use of trusts and trust litigation as a form of financial abuse in Aotearoa New Zealand and what to do about it" (2020) 33 AJFL 303 at 303–304.

2 Janet Fanslow and others "Change in prevalence of psychological and economic abuse, and controlling behaviours against women by an intimate partner in two cross-sectional studies in New Zealand, 2003 and 2019" (2021) BMJ Open at 7.

economic freedom. As a result, financial abuse is under-recognised and not well understood, particularly in the context of agreements under the Property (Relationships) Act 1976 (PRA). The lack of understanding and recognition of possible avenues of financial abuse is leaving women mentally and emotionally exhausted, as well as financially worse off.[3]

Part 6 of the PRA provides a mechanism for parties to a de facto relationship, marriage or civil union to contract out of the property-sharing provisions in the PRA. In many relationships, this enables both partners to have control over their finances and determine their property arrangements. However, if one party to the relationship has more power than the other due to gender, class, education, race or disability, relationship property agreements can be used to coerce or financially abuse the more vulnerable partner. The PRA recognises that relationship property agreements are not simply commercial agreements and that there may be uneven power dynamics between parties entering into these agreements. It also imposes mandatory procedural safeguards.[4]

This article begins in Part II by examining financial abuse, the underlying patterns of harm at play when dealing with psychological abuse, and how the harm of IPV can be invisible while still being detrimental to victims. This Part explores the social science behind financial abuse and paves the way to consider how s 21 contracting out and settlement agreements can be used as a tool to perpetrate IPV.

Part III focuses on how relationship property agreements can lead to financial abuse. Part IV then addresses the current laws that could assist in mitigating the imbalance in power caused by financial abuse. This includes the potential use of duress and undue influence, although they do not provide a conclusive and strong protection mechanism until they are further developed. This Part also considers how Australian jurisdiction provides some insight into how New Zealand's case law may develop to better protect victims from financial abuse. Lastly, Part V addresses prevention and solutions.

This article will refer to agreements under s 21 of the PRA as "contracting out agreements", agreements under s 21A of the PRA as "settlement agreements" and the two types of agreements together as "relationship property agreements".

3 Women's Aid "What is financial abuse?" <www.womensaid.org.uk>.

4 Property (Relationships) Act 1976, s 21F(3).

II FINANCIAL ABUSE AS A FORM OF FAMILY VIOLENCE

Family violence is prevalent in New Zealand. One in two women in New Zealand are likely to experience physical, sexual, or psychological abuse.[5] However, financial or economic abuse in New Zealand is not well understood or researched.[6] Research from the United Kingdom found that over one third of adults in Britain had been subject to some form of financial abuse.[7] Currently, public awareness in New Zealand of financial abuse is 40 years behind the understanding of physical and sexual violence.[8]

While IPV can happen between any combinations of gender, because of historical norms and the statistical and anecdotal evidence, this article will primarily discuss IPV and financial abuse occurring where women are the victims.

A Financial abuse, coercive control and unequal bargaining power

Although economic abuse is becoming more widely understood to be an aspect of psychological abuse, as a phenomenon on its own, it has received little attention relative to its detrimental effect.[9] There is silencing of women's lived experiences of economic violence.[10]

Financial abuse is part of a pattern of "physical and psychological abuse" that an abuser uses "to establish and maintain power and control over their victim".[11] Evan Stark has defined coercion as the "use of force or threats to compel or dispel a particular response" and control as referring to the "structural forms of deprivation, exploitation, and command that compel obedience

5 New Zealand Family Violence Clearinghouse "NZFVC Data Summaries 2017: Family violence reports reach record high" (26 June 2017) <www.nzfvc.org.nz>, as cited in Ayesha Scott "Surviving post-separation financial violence despite the Family Court: complex money matters as entrapment" (2020) 10 NZFLJ 27 at 27.

6 Sandra Milne, Susan Maury and Pauline Gulliver *Economic Abuse in New Zealand: Towards an understanding and response* (Good Shepherd, Abbotsford, 2018) at 8.

7 Nicola Sharps-Jeff *Money Matters: Research into the extent and nature of financial abuse within intimate relationships in the UK* (Refuge, 2015), as cited in Scott, above n 5, at 27.

8 Nicola Sharps-Jeffs *Supporting Survivors of Financial Abuse: Learning for the UK* (Winston Churchill Memorial Trust, London Metropolitan University and Surviving Economic Abuse, 2016), as cited in Scott, above n 5, at 27.

9 Ang Jury, Natalie Thorburn and Ruth Weatherall "What's his is his and what's mine is his": Financial power and the economic abuse of women in Aotearoa" (2017) 29(2) Aotearoa New Zealand Social Work 69 at 69.

10 Scott, above n 5, at 29.

11 Jury, Thorburn and Weatherall, above n 9, at 71.

indirectly".[12] The combination results in the "condition of unfreedom", or the experience of entrapment.[13]

Coercively controlling behaviour encompasses psychological, physical, sexual, financial, and emotional abuse to make a person feel subordinate and dependent.[14] This isolates the victim from support and exploits their resources and capacity for individual gain. The victim is then powerless and deprived of independence and the means to regulate, resist and escape to live their life with freedom and self-control.[15] Often because the victim is complicit with the commands of the perpetrator to maintain peace and perceived safety, the abuse is not visible. This is why it is important to understand the violence as a pattern of behaviour, which creates "harms to autonomy, personhood and decision-making".[16] Assumptions that victims should be able to get out of relationships involving IPV can lead to women not being supported in these situations.

B Law relating to financial abuse

Financial abuse was not specifically recognised in New Zealand's family violence legislation until 2013.[17] The Family Violence Act 2018 (FVA) provides that financial or economic abuse is a form of psychological abuse.[18] It gives examples of unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education.

The FVA emphasises that family violence often is or includes coercive behaviour.[19] Section 9 of the FVA provides that violence means any physical, sexual, or psychological abuse. Violence includes patterns of behaviour, which is coercive or controlling behaviour or behaviour that has the effect of coercing or controlling the person and/or causes the person cumulative harm.[20] Abuse

12 Evan Stark *Coercive control: How men entrap women in personal life* (Oxford University Press, New York, 2007) at 228–229, as cited in Evan Stark and Marianne Hester "Coercive Control: Update and Review" (2019) 25(1) Violence Against Women 81 at 89.

13 At 205, as cited in Stark and Hester, above n 12, at 89.

14 Stark and Hester, above n 12, at 83.

15 At 90.

16 Vivienne Elizabeth, Nicola Gavey and Julia Tolmie "'… He's Just Swapped His Fists for the System' The Governance of Gender Through Custody Law" (2012) 26 Gender and Society 239 at 252; citing Evan Stark "Rethinking custody evaluation in cases involving domestic violence" (2009) 6(3) Journal of Child Custody 287.

17 Domestic Violence Amendment Act 2013, s 5.

18 Family Violence Act 2018, s 11(1)(e).

19 Section 4.

20 Family Violence Act 2018, s 9(3)(a)–(b).

is also defined with reference to the cumulative effects of IPV, as it includes:[21]

> A number of acts that form part of a pattern of behaviour (even if all or any of those acts, when viewed in isolation, may appear to be minor or trivial) may amount to abuse.

Psychological abuse, as included in the FVA, includes threats of physical abuse or sexual abuse and intimidation or harassment.[22] Section 11(4) recognises that psychological abuse does not have to involve actual or threatened physical or sexual abuse nor does it require a physical element to be psychologically abusive.[23] Psychological abuse has been defined as:[24]

i) Behaviour which chips at a person's confidence or is designed to "put a person down" or humiliate that person.

ii) Abuse of power, which by degrees makes another person apprehensive and unsettled.

iii) Exploiting an emotional or psychological vulnerability of another party.

iv) Indulging in behaviour designed to unsettle, antagonise, offend, annoy, provoke or worry another party.

v) Implicit or explicit threats.

Significantly, since the 2013 amendment of the FVA, s 11(1)(e) includes financial or economic abuse as a form of psychological abuse.[25] The inclusion of this within the definition of "family violence" shows that it alone is a form of abuse, and that it is also one facet of psychological abuse, which is often used in combination with other forms of abuse to deny or limit access to financial resources. Actions such as taking away resources or limiting employment or education opportunities are considered financial abuse under the FVA.

In *Arps v Arps*, reducing the money available to the plaintiff to run the household was held to amount to psychological abuse.[26] In combination with

21 Section 10(2).

22 Sections 11(1)(a)–(b).

23 Debra Wilson and Sharon Chandra (eds) *Family Law — Adult Relationships* (online loose-leaf ed, Thomson Reuters) at [FV9.09].

24 *G v C* (1997) 16 FRNZ 201 (FC) at 208.

25 Domestic Violence Amendment Act, s 5. Note that this amended the Domestic Violence Act 1995, which was the predecessor to the Family Violence Act 2018.

26 *Arps v Arps* FC Christchurch FP009/548/02, 11 October 2002.

other factors, this led the Court to make a protection order. Importantly, the Court found that a pattern of harm may not be obvious or visible as a one-off incident. The recognition of psychological abuse, patterns of behaviour, cumulative harm and coercive or controlling behaviour in the FVA has been vital in improving the safety of victims of family violence.

III THE PROPERTY (RELATIONSHIPS) ACT 1976 AND HOW RELATIONSHIP PROPERTY AGREEMENTS CAN PERPETUATE FINANCIAL ABUSE

Financial abuse can come in varying forms. However, this article is focused on how relationship property agreements can be used as a form of financial abuse or to perpetuate financial abuse. This part sets out the legislative framework of the PRA and the issues that can arise when entering into relationship property agreements, as well as at the end of a relationship where a relationship property agreement exists.

A Background to the Property (Relationships) Act 1976

The PRA governs how property is divided at the end of a relationship. The PRA is a piece of social legislation, "aimed at ensuring a just division of property between partners who may be in unequal bargaining positions".[27] The PRA aims to protect the property interests of both parties involved in a de facto relationship, civil union, or marriage.

Being social legislation, the PRA has been updated over the years to adapt to a changing society, albeit slowly. It was recognised by the late 1990s that family property law no longer reflected social reality.[28] For example, since the PRA was enacted in 1976,[29] there has been a significant increase in the number of de facto relationships.[30] In 2001, the PRA was amended to include de facto relationships and to strengthen the entitlement to equal sharing of relationship property when partners have lived together for three or more years.[31]

The purpose of the PRA includes recognising the equal contribution of partners to a relationship and providing for a just division of relationship

27 Law Commission *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [13.3].

28 Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2008) 39 VUWLR 813 at 818

29 Matrimonial Property Act 1976, now the Property (Relationships) Act 1976.

30 Peart, above n 28, at 818.

31 Property (Relationships) Amendment Act 2001.

property.[32] There is a strong notion of a relationship being a partnership of equals. The PRA is part of a wider legislative purpose of ensuring the equal status of men and women in society.[33]

There is a presumption under the PRA that relationship property will be shared equally.[34] This is subject to certain exceptions, such as where there are extraordinary circumstances that make equal sharing repugnant to justice,[35] or where courts consider it just to award compensation for economic disparity.[36]

The PRA favours equal entitlement to relationship property while aiming to avoid uncertainty, by providing a settled statutory concept of justice instead of leaving room for abstract and individual notions of justice.[37]

B Contracting out of the Property (Relationships) Act 1976

The PRA allows parties to "contract out" of the equal sharing provisions of the PRA that would otherwise apply by default. It enables parties to enter into agreements as to how their relationship property will be divided that differ from how their property would be divided under the PRA.

The next section of this article summarises the key provisions of pt 6 of the PRA, which deals with contracting out of the PRA. This provides couples with autonomy as to how their property will be divided at the end of their relationship. The risk is that while relationship property agreements have a valid purpose in creating individualised property sharing arrangements, where one partner suffers from financial abuse at the hands of the other, the vulnerable partner may be pressured or coerced into signing an agreement that is against their interests. The PRA does, however, provide some procedural safeguards against this, as well as the ability for the courts to overturn agreements.

1 Section 21

Section 21 of the PRA enables spouses, civil union or de facto partners, or any two people in contemplation of entering a marriage, civil union, or de facto relationship to "make any agreement they think fit with respect to the status, ownership, and division of their property". This enables people to opt out of the default provisions of the PRA. This statutory right has been said to be "one

32 Property (Relationships) Act, s 1M.
33 Section 1N(1).
34 Sections 1C(3) and 11.
35 Section 13.
36 Section 15.
37 *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580–583; and *Martin v Martin* [1979] 1 NZLR 97 (CA) at 99.

of the pillars on which New Zealand's relationship property regime is built".[38] Section 21 agreements, or contracting out agreements, are entered into at the beginning of or during a relationship and govern how property will be divided in the event the parties separate.

2 Section 21A

Section 21A provides that partners "may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make any agreement they think fit with respect to the status, ownership, and division of that property". Agreements under s 21A, namely settlement agreements, are made after separation in order to divide relationship property as an alternative to going to court.

3 Section 21D

The subject matter that contracting out agreements may deal with is prescribed in s 21D. This section provides that by agreement, any property can be deemed relationship property, or any share of the property declared separate property.

C Issues when entering into relationship property agreements

1 Inherent pressured nature of agreements

Relationship property agreements, by their nature, have some inherent pressure attached to them. As noted by the Court of Appeal in *Harrison v Harrison*:[39]

> In the case of a contracting out agreement…the very purpose of the parties is to make provision which differs from the statutory regime.
>
> …
>
> [90] It will almost always be the more affluent party who wants a contracting out agreement and it will often be the case that the other party only signs the agreement given the implications for the relationship if he or she declines to do so.

The Court commented that the parties were in general free to agree to quite different arrangements than those under the PRA.[40] The fairness and reasonableness of the agreement should therefore not be measured against

38 *De Malmanche v De Malmanche* (2002) 22 FRNZ 145 (HC) at [98].
39 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [81].
40 At [112].

the outcome if the PRA applied.[41] It was not unfair pressure if the party that wanted the agreement said that he or she would terminate the relationship if the other party did not sign the agreement.[42]

Understandably, there is some pressure to sign an agreement in many situations. Autonomy should be encouraged and respected by law if it is not causing harm and if both parties are able to rationally think through the consequences of such an agreement and come to their own conclusions as to whether they wish to sign it or not. This article is not concerned with the situation where a party wishes to overturn a contracting out agreement simply because it achieves a less favourable result than the PRA. This article is concerned with relationship property agreements that have been made where the vulnerable partner suffers from financial abuse (or some other form of abuse) from the other partner, and because of such abuse, does not feel like they have the ability to make an independent, voluntary and informed decision regarding the agreement.

2 *Lived experiences of relationship property agreements*

A recent study of the experiences of separated people in New Zealand demonstrated some of the issues that arise for people entering into relationship property agreements.[43] The survey found some participants had a strong desire to leave the relationship and knew the split of the property was not even or fair, but accepted it to step out of the conflict.[44] There were acknowledgements of simply "giving up".[45] The following are quotes from participants in the survey, where nearly all were women:[46]

i) "Just wanted to get out and away ASAP."

ii) "I gave up the arguing. I didn't receive any chattels or compensation for them even though I was still paying them off."

iii) "I gave him a bit more to make him shut the fuck up."

The survey also found that some participants experienced a lack of choice in

41 At [93].
42 At [84].
43 Megan Gollop and others "Relationship Property Division in New Zealand: The Experiences of Separated People" (Descriptive Research Report, University of Otago, October 2021).
44 At 135.
45 At 135.
46 At 135.

property division settlement, often due to coercion or feelings of pressure, threat and manipulation from their ex-partners:[47]

i) "He manipulated and blackmailed me until I gave up the money. Also, it became too expensive to continue."

ii) "It was not divided equally because I was forced by the lawyers who wanted to be paid quickly to sign a final agreement which ended the court procedure. It was not fair, but I had to sign it otherwise lawyers were threatening to ask me [for] more money. I could pay until I die."

iii) "Due to the volatile nature of our relationship and the power and control my ex had over the situation."

The Law Commission recently examined why people enter into agreements to opt out of the PRA.[48] Positive reasons included that the agreements seemed fair or made the couple happy.[49] However, more problematic reasons were apparent, such as people not being aware of their property rights, or legal advice being unaffordable or seeming out of reach.[50] Most individuals entering into contracting out agreements during or after a relationship were in their second or subsequent relationship.[51] Understandably, people who entered agreements wished to protect their assets or provide some certainty around what was separate property versus relationship property.[52]

The Commission found that high-net-worth individuals were more likely to enter into agreements than those with fewer assets.[53] High net-worth individuals are not stereotypically perceived as being vulnerable to IPV and financial abuse, which aids in creating a pattern of harm that is invisible. Agreements were a difficult subject to discuss in most relationships, as talking about potential or realised separation and protection of financial interests were not considered easy or natural conversations.[54] Emerging from the research is that discussion of finances is often seen as a taboo topic, and the stigma surrounding financial abuse further perpetuates the silence around it.

47 At 136.
48 Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 719.
49 At 720.
50 At 720.
51 At 720.
52 At 720.
53 At 720.
54 At 720.

Interdisciplinary researcher Ayesha Scott explores the impact of financial and economic abuse in intimate partnerships.[55] Overall Scott's research indicates that silence increases women's vulnerability and creates a largely invisible problem in New Zealand. Complex financial institutions, costly legal processes and lack of education also perpetuate this.[56] Scott's research and interviews discuss lived experiences. This included an example of a victim who was influenced to sign a relationship property agreement in circumstances where she wanted to have a child and her partner said he would be willing to reverse a vasectomy if she signed the agreement.[57] He was a lawyer and drafted the agreement. She was advised against signing the agreement, but ultimately decided to enter into it. This situation shows how a contracting out agreement can be used as leverage against the vulnerable party. It also illustrates a situation where the current law is illequipped to provide the vulnerable party with a remedy, as this situation is unlikely to meet the standard of duress required to set aside the agreement.

Financial abuse linked to relationship property agreements can occur during a relationship, when a couple is entering into a contracting out agreement, or post-separation, when the parties are dividing their relationship property, either through a settlement agreement or litigation.

D Post-separation financial abuse

Further, Scott argues that "post-separation financial violence appears to sit comfortably in a 'business as usual' judicial setting, as seemingly benign methods of household money management exacerbate unequal power dynamics".[58] This form of financial violence may occur after a couple split in the form of a relationship property agreement. Due to the difficult nature of any separation, manipulation during the relationship breakdown and post-separation (for example in the process of dividing assets) is more likely to go

55 Ayesha Scott "Legal system perpetrates financial abuse" (5 November 2019) AUT <www.news.aut.ac.nz>.

56 Scott, above n 55.

57 Scott, above n 5. Scott's work also touches on aspects of abuse that are outside the scope of this article but important to recognise, such as complicating financial set ups to further isolate the victim from having financial independence and control, for example through the use of trusts to add a layer of complexity to someone who lacks legal or financial education. Other stories in Scott's work highlight the dangers of trying to leave an abusive relationship and the need for the Family Court to recognise what different forms of abuse can look like.

58 Scott, above n 5, at 28.

unnoticed.[59] Scott's work also explains that it is "logical that finances are used to entrap women" considering the complexity of power dynamics in intimate partnerships and how financial resources can shape individuals' lives.[60] Scott's work adds to a line of feminist research that critiques the social, cultural, societal and institutional norms that enable violence against women.[61]

The adversarial nature of the legal system can also benefit perpetrators of abuse. It is common for perpetrators of financial abuse to engage in lengthy litigation with their expartner.[62] Vivienne Elizabeth used the term "paper abuse" to describe how coercive control is maintained through court processes,[63] or: [64]

> …the use of legal and other bureaucratic procedures by coercively controlling partners to continue to attack, harass and control their former partners through "exerting power over them by forcing them to have contact, and financially burdening them with the costs associated with litigation".

The law and legal proceedings may seem expensive and incomprehensible to an abused person, which can perpetuate IPV.

IV MITIGATING POTENTIAL POWER IMBALANCES AND FINANCIAL ABUSE

The ability for parties to enter into any agreement they think fit regarding their relationship property means the contracting out provisions of the PRA can be used as a form of financial abuse. The PRA recognises this and includes procedural safeguards in s 21F to try to mitigate that risk. A court also has the power under s 21J to overturn relationship property agreements where it considers giving effect to the agreement would cause serious injustice. This section of the paper discusses the laws in place to mitigate the potential for abuse, particularly where there is a power imbalance between the partners.

59 At 28.
60 At 28.
61 At 28.
62 At 28.
63 Vivienne Elizabeth "From Domestic Violence to Coercive Control: Towards the Recognition of Oppressive Intimacy in the Family Court" (2015) 30 New Zealand Sociology 26, as cited in Henaghan and Reynolds, above n 1, at 304.
64 Vivienne Elizabeth "Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation" (2017) 25 FLS 185 at 187, citing Susan L Miller and Nicole L Smolter "'Paper abuse": When all else fails, batterers use procedural stalking" (2011) 17(5) Violence Against Women 637 at 637–650.

A Procedural safeguards — s 21F

Section 21F of the PRA contains procedural requirements in order for agreements to be legally binding, which act as safeguards against abuse. The agreement must be in writing and signed by both parties and their lawyers. Both parties must receive independent legal advice. Each of their lawyers must certify that they have explained the effects and implications of the agreement to their client.

Because avoiding the statutory regime requires a conscious decision, s 21F is in place to ensure as best as possible that each partner's choice is voluntary and fully informed.[65] Failure to comply with the terms in s 21F deems the agreement void unless the court is satisfied that noncompliance has not materially prejudiced the interests of any party to the agreement.[66]

When the PRA was amended in 2001, there was debate about whether the requirement for independent legal advice was too costly.[67] However, the Government and Administration Select Committee considered that it would ultimately cost more to go without it, as it could lead to more agreements being challenged through the courts.[68]

The courts have considered what constitutes adequate legal advice on several occasions.[69] In *Coxhead v Coxhead*, the wife had successfully overturned a s 21A agreement in the High Court on the basis that she did not receive proper legal advice.[70] She had rushed into signing the agreement. Her lawyer advised that the timing did not allow for proper consideration of the agreement and the extent of her rights to her husband's property. The agreement provided for a relatively large disparity between what the wife would have received under the PRA and what she was to receive under the agreement. Despite this, the wife signed the agreement. She later argued it was void as she had received inadequate legal advice.[71] The Court of Appeal found the advice given was adequate but set the agreement aside on the basis that it would be unjust to give effect to it. This was because the wife would have received only slightly

65 Peart, above n 28, at [PR21F.01].
66 At [PR21F.01].
67 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 24–25.
68 Law Commission *Part J – Can partners make their own agreement about property? Chapter 30 – Contracting out of the PRA* (IP41 Part J, 2020) at 736.
69 At 711.
70 *Coxhead v Coxhead* [1993] 2 NZLR 397 (CA).
71 At 404.

more than 25 per cent of the parties' relationship property, the lawyer had inadequate information available to him at the time, and the wife was under pressure to sign, which meant she was "not able to consider her position in an informed and dispassionate manner".[72]

While the requirement for independent legal advice provides some protection by ensuring both parties are informed of their rights, partners who are subjected to financial abuse may still enter an agreement that is not in their best interests. Accordingly, s 21F alone may not be enough to protect against relationship property agreements being used in situations of financial abuse.

B Setting aside agreements

There are options available for parties to set aside agreements on the ground of "serious injustice". Further, the procedural requirements in s 21F do not affect any rule of law or equity that makes a contract void, voidable or unenforceable on any other ground.[73] Accordingly, there are several common law claims that can be used to set agreements aside. This section of the article discusses the doctrines of duress, undue influence and unconscionable bargain, including reference to the Australian jurisprudence.

1 Serious injustice

A court may set aside an agreement under s 21J if satisfied that giving effect to the agreement would cause serious injustice. In *Wood v Wood*, the High Court held that there must be solid grounds for intervention into relationship property agreements and commented that it "is a serious matter to cast aside a formal agreement upon the strength of which people have entered relationships and ordered their lives".[74] The High Court recognised that contractual certainty and party autonomy were important values to be upheld. However, there are numerous factors for the court to have regard to, including whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made or has become so due to changes in circumstances. There is no reference to potential financial abuse or patterns of harm. However, the court must have regard to "any other matters that the court considers relevant".[75]

72 At 404–405.
73 Property (Relationships) Act, s 21G.
74 *Wood v Wood* [1998] 3 NZLR 234 (HC) at 242.
75 Property (Relationships) Act, s 21J(4)(f).

The High Court recently set aside a contracting out agreement under s 21J in a situation involving allegations of abuse. In *White v Kay*, Ms Kay claimed that Mr White was physically and psychologically abusive.[76] The contracting out agreement provided that Mr White was to receive all the parties' relationship property following a relationship of 28 years. The Court set aside the agreement under s 21J on the basis that it was seriously unjust, referring to the length of the relationship, the parties' roles in the relationship and the power imbalance.[77] The parties met when Ms Kay was 22 and she gave up her job one year later.[78] Mr White's age at the time was not made clear but he had previous relationships and a child, whereas it was Ms White's first serious relationship.[79] Ms Kay's evidence was that "Mr White was physically and psychologically abusive to her throughout the relationship … she felt like a slave and was totally controlled by him".[80]

This case did not discuss the alleged abuse in detail, potentially as it had not been proven and the Judge did not need to make a finding on this to set aside the agreement.

It seems this case was only analysed on the surface of what would be a "serious injustice". Analysis of potential financial abuse, coercive control, or patterns of harm is lacking. This may because in this case, abuse had only been alleged and not proven. It may also be because such considerations are not specifically listed as factors under s 21J or because these issues were not pleaded. Further, where agreements are looked at in isolation at the time of signing, it may lead to insufficient consideration of the underlying dynamics of the parties' relationship.

2 Duress

An agreement will be voidable where there is duress. Economic duress involves an improper threat or pressure, such that a victim's will is overborne, and they cannot exercise free will or judgment. As a result, they enter into the agreement as they had no reasonable alternative.[81] This makes the agreement voidable, provided the victim has not otherwise affirmed the agreement.[82] These

76 *White v Kay* [2017] NZHC 1643, [2017] NZFLR 592.
77 At [80].
78 At [6] and [8].
79 At [6].
80 At [15].
81 *Pharmacy Care Systems Ltd v Attorney General* (2004) 2 NZCCLR 187 (CA) at [98].
82 At [98].

circumstances of duress may be present in the instance of financial abuse, but it is a difficult standard to establish.[83] There is a two-stage test to establish duress, being the presence of illegitimate pressure and the victim being compelled to enter the contract as a result of that pressure.[84]

In *Starr v O'Meehan*, the appellant sought to set aside a s 21 agreement on the ground of duress.[85] She contended that the Family Court made incorrect assumptions about abusive relationships, including that a victim can leave a violent relationship.[86] The High Court acknowledged that "physical and psychological abuse of the appellant is a factor that may be significant in determining whether there has been duress or undue influence" and "other factors may also be significant".[87] But the High Court found that the Family Court had not erred in upholding the agreement:[88]

> [47] The Judge accepted that the appellant was under significant pressure to sign the agreement but this was within the bounds contemplated by the legislation as recognised by the Court of Appeal in *Harrison v Harrison*.

JCF v DWG is an example where duress was found, despite the applicant not relying on this claim and instead applying to set aside the agreement under s 21J.[89] The judge discussed the following points as support for duress being made out:[90]

> … the applicant was very anxious to be able to purchase a new house and that she needed the $100,000 in order to be able to conclude that purchase. The flat she was living in was very small and damp. There were gang members and dope smokers next door and she felt her children were at risk. They did not want to come and stay there with her. She said she was getting threats from the respondent.
>
> …
>
> … it is clear that the applicant felt under a lot of pressure and part of that

83 David Neild "Using duress, undue influence and unconscionable bargain to set aside relationship property agreements" (2014) 8 NZFLJ 10 at 10.
84 *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [20].
85 *Starr v O'Meehan* [2017] NZHC 1889.
86 At [18].
87 At [25].
88 At [47] (footnotes omitted).
89 *JCF v DWG* [2012] NZFC 5854.
90 At [220] and [222].

> pressure was the respondent's attitude to her and her claim. That was the result of a campaign of psychological abuse over the previous 24 years.

This decision shows that duress can be made out even where refusing to sign a relationship property agreement would not necessarily result in violence or abuse. However, courts can instead set the agreement aside on the broader ground of serious injustice under s 21J of the PRA. Duress—as a contractual claim—gives rise to a greater range of remedies, including damages, which are not available under the PRA. The PRA only enables the use of contractual remedies available to enforce contracts.[91] Applying under s 21J is a procedurally easier option, as this can be done with an application to divide relationship property and is easier to plead than a claim for duress.

3 Undue influence

It is also possible to rely on undue influence as a means of setting aside an agreement. Undue influence involves one person taking advantage of a position of power over the other, namely "the exercise of pressure, directly or indirectly, by the stronger party on the weaker party to enter into the impugned transaction".[92] It has a slightly lower standard than duress.

A party can prove actual undue influence or presumed undue influence. The latter requires a relationship that gives rise to a presumption of trust and confidence, as well as a transaction calling for explanation in the light of that relationship.[93] Once these are established, "the evidential onus shifts to the defendant to demonstrate the absence of undue influence".[94]

The High Court has commented that a de facto relationship is one in which trust and confidence should be inherent and a partner could be vulnerable to undue influence.[95] However, whether there is undue influence will depend on the circumstances of the agreement.

In *Marston v Moor*, a claim for undue influence (as well as duress and unconscionable bargain) was unsuccessful where there was alleged psychological abuse. The High Court had to consider whether the relationship was "as Dr

91 Property (Relationships) Act, s 21L.

92 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [70], as cited in *Marston v Moor* [2013] NZHC 2249 at [27].

93 *Marston v Moor*, above n 92, at [29].

94 *Attorney-General for England and Wales v R*, above n 92, at [72], as cited in *Marston v Moor*, above n 92, at [29].

95 *Marston v Moor*, above n 92, at [32].

Moor contends, a relationship of complete equals? Or was it, as Ms Marston contends, one in which he dominated her and exploited her vulnerability?"[96] Ms Marston filed evidence from a psychologist that there were events during the relationship that amounted to psychological abuse. However, Keane J was reluctant to rely on this evidence as it "relies largely on Ms Marston's own account".[97] His Honour also commented that:[98]

> … while I do accept and take into account that Ms Marston's decision to terminate her pregnancy and to be rendered sterile is a decision she has regretted ever since, and I accept that Dr Moor's infidelity to her must have been extremely distressing, the question remains what effect that could have had in 1998. To my mind it is implausible to suppose that these sources of distress would continue to have affected her so adversely then. It is even more implausible to suppose that they, and any other more general sources of stress for which Dr Moor is answerable on the evidence, could have accounted for the decisions that she made in the years after.
>
> [120] In short, I do not find that the psychological evidence called for Ms Marston assists her. I find that despite the evident difficulties she and Dr Moor experienced, she did enter into the 1998 agreement, however reluctantly, because she wanted to secure their relationship; and that their relationship remained important to her until they separated in 2009.

This case demonstrates the difficulty in setting aside an agreement based on duress, undue influence or unconscionable bargain, even in circumstances of potential abuse. It is potentially troubling that Keane J found Ms Marston's reaction to distressing events "implausible", though it appears this is because his Honour preferred the expert evidence Dr Moor had filed.[99]

In *Hewett v First Plus Financial Group Plc*, the England and Wales Court of Appeal held that hiding an affair breached the relationship of trust and confidence and was satisfactory to establish a finding of undue influence.[100] Importantly, this was because the husband convinced the wife to agree to mortgage their family home as security for his separate debts. This had led to

96 At [5].
97 At [115].
98 At [119]–[120].
99 At [115], referring to evidence of Dr Blackwell.
100 *Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312 at [30]–[33].

a company, First Plus Financial Group Plc, seeking an order for possession of their home. The Court found that the wife:[101]

> … reposed a sufficient degree of trust and confidence in her husband to give rise to … an obligation of candour and fairness owed to her … [and] [the] purpose of an obligation of candour is that the wife should be able to make an informed decision (with or without the benefit of independent advice) properly and fairly appraised of the relevant circumstances.

Hewett has not been discussed in New Zealand cases, potentially due to the relatively rare facts involved.

4 Unconscionable bargain

The doctrine of unconscionable bargain is of a more limited use, as it requires the vulnerable party to be under a disability. This means it would not assist in a case of financial abuse and IPV where the vulnerable party was not also disabled.

5 Australian jurisdiction

There is more Australian case law on duress and undue influence in the context of relationship property agreements. Section 90K(1)(b) of Australia's Family Law Act 1975 (Cth) gives courts the power to set aside a financial agreement that is "void, voidable or unenforceable". Equitable relief can be used to set aside agreements, including remedies such as estoppel, undue influence, duress, unconscionability and mistake.[102]

Financial abuse as a form of undue influence was successfully argued in *Raleigh & Raleigh*.[103] Watt J found the husband was in a controlling position financially and put extreme pressure on his wife to sign the agreement.[104] The wife was pregnant and in a weak financial position. She would have signed the agreement no matter what advice her lawyer gave her. While a romantic relationship is a presumed relationship of influence, the facts met a claim of undue influence as the wife was in a compromised position due to the disparity in financial positions. She was vulnerable to the extent that her

101 At [29].

102 Simon Marks and Jamie Burreket "Setting Aside a Financial Agreement in Equity" (Seminar paper, October 2016) at [3.6].

103 *Raleigh & Raleigh* [2015] FamCA 625.

104 At [170]–[172].

capacity to protect her interests was affected. Her husband knew this and took advantage of it.

In contrast, a similar claim failed in *Saintclaire v Saintclaire*.[105] While the wife succeeded in setting aside an agreement in the first instance, on appeal the Court found her claim fell short of establishing undue influence and unconscionable bargain.[106] Commentary on this case suggests that the evidence to support the wife's claim was lacking, for example the lack of medical evidence regarding the wife's mental state and that "there was no attempt to create any connection between recent historical events like the domestic violence and postnatal depression and the execution of the financial agreement".[107]

In *Parkes v Parkes* the wife applied to have the couple's financial agreement set aside, relying on the grounds of duress or undue influence.[108] The wife claimed that the time leading up to their wedding was "hectic" and, despite her lawyer advising her against signing the agreement, she signed anyway due to the pressured nature of her situation.[109] The wife's parents had paid for the wedding reception and the husband threatened to cancel it if the agreement was not signed. These events took place three days ahead of the wedding, after a relationship of six years and an engagement of 11 months.[110] The husband drove the wife to her appointment with a lawyer to sign the agreement, waiting outside while this took place.[111] The wife claimed his mother went with them, but the husband denied this.

The Federal Circuit Court of Australia effectively acknowledged the emotional and economical reliance one partner can have on another and held that the wife was in a position of "special disadvantage".[112] The Court drew an inference that, due to the "late production of a completed and signed agreement … he wanted to give the wife no choice and he knew that if it was presented to her days away from the wedding she would have no choice".[113] This meant that the threatened wedding cancellation subjected the wife to duress.[114]

105 *Saintclaire v Saintclaire* [2015] FamCAFC 245.
106 Marks and Burreket, above n 102, at [5.5.5].
107 Marks and Burreket, above n 102, at [5.5.6].
108 *Parkes v Parkes* [2014] FCCA 102, at [46].
109 At [53]–[56].
110 At [67].
111 At [56]
112 At [67].
113 At [69].
114 At [68]–[70].

The Australian cases show reasoning and insight at a slightly deeper level than New Zealand case law. They indicate how New Zealand case law could be developed to provide more just outcomes for partners suffering from financial abuse, particularly where relationship property agreements are used to further the abuse.

V POTENTIAL FOR DEVELOPMENT IN THIS AREA

This section discusses where there is potential for development and improvement in this area. Namely, in relation to the role of lawyers, potential legislative change, development of case law and through better access to justice.

A Lawyers' role

Greater consideration of the role of lawyers advising on ss 21 and 21A agreements could assist in dealing with financial abuse. A lawyer's role, in relation to these agreements, is to provide their client with independent legal advice on the effects and implications of the agreement. They can assist their client by negotiating the terms of the agreement, but they are ultimately bound to act on their client's instructions. They can advise a client against signing but will ultimately need to certify the agreement if the client chooses to enter into it.

However, lawyers can help to emphasise that their clients should not rush into agreements. They can raise concerns with clients where they see signs of financial abuse and discuss options such as obtaining a protection order or refer the client to family violence support services. Lawyers could undertake training to recognise signs of coercive control or financial abuse. It would be helpful for lawyers to ask comprehensive questions about the relationship and take detailed file notes about the circumstances of the relationship. This would assist in spotting potential abuse and also be useful in the event the lawyer was called to give evidence in relation to a claim to overturn an agreement.

B Legislative change

The language of the PRA could address financial abuse more specifically. Section 21J refers to "any other relevant factors". Coercive control, power dynamics and cultural norms can all be factors in a party choosing to sign an agreement that is not in their interests. The factors relevant to the test of serious injustice could include coercive control or financial abuse. The Law Commission recently considered whether family violence should be addressed in relationship property legislation, insofar as whether it should have a bearing

on the division of relationship property.[115] It recommended that the Government should consider the relevance of family violence to the division of relationship property in the context of its wider response to family violence, rather than making provision for it in largely unrelated legislation.[116] However, including financial or other abuse as a factor relevant to setting aside an agreement does not go as far as making the courts consider the existence of family violence as a relevant factor that impacts the division of relationship property. While courts may take financial abuse into account under s 21J under the catchall provision of "any other relevant factors", express inclusion would ensure this is taken into account where relevant.

C Development of case law

Further analysis of financial abuse in case law would help to shed more light on an issue that is underrecognised. The Australian case law includes a more comprehensive analysis of financial abuse in the context of setting aside agreements. This demonstrates how New Zealand case law could develop, with judges having a more nuanced understanding of the elements financial abuse and how relationship property agreements can perpetuate this abuse.

Further, expert evidence relating to financial abuse could assist in developing the case law. Academics have argued for the need for family violence experts in the criminal court.[117] Family violence experts would also be helpful in proceedings to overturn agreements. However, judges having a thorough understanding of financial abuse would assist when parties do not file expert evidence. Obtaining expert evidence can be expensive and it is not desirable that a victim of financial abuse should have to fund this in order to demonstrate abuse. Alternatively, courts could use s 38 of the PRA to direct that an expert report be filed and that the cost of this be met by the abuser or from public funds.

D Access to justice

Providing better access to justice would also help to improve outcomes for victims of financial abuse. The cost and time to bring court proceedings to set aside agreements will often mean many do not go ahead with this. This

115 Law Commission, above n 27.

116 At 214.

117 Mark Henaghan, Jacqueline Short and Pauline Gulliver "Family violence experts in the criminal court: the need to fill the void" [2021] Psychiatry, Psychology and Law 1.

reduces the strength of this mechanism to act as a remedy for financial abuse. More public education about relationship property laws would also promote access to justice. It would assist parties at the outset of relationships and when entering into relationship property agreements. The Law Commission has recognised the need for greater public awareness of and education about the PRA.[118] The Commission's recommendations included the following options:[119]

i) A public education campaign.

ii) Education in secondary school programmes and for professionals such as financial planners, business advisers and chartered accountants.

iii) Providing of information at different points of interaction with government departments, such as when applying for a marriage or civil union licence, when applying for state benefits or Working for Families Tax Credits and when applying for New Zealand residency.

iv) Introducing requirements on registered professionals or organisations such as real estate agents and banks to provide some form of prescribed information to clients when buying or selling property, applying for credit or opening joint bank accounts.

v) Producing and providing information online, in Family Courts around New Zealand and to community organisations such as Citizens Advice Bureau and Community Law Centres.

Support systems for people in vulnerable positions are crucial to ensure that they have the help and resources necessary to leave abusive relationships. Leaving the abusive relationship will be the difficult first step before the person even goes on to consider challenging a relationship property agreement. Family violence services such as Shine and Women's Refuge provide practical support, which would seem to go further in helping victims of financial abuse than some of the purely legal avenues for change discussed above.

These practical solutions would go a long way in helping people to understand the law in this area, so they are aware of what their rights may be. This may make people less susceptible to financial abuse. It would also make it easier for people to seek help if they are already suffering from financial abuse.

118 Law Commission, above n 27, at 69.

119 At [2.72](a)–(e)

Someone who is stuck with an unfavourable relationship property agreement would not try to challenge it if they were unaware that it was unfavourable.

VI CONCLUSION

There is tension between ensuring relationship property agreements provide certainty to the parties that choose to enter into them, and ensuring that relationship property agreements protect vulnerable parties. The law needs to strike a balance between these competing concerns. There are procedural safeguards to ensure that parties are aware of their legal position, but these may not fully protect victims of financial abuse. There are options available to apply to set aside agreements, but many people would face an uphill battle in order to do so. They would need to convince a court that the agreement should be set aside and take on the significant burden that is the time, cost and stress associated with litigation.

There are some areas where change can be made, with the most effective mechanisms being greater awareness, education and support for those who have been subjected to financial abuse. There is also potential for case law to be developed. Patterns of coercive control and financial abuse can be better identified and analysed so that courts can ensure that a just outcome is achieved.

SPEAKING ILL OF THE DEAD WHEN "EROTIC ASPHYXIATION GOES WRONG": NEW ZEALAND'S NEED FOR A CONSISTENT APPROACH TO SEXUAL HISTORY EVIDENCE FOR FATAL AND NON-FATAL SEXUAL CASES

Nadia Murray-Ragg*

Sexual history evidence with respect to deceased victims of sexualised killings is admissible in New Zealand. Arguing the death occurred during consensual "erotic asphyxiation gone wrong" is a popular defence strategy which emphasises the deceased's sexual history. Section 7 of the Evidence Act 2006 provides that evidence is only admissible when, in logical terms, it tends to prove or disprove a material issue. However, it is logical that a woman can have previously consented to erotic asphyxiation, and not have consented to erotic asphyxiation in a later sexual experience. There are good reasons to doubt whether consensual sexual history is ever relevant, both when the victim is deceased, and when the complainant is living. This article analyses why having different rules for the admissibility of sexual history evidence in fatal and non-fatal sexual cases is harmful, using Grace Millane's case as an example. Drawing on submissions made in the Peter Ellis appeal, this article argues for a consistent approach to the admissibility of sexual history evidence whether the victim is deceased, or the complainant is living. This article suggests that the current evidence admissibility rules can exclude sexual history evidence if applied consistently with the modern definition of consent. However, influenced by gendered stereotypes and rape myths, courts are finding that the deceased's sexual history evidence is relevant. This precedent is unlikely to be expeditiously changed. Therefore, this article recommends that Parliament amend the Evidence Act to exclude sexual history evidence with respect to deceased victims of femicide.

* Nadia submitted her article for the Bachelor of Laws with Honours degree at Victoria University of Wellington in 2021. Nadia is grateful to her research supervisor, Dr Zoë Prebble, for her helpful feedback on drafts and support throughout the year.

I INTRODUCTION

Imagine the following scenario: it is a murder trial for the sexualised killing of a woman, known as femicide.[1] The defence present evidence showing the deceased previously consented to a sexual partner restricting her breath for her sexual pleasure, known as erotic asphyxiation.[2] As a result, the jury finds her accused killer not guilty. It might appear a significant logical leap to move from evidence of consent to erotic asphyxiation on previous occasions to the conclusion that the deceased consented on the occasion she was killed. However, such evidence is admissible and defence strategies that emphasise the deceased's sexual history are often effective.[3]

Sexual history evidence purports to give credibility to the defence's "erotic asphyxiation gone wrong" (EAGW) narrative or strategy. The EAGW narrative is a subset of the broader "rough sex gone wrong" (RSGW) narrative.[4] Notably, while RSGW defence strategies are open to defendants in cases where the victim has died, in sexual violence cases with living complainants, legislation presumptively excludes evidence of complainants' sexual history.[5] This presumption recognises the irrelevance of sexual history evidence and that its high risk of unfair prejudicial effect outweighs its low probative value.

In the recent Peter Ellis appeal, the Supreme Court heard arguments on the tikanga Māori perspective that individuals' interests and mana continue after death.[6] If the Court accepts those submissions, the legal system's distinction between living and deceased appellants may become less defined. Such a precedent may influence consistent approaches to living and deceased persons in other areas of the law, including sexual history evidence. The Court has allowed the appeal to continue after Peter Ellis's death.[7]

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1 Elizabeth Yardley "The Killing of Women in 'Sex Games Gone Wrong': An Analysis of Femicides in Great Britain 2000–2018" (2021) 27(11) VAW 1840 at 1842.

2 Asphyxia is the deprivation of breath resulting from strangulation. For more detail, see Elisabeth Sheff "Kinky Sex Gone Wrong: Legal Prosecutions Concerning Consent, Age Play, and Death via BDSM" (2021) 50(3) Arch Sex Behav 761 at 765.

3 See generally Yardley, above n 1; and, for worldwide examples, see "The Women & Girls" We Can't Consent to This <www.wecantconsenttothis.uk>.

4 For a detailed analysis of rough sex narratives, see generally Ciara Connolly "Should Defendants Be Allowed to Rely on the 'Rough Sex Defence' in New Zealand Trials?" [2021] NZWLJ 123; and Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 315–320.

5 Evidence Act 2006, s 44.

6 *Ellis v R* [2020] NZSC Trans 19 [Ellis Transcript 2020] at 28–31.

7 *Ellis v R* [2020] NZSC 89 [Interim Ellis judgment] at [4]. The Court's reasons are to be provided in the judgment to the substantive appeal which has not been released at this time of finalising this article.

There is a gap in scholarly discourse with respect to analysing the admissibility of the deceased's sexual history evidence in New Zealand femicide trials in which the defence advances the EAGW strategy. A moderate volume of research on sexual history evidence in rape trials exists in New Zealand and other jurisdictions.[8] Although some research has analysed RSGW narratives in femicide trials, it has predominantly focused on cases in England and Wales.[9] Beyond that English scholarship, there has been little academic consideration of how sexual history evidence regarding the deceased in femicide cases is, or should be, treated.[10] Within this minimal scholarship, a notable 1988 United States article proposed extending rape shield provisions to deceased persons.[11] This article speaks to this gap in the literature.

This article has six parts. Part II explains how EAGW narratives work in the context of trials. It draws on the case study of Jesse Kempson's trial for Grace Millane's murder in which the defence advanced the EAGW narrative. This case study illustrates the harm that such defence strategies can cause the deceased, her family and the wider public. Part III examines the exclusion of sexual history evidence from non-fatal sexual cases. Part IV and Part V critique the logic in admitting evidence of sexual history in EAGW femicide trials. Part VI analyses the Supreme Court's opportunity to soften the distinction between living and deceased parties to proceedings. Part VII proposes reform to New Zealand's sexual history evidence laws.

II UNDERSTANDING "EROTIC ASPHYXIATION GONE WRONG" NARRATIVES

A The burden of proof

In all criminal trials, including murder, the prosecution has the burden of

8 See for example Susan Easton "The Use of Sexual History Evidence in Rape Trials" in Mary Childs and Louise Ellison *Feminist Perspectives on Evidence* (Cavendish Publishing, London, 2000) 167; Clare McGlynn "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81(5) JCL 367; Aileen McColgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16(2) OJLS 275; and Regina A Schuller and Patricia A Hastings "Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions" (2002) 26(3) Psychol Women Q 252.

9 See for example Yardley, above n 1, at 1841; Susan SM Edwards "Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence" (2020) 84(4) JCL 293; and Hannah Bows and Jonathan Herring "Getting Away With Murder? A Review of the 'Rough Sex Defence'" (2020) 84(6) JCL 525.

10 Bows and Herring, above n 9, at 532.

11 Joan L Brown "Blaming the Victim: The Admissibility of Sexual History in Homicides" (1988) 16(2) Fordham Urb L J 263 at 265.

proving all offence elements beyond reasonable doubt.[12] The first element is the actus reus: the defendant must have done the act that causes the death. The second element is the mens rea: the defendant must have intentionally killed the deceased, or intentionally caused them bodily harm, knowing that this harm was likely to kill them and being reckless as to whether their death ensued.[13]

The defence has no legal burden of proving, or disproving, any element of the offence. However, in practice, the defence usually presents evidence and advances a narrative about the facts and evidence. Advancing a narrative accords with the Story Model proposed by Professors Nancy Pennington and Reid Hastie in 1991.[14] According to the Story Model, jurors tend to understand evidence by constructing stories.[15] The story the jurors accept is the one that makes the evidence make the most sense to them.[16] The jury make their verdict decision according to how the story suits the verdict options.[17] The parties in the trial can influence the jurors' story construction by advancing their own narrative about how the evidence fits together.[18] Given the potential that narrative has to influence a jury, the defence may attempt to raise reasonable doubt about one or more offence elements by advancing the EAGW narrative.

B The modern definition of sexual consent

The EAGW narrative is difficult to reconcile with the modern moral and societal definition of sexual consent expressed in New Zealand legal literature.[19] Modern understandings of sexual consent reflect that the very nature of consensual sex is an activity that is in the moment. While consent education once advocated that "no means no", consent is now framed as "yes means yes".[20] This framing illustrates that consent is not presumed. Rather, when

12 Courts of New Zealand "Murder or manslaughter or self-defence (Sections 48, 167 and 171 Crimes Act 1961)" <www.courtsofnz.govt.nz>.

13 Crimes Act 1961, s 167(a)–(b).

14 Nancy Pennington and Reid Hastie "A Cognitive Theory of Juror Decision Making: The Story Model" (1991) 13 Cardozo L Rev 519.

15 At 521–523.

16 At 522–523.

17 At 530–531.

18 Richard Lempert "Telling Tales in Court: Trial Procedure and the Story Model" (1991) 13 Cardozo L Rev 559 at 561–562.

19 See for example Rosa Gavey "Affirmative Consent to 'Sex': Is It Enough?" [2019] NZWLJ 35.

20 Katie Mettler "'No means no' to 'yes means yes': How our language around sexual consent has changed" *The Washington Post* (online ed, Washington, 15 February 2018).

consent is given, it is unequivocal, enthusiastic, ongoing and reciprocal.[21] Therefore, consent is independent of previous sexual experiences. A person can give consent and withdraw consent during a single sexual experience. According to this level of nuance during a single occasion, it is even more the case that consent on a previous occasion, with a different partner, does not mean that person consented at the later date. This definition is central to critiquing the logic of finding relevance and probative value in the deceased's sexual history evidence.

New Zealand case law has not been as expressive of the modern social definition of sexual consent as legal literature. In the 2017 case of *Christian v R*, the Supreme Court did not adopt the affirmative model of consent advocated by the modern definition.[22] The legislative position is that consent requires more than an absence of protest.[23] For consistency with legal literature and feminist theory, this article uses the lens of modern social understandings of sexual consent. Further, this article encourages courts and Parliament to revisit the definition of sexual consent in the near future. It is important that the legal definition of sexual consent achieve consistency with the feministic social definition of sexual consent.

C Grace Millane and the harmfulness of sexual history evidence

The recent decision of *K v R* exemplifies the implications of the EAGW narrative.[24] In *K v R*, the Court of Appeal dismissed Jesse Kempson's appeal of his conviction and sentence for the murder of Grace Millane.[25] Kempson's trial and appeal illustrate the EAGW narrative playing out in New Zealand courts. The facts were that Millane and Kempson met for drinks arranged via Tinder,

21 See generally Eithne Dowds "Rethinking affirmative consent: A *step* in the right direction" in Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, New York, 2021) 162; Gavey, above n 19, at 40–41; Daniel Jackson "Six Mistakes of Law About Consent" [2020] NZWLJ 97 at 110–119; and, for how youth and Millennial culture understand consent, Sinead Gill "Calling Out Consent" *Critic Te Arohi* (online ed, Dunedin, 4 April 2019); Kim Vinnell "New Zealand rape survivors, in their own words (WATCH)" (1 May 2017) The Spinoff <www.thespinoff.co.nz>; and De Elizabeth "Enthusiastic Consent is Changing How We Have Sex" (3 April 2019) MTV <www.mtv.com>.

22 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [5(c)]; see also Gavey, above n 19, at 42; and see also Emily Blincoe "Yes, no or maybe? The 'odd' result in *Christian v R*" [2018] NZWLJ 265.

23 Crimes Act, s 128A(1).

24 *K v R* [2020] NZCA 656.

25 *K v R*, above n 24; and for the High Court sentencing judgment, see *R v K* [2020] NZHC 233 [Kempson sentencing judgment].

New Zealand's most popular dating application.[26] Later that evening, at Kempson's apartment, they engaged in sexual activity during which Kempson killed Millane. The cause of Millane's death was manual strangulation lasting between five and 10 minutes.[27] This strangulation left a six-by-three centimetres pre-mortem deep bruise on Millane's neck from the application of "sustained and prolonged pressure".[28] After Millane's death, Kempson viewed pornography, including content relating to slaves and teenagers, and took sexualised photographs of Millane's deceased body.[29] The following day, Kempson met with another woman he met on Tinder before burying Millane's body in a suitcase in the Waitākere Ranges.[30]

The defence attempted to raise reasonable doubt about Kempson's mens rea using the EAGW narrative. Kempson accepted the actus reus element of homicide: he killed Millane by allegedly consensual manual strangulation.[31] Kempson denied he had done so intending to kill Millane and denied he was reckless as to the possibility of her death.[32] Rather, he argued that he had intended to engage in consensual erotic asphyxiation during rough sex that went accidentally wrong.[33] Kempson claimed he lacked experience with sex involving domination and sadomasochism (BDSM) and that it was Millane who had initiated the erotic asphyxiation.[34]

The defence used Millane's sexual history, particularly her past interest in erotic asphyxiation, to add credibility to those arguments. One of Millane's previous sexual partners had a statement read about his historical sexual interactions with her.[35] A friend of Millane's, with whom she had discussed her sexual interests relating to erotic asphyxiation and submission, also had her

26 *K v R*, above n 24, at [12].
27 At [122]–[123], but see [111]–[120].
28 At [111]; and Kempson sentencing judgment, above n 25, at [52].
29 Kempson sentencing judgment, above n 25, at [65]–[67].
30 At [64] and [69]–[70].
31 *K v R*, above n 24, at [17].
32 Catrin Owen "Grace Millane murder trial: Accused didn't intend to kill backpacker, defence says" (19 November 2019) Stuff <www.stuff.co.nz>.
33 *K v R*, above n 24, at [37]; and *Kempson v R* [2021] NZSC 74 [SC leave judgment] at [10].
34 *K v R*, above n 24, at [18]–[19].
35 Edward Gay "The complete evidence in the Grace Millane murder trial: Inside the case that gripped a nation" (21 February 2020) Stuff <www.stuff.co.nz>; and see also Connolly, above n 4, at 134.

statement read.[36] In addition, the defence presented evidence about the dating websites and mobile phone applications that Millane had used. As highlighted by the media, one of these applications was Tinder.[37] Others included Fetlife, a social networking website used by people in the BDSM community, and Whiplr, a BDSM-focussed dating website.[38] The defence presented evidence detailing Millane's messages with men she had "matched" with—meaning both persons liked the other's profile, creating a private chatroom—in those applications and on those websites. The connotations of these websites and applications about users' proclivity for BDSM sexual practices purported to give credibility to the defence's narrative about Millane's sexual proclivity for erotic asphyxiation.

Unconvinced by Kempson's EAGW narrative, the jury found him guilty of murder.[39] Despite this guilty verdict, hearing Millane's sexual history evidence harmed Millane and her family. While Kempson initially benefitted from name suppression, Millane's name, with sensitive and private details of her sexual history, were detailed at length in open court and in the international media.[40] In contrast, the law would have protected Millane from such harms if she had survived the strangulation.[41] The Kempson trial and appeal provide an illuminating case study of the harmful inconsistency between the way New Zealand law treats the sexual history evidence of femicide victims as compared to complainants in non-fatal sexual violence cases.

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36 Sam Hurley "Grace Millane murder trial: Sexual culture expert testifies, evidence about Whiplr sex app" *The New Zealand Herald* (online ed, Auckland, 20 November 2019); Sam Hurley "Grace Millane murder trial: Sexual preferences and accused's 'life through Tinder' canvassed" *The New Zealand Herald* (online ed, Auckland, 20 November 2019); and Sam Hurley "Grace Millane murder trial: Jury to hear Crown, defence closing arguments" *The New Zealand Herald* (online ed, Auckland, 21 November 2019).

37 See for example Amber Hicks "How Grace Millane's dream trip turned to tragedy after Tinder date with sick killer" *The Daily Mirror* (online ed, London, 22 November 2019).

38 Hurley "Grace Millane murder trial: Sexual culture expert testifies, evidence about Whiplr sex app", above n 36.

39 *K v R*, above n 24, at [37]–[38].

40 See for example Zoe Drewett "Grace Millane belonged to BDSM sites and asked ex-boyfriend to choke her, defence claims" *Metro* (online ed, London, 19 November 2019); Bernard Lagan "Grace Millane trial: backpacker liked choking during sex, says ex-lover" *The Times* (online ed, London, 20 November 2019); Lee Brown "Killed backpacker Grace Millane was into choking, BDSM: court evidence" *New York Post* (online ed, New York, 20 November 2019); Chiara Giordano "Grace Millane: British backpacker gave list of fetishes to man on BDSM website, murder trial told" (20 November 2019) The Independent <www.independent.co.uk>; and Catrin Owen "Grace Millane murder trial hears from past date and men she messaged online" (20 November 2019) Stuff <www.stuff.co.nz>.

41 Evidence Act, s 44.

D Grace Millane's case indicates greater dangers

For reasons of space, this article is tightly focussed on the treatment of sexual history evidence in femicide by strangulation cases in which a male defendant advances the EAGW narrative. However, male-against-female is not the only gender dynamic where such violence can play out. Women can perpetrate fatal and non-fatal strangulation offences.[42] Men can be fatally or non-fatally strangled. Not all femicide cases involve manual strangulation. While the broader RSGW narrative encompasses those other dynamics, this article's focus is EAGW femicide because of its statistical prevalence. In fatal strangulation incidents, women comprise the majority of victims.[43] Male perpetrators are most often convicted of perpetrating fatal strangulation.[44] In femicide cases in England and Wales, manual strangulation is a common circumstance.[45] In addition, exclusively male defendants have argued RSGW narratives to defend homicide in England and Wales.[46] The murder of Grace Millane reflects this gender dynamic and the cause of death.

Millane was a "perfect victim".[47] She was white, middle-class, tertiary-educated, photogenic and heterosexual. Part of what is striking about the example of the Kempson trial is that although Millane's access to certain privileges made her less likely to fall foul of racist and classist stereotypes,[48] the legal system still treated her harmfully. Admitting her sexual history evidence allowed for unfair and illogical inferences to be made about Millane as a person. The hearing of this evidence made it seem as if she were the person on trial.[49]

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42 Crimes Act, ss 168(1)(c) and 189A.

43 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, June 2014) at 100; and in an England and Wales context, see Yardley, above n 1, at 1841.

44 Family Violence Death Review Committee, above n 43, at 100.

45 Bows and Herring, above n 9, at 526.

46 "Who Claims 'Sex Games Gone Wrong'" (3 July 2019) We Can't Consent To This <www.wecantconsent tothis.uk>.

47 For more literature on the "perfect victim" construct, see generally Elizabeth L MacDowell "Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence" (2013) 16(2) J Gender Race & Just 531; Adele M Morrison "Changing the Domestic Violence (Dis)Course: Moving From White Victim to Multi-Cultural Survivor" (2006) 39(3) UC Davis L Rev 1061; and Jan Jordan "Perfect Victims, Perfect Policing? Improving Rape Complainants' Experiences of Police Investigations" (2008) 86(3) Pub Adm 699.

48 For more literature on the impact of racist and classist stereotypes in Aotearoa's criminal justice system, see generally 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.

49 Anna North "She was fatally strangled. The media is making it about her sex life" (21 November 2019) Vox <ww.vox.com>.

This caused her family intense distress.[50] Millane's case indicates that sexual history evidence admissibility may present even greater dangers for persons disadvantaged by intersectional challenges.

III THE RAPE SHIELD: EXCLUSION OF COMPLAINANTS' SEXUAL HISTORY EVIDENCE

A The rape shield's legal effect

Section 44 of the Evidence Act 2006, known as the "rape shield", presumptively excludes complainants' sexual history with persons *other than* the defendant.[51] This presumption is rebuttable when the judge is satisfied that the evidence is of "such direct relevance to facts in issue in the proceeding … that it would be contrary to the interests of justice to exclude it".[52] When the rape shield is rebutted, defendants effectively construct narratives based on spurious background assumptions, stereotypes or myths.[53] Two of these are that sexually experienced women are "up for it" and are likely to consent to sex, and that they are likely to be untruthful when they say they did not consent.[54]

Section 44 does not exclude all of a complainants' sexual history evidence. Complainants' sexual history *with* the defendant is subject to the standard evidence admissibility rules discussed in Part IV of this article. However, the recently enacted Sexual Violence Legislation Act 2021 amends s 44 of the Evidence Act to restrict the admissibility of evidence of sexual history between the complainant and defendant in non-fatal sexual violence cases.[55] Such evidence is limited to establishing the fact that there is sexual history between

50 Ireland Hendry-Tennent "Grace Millane's family call for NZ Government to follow UK's lead and ban 'rough sex defence'" (8 July 2020) Newshub <www.newshub.co.nz>; and Charlie Jones "Grace Millane: Family welcome ban on 'rough sex' murder defence" (1 May 2021) BBC News <www.bbc.com>.

51 Law Commission *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at [3.1]–[3.2]; and Elisabeth McDonald and Yvette Tinsley "Reforming the Rules of Evidence in Cases of Sexual Offending: Thoughts from Aotearoa/New Zealand" (2011) 15(4) E&P 311 at 320.

52 Evidence Act, s 44(2).

53 For examples of specific stereotypes and myths, see Elisabeth McDonald *In the Absence of a Jury: Examining judge-alone rape trials* (Canterbury University Press, Canterbury, 2022) at 24–25; and Elisabeth McDonald *Rape myths as barriers to fair trial process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 43–44.

54 Law Commission, above n 51, at [3.45]; (11 February 2021) 749 NZPD 775–776; McDonald *Rape myths as barriers to fair trial process*, above n 53, at 44; illustrating the nature of this idea in New Zealand's law, in relation to the Evidence Act 2006's predecessor, (18 August 1976) 405 NZPD 1753–1754; and see generally Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 362–363.

55 Sexual Violence Legislation Act 2021, s 8.

the complainant and the defendant,[56] or to proving an act or omission that is an offence element or, in a civil proceeding, the cause of action.[57] At the first reading of the Sexual Violence Legislation Bill, Jan Logie MP explained that the reform provides for sexual cases to be tried on their facts and evidence instead of "myths and stereotypes" that dispirit and confuse complainants.[58] Although the kaupapa of the Sexual Violence Legislation Act is commendable, further law reform with respect to deceased victims of sexual violence is necessary.

B Preventing illogical leaps in reasoning

The rape shield reflects that on any given occasion, the factual question of whether a person either does or does not consent to a sexual experience is logically independent of whether, on past or future occasions, he or she did or did not consent to other sexual experiences.[59] In turn, the rape shield reflects modern understandings of consent by shifting the focus from previous sexual activity to ongoing, reciprocal and enthusiastic consent for each sexual act.[60] Hon Andrew Little MP emphasised this understanding of consent at the first reading of the Sexual Violence Legislation Bill. According to Little, the presumptive inadmissibility of complainants' sexual history reinforces that it is too much of a logical leap to infer the complainant consented to the sexual activity at issue from their sexual history.[61] Such concerns led to Parliament enacting s 44 of the Evidence Act. As argued throughout this article, an equivalent provision for fatal sexual violence would be a logical provision.

C Conviction and sentencing outcomes

Further, case law from England and Wales illustrates that sexual history evidence presented as part of a RSGW defence narrative can affect the outcome of a sexual assault trial.[62] The hearing of sexual history evidence can result in the defendant receiving a lesser charge and sentence than they would have

56 Evidence Act, s 44(1)(a)(i).
57 Section 44(1)(a)(ii).
58 Sexual Violence Legislation Bill 2019 (185-1); and (14 November 2019) 742 NZPD 15140.
59 McGlynn, above n 8, at 369–370; Bridget Alice Foster Sinclair "New Zealand Rape Shield and the Need for Law Reform to Address Substantial Harm: When Politics and the Law Must Address Social Injury" (LLB(Hons) Dissertation, Victoria University of Wellington, 2016) at 18; and McDonald and Optican, above n 54, at 361.
60 Sinclair, above n 59, at 4–5; and McDonald and Optican, above n 54, at 361.
61 (14 November 2019) 742 NZPD 15136; and see in relation to the Evidence Act 2006's predecessor, (18 August 1976) 405 NZPD 1753–1754.
62 In relation to England and Wales, see for example Easton, above n 8, at 173.

otherwise received, or no conviction at all.[63] These conviction and sentencing outcomes justified the enactment of the rape shield.[64]

IV FEMICIDE: NO EVIDENCE SHIELD

"[W]hen people play consensually, they do not die."[65]

A The evidence shield discrepancy

New Zealand does not have a sexual history evidence shield provision for the deceased in femicide cases. Parliament does not appear to have an impetus to enact such a provision. The new rules that the Sexual Violence Legislation Act creates for admitting sexual history evidence continue to separate deceased victims from living complainants.

This discrepancy between the treatment of sexual history evidence in sexual violence trials with living complainants, and in femicide trials with deceased victims, raises the question: why? Do principled differences justify the discrepancy between those two crimes? Both crimes are sexual cases by definition.[66] A material issue in both murder and non-fatal sexual violence cases is whether the defendant acted with the requisite mens rea. Although the mens rea in the different crimes pertains to intention or recklessness to do different acts, both concern an intention to harm the alleged victim. The difference between the outcomes is that with rape, the complainant survives the violence inflicted upon them, and with femicide, the deceased does not survive the violent interaction. This article argues that those differences in outcome are not significant enough in principle to justify the different admissibility approaches to sexual history evidence between the respective crimes. Reflecting this argument, three submissions to the Justice Committee on the Sexual Violence Legislation Bill recommended that Parliament enact a consistent approach to sexual history evidence admissibility.[67] Those submissions recommended

63 Bows and Herring, above n 9, at 527; and Elisabeth McDonald "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 Crim LJ 321 at 322.

64 McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 322–323.

65 Franki Cookney "The 'rough sex' defence was a gross perversion of BDSM, I'm delighted it's finally been banned" (17 June 2020) The Independent <www.independent.co.uk>.

66 Nikki Pender "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at [7].

67 Pender, above n 66, at [6]–[11]; Office of the Privacy Commissioner "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at [5]–[14]; and Ruth Money "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at 4.

extending the rape shield to murder cases[68] such as the Kempson trial.[69]

B Conviction and sentencing outcomes

The inconsistent approach to sexual history evidence for deceased and living victims is concerning given similar outcomes with respect to favourable convictions and sentencing can arise in femicide. In RSGW femicide cases in England and Wales, the deceased's sexual history evidence to has led to convictions for lesser included offences such as manslaughter and favourable sentencing.[70]

The Story Model offers an explanation for these trial outcomes. By definition, in advancing the EAGW narrative, the defence aims to latch onto gendered myths, stereotypes and biases reposed by the jurors.[71] The Kempson trial illustrates the gendered myths the defence's EAGW argument relied on. If the defence had persuaded the jury that Millane consented to erotic asphyxiation in the past and that she enjoyed being dominated during sex, the jury could have extrapolated conclusions. Namely, that she was more likely to have consented, or in fact did consent, to the manual strangulation during the interaction at issue. Understanding sexual consent as the "yes means yes" modern definition is inconsistent with that belief. Judges have discretion to issue a judicial direction to the jury to control these inferences.[72] However, this practice is insufficient given the variance between trials as to whether, and if so, to what extent, directions are provided. When the judge does not provide such a direction, according to Professor Elisabeth McDonald, "sexual history evidence allows juries to make verdict choices based on rape myths".[73] If the jury had accepted Millane's alleged sexual proclivity, then the defence narrative that Kempson only intended to engage in consensual erotic asphyxiation, and had no intention to hurt or kill Millane, would have been likely to strike the jury as more credible. To jurors, this conclusion would have suited the verdict

68 Office of the Privacy Commissioner, above n 67, at [10]–[14]; and Money, above n 67, at 4.

69 Pender, above n 66, at [7]–[8].

70 "Does Claiming a 'Sex Game Gone Wrong' Work?" (18 February 2020) We Can't Consent to This <www.wecantconsenttothis.uk>.

71 For discussion on rape myths generally, see McDonald *Rape myths as barriers to fair trial process*, above n 53, at 47; and Abuse and Rape Crisis Services Manawatū "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at 2; and McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 324.

72 See for example Evidence Act, s 122(1)(b).

73 McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 322. For more information on rape myths, see McDonald *In the Absence of a Jury*, above n 53, at 23–27.

options of not guilty or guilty of a lesser offence. As a result, it would have been more likely that Kempson would be convicted of a lesser offence, such as manslaughter, rather than the more serious murder charge he initially faced.[74]

Kempson received a murder conviction and sentence imposing a minimum period of imprisonment of 17 years.[75] In the Court of Appeal, Kempson appealed against his conviction for murder on the primary ground that the Crown should have been required to disprove consent, or an honest belief in consent, in order to prove murder.[76] He also appealed against his sentence on the ground that his sentence was manifestly excessive and that the trial judge erred in finding s 104(1) of the Sentencing Act 2002, which required a minimum period of imprisonment of at least 17 years, applied.[77] Although neither of those grounds were successful, the outcome of *K v R* could have been different if the High Court trial jurors had been more sympathetic to Kempson and his EAGW narrative and therefore found him not guilty of murder.

Although not the case for Kempson, case law from England and Wales shows that even when the defendant is convicted of murder, the EAGW narrative *can* lead to reduced sentences for murder convictions when sexual history evidence is admitted into the trial.[78] Consequently, Professor Susan Edwards argues that with the EAGW narrative, defendants "disguise what is essentially cruel and misogynist conduct as a strategy to manipulate trial and sentencing outcomes".[79] Similarly, Dr Hannah Bows and Professor Jonathan Herring have questioned whether such defence tactics lead to defendants "getting away with murder".[80]

Kempson's conviction and sentence may seem out of step with those outcomes. However, in England and Wales, early relationship situations comprising first dates and "just-met" circumstances are more likely to result

74 Theodore Bennett "A Fine Line Between Pleasure and Pain: Would Decriminalising BDSM Permit Nonconsensual Abuse?" (2021) 24(2) Liverpool LR 161 at 170.

75 Kempson sentencing judgment, above n 25, at [83].

76 *K v R*, above n 24, at [4].

77 At [4].

78 For examples of the case law, see We Can't Consent to This, above n 70; We Can't Consent to This "Submission to the Constitution Committee on the Domestic Abuse Bill 2019–21" (June 2020) at [1.37]–[1.39]; and Bennett, above n 74, at 170.

79 Susan S M Edwards "Assault, Strangulation and Murder – Challenging the Sexual Libido Consent Defence Narrative" in Alan Reed and others (eds) *Consent: Domestic and Comparative Perspectives* (Routledge, London, 2016) 88 at 89.

80 Bows and Herring, above n 9, at 534.

in severe convictions and sentences than when the defendant and the deceased were in an established relationship.[81] Professor Elizabeth Yardley suggests that this trend is explained by the "backdrop" an established relationship provides of "the myth of a level playing field".[82] With respect to established relationships, if the jury believes the defence argument that the defendant and the victim had "regularly engaged in consensual BDSM", the jury may be more inclined to believe the RSGW narrative that the death was a tragic accident.[83] In contrast, in first date circumstances, the defence cannot support their RSGW narrative with arguments of a consensual BDSM history between the alleged victim and the defendant. Therefore, the fact that Millane's murder occurred during a first date may account for the outcome of *K v R*.[84]

However, even in a case such as Millane's in which the admission of sexual history evidence did not result in an acquittal or sentence reduction, the decision to hear the evidence was not without harmful consequences. Millane's sexual history, a matter which most people regard as intimate and private, was laid bare in court and in the media. This added harm to the fatal injury Millane and her family had already experienced.[85]

V THE RULES OF EVIDENCE: WHY THE DECEASED'S SEXUAL HISTORY IS ADMISSIBLE AND ISSUES WITH THIS LOGIC

Given the same motivations for enacting the rape shield are reflected in femicide cases, New Zealand should take a consistent approach to the treatment of sexual history evidence in fatal and non-fatal sexual cases. One way to achieve this consistency is by applying the rules for admitting evidence in a manner consistent with the modern social definition of consent and without the influence of gendered myths and stereotypes. If courts did this, they would exclude sexual history evidence for its irrelevance in both fatal and non-fatal sexual cases without the need for evidence shields. This article examines why the

81 Yardley, above n 1, at 1850–1851 and 1857.

82 At 1857–1858.

83 At 1857–1858.

84 *K v R*, above n 24, at [12].

85 For examples of the harmful media coverage of Millane's sexual history, see Drewett, above n 40; and Giordano, above n 40. This issue is not isolated to Millane: see for example John Siddle "'It Broke My Heart' Brother of mum, 33, strangled to death during sex reveals '50 Shades' defence 'made losing her a million times worse'" *The Sun* (online ed, London, 4 March 2020).

deceased's sexual history is currently admissible, contrasted with an alternative way the courts could apply New Zealand's evidence admissibility rules.

It must be noted here that it is unclear whether there was a pre-trial ruling about the admission of sexual history evidence in the Kempson trial.[86] Therefore, the following discussion about whether sexual history evidence is admissible is based on the defence EAGW strategy in the Kempson trial.

A Relevance

Under New Zealand's rules for admitting evidence, relevance is a necessary condition and the lowest common denominator for admissibility.[87] Section 7 of the Evidence Act establishes that evidence that is not relevant is inadmissible. Section 7(3) defines relevant evidence as that which "has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".

Relevance is a matter of logic.[88] When the defence seeks to admit evidence of the deceased's sexual history, they claim that such evidence is relevant to the question of whether or not she consented to the erotic asphyxiation that caused her death. This, in turn, is relevant to the question of whether the defendant intended to kill or harm her, or instead only intended to engage in consensual erotic asphyxiation. However, there are reasons to be sceptical of whether evidence of sexual history is either material (in the sense of relating at all) or probative (in the sense of having a logical tendency to prove or disprove) to whether the deceased consented to the strangulation that killed her. This is because consent to sexual experiences, including erotic asphyxiation, are logically independent**.** The modern understanding of consent demonstrates this independence. It follows from consent being enthusiastic, ongoing and reciprocal, that past consent does not indicate a likelihood of future consent.

Previous case law has rejected illogical inferences within chains of reasoning. In *Alletson v R*, the appellant sought the admission of propensity evidence. Propensity evidence is adduced to show a person's proclivity to act in a certain way, and therefore to give credibility to arguments that the person likely acted in that way on the occasion at issue in trial.[89] The appellant argued

86 From searches on Westlaw, Lexis Advance, the New Zealand Legal Information Institute and the Courts of New Zealand website, a pre-trial case, if it exists, is not available to review.

87 McDonald and Optican, above n 54, at 53.

88 At 54.

89 Evidence Act, s 40(1).

that evidence about his history of religiousness and a reverend viewing him as a "decent person" should be admissible because such evidence was relevant to whether or not he committed sexual offences against young girls.[90] The Court of Appeal found that admitting the evidence would ask the jury to accept the chain of reasoning that:[91]

> … the appellant was a religious person in his younger days and considered by a reputable figure in religious circles to be a decent person; a boy who is religious and is considered by a reputable person to be of good character is unlikely to commit sexual offences against young girls; therefore, it is less likely that the appellant did so in this case.

The Court considered the flip side of such a finding: it would begin a slippery slope into concluding that it is logical "that someone who has no religious beliefs and is not highly thought of by an authority figure is more likely to commit sexual offences against young girls".[92] The Court found that conclusion to be illogical. The evidence did not illustrate a lesser likelihood of sexually abusing children as the defence argued. Given the evidence's irrelevance, the Court excluded it.

1 The "relevance" of sexual history

It can be argued that the Kempson trial featured propensity evidence as well. In *Alletson*, the propensity evidence concerned the defendant. However, in the Kempson trial, the propensity evidence concerned the deceased victim. As in *Alletson*, admission of the deceased's sexual history in the Kempson trial asked the jury to adopt a chain of reasoning that similarly appears to rely on illogical inferences. Namely, that Millane was an experienced practitioner of BDSM with a sexual predisposition to engage in consensual erotic asphyxiation, and women with erotic asphyxiation sexual preferences are more likely than the "average" woman to engage in consensual erotic asphyxiation. Therefore, it is likely she consented to the manual strangulation during the occasion at issue and that her death was due to an accident during that consensual sexual encounter, rather than due to murderous intent.[93]

90 *Alletson v R* [2009] NZCA 205 at [36].

91 At [43]; and see also 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(3) VUWLR 487 at 496–497.

92 *Alletson v R*, above n 90, at [44].

93 See generally SC leave judgment, above n 33, at [7].

This chain of reasoning has poor logic and is prejudicial for three reasons. First, this type of reasoning made it seem as if Millane herself were on trial.[94] There is a stigma around BDSM preferences and risky sex that Millane was accused of having a history of engaging in.[95] Given this stigma, and because the defence argued she contributed to her death through "asking for" manual strangulation on the material occasion,[96] this shifted the focus from Kempson's mental state to Millane and her history. Similarly, complainants in rape cases reported feeling as if they were the person on trial before Parliament enacted the rape shield.[97] However, the deceased's sexual history is not relevant. Millane's alleged propensity for consenting to erotic asphyxiation does not go to the issue of whether Kempson acted with the required mens rea. Kempson and Millane are different people. Kempson's mental state at the material time cannot be inferred from past, different actions of Millane. It follows that the deceased's sexual history evidence derives relevance from a convoluted chain of reasoning about what the defendant believed and whether he acted with mens rea. It could be true that Millane consented to erotic asphyxiation with a certain person (person Y) at a certain point in time in the past. However, it is not accurate that the conclusion from that fact is that Millane consented to manual strangulation during sex, in the same or in a similar way as she did with person Y, with Kempson at another time.

The notion that present consent is logically independent of previous consent is not a product of any particular political ideology.[98] It is also not exclusive to sexual consent. The popular cup of tea analogy illustrates this point. The fact that a person wanted a cup of tea on one occasion does not mean, nor make it more likely, that the same person wanted a cup of tea on a different occasion.[99] A plethora of factors can influence why a person does or does not want a cup of tea on any given occasion. A person can want a cup of tea and change their mind before drinking it or part-way through drinking that tea. They are not obliged to finish that cup of tea. This logic

94 North, above n 49.
95 Bennett, above n 74, at 164.
96 *K v R*, above n 24, at [19].
97 (18 August 1976) 405 NZPD 1753 and 1756.
98 For examples of the illogicality of treating present consent as logically connected to past consent, see Alli Kirkham "What If We Treated All Consent Like Society Treats Sexual Consent?" (23 June 2015) Everyday Feminism <www.everydayfeminism.com>.
99 (11 February 2021) 749 NZPD 776; and Rob McCann "Consent explained with a cup of tea" (12 July 2015) White Ribbon <www.whiteribbon.org.nz>.

also applies to sexual consent. Therefore, consent to BDSM practices, such as erotic asphyxiation, on one occasion, tells the jury nothing about consent on a later occasion. The admissibility of Millane's sexual history evidence in the Kempson trial illustrates that there is a problem at this most basic level: the deceased's sexual history evidence is irrelevant to whether she consented to erotic asphyxiation, and whether Kempson acted with the requisite mens rea.

Secondly, consent lapses once a person becomes unconscious. Pursuant to s 128A(3) of the Crimes Act 1961, no one can legally consent to sexual activity once they become unconscious. Whether erotic asphyxiation constitutes "sexual activity" in the sense defined in s 128A(9) is yet to receive a definitive legal position. It is likely that erotic asphyxiation will come under s 128A(9)(b) as strangling a person in a sexualised manner can be viewed as an indecent act while that person is unconscious. In addition, New Zealand case law sets out that it will only be in very rare situations where a person could have a reasonable belief that their sexual partner was consenting while that other person is unconscious.[100] Therefore, in the Kempson trial, even assuming that Millane had initially consented to strangulation, as soon as she lost consciousness, that consent would have lapsed. At this point, Kempson could have no longer had a reasonable belief that Millane was consenting.[101] Although Kempson should have then stopped applying pressure to her neck, he continued applying pressure for several more minutes.[102] Rather than suggesting Kempson did not intend to hurt or kill Millane as he argued, the fact her consent lapsed (if there was consent to erotic asphyxiation from the beginning) but Kempson continued, suggests he acted with the requisite mens rea. It is therefore illogical for the defence to use Millane's alleged consent in their chain of reasoning about why the jury should have reasonable doubt about whether Kempson acted with mens rea.

Thirdly, adopting the chain of reasoning would be a slippery slope into confining consent into patterns and formulae. If what a woman consents to on a given sexual occasion can be inferred from her sexual history, it would appear that her sexual history would predict consent on future occasions. This challenges whether women could consent to experimenting in their sex lives

100 *R v S* [2015] NZHC 801 at [36]–[37]; but see *R v Pakau* [2011] NZCA 180 at [30].

101 It was common ground that Millane would have lost consciousness and gone limp at some point during the strangulation: Kempson sentencing judgment, above n 25, at [51].

102 At [51].

and exercising sexual agency.[103] Ultimately, as discussed in Part II, past consent does not predict future consent. This is particularly the case for sex involving BDSM. Erotic asphyxiation involves a restriction of breath. Therefore, consent relies on prior communication between the sexual partners of their respective boundaries.[104] For Millane, one of her previous sexual partners said that they used the safe word "turtle" and agreed on a tapping action to communicate withdrawal of consent.[105] Sexual partners who are not in a relationship, and indeed those who have just met, can engage in consensual sex involving BDSM, coloured by effective communication. However, whether sexual partners did so is not a conclusion which can logically be extrapolated from sexual history evidence showing past consent to erotic asphyxiation. Consent is specific to each partner on each occasion. Communicating consent to BDSM practices involves more layers than merely saying "yes" or "no".[106] The law should reflect that that someone who has engaged in erotic asphyxiation in the past does not automatically, presumptively, or even probably, consent to similar BDSM-focussed or rough sexual activity on a different occasion. For Millane, given the purported lack of safety precautions with Kempson in comparison to her sexual history, it is even more accurate that such evidence could not have illustrated that she consented to Kempson applying prolonged pressure to her neck.

Understanding the nuance of consent suggests that sexual history does not illustrate a propensity to consent to sex, including erotic asphyxiation. Sexual history evidence is irrelevant. Similar to excluding religious history evidence in *Alletson*, courts should also exclude the deceased's sexual history evidence in femicide trials. Such evidence does not illustrate a proclivity for enjoying erotic asphyxiation as the defence argues.

Even if sexual history evidence is relevant, which this article argues it is not, it does not follow that the deceased's sexual history evidence should be admissible. New Zealand's other rules for admissibility decisions should catch such evidence.

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103 See McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 331; and McGlynn, above n 8, at 369.

104 See generally Cara R Dunkley and Lori A Brotto "The Role of Consent in the Context of BDSM" (2020) 32(6) Sexual Abuse 657 at 660–664.

105 Connolly, above n 4, at 134; Stephen D'Antal and Matthew Dresch "Backpacker Grace Millane 'used a safe word while practising BDSM' her ex tells court" *The Daily Mirror* (online ed, London, 19 November 2019).

106 See Dunkley and Brotto, above n 104, at 661.

B Balancing probative value and prejudicial effect

Section 8 of the Evidence Act sets out a balancing test determining the *legal* relevance of the evidence.[107] The judge *must* exclude evidence when "its probative value is outweighed by the risk that the evidence will … have an unfairly prejudicial effect on the proceeding".[108] Evidence has probative value when it proves or disproves a matter in the trial. Evidence carries a risk of prejudicial effect when it could inappropriately influence the fact finder, being either the judge or the jury, in the trial.[109] In applying this balancing test, the judge must also "take into account the right of the defendant to offer an effective defence".[110]

1 The prejudicial value of sexual history significantly outweighs any probative value

In relation to complainants' sexual history evidence, the Law Commission has recognised the low probative value in such evidence.[111] Earlier in Part IV, this article argued that the differences between fatal and non-fatal sexual cases are insufficient to justify the different evidence admissibility rules for the respective crimes. Further, as discussed above, the probative value of previous evidence of consent to sexual encounters or erotic asphyxiation is minimal, because it has no bearing on current or future consent. According to that reasoning, the deceased's sexual history evidence also has low probative value.

K v R illustrates that taking into account the defendant's right to offer an effective defence, courts have found that the probative value of the deceased's sexual history evidence is not outweighed by the risk of unfair prejudicial effect. This article argues that the way courts have struck that balance excludes the modern definition of sexual consent. The calibration should instead recognise that the risk of the deceased's sexual history having a prejudicial effect on the trial is high whilst that evidence has relatively little probative value. This calibration is not new to legal scholarship. In 1994, Professor McDonald argued that "[a]lthough there is low probative value in sexual history evidence, there

107 See generally McDonald and Optican, above n 54, at 65–66.
108 Section 8(1)(a).
109 McDonald and Optican, above n 54, at 66–67.
110 Evidence Act, s 8(2).
111 Law Commission, above n 51, at [11]; and see also Law Commission *Evidence: Reform of the Law* (NZLC R55, 1999) at [184].

is a high potential for prejudice when such evidence is admitted to show the victim's consent".[112]

A potential reason for the current miscalibration is the courts' obligation to preserve the defendant's right to offer an effective defence under s 8(2) of the Evidence Act. This article argues that the defendant's right to offer an effective defence should not support the defence's arguments that the deceased's sexual history evidence should be admissible. This is because the low probative value is outweighed by the high risk of prejudicial effect. Judges must be careful determining the admissibility of evidence adduced by the defendant. This is because judges must not compromise defendants' fair trial rights[113] or increase the omnipresent power imbalance between defendants and the state. However, sexual history evidence should not bolster the effectiveness of a defendant's EAGW defence strategy given such evidence does not illustrate a likelihood of consent. Therefore, such evidence should not raise reasonable doubt about the defendant's mens rea which is the objective of the EAGW defence strategy. Even if the deceased's sexual history evidence does bolster the effectiveness of a defendant's defence somewhat, admitting such evidence with its high risk of prejudicial effect is an excessively cautious approach which causes significant harm to the deceased and her family.

C Logically speaking: evidence shields are unnecessary

This article proposes legislative reform in Part VII. Legislative reform would create a new provision and definitively alter the rules of sexual history evidence admissibility. However, ss 7 and 8 of the Evidence Act can already exclude sexual history evidence.

Unlike the explicit exclusion of sexual history evidence for sexual cases, there is no legislative requirement that judges exclude such evidence. Nor is there a legislative requirement that such evidence meet a heightened relevance test as there is for sexual history evidence in non-fatal sexual violence cases.[114] It follows from Millane's sexual history being admissible that the precedent courts follow with respect to the deceased's sexual history is that such evidence is admissible. Without principled differences justifying departure from precedent, judges are bound, or highly persuaded, by previous judgments. The admission of the deceased victim's sexual history evidence in the Kempson trial

112 McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 322.

113 Specifically, the right to present a defence: New Zealand Bill of Rights Act 1990, s 25(e).

114 Evidence Act, s 44.

endangers the future application of ss 7 and 8 with respect to the deceased's sexual history. New Zealand is a small jurisdiction and only a limited number of appeals are heard in New Zealand's highest courts. A judgment with enough precedential weight to change this admissibility and require courts to exclude the deceased victim's sexual history evidence is therefore unlikely to enter the common law quickly.

However, there are good reasons to query judges' logic in relation to the status quo application of ss 7 and 8 to evidence of the deceased's sexual history. *K v R* illustrates that judges are not applying ss 7 and 8 in a manner consistent with the modern social definition of consent, nor with the application of logic and relevance discussed in this article. Moreover, Parliament has legislated against this application of relevance in the context of non-fatal sexual violence. Parliament noticed a problem in allowing judges to decide to hear complainants' sexual history despite the logical gap between sexual history evidence and whether that person consented on the later occasion. Rather than leaving judges to work through this gap, Parliament enacted the rape shield. In 2021, Parliament bolstered this shield with the Sexual Violence Legislation Act.

If judges were free of all biases, the application of New Zealand's evidence admissibility rules could potentially produce a different result. According to the application of ss 7 and 8 that this article has set out, sexual history evidence is irrelevant, has low probative value and carries a high risk of prejudicial effect. Particularly in light of the modern understanding of sexual consent, an alternative application would hold there is no logical link between past consent and the separate question of whether there was consent on the occasion at issue. Furthermore, there is no logical link between the deceased's past consent and the defendant's mens rea. Therefore, such evidence should be inadmissible under ss 7 and 8. There should be no need for an evidence shield for both femicide and non-fatal sexual cases when courts apply ss 7 and 8 in accordance with the modern understanding of consent.

However, this is not the current precedent. This article argues that given the need for the law to treat sexual history evidence consistently in fatal and non-fatal sexual cases because of their lack of principled differences, reform should come from Parliament. This recommendation is with the qualification that, logically speaking, such legislative intervention should be unnecessary. Certainly, a consistent approach could already occur under the current evidence admissibility rules.

VI MOVING TOWARDS CONSISTENCY: DECEASED AND LIVING PARTIES TO PROCEEDINGS

A Ellis *submissions*

When an appellant in a trial dies, New Zealand's legal system has typically treated their interest in the case as having died with them.[115] A current high-profile case in the Supreme Court, *Ellis v R*, shows that New Zealand's law could be moving to shift this orthodox view. This article argues that if this shift occurs, it could begin to break down the current distinction between living and deceased parties to proceedings. That change would further support this article's argument that the law should have consistent sexual history evidence admissibility rules for the deceased in femicide trials and living complainants.

In 1993, Ellis was convicted of 16 counts of child sex offences involving seven child complainants who attended the childcare centre he worked at.[116] Ellis always maintained he was innocent.[117] The Supreme Court granted Ellis leave to appeal his convictions.[118] Ellis died just over one month after the Court granted him leave.[119] The Court then had to consider in light of Ellis's death whether it still had jurisdiction to hear his appeal. At the direction of Glazebrook and Williams JJ, counsel made submissions on the relevance of tikanga Māori.[120] The Solicitor-General argued for revoking the leave to appeal according to the orthodox position that a person's interests in their appeal die with them.[121] According to Williams J, in a tikanga Māori context, a deceased person becomes an ancestor with more mana than a living person.[122] One of Ellis's lawyers, Natalie Coates, later argued that because Ellis's mana continued when he died, Ellis and his whānau had just as much of an interest in his appeal posthumously as they would have had if he were still alive.[123]

The Court concluded that it did have jurisdiction to hear Ellis's appeal in spite of his death.[124] The Court's substantive reasons for this decision are yet to

115 Canterbury Legal "A new evolution in New Zealand law from the Peter Ellis case" (16 November 2020) <www.canterburylegal.co.nz>.
116 *Ellis v R* [2019] NZSC 83 at [1].
117 At [11].
118 At [20].
119 Interim Ellis judgment, above n 7, at [3].
120 *Ellis v R* [2019] NZSC Trans 31 [Ellis Transcript 2019] at 20 and 52–54.
121 At 19–22.
122 At 53.
123 Ellis Transcript 2020, above n 6, at 28–31.
124 Interim Ellis judgment, above n 7, at [4].

be released. If the Court's reasoning accepts Coates' submissions, this would represent an important change in the law. It would show a move in the common law of New Zealand away from its orthodox position about deceased persons' interests ending with their death. This would be an important dimension of tikanga Māori being recognised within the Western state legal system.

The facts of *Ellis* do not align precisely with the facts of Millane's murder. Millane was the *victim* of a sexualised killing. This is different to *Ellis* where Ellis was the appellant appealing his conviction for *perpetrating* child sexual offences. However, the underlying policy reasoning and tikanga Māori justifications are applicable to both cases. Both Millane and Ellis's interests were fundamental to the proceeding despite them being deceased. As ancestors or tūpuna, they had greater mana after their deaths.[125]

B Interests after death according to tikanga Māori: setting a precedent?

Tikanga Māori is an important thread in the legal system.[126] If the Court's substantive reasons reflect Coates' submissions and the tikanga Māori view on posthumous interests takes precedence in the common law, it is possible that the current distinction between deceased and living persons in relation to proceedings could become less defined. This reduction in distinction could produce two crucial results. First, an appellant being able to proceed with their appeal posthumously. Coates argued for this result for Ellis. If the Court recognises that deceased appellants have interests and mana continuing after death, this will set a precedent extending to appellants beyond Ellis. Potentially, that precedent could hold that there are no principled differences between deceased and living appellants. Therefore, the law should take a consistent approach, and the same rules should apply to both.

Secondly, other areas of the law which currently distinguish deceased and living persons could also take a consistent approach. Arnold J raised concerns

125 Ellis Transcript 2019, above n 120, at 53.

126 See generally Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 65–87; Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZ L Rev 1; Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1; and Ellis Transcript 2020, above n 6, at 5–8. A recent example is *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [168]–[169] and [297]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [177].

that if the Court accepts the logic of Coates' submissions and endorses the tikanga Māori perspective on interests after death in the context of criminal appeals, there is a risk of creating inconsistency in other areas of the law.[127] His Honour drew attention to how defamation appeals cannot proceed after death. Coates' response to Arnold J framed this risk as an opportunity to reconsider the law in New Zealand beyond the issue in the proceeding of criminal appeals.[128]

Another area where extending this view on interests and mana after death could be a logical step forward is in evidence law. Creating consistent evidence admissibility rules for the sexual history evidence of the deceased in femicide trials and the complainant in non-fatal sexual violence cases would be consistent with the tikanga Māori view advanced by Coates in Ellis's appeal.

This article recommends that the Supreme Court adopt Coates' submissions on interests after death in its substantive reasoning in order to reduce the present distinction between living and deceased parties to proceedings. Such parties should include appellants as well as deceased femicide victims and living sexual violence complainants.

VII PROPOSED REFORM

Amending the Evidence Act would provide a consistent approach to sexual history evidence in fatal and non-fatal sexual cases. At a minimum, Parliament should enact an evidence shield equivalent to the rape shield for femicide cases. To achieve this, one submission to the Justice Committee on the Sexual Violence Legislation Bill recommended that Parliament replace the word "complainant" in s 44 of the Evidence Act with "complainant or deceased person".[129] The submission also recommended that Parliament extend s 40(3)(b) of the Evidence Act to include the deceased in homicide cases.[130] According to s 40(3)(b), propensity evidence about "a complainant in a sexual case in relation to the complainant's sexual experience … may be offered only in accordance with section 44", the rape shield. This change would largely limit propensity evidence's admissibility to that which illustrates a pattern of offending on part of the defendant, rather than that which draws illogical and prejudicial

127 Ellis Transcript 2020, above n 6, at 20.
128 At 21.
129 Pender, above n 66, at 3.
130 At 6.

conclusions from the deceased's historical sexual experiences.[131] Parliament did not adopt those recommendations in the Sexual Violence Legislation Act.

However, merely extending the rape shield would be insufficient. The rape shield does not exclude sexual history evidence entirely. Sexual history evidence between the defendant and the complainant is admissible, although only in limited circumstances.[132] In addition, defendants can rebut the rape shield to admit complainants' sexual history if such evidence is of heightened relevance. To this extent, the rape shield buys into the notion that there can be, in some circumstances, a logical connection between past consensual sexual history and consent on the occasion at issue in the trial. According to the modern understanding of sexual consent, that notion is inaccurate. Therefore, the rape shield does not provide protection against the use of sexual history evidence in non-fatal sexual violence trials in a manner that is wholly consistent with logic. In EAGW femicide trials, there is an evidentiary lacuna given the deceased cannot be present in court. She therefore cannot provide her own narrative, testify about her subjective experience of the events and refute the defence's narrative. In principle, complainants have those options. However, such options are often inaccessible in practice given the extreme re-traumatisation that adversarial rape trials can impose on complainants.[133] The additional challenges of the victim being deceased justify legislative protection going beyond the presumption that femicide victims' sexual history is inadmissible.

Parliament should explicitly exclude the deceased's sexual history from murder trials. This provision should apply to the deceased's sexual history with persons *other than* the defendant as well as *with* the defendant. According to Joan Brown, such reform would move the focus to the defendant's "actions and culpability" rather than the deceased's "moral worth".[134] In turn, this would reduce instances of the deceased's sexual history evidence being used to give unfair credibility to the defence's EAGW arguments and thereby producing lesser sentences and convictions for lesser included offences.

131 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 31.

132 Evidence Act, s 44(1)(a).

133 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 26–27.

134 Brown, above n 11, at 293.

VIII CONCLUSION

In femicide cases, the deceased's sexual history evidence is extraneous to consent and the defendant's mens rea. This article analysed New Zealand's rape shield provision. It explored the policy reasoning behind Parliament's decision to exclude complainants' sexual history. It compared these reasons to concerns currently abounding about the evidence admissibility rules in femicide trials which are discordant with non-fatal sexual cases. This article then analysed courts' application of the femicide trial evidence admissibility rules. It set out why sexual history evidence appears to fall short of the current admissibility rules in light of modern understandings of sexual consent. Contrasts to case law, jurisprudence and statutory provisions supported this analysis. This article analysed the underlying influences in the application of the rules which contribute to the admissibility of sexual history evidence. It concluded that reform of New Zealand's evidence laws is necessary.

This article proposed that courts should refine their application of the evidence admissibility rules to reflect relevance and logic given the modern definition of sexual consent. To provide for the event that this does not occur, this article argued that Parliament should reform the Evidence Act. It found support for this change in tikanga Māori, drawing upon submissions made to the Supreme Court. The time is apt to learn from the harms the EAGW narrative in the Kempson trial caused Millane and her family. New Zealand law should evolve to create a consistent approach for living complainants and deceased femicide victims' sexual history evidence.

TUAKANA-TEINA WHAKAWHITI KŌRERO

WE ARE NOT HERE TO BLESS THE FOOD OR CONDUCT ACCESSIBILITY AUDITS

Reina Vaai and Alice Mander

This tuakana-teina discussion was born out of the "Law and Gender: Beyond Patriarchy" Symposium, where both Alice and Reina spoke about their experiences in the legal profession. Reina is a Samoan lawyer and journalist from South Auckland. Alice is a Law and Arts student, and a passionate advocate for the disabled community. She currently serves as Co-President of the National Disabled Students' Association. In this kōrero, Alice and Reina discuss three topics that have shaped their experiences in the legal world: belonging, tokenism and being the exceptional anomaly.

I BELONGING

Alice: As a disabled woman, I've learnt that belonging is a more complex process than simply accessing a space.[1] I'm unsure whether non-minorities or women without intersecting identities understand the extra burden of looking for a place of work that isn't just accessible but is also welcoming of us as whole people. It's one battle finding a place of employment with a lift, an accessible bathroom, and a carpark. But it's a whole other battle finding employment with colleagues who don't become sheepish and quiet when disability is mentioned, or who don't organise work drinks and coffees at the inaccessible bar down the road. To fully participate as myself in the legal sector, I need to find a place that is more than just accessible—a place in which I belong as a disabled woman.

I am in my fifth and penultimate year of a law degree, and my first experience of seeing or hearing about a disabled lawyer was in second year. I had to attend an Auckland High Court hearing for a law paper, something

1 Throughout this paper I use the term "disabled person/people". While some disability studies literature advocates for "person-first" language (ie, "person with a disability"), "identity-first language" is more in line with social models of disability. Calling myself a "disabled woman" gives credence to the idea of disability as an identity that is capable of being politicised, and allows me to reclaim often stigmatised language.

which my non-disabled peers could do easily. For me, attending the High Court—an inaccessible building with the protective label of "heritage"—was an entire day's event, causing anxiety and requiring preparation the few days before. While waiting for the hearing, we began talking to a policeman. He told us about a Crown prosecutor who had to be carried into the court room because it was inaccessible for her, a wheelchair user. Whenever I tell this story, people are shocked and disgusted. However, I was just disappointed. Disappointed to think that I could one day be at the top of my game and still face stark reminders that a person like me was never intended or envisioned to exist in a space like this.

In some ways, however, I was also relieved to hear that disabled lawyers actually *do exist*. You only need to look at the New Zealand Law Society website to discover the complete erasure of disabled lawyers in Aotearoa.[2] We are invisible in the statistics and invisible in the profession. Ironically, we are disproportionately represented in statistics on the other side of legal justice. For instance, 49 per cent of inmates in prisons in the Lower North Region experienced significant dyslexia. This is compared to approximately 10 per cent in the general population.[3] It has been found that 40 per cent of disabled women experience physical violence from an intimate partner over their lifetimes, compared with 25 per cent of non-disabled women.[4] My future career in the law—or in any field—is not free from this context and history.

Unfortunately, erasure is a self-confirming habit. It's something I continue to impose on myself—sitting out of young lawyers' social events, dreading pre-interview functions with firms, avoiding common areas in the law school. Why? Because I am acutely aware that I do not fit in these spaces. They may be accessible on the surface, but my body and my identity are still a misfit with the polite society of the legal profession: "[i]ndeed, much of the disability rights movement grew from solidarity born of misfitting".[5]

2 See for example the Snapshot of the Profession 2021, which does not include any reference to disability or disabled lawyers, other than reference to seven lawyers who speak New Zealand Sign Language: James Barnett, Marianne Burt and Naveeth Nair "Snapshot of the Profession 2021" (2021) 984 LawTalk 36 at 40.

3 Michael Stewart "Supporting neurodiverse learners in New Zealand Prisons" (2019) 7 Practice: The New Zealand Corrections Journal 45 at 45–46.

4 Janet L Fanslow and others "Lifetime Prevalence of Intimate Partner Violence and Disability: Results from a Population-Based Study in New Zealand" (2021) 61 Am J Prev Med 320 at 324.

5 Rosemarie Garland-Thomson "Misfits: A Feminist Materialist Disability Concept" (2011) 26(3) Hypatia 561 at 597.

With all this in mind, thinking about my future post-graduation is a constant oscillation between wanting to be a role model while raging against the system from within, and staying in my safe academic bubble where my identity is a source of power and knowledge.

I'm quickly learning that, as a minority, finding a career is not only a matter of finding a place where I belong, but finding a place where *I should be.*

Reina: I've been a lawyer for seven years, mainly working in criminal law, and there have been many moments when I've questioned whether I truly belong in this profession. As a Samoan woman I've become accustomed to microaggressions such as being asked whether I am "here to see a duty solicitor", assuming, of course, that I'm appearing in court as a defendant. I've also had clients ask me: "when can I speak to a real lawyer?"

I recently completed qualitative research exploring the experiences of Pacific female lawyers in New Zealand's criminal justice system.[6] From the group of lawyers I interviewed, I was both comforted and disturbed to confirm that I was not the only woman of colour who has been questioned like this on a regular basis. Even as I'm writing this, I'm reminded of the time I immediately regretted talking about my experiences in an interview after a lawyer stopped me in court and said, "I've never done that to you and I've never seen that happen". Such comments prevent minorities from speaking out and holding members of the profession accountable for racism, sexism and ableism. Tiptoeing around egos is a tiresome exercise and further perpetuates attitudes and comments that are harmful to minorities.

My family migrated from Samoa to New Zealand when I was very young and like most Pacific parents, they hoped that I would have access to opportunities that were not available to them when they were growing up. From a young age however, I viewed the legal profession as something that I couldn't access or reach. This was because I didn't know many lawyers who looked like me or who had similar life experiences. The closest contact I had to lawyers was watching the TV shows Boston Legal and The Good Wife, neither of which highlighted characters that I could relate to. Unfortunately, How to Get Away with Murder and Jessica Pearson from Suits came a little

6 Reina Vaai "Smashing the concrete ceiling: Experiences of Pacific female lawyers in New Zealand's Criminal Justice System" (MSt in Applied Criminology, Penology and Management, University of Cambridge, 2022).

too late for my childhood. My views of the legal world were largely shaped by popular culture and mainstream media, in particular the representation of Māori and Pacific defendants in New Zealand media. Māori and Pacific peoples' interactions with the legal profession in mainstream media were (and still are) predominantly as criminal defendants. Their lawyers were also almost always white (and still are). As a proud daughter of South Auckland, I knew which side mainstream New Zealand society expected me to be on.

In 2008, Reynolds-Dobbs et al discussed how professional women of colour that break the mould and progress to become leaders in their field are often viewed as the lone exception.[7] We are now in 2022 and for me, this statement still feels accurate. A number of people that I grew up with did not have the privilege of attending university because their priorities were to help their families, often working full-time to provide financial support without the luxury of sparing hours to attend classes or study. I acknowledge the privilege that I had because my parents were able to encourage me to attend university, without fear of cost or sacrifices. Hence, when I became a lawyer, I knew that I wasn't just going to be a lawyer for the firm I was working for. I was going to be the lawyer for my entire family, my entire neighbourhood, anyone that knew me from primary school, anyone from my village, anyone that knew my parents and any Pacific person that interacted with me on social media. This is a responsibility that I never think twice about. It's my commitment to my community. When you belong to a community that does not have equal access to opportunities, resources, and ultimately power, there is an obligation for those of us who have received some level of privilege to open these doors.

While managing a busy workload as a criminal defence lawyer, during my lunch breaks, I visited schools in South Auckland to encourage Māori and Pacific students to consider a career in the law. I still prioritise these visits, regardless of my schedule. I take phone calls from friends of friends or complete strangers from Instagram asking for advice on how to get into law school or what to expect for their first court appearance. There were times when I had to use my annual leave days to fulfil family commitments. I know that many other Pacific lawyers have similar responsibilities too. The *Pacific Economy Research Report on Unpaid Work and Volunteering in Aotearoa* in 2021

7 Wendy Reynolds-Dobbs, Kecia M. Thomas and Matthew S. Harrison "From Mammy to Superwoman: Images That Hinder Black Women's Career Development" (2008) 35 Journey of Career Development 129.

estimated that 27,000 hours of unpaid work and volunteering were being carried out by Pacific peoples every week,[8] including assisting with church and family activities and duties. At law school, I witnessed many Pacific students sacrificing time away from their studies to uphold their cultural, community and family obligations, often balancing multiple hats at once, which would naturally impact their grades. When law firms place such a strong emphasis on grades, students that have extraordinarily different responsibilities outside of law school are immediately excluded from employment opportunities. Unless of course, they personally know a lawyer that can vouch for their character and integrity, one that isn't a fictional character. For minorities navigating a wide range of circumstances, this means that they are already behind before they have even begun.

I must also acknowledge the pay equity gap. Pacific women are the lowest paid group in the entire country.[9] Drawing from my own experiences, the interviews I conducted from my research and the evidence produced by Mind the Gap, it must be noted that Pacific female lawyers are more susceptible to marginalisation in the profession because of their race, class and gender. As a Pacific female lawyer, I acknowledge that I am in a more privileged position than other Pacific women in Aotearoa. Although I cannot be considered a vulnerable member of this group, I am not completely excluded from this issue. There are cultural expectations that I am expected to fulfil such as supporting family members that fall at the lower end of the pay gap, assisting my family's obligations to our villages in Samoa and providing support for members of the wider Pacific community. The responsibility to uplift Pacific families in Aotearoa often falls on Pacific family members that have been able to pursue careers and obtain financial security. While I was working in Manukau, I remember speaking with my Samoan colleagues about the collective responsibilities we shared within our own families. Two of my colleagues were living in intergenerational households to help pay for rent, groceries and school fees for their entire family, as well as trying to manage how they would pay for a new suit for court. These experiences are particularly unique to Pacific lawyers, yet they are rarely acknowledged in the profession. Although I recognise there are barriers for people from low socio-economic

8 Ministry for Pacific *Peoples Pacific Economy Research Report on Unpaid Work and Volunteering in Aotearoa* (July 2021) at 38.

9 Mind the Gap *Ethnic and Gender Pay Reporting for Aotearoa / New Zealand: The Case for Change and Policy Recommendations* (December 2021) at 5.

backgrounds, it is important to make clear that these are not the same as the barriers that Pacific women and people face.

Ensuring that our profession does not exclude minorities goes beyond saying "Mālō e lelei" during Tongan language week or telling a young Fijian lawyer about your holiday in Fiji in 1988. It requires genuine acknowledgement that racism, sexism and ableism are well and truly alive in New Zealand's legal profession. Acknowledgement must be followed with action. Leaders in the profession have a responsibility to continuously speak out against behaviour, practices and processes that enable racism, sexism and ableism to grow. All workplaces, organisations and networks must review their processes and cultural practices which continue to foster exclusivity and oppression. During this review process, minorities must be consulted and protected. If authority figures lead by example, others will follow.

I must acknowledge that there has been progress for Pacific peoples in the legal profession with the appointment of several Pacific judges and the first Pacific President of the New Zealand Law Society, Tiana Epati. I am immensely grateful for the barriers that they have managed to break through because their courage has enabled many of us to move forward. The work however is not over until every single person in the profession feels acknowledged and seen. There is much work to be done.

II TOKENISM

Alice: Up until recently, disabled people haven't been viewed as a minority group facing *external* structural and social oppression. Historically, disabled peoples' disproportionately poor life outcomes were blamed on our disability and health as opposed to ableist structures. We're used to being left out of discussions about diversity in employment. This is something that is slowly changing, and firms are making a conscious—albeit, at times, minimal—effort to encourage disabled applicants to apply. With that, of course, comes the danger of tokenism.

As is common for many people involved in social justice advocacy, my personal and professional life has never been strictly delineated. My resume is speckled with a strong indication that I work for the disabled community, and I am proud of this passion and the work that I have done. I'm also not ashamed that this work increases my employability in some fields—it's not necessarily tokenistic to hire someone with the understanding that they have

knowledge and experience as a strong advocate for their community. I've been lucky enough to experience work in a firm which recognises this as a strength—and has encouraged me to carve out a niche in the law where I can explore this passion. However, this is not the case for all places of employment. Recognition of a tendency for advocacy can become a problem when it is used to take advantage of that employee's desire to achieve equity. Disabled people are all too familiar with the extra burden of educating those around us. In jobs not at all connected to our disability, we are often expected to be the spokesperson for office accessibility, and help the organisation improve its disability awareness. This puts us in an awkward position—a large part of me wants to help improve spaces around me so that they are more accessible for disabled employees that follow me. On the other hand, should the onus of accessibility fall on disabled employees? Furthermore, should I be expected to do work that I wouldn't be asked to do if I wasn't openly disabled?

Tokenism is dangerous, and can often leave the impression that organisations only see accessibility and disabled employees as a marketable tool. While accreditations like the Accessibility Tick indicate that a firm is at least considering disability and accessibility, they don't necessarily indicate that I will feel a sense of belonging in the workplace. The legal profession shouldn't see accessibility as a "nice to have", nor should it be marketed as an indication of how unprejudiced a firm is. I'm tired of our inclusion being congratulated as the exception, as opposed to being expected as the norm. Disabled employees have a lot to offer the workforce—and are currently utterly underutilised.[10] We have unique insights and empathy, we are born advocates for ourselves and our families, and we are innovative problem solvers. Physical accessibility is an important step, but we need to move away from the notion that it is the 'charitable' or 'right' thing to do, and move towards the notion that it is the smart thing to do.

The main issue with tokenism is it is another reminder that I am a misfit in this space. It sends the message that to the legal sector, I am quite literally a token—a tangible representation of disability that can be exchanged for social capital.

10 In the June 2021 quarter, the unemployment rate for disabled people between 15–64 years was 9.6 per cent, compared with 4.0 per cent for non-disabled people: "Labour market statistics (disability): June 2021 quarter" (18 June 2021) StatsNZ <www.stats.govt.nz>.

Reina: There have been plenty of times where I, along with my other Māori and Pacific colleagues, have been called on to bless the food at various work events. If you are only inviting us into the kitchen to bless the food but not arranging a seat for us at the table when discussing pay equity, promotions and ensuring that the workplace is a culturally safe environment, then please, just bless your own damn food. I'm not particularly interested in hearing what percentage of Māori and Pacific staff are in the workplace or admiring the happy brown faces on a firm's website. If minorities in the workplace are not completely celebrated for bringing their whole selves, or are not reflected in the leadership within the firm, or there are no targeted processes in place for promotions and opportunities, then any attempt to publicly celebrate us is tokenism. Publicly celebrating minority lawyers while privately disregarding them as professionals is worse than making no attempt at all. The public celebration of our languages and cultures without providing adequate support is dangerous because our mana, traditions and histories are only being used to increase an institution's social capital. Plastic lei, an upbeat waiata and pork buns for morning tea are not solutions.

Recently, I spoke to a friend about her promotion and rather than feeling ecstatic about this new milestone, she seemed very upset. One of the first remarks she received from another lawyer when her promotion was announced was that she was only promoted because she "ticks all the boxes". This was followed up with: "you're the token brown lawyer. It looks good for them". It's difficult to celebrate or share career achievements when there's a genuine risk that colleagues may suspect that the only reason for a Pacific lawyer's success is due to pity and ticking a diversity box. Similarly, when I announced that I would be attending a university overseas, a colleague asked "was there a brown quota?" I was asked the same question when I was starting law school more than 10 years earlier. These interactions can discourage Pacific female lawyers to put their hands up for opportunities because of the fear that their intelligence, qualifications and experiences will be overlooked and mistaken as a handout in the name of diversity.

It's amusing that some view diversity as being synonymous with lack of merit. In actual fact, diversity requires merit. In criminal justice for example, a lawyer without any lived experiences similar to the clients they are representing risks having a limited view of how to approach, communicate and effectively advocate for those clients from different backgrounds. We often hear discussions

on the importance of diversity in the workplace, however, there must also be an emphasis on the harmful effects that a lack of diversity can have on the profession and the communities that the profession serves. Approaching vulnerable clients with a genuine understanding of the community they are part of, the families they were raised in and the cultural environments that they exist in, are marks of an effective advocate. Effective advocacy is therefore rooted in the depths and richness of cultures, experiences and backgrounds.

When hiring effective advocates, it's also imperative to understand the needs of the communities that we are serving. I've watched firms hire lawyers from minority backgrounds simply because they were the top of their class or because they attended an Ivy League university; their cultural backgrounds are merely a convenient coincidence. Ticking one of the Pacific ethnicity boxes on the census does not always mean that these lawyers genuinely reflect the needs of their communities. A non-tokenistic recruitment process is one that acknowledges that there will be hardworking Pacific students that may not have the best grades and have not had the opportunity to attend Harvard, Oxford or Cambridge. However, they are actively involved in their communities, they know how to manage multiple pressures because of their upbringing, and they value the importance of service, resilience and diversity. These are the students that should be provided the opportunity to learn, train and develop in a firm, because beyond their grades, they will have other important skills that cannot be taught in a classroom. Their lived experiences alone will make them valuable assets. These are the students that will not only contribute to the profession but most importantly to their communities.

III THE EXCEPTIONAL MINORITY

Alice: With visibility comes responsibility, as cliché as that sounds. This is something I've become particularly cognisant of as I've been applying for legal jobs. Yes, I am a disabled woman. However, I am a physically disabled woman. In many ways, I fit the normative image of disability, being neuro-typical and not having a learning disability. I'm also an Honours student who has received awards for my academic performance. I am a Pākehā woman, from a financially privileged background and privileged education.

Despite this, *I've* still struggled to find employment in the past. It's been implied by firms that I'm too liberal and people-driven for them. On the surface, it seems that people with lower or the exact same GPAs than me have

had greater employment success. It's important to recognise that if I face these barriers, other disabled people have it much, much worse.

Many disabled people share the experience of spending their youth striving to counter low expectations. We've been told by the media, the education system and sometimes even our family and friends—that completing simple tasks is an achievement for us in itself. Many of us feel a need to overcompensate through perfection and overachievement, to somehow eschew our disabled identity, to prove the world wrong, and to show we can go above and beyond. I've found myself feeding into this ableist narrative: "it doesn't matter that I'm disabled because I have so much else going on for me!" While I work to throw off this internalised ableism, the need to overachieve remains.

For a firm looking to increase their diversity, a disabled student like me is therefore a prime candidate. I am disabled, yes, but I don't challenge many of their other norms. I've been described as a "workaholic", and I enjoy working at a fast pace—something some disabled people do not have the spoons for.[11] I've received top grades in "typical" law papers by using "typical" legal analysis and argument, because the Pākehā notions of our legal system come naturally to me. Ultimately, when sat behind a desk in a courtroom, I will appear to be just like any other well-spoken, young, Pākehā lawyer.

With my own increasing visibility, I fear that I will become the litmus test for disabled inclusion in the legal profession. This is dangerous because I already fit within many of the existing power structures of the profession, requiring only a few adjustments and arrangements. This is particularly relevant in Aotearoa, where there is a higher proportion of Māori who are disabled than Pākehā.[12]

It is critical that firms, universities, and the judiciary do not consider disabled people like me to be the extent of the disability community. I want to see a legal sphere with greater representation of neurodiverse disabled people, and people experiencing mental ill health. I want to see tāngata whaikaha in the judiciary,[13] and I want to see their laws and tikanga upheld in the New Zealand

11 "Spoons" is a metaphor used in the disability community referring to the amount of mental or physical energy a person has. For more see Christine Miserandino "The Spoon Theory" (2003) But You Don't Look Sick? <www.butyoudontlooksick.com>.

12 "Key facts about disability in New Zealand" (1 December 2016) Office for Disability Issues <www.odi.govt.nz>

13 Tāngata whaikaha was the term developed to describe a Māori person with a disability. For more see Ministry of Health *Whāia te Ao Mārama 2018 to 2022: The Māori Disability Action Plan* (March 2018) at 4.

system. I want more space and support for disabled Pacific communities. I want to see nonbinary disabled lawyers celebrated and respected in the Court room. We need increased visibility of people in the learning (intellectual) disability community, and lawyers should be able to practice in New Zealand Sign Language.

I want to help open the door to legal education and the profession for other disabled people. My project will have failed if they all look, speak, and act like me.

Reina: While I have experienced and continue to experience several barriers in my career, I am privileged in many ways. I was employed right out of university, my previous employer was a judge and I have had the opportunity to name her as my referee when applying for jobs and other opportunities. I also studied and worked overseas. I was able to do this because my family did not financially depend on me. There were no expectations for me to take on any responsibilities at church and I shared family obligations with three of my other siblings. These circumstances that commonly exist for many of my Pacific colleagues were removed for me. I would not have been able to pursue any career opportunities without the removal of these particular conditions. I acknowledge that I also do not struggle to socialise or network in the mainstream legal world; English is now considered my first language, I am not disabled, and I am comfortable holding lengthy conversations with different people because I have been exposed to various networks and professional opportunities. I should not however be viewed as the quintessential Pacific female lawyer. There are other barriers that I have not confronted because I haven't needed to, and this has contributed to my ability to progress in my career and communicate with others in the profession. I am conscious that I will not always be the most appropriate person to take up an opportunity or speak on an issue. There are plenty of exceptional Pacific lawyers that may never have had the opportunity to be asked and would be better qualified. I have a responsibility to constantly be aware of when I need to pass the microphone, because being a genuine ally means valuing the importance of sharing space and power to ensure that other voices are heard too.

I know that many of my incredible Pacific colleagues have been overlooked because it's not always in our nature to put our names forward or to speak up. This can be a daunting task for minorities who are typically

excluded or not supported. From my observations, lawyers who tend to progress successfully are lawyers that have wide networks that can speak their names in rooms filled with opportunities. Learning how to network is a skill that many lawyers value, despite the fact that networking events, from my perspective, are often culturally unsafe and uncomfortable environments. An African-American lawyer, Tsedale Melaku, used the term "invisible labour" to emphasise the efforts that female lawyers of colour must pursue to engage with their colleagues on a social level.[14] For example, taking on hobbies that are stereotypically accessible to rich people such as skiing, or discussing private schools that they will send their children to, so that there is some common ground in the breakroom. A lack of interest or relevant experience to engage in topics that are valued by the majority can perpetuate further exclusivity and isolation for lawyers of colour. In the Pacific context, attempts to fit into the daily world of the law can be a double-edged sword. Melaku's invisible labour could easily result in rejecting aspects of our cultural identities, such as our appearances or attempting to hide our own lived experiences and backgrounds. I've learned that sharing my personal experiences of being a brown woman and growing up in circumstances that were vastly different from my colleagues has been one of the most powerful pillars for me throughout my career. It has helped me to decide the different lawyers I want to work with, and work environments and projects that I want to be part of, because these have been people and workplaces that are willing to accept me for bringing my whole self. Throughout the difficult moments in my career so far and my life generally, I have leaned on my cultural values as a source of strength and clarity.

As a Pacific female lawyer, we are constantly navigating these two worlds. One of the complex aspects of the Pacific female lawyer experience is that there are unique barriers for us; we are minorities in both the profession as brown women, and we are minorities in our own communities as lawyers. This cultural shift is very rarely acknowledged. While I might be standing in court and advocating for clients on Monday, on Tuesday evening at a family gathering, I know that I may not be called on to speak at all. I accept speaking engagements and advocate for vulnerable people in my professional life, however in my personal life as a Samoan woman, I understand that there are different roles and expectations because it is a completely different context.

14 Tsedale Melaku *You don't look like a lawyer: Black women and systemic and gendered racism* (The Rowman and Littlefield Publishing Group Inc, Maryland, 2019), at 16–17.

When I see professional organisations that are aimed at supporting women, some of the principles and approaches do not always reflect my values as a Samoan person. The Western approach to feminism is not easily applied in Pacific cultures due to a variety of reasons, including cultural traditions and expectations. In cultural settings such as a Samoan *fono*, if you do not hold a *matai* title, the opportunity to speak may not be provided, regardless of professional backgrounds and experiences. Being a Pacific female lawyer means constantly striking a balance between being accepted in the workplace by peers and genuinely attempting to contribute our skills while remaining connected to our cultural identities without compromising our values and beliefs.

I am aware that my reflections will not be accepted by some, and I have been advised that sharing my experiences in this way may limit my career opportunities in the profession. Any project, workplace or network that does not embrace change, honesty and diversity is not something that I wish to be part of anyway. As members of this profession, we must act now. Every single lawyer, judge, advocate and ally can contribute towards building a profession that values everyone. Working towards transformative change requires consultation and collaboration with people that rarely receive an opportunity to share and engage in these conversations. If all the representatives at the decision-making table look, speak, think and act alike, then change will never happen. '*E felelei manu ae ma'au i o latou ofaga*' is a Samoan proverb that translates to 'Birds migrate to environments where they survive and thrive'. Addressing racism, sexism and ableism in the profession requires everyone to be accountable and aware because we all deserve to thrive.

EDITORIAL — KŌRERO TĪMATANGA

Since its beginning, the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine has been more than just an academic journal. Scholarship is of course an integral part of our kaupapa, and we pride ourselves on being the only academic publication in New Zealand that is solely dedicated to publishing feminist legal scholarship aimed at helping achieve gender equity in and through the law. Over the past few years however, the Journal has expanded to be and symbolise much more than just the legal scholarship published in each edition—it is a network for people across all genders to meet, share feminist ideas, support each other and lift each other up. From law students to practitioners to academics to judges, we see the Journal as something available and accessible to all.

Advocacy has also always been at the heart of the Journal. It was only in our second year when the legal profession was rocked by the reports of sexual assault and harassment at Russell McVeagh, and the subsequent outpouring of similar stories from wāhine lawyers. We did not shy away from this, but put our challenge to the profession, that this was the time for real change and accountability. We have continued to be a platform for advocating often silenced issues and we hope that the Journal has sparked conversations and debates that must remain ongoing.

In 2022, the Journal decided to actively expand its reach. An advocacy and an outreach team was established, with members creating space for more discussion of gender justice and feminist legal issues in the legal profession, as well as advocating about these issues through submissions on Bills in Parliament.

This edition of the Journal was born out of this journey beyond just the publishing world. In February 2022, the Journal collaborated with the Auckland University of Technology Law School Te Wānanga Aronui o Tāmaki Makau Rau to hold a Symposium titled "Law and Gender: Beyond Patriarchy". As discussed by Dr Cassandra Mudgway and Dr Lida Ayoubi in the Foreword,

FOREWORD — KUPU WHAKATAKI

Academic conferences are integral to the process of developing and disseminating research and research-based teaching and learning which, in relation to law, can inform policy and law reform as well as judicial decision-making. Conferences are a place where researchers can exchange ideas and form collaborative networks across the discipline. However, conferences can also be dominated by certain voices (cisgender Pākehā men, for example) and be absent of others. If gender or intersectional issues are discussed, they are often lumped into one panel and placed "over there".

As young female academics with marginalised identities attending conferences, we have experienced this time and time again. Cassandra, as a neurodivergent queer woman engaging in feminist legal research, sometimes feels alienated in academic spaces like conferences. As a feminist immigrant woman of colour researching human rights law, Lida often finds herself in the minority in academia, both in her home country of Iran and elsewhere.

So, in 2018, a conference was proposed. This conference would place the intersection of gender and law front and centre. It would seek to prioritise diverse voices and provide an opportunity to present research to those who might not otherwise have had that opportunity. In addition, the conference would provide a forum for dialogue across the law profession—undergraduate and postgraduate students, practitioners and academics—as well as create space for personal and professional reflection and the sharing of our stories, thereby placing a feminist lens on the academic conference. That was the kaupapa of the Symposium on "Law and Gender: Beyond Patriarchy".

Postponed by the challenges of the pandemic and finally taking place online on 1 February 2022, the Symposium was a collaboration between the AUT Law School Te Wānanga Aronui o Tāmaki Makau Rau and New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine. Almost 200 people from around Aotearoa registered for the event, including

law academics, practitioners, students, members of various non-governmental organisations, and the general public.

On the day, twelve presentations were delivered on various issues relating to law and gender in Aotearoa. Associate Professor and Dean of AUT Law School Khylee Quince's keynote on wāhine Māori and feminism contextualised the unique nature of the law and gender debate in Aotearoa. Other presentations covered themes of judicial constructions of sexual orientation, gender identity as a prohibitive ground for discrimination, responses to sex and gender-based violence, gendered financial abuse, consent and evidence related challenges in sexual violence proceedings, and intersectional lived experiences of women lawyers in Aotearoa. The presentations were received with much interest from the audience and created some of the liveliest and engaged debate and sharing of constructive feedback we have ever witnessed at an academic event.

Of the articles presented, a few were submitted and selected for publication in this Special Edition. Using the Canterbury Earthquakes as a demonstrative example in her article, Professor Annick Masselot posits responses to natural disasters as contributors to inequality which warrant the adoption of a feminist perspective. Phoebe Moir's article canvasses the trans inclusivity of women-only safe houses in Aotearoa and advocates for more inclusive policies and perspectives. The analysis of the Property (Relationships) Act 1976 by Freya McKechnie and Emma Phelps focuses on how the law can be abused through power imbalances and gendered financial dynamics in a relationship. Nadia Murray-Ragg's article calls for revisiting the practices around the use of sexual history evidence in sexual violence trials. Finally, Alice Mander and Reina Vaai reflect on their lived experiences of belonging to marginalised minority groups while practising law in Aotearoa.

As Co-Directors of the Symposium, we are grateful for the support of AUT Law in hosting the event and the New Zealand Women's Law Journal – Te Aho Kawe Kaupapa Ture a ngā Wāhine for allowing an opportunity for the panellists to publish their work. Likewise, we are thankful to Ella Maiden and Kat Werry for their tireless support and diligence in putting together this wonderful collection of articles. We also have a host of others to thank for their important contributions to the Symposium, including Associate Professor and Dean of AUT Law School Khylee Quince, Blaze Leslie, Paula Ioapo, Monique van Alphen Fyfe, Paulette Benton-Greig, Christopher Whitehead, Dr Eddie Clark, and Yasmin Olsen.

Returning to the kaupapa of the Symposium, a small follow up story: during the day's discussions, panellists spoke about barriers for young women entering the legal profession, particularly for Māori and Pasifika. One such barrier was the difficulty of purchasing work clothes. A female colleague from the University of Canterbury was especially moved by these comments. After the Symposium, with the support of two others, she took up the cause with the New Zealand Law Society, whose General Manager agreed to raise the issue at the next national meeting.

This is a reminder that our stories have power to make change, legal and otherwise (albeit, a slow change). It is an illustration of the importance of kōrero that blend the academic and the personal, and that these intersectional and intergenerational conversations are part of our path to moving beyond patriarchy.

Dr Cassandra Mudgway
Senior Lecturer, University of Canterbury, Faculty of Law
Dr Lida Ayoubi
Senior Lecturer, Auckland University of Technology, Law School
18 May 2022

"LAW AND GENDER: BEYOND PATRIARCHY"
SYMPOSIUM – KEYNOTE SPEECH

SISTAHS IN ARMS? MANA WĀHINE AND FEMINISM

Khylee Quince*

Tēnā koutou katoa, tēnei te mihi mahana, te mihi nui ki a koutou katoa, wāhine mā. Ko Khylee Quince tōku ingoa, he uri o Ngāpuhi, Ngāti Porou me Ngāti Kahungunu hoki. Ko au te Tumuaki o Te Kura Ture ki te Wānanga Aronui o Tāmaki Makaurau. Ka nui te hari ki te kite i a koutou, nō reira, kei te mihi, kei te mihi, kei te mihi.

I INTRODUCTION

Mōrena koutou. My name is Khylee Quince and I am the Dean of AUT Law School. On behalf of the Law School and AUT more broadly, I welcome you all to this Symposium on "Law and Gender: Beyond Patriarchy", hosted by AUT and the New Zealand Women's Law Journal.

I'm going to give an overview of a wāhine Māori's perspective and reaction to the theme of today's Symposium, being Beyond the Patriarchy. I've called my kōrero "Sistahs in Arms?" and you will note that I have deliberately used the use of slang, which is generally a spelling and a term used by women of colour. And that's deliberate, because the reason for the question mark is of course, the broad question for Māori women and one that I hear many friends, colleagues and relations react to or talk about if they do talk about feminism at all, is: is feminism relevant to us at all? In other words, are we sistahs in arms? Do we have anything in common or do we have more in common than not? That's really my moot question.

I'm going to give an overview of what is Māori women's feminism. And I have a couple of things to say about this. It's really sort of a grand overview

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of what was the position of wāhine Māori in te ao Māori, particularly in pre-colonial or pre-contact Māori society, how this changed, and where does that leave us in 2022. This is a really short kōrero and I'm going to leave you with a couple of questions. We have facilitators from amongst our tauira Māori to assist you to discuss really those big questions: what is the relevance of feminism for wāhine Māori? What can non-Māori feminist allies do to assist Māori women in obtaining their objectives? Those objectives may be different to the one that is sort of the premise of "beyond patriarchy". One of my big questions is he aha tēnei mea, the patriarchy? What is this thing, the patriarchy? There was no such thing in te ao Māori, there certainly is in the lives of contemporary Māori women. What can we do as a post-colonial or decolonisation strategy to reify or lift or raise the position of wāhine Māori; to improve their lives and to be Treaty compliant; to assist in addressing the breaches of equity and discrimination which are breaches of Article 3 of Te Tiriti o Waitangi; and what can we do to then use that as a platform to assist in goals of mana motuhake and tino rangatiratanga, self-determination of wāhine Māori as guaranteed by Article 2 of Te Tiriti. That might sound a lot grander than what I'm going to say, but really those are my questions. What is the relevance of feminism in te ao Māori? Does feminism resonate within te ao Māori? He aha tēnei mea? What is this thing the patriarchy? I'll answer those questions by setting up a really short overview of what are notions of gender, what was the relevance of gender, including the roles and responsibilities of wāhine Māori, in te ao Māori.

II THE RELEVANCE OF GENDER IN TE AO MĀORI

One of the core things, when I say that there was no patriarchy in te ao Māori, is that te ao Māori was not a patrilineal society traditionally, neither was it matrilineal. It was ambilineal or ambilateral. Meaning it was non-gender specific. Gender was not and never has been the core determinant of status or power within te ao Māori. Mana is. In te reo Pākehā, or in non-Māori terminology, you might say that rather than gender, class—if you were to nut it down to a broadly analogous term—was much more important in terms of mana, status and authority. Briefly, the story arc of colonisation and the introduction of Pākehā and tauiwi into Aotearoa has meant that the balance of roles and responsibilities and the place of women vis-à-vis the place of men was destroyed upon colonisation and had unique effects upon Māori women.

When I say unique effects what I mean by that is that colonisation had very, very different consequences for wāhine Māori compared with tāne Māori. One of the story arcs that we will see is that Māori men internalised much of the patriarchy of the incoming European colonisers. And why wouldn't they? Obviously, they had a lot to gain, particularly if you were a man without a lot of status or non-chiefly status. This democratisation of te ao Māori had enormous effects upon the stratification of Māori society into quite new social orderings in which gender did become the more significant determinant of status and power. Women of mana were diminished, and men without mana were raised into much more significant roles of power and responsibility. I've used that phrasing "the balance destroyed." That's in reference to Professor Ani Mikaere, one of the foremost, probably the foremost Māori feminist legal scholar, of Te Wānanga o Raukawa. That's the title of her Master's thesis from the 1990s, *The Balance Destroyed*, in reference to the balance between women and men in te ao Māori.

This is a particularly pertinent kaupapa or topic to be thinking about given the revival of what was Wai 2864, now renumbered Wai 2700—the Mana Wāhine Kaupapa Inquiry with the Waitangi Tribunal. For those of you who aren't aware, in the Waitangi Tribunal you have inquiries or claims that are specific to a particular iwi or hapū, and sometimes even smaller than that, individuals or families. Kaupapa inquiries are those that are of national significance, so they tend to be the broader topics or issues. And the Mana Wāhine claim is one of those. It was a claim that was initially filed in 1993 by 16 very prominent wāhine Māori, including Dame Mira Szaszy, whose beautiful āhua you can see on the photo in the slide. Dame Mira Szaszy, Dame Areta Koopu, Dame Whina Cooper, Dame Georgina Kirby, Dame Aroha Reriti-Crofts, Ripeka Evans, Donna Awatere Huata, and a number of other wāhine. You'll see a lot of dames there – not sure what the collective noun for a group of dames is!

In 1993 the timing of the first filing of the Mana Wāhine claim was around the removal of Dame Mira from the Fisheries Commission shortlist. In the 1990s, when I was at law school, there was a particular time of raru or conflict in the Treaty Settlement era, with a huge fight over fisheries that went all the way to the Privy Council. Part of one of the settlements involved the establishment of the Fisheries Commission, and the choice of Commissioners by the government was particularly controversial. Dame Mira Szaszy was on

the shortlist for one of these Commission roles, and her name was removed. There were no women on that initial Fisheries Commission, and the elevation of a number of male tribal leaders, many of whom received knighthoods as a result: Sir Bob Mahuta, nō Tainui, Sir Tipene O'Regan, nō Ngāi Tahu. Part of the claim was that it was part of a colonial trope—this narrative that Māori men were the tribal leaders, *they* were the people of chiefly status, *they* were the heads of industry, *they* were the people who could lead the development of contemporary Māori. These women filed a claim in opposition to that. The claim fell over in the 1990s and was refiled in 2019, so it's currently on track. In 2021 the Tūāpapa hearings began—a Tūāpapa hearing is the foundation of the claim, so setting out what the claim is about—that occurred in Kerikeri in February of last year, thankfully before lockdown. It became a much more generic claim about the discrimination faced by Māori women more broadly, post-colonisation and post Te Tiriti o Waitangi. Not just about that Fisheries Commission kaupapa, but a much broader claim. That claim is based upon this breach of the inherent mana and iho, the connecting thread of wāhine Māori, and it aims to examine the systemic discrimination, inequities and deprivation suffered by wāhine Māori in the post-colonial context, and the effect that it has had upon the positioning of contemporary wāhine Māori, not just contemporary but generations of Māori women—the negation of our mana motuhake and rangatiratanga, so leadership, self-determination, as well as status for all women. Obviously because it's a claim in the Waitangi Tribunal, the opposition if you like is the Crown, and it's about the breaches of the Treaty and how the Crown has facilitated this discrimination, and the consequential inequities and deprivation suffered by women in ways that are Treaty non-compliant. So that's the mana wāhine claim. The hearings are scheduled, Covid dependent, to continue by the end of 2022. Once that Tūāpapa evidence has been given, then there is the need to hear material and evidence about the consequences of the breach, and the end is consideration of remedies, what can we do about it, and that's something that we might want to discuss at the end of my kōrero.

If the first part of my thesis is that the position of wāhine Māori in te ao Māori was significant and equal, different but equal, to that of tāne Māori, there is plenty of evidence that tells us that this was the case. If we start right back with wāhine Māori in creation stories, and the starting point of a duotheistic, a two god creation story, with the primordial parents of tāngata

Māori, and of te ao mārama, the world of light and living in which we live, being Ranginui and Papatūānuku, the Sky Father and Earth Mother. The importance of the balance between male and female tracing right back from human whakapapa to that relationship. The first human being created by one of their children, the atua Tāne Mahuta, was a female, Hineahuone. The first piece of evidence about that normative ideal of gender balance is evident in the Māori cosmogeny and creation stories.

Within te ao Māori there are threads of normativity and notions of gender, and I'm assuming at some part of today there will also be discussion about notions of duality of gender and perhaps multiplicity of genders and sexuality. At a very basic level, this idea of te ira wāhine (the female gender) and te ira tāne (the male gender) with differing roles and responsibilities, but equally respected and contributing to the collective whole and wellbeing of whānau, hapū and iwi Māori. That was the position in pre-colonial Māori society. Now as I've said already, within that society, mana was a much more significant determinant of a person's status than gender. Everybody is born with mana. Some people are born, in terms of inherited mana, with more than others. That's that notion of, in a crude sense, class status. Are you born with chiefly status, are you born to a significant family? The notion within te ira wāhine, of women as powerful sexual beings, with inherent tapu. Tapu is that dedication of separate important status, again deriving from our whakapapa to the atua or gods. The core identity of women, not only in te ao Māori but in the female gender worldwide and across cultures, is this concept of ngā whare tangata: the houses of humanity. All human beings come from a whare tangata, come from a woman. The role and status of women as mothers, as nurturers, as carers, and of kuia or older menopausal women as repositories of knowledge. And again, there is a lot of evidence of this, in our language, in our reo, the gender-neutral pronoun terms, ia for example, gender neutral names, but also of course the place of women within pakiwaitara, purakau, tribal stories, the naming of places and important events, the naming of hapū and iwi after important and chiefly notable women.

The balance within tikanga was evident in the speaking roles ascribed to women. You're probably well aware, particularly from the annual raruraru or conflict on the Waitangi treaty grounds, of the divvying up of roles on the marae between men and women. Many would say that part of that is post-colonial practice, of women not speaking on the marae, but even in the

most conservative of iwi, women play a role in terms of kaikaranga, men as kaikōrero—formal speakers, speech markers—and then women again. There's this constant to and fro, so that often the last word is given to a woman, a kaiwaiata. Once a male, usually, has given a formal speech, it is the role of women to stand up and support, or not, what that person has said. Their choice of waiata, their choice of song, and the *way* in which they sing it, matters. Quite often in hui you will hear women very vociferously sing a song that gives the impression or sends the message that they either agree with what that man has said, or they do not. Sometimes they will sing a nonsense song which clearly gives the message that that man is not speaking for us. I've seen that many times in my own tribal setting.

III THE IMPACT OF COLONISATION ON WĀHINE MĀORI

This all changed upon colonisation, but within pre-contact te ao Māori, the legal status of wāhine Māori was very clear. There was equal citizenship to the extent that a person's mana allowed for it. There were, for want of a better equivalent term, slave people with little to no mana and little to no property, legal status, rights within the community, but the qualifying mea or thing was not their gender, but their mana. Generally speaking, women had the right to equal citizenship and legal personality, they could hold positions of political and tribal power and influence, they could contract, own land, gift or bequeath property, they had sexual and bodily autonomy, they could have multiple partners. There was not necessarily any idea that you would stay with one partner for life. You could marry for love, you could marry for alliance, and as is often the case in communities or societies based upon stratification by class, you could have a tomo or taumau, an arranged marriage by alliance for political purposes. Equally parties could separate. Upon marriage women maintained their family or whānau tribal names, their own identity and separate property. That is because the most significant aspect of te ao Māori is whakapapa. If you do not whakapapa or have a genealogical link to a place or a piece of property, then you had no rights to it. Marrying someone does not merge your property portfolios or your access to particular rights and responsibilities. The primacy of whakapapa as a means of determining legal entitlement was maintained upon marriage or coupling in traditional te ao Māori. This is really important in terms of protecting the rights and status of wāhine Māori, because the whānau remained your primary source of support. There was no severing of ties upon

marriage. This is really significant for those of you who are family lawyers or particularly engaged in, whether you are talking about family violence, intimate partner violence, or relationship property. That's really important to remember, that the whānau as a form of support and protection was always there within te ao Māori. In my view at least, and in the view of other Māori female researchers such as Kuni Jenkins, Stephanie Milroy, Leonie Pihama, the division of social ordering into the public and private spheres, and this notion of the primacy of the marital relationship over other family relationships, have been significant in the breakdown of the protective factors within traditional Māori communities. In their view, and I agree with them, the diminishment of the family and the primacy of the marital relationship has meant that it is easier for people to perpetrate intimate partner violence. It is easier for all kinds of horrors to go on and deprivation and discrimination to go on behind closed doors when your whānau no longer has automatic right of access to your marital home. Ani Mikaere, in her Master's thesis I've mentioned already, she provides numerous pieces of evidence of marriages where a woman moves away from her family community, her home community for the purposes of marriage, she maintains the link to her home community and she sends words to them when things go wrong, and the husband's community is aware that this can happen. She gives numerous instances, pieces of evidence where a married woman would send word back to her community that she has been insulted or that she has been physically harmed by someone in her husband's community or her husband himself. Her own community has the right of utu to come and generally seek muru, compensation, recompense for the harm done, because diminishment of her mana is diminishment of their mana, because of collective responsibility and identity. There was no severing of those ties upon marriage, and the maintenance of those ties was a form of protection for women and children. That is no longer the case.

Colonisation destroyed much of that balance, in making gender a primary determinant of status. In terms of Te Tiriti o Waitangi, there were at least 13 female signatories to the Treaty but of course, we don't know of the 500 plus signatories, because many Māori names are non-gender specific. Some of those signatories may be women that are unidentified. We also know of many wāhine rangatira who turned up to sign on behalf of their hapū who were turned away. Matua Moana Jackson gives a story of one of his female tupuna who was in that position, who was denied the right to sign and who then had her people

walk away. They are not signatories for that very reason, because her mana was not recognised because of her gender. We know of course that in terms of Pākehā law from the UK that the Married Women's Property Act in 1877 was the piece of legislation that gave legal status and personality to women. So, we have that early one or two generations of colonial contact where Māori women were assumed not to have legal personality. They couldn't contract, they couldn't sign the Treaty, they couldn't own property. I've mentioned that distinction between the public and private spheres and the effects that that had, the destruction of the protective capacity of the whānau. We saw the retelling of Māori cosmogony, the retelling of those stories. Possibly a controversial take and particularly within my whānau, which is wholly colonised within the Mihinare, the Māori Anglican church, in the belief and the idea of the Io, the primary monotheistic whakapapa of God. We move away from the dualistic cosmogony of Ranginui and Papatūānuku and you start to see materials referring to Io, which coincidentally sounds a lot like the Christian God, although as I say people within my whānau and others are adamant that the history of Io predates colonial times. That's another matter of controversy within Māoridom.

The new moral order of the colonial invasion also brings with it different sexuality and behaviours and mores about what is appropriate feminine behaviour. I'll mention very briefly the effect that that has had on the representational intersectionality of contemporary Māori women. Judgement about sexuality. Judgement about not being married that is represented in our laws of welfare. Media representation of women, Māori women in particular. Judgement of their choice of partner. In criminal law the law of omissions, of failure to protect children, in my view is in some way related to this imposition of this new moral order about appropriate female sexuality and behaviour.

Ani Mikaere, she's the godmother, the godfather in this area, in her constant refrain about law as colonisation's enforcer. That the law was used to enforce this new moral and legal order, and of course there is an unending number of pieces of legislation and policy that enforces this new order. Starting with the Native Land Act, its long title, its very purpose is the destruction of collectivism, and along the way the position of Māori women, wāhine Māori as landholders, as leaders of iwi hapū and whānau. The Land Act is really one of the first, probably foremost, means of the destruction of Māori women's place in our local tribal economies. Then we had the ten owner rules in the early

days of the new land tenure system, which meant that only ten owners could be named upon the title deed. The reason for that is just because the piece of paper, the deed, could only fit ten names on it, and so those names became male names. Initially it was intended that those men were kaitiaki or trustees of the wider group but they very quickly under the legal order became absolute landholders, landholders not trustees for the greater good. We quickly see the economic destruction of the role of Māori women within Māori communities.

In education, the Native Schooling Act 1867 set up a racialised and gendered education system for wāhine Māori that persisted for 100 years. I say it's racialised and gendered because the primary purpose was to set up an education system for Māori children, but within that system there were gendered pathways, so that Māori boys became fathers and farm labourers and Māori women were set up to be housewives, domestic servants, and in later decades possibly nurses or teachers. In that pathway, you see a very big internal distinction between Māori men and women and their ability particularly to access tertiary education. My tupuna Tā Apirana Ngata was the first Māori lawyer, or the first Māori to gain an LLB, and that was in the 1890s. The first Māori female lawyer was Georgina te Heuheu, who became a National Party MP, and she wasn't admitted to the bar until the 1970s, almost 100 years later. That's the gap, that internal gap, that intersectional gap between wāhine Māori and tāne Māori. There are just numerous, hundreds of pieces of legislation in which you see the differentiation on the basis of gender or race or both. Customary marriage was curtailed. I've mentioned the concept of ambilineal or ambilateral identification and succession in Māori land law. Traditionally you could succeed and identify with either of your female or male or matrilineal or patrilineal whakapapa lines, but not both. Bilineal succession under the native land tenure system meant that you had very quickly thousands of owners, as people inherited rights to land that they had no domicile connection to. Again, destruction of the internal protective factors of our own land tenure system, which was that you only inherited land and use rights to resources around whenua in places where you were living. If your father was from the Hawkes Bay and you never lived in the Hawkes Bay, you did not get rights to that land. After colonisation, the series of Native Land Acts allowed for this succession to land interest that people had no domicile connection to, in terms of their contribution to those communities. That's had again a devastating impact on the Māori economy and the usefulness of Māori land, the ability

then to mortgage and develop land, because blocks have tens of thousands of owners.

The Adoption Act, and family law, and other pieces of law in terms of things like the Administration Act. Who inherits when someone dies, who is your next of kin when you need organ donation, or you have a dispute over a tūpāpaku? Billy T James and of course the case of James Takamore of Tuhoe that went to the Supreme Court, in a dispute between his Pākehā wife and birth whānau. Again that's essentially a dispute about which is the primary relationship in a person's life – is it the marriage partnership, or is it the broader whānau?

Here we see what I call the tactics of divide and rule. We see Māori women and Māori men pitted against one another, and when we come to the contemporary position of Māori women, we see lateral violence. Men taking out their frustration and the discrimination against them, the inequities that they face, on the women in their lives, extremely dangerously. I've mentioned this briefly, and again somewhat controversially perhaps, this concept of tāne Māori as collaborators in the colonial project. In the 1990s, when that Mana Wāhine claim was tabled, there was a North American legal academic at the University of Waikato called Nan Seuffert. I think Nan might be at the University of Wollongong in Australia now. She wrote a few interesting pieces at the time about this idea of the alliance of men across race, this idea of men bonding across the patriarchy in that fisheries settlement kaupapa, that Māori men were willing to diminish the status and potential leadership of wāhine Māori in order to advance themselves. That was quite controversial at the time, and I don't think it is coincidental that we had not only a non-Māori woman making those claims safely, but also not only a Pākehā woman, but he wāhine tauiwi, a foreign woman, because she could.

So, this internalisation of Christian morality and gender hierarchies that I've flagged already, women as supporters of men, men who are the heads of nuclear families, again this internalisation of these very Victorian Pākehā social organisation demographics. The democratising of the position of men as landholders, voters, persons with social, cultural, economic, and political power. One example is the case of Meri Mangakāhia, another woman from the North, from Te Rarawa. She's significant in the women's suffrage movement, but remember at the time in the 1890s there was a separate Māori Parliament or Te Kotahitanga, and Meri Mangakāhia's husband was, at the time, elected the

premier of Te Kotahitanga, Hamiora Mangakāhia. Meri represented the Māori women's suffrage movement in asking them, the Māori Parliament, made up only of men, Māori men, to support the suffrage rights and advancement of wāhine Māori. And they closed ranks upon her. Māori women were not granted the right to the franchise within Te Kotahitanga until 1897, which of course was four years after the general suffrage right granted to women in the New Zealand Parliament. That gives you some idea of the difference and the internal discrimination faced by Māori women.

Another example is Cathy Dewes of Te Arawa, elected to the Te Arawa Māori Trust Board, again in the 1990s. Te Arawa have quite a specific tikanga or kawa around protocols around the place and position of women, probably I would say the strictest of any tribal grouping or area within New Zealand. Cathy was elected and within their protocol, and of course I may get some flak for this, but women are generally seen and not heard in their political tribal spheres. When Cathy walked into the room for the first Trust Board meeting, the men either turned their backs on her or got up and left. So, this has contemporary consequences for wāhine Māori, this internalisation of patriarchal views.

Just to finish, the contemporary position of wāhine Māori, and this is obviously the intersectional point. If we think about the core of intersectionality being that all of us all human beings have multiple points or multiple identities and some of those identifies have agendas or cultures that conflict with other aspects of our identity. The core point for women of colour is that our race or cultural ethnicity is read or responded to, so our gender is read and responded to in particular ways because of that cultural or ethnic identity. In other words, we are characterised or responded to, presented in the media and in other public forums, in different ways because we are Māori. Not just because we are women, but because we are Māori. In ways that are different to the representation of other women, non-Māori women, but also in ways that are different to Māori men. Most people I think are familiar with the classification of statistical information about health, well-being, education, justice indicators, in the aggregated or disaggregated data by gender and ethnicity. Often the hierarchy will be, in terms of wellbeing or education status etc, that Pākehā men will be best off then possibly Pākehā women, Māori men, but always Māori and Pasifika women at the bottom. That is the effect of intersectionality. In my field, in terms of criminal justice, the

most overincarcerated demographic in Aotearoa, by proportionate numbers, is wāhine Māori, and that is growing exponentially.

IV MANA WĀHINE AND INTERSECTIONALITY

So, Māori feminism then, mana wāhine, is underpinned by Te Tiriti o Waitangi and the promises of tino rangatiratanga under Article 2, and equal citizenship in Article 3. It's about the promotion of mana, the power, authority and influence of women, and the recognition of tikanga and kaupapa Māori, in our laws, our legal processes and institutional structures. The recognition of different familial structures and obligations, our roles and responsibilities in relation to whenua, territory and resources, but also political decision making and power. Mana wāhine is about the denunciation and rejection of violence and colonial gender hierarchies and the deconstruction of that public private divide that I flagged very quickly. Deconstruction of the notion of individualism and the idea of individual rights holders. We've seen this for example in the very recent Pou Matakana judicial review claim by John Tamihere and the Whānau Ora Commissioning Agencies around the Māori data request in respect of the vaccine rollout. That is a pitch for collectivism over individual data. It's about the centring of gender and race in our discourse, not one over the other.

To use Professor Kimberlé Crenshaw's framework, intersectionality has reference to three different aspects of our race and gender identities as women of colour. It's about the structural – so what is the narrative that has set us up in terms of that contemporary position, in terms of our health, our wellbeing, our life expectancy, our education, our access to housing etc. That's our structural position. The political position is about the inconsistency and the competition between those competing agendas of our race and gender. That comes to the fore of course in Professor Crenshaw's work in terms of intimate partner violence. We know that Māori men and men of colour are particularly poorly treated, if we think about the Black Lives Matter movement, by the police and justice agencies. But we also know that women of colour are the victims of their private violence. The dilemma for those women of colour is: do I prioritise my race over my gender? Do I prioritise my own and the safety of my children against the safety of my man by handing him over to the authorities where he may be harmed, or killed, or at least one of the many thousands of men of colour incarcerated? That is political intersectionality. Then there's the representational aspect of the way in which wāhine Māori are presented in the

media compared with Māori men or compared with Pākehā women or other demographics. I've just got a couple of examples of two Māori women, Nicola Daly Paki, mother of Moko Rangitoheriheri, killed by caregivers, and Macsyna King, whose partner Chris Kahui was acquitted of the murder of their babies. Neither of these women, these Māori mothers, neither of them were suspected of harming their children. Yet they were the ones vilified in the media, for their choices of partner, for their choice of activity in terms of sexuality and behaviour, for going out, in the case of Nicola Paki, leaving their children with caregivers so she could speak medical help and treatment for one of her other tamariki. That is a form of representational intersectionality. The New Zealand Herald at the time had a headline that referred to Macsyna King as "the worst mother in New Zealand." Neither of these mothers had harmed, or were even suspected of harming, their children.

V CONCLUSION

I want to finish with a story, the story of Meri Ngaroto, another wahine Rangatira, a chiefly woman from Te Aupōuri, one of the five tribes of Muriwhenua in the Far Far North, who lived in the early 19th century. Now Meri Ngaroto, her father was a significant chief, and they were at their marae in Ōhaki near Ninety Mile Beach when they heard that a group of visitors were coming who were unwelcome. There was talk about slaughtering them or offering her up to marry the visitors. Two different forms of traditional dispute resolution strategies in te ao Māori, you either marry the people that you have conflict with, or you just wipe them out. A decision was made to wipe them out. Meri Ngaroto pled with her father and the other chiefs of her hapū for the lives of these manuhiri who were going to be slaughtered. She did so in a metaphorical way, which was also a very Māori way of doing such a thing. In doing so, this is one of these most famous and in my view overused whakatauāki, misunderstood quotations of famous Māori speeches if you like. She made the plea in this way:

> Hutia te rito o te harakeke
> Kei hea to komako e ko?
> Ki mai ki ahau
> He aha te mea nui o tea o?
> Maku e ki atu

He tangata, he tangata, he tangata
If you pluck out the centre shoot of the flax
Where will the bellbird sing?
If you ask me
What is the most important thing in the world?
I will reply
It is people, it is people, it is people

Her metaphor was one about the health and ecosystem of the flax bush as a metaphor for a healthy functioning Māori whānau, hapū or iwi unit. The rito is the centre shoot that she refers to and it is where the bellbird, the komako sits and sings and is part of a healthy functioning ecosystem. She says if you take the child out of that flax bush where the child is the centre and the parents and grandparents are the shoots that wrap around and provide nurturing support, love, awhi and tautoko to that child, the whole ecosystem falls apart. What she is saying is that if you kill these people then you will kill not only the living people amongst them, but also their ability to procreate, and the people that they are connected to will be affected. So, when she says the most important thing is people, it's not people in the Western sense of individual human beings. She means the most important thing is *whakapapa*. It is our connection to one another, our connection to whenua, our connection to place, people and the broader universe. It's not about human beings at all, it's about connectivity. That's what she meant in that whakatauāki. In relation to the place of wāhine, wāhine are part of a functioning ecosystem within that flax bush, along with men, along with grandparents, along with the wider community. That's what mana wāhine means.

Kua mutu tāku kōrero i tēnei wā, kia ora koutou mō tō koutou whakarongo mai, thank you very much for listening, and I've left a couple of questions for discussion for you. The first is, is mana wāhine compatible with feminism, and do the schools of thought have common goals or objectives? What is the relationship? Are we sistahs in arms? The second is the question of allyship. What can a good ally do? How can Pākehā and tauiwi, non-Māori feminists, assist and contribute to the goals of wāhine Māori? What is your role as a non-Māori person? That's a very common question that's asked and it's a very good one. And my final question for you is this, is that Matua

Moana Jackson, one of the best Māori feminists I know, he tane Māori, has described colonisation as the process of replacing one house with another. The colonisers came, and they established a house. Every society's house has a similar foundation as being a place to live, as providing sustenance, as being built upon particular values, but each house is organised according to the cultural beliefs, history, environment and resources of that society. It is also adorned with its art, traditions, etiquette, and music. My final question is the decolonisation one: how can we reconstruct the whare Māori, the Māori house in Jackson's metaphor, and why should we? Where does our impetus or desire to do so come from? And of course, the big question is what would that involve for wāhine Māori, and with what potential impact? What are the resources that we need to tell the truth of our past? What are the resources that we need to rebuild the capacity of whānau, hapū and iwi Māori so that we can properly access the promise of Te Tiriti o Waitangi? Of equality and equity in Article 3, being a platform for tino rangatiratanga, mana Motuhake in Article 2? I've spoken for far longer than I've intended to e wāhine mā, I hope that wasn't too basic an introduction or reader to Māori feminism and the story arc or narrative of the role or place of wāhine Māori within te ao Māori and contemporary Aotearoa. But again, I thank you very much for listening and coming today.

Kia pai tō rā koutou, have a great day today, once again enjoy the Symposium, I hope to catch you all in person sometime soon. Kia ora rā koutou. Ka kite.

FEMINIST PERSPECTIVE ON NATURAL DISASTERS RESPONSES: LESSONS FROM THE CANTERBURY EARTHQUAKES

Annick Masselot*

What do earthquakes have to do with gender? Quite a lot. Based on the experience of the Canterbury earthquakes, this article argues that disaster emergency management and responses must necessarily be underpinned by considerations of gender equality. Earthquakes take place in the context of structural inequalities. The gender impact of natural disasters leads to unequal gender outcomes which, in turn, are further amplified by disaster emergency responses. Fundamental values, such as gender equality, are typically compromised during disaster emergency management and recovery. Gender equality is frequently dismissed as a luxury for times of plenty, while efficiency and cost are often raised as objections to including gender considerations into emergency responses. This article argues that gender-based decisions contribute to strengthened emergency response outcomes. More importantly, humanity's very way of life, and potentially existence, depends fundamentally on the ability to make gender-based decisions at all times, including in times of natural disaster emergencies.

I INTRODUCTION

Humanity is roughly represented by men and women in equal proportion. Yet earthquakes, and many other disasters, are more likely to kill or harm women in disproportionate numbers compared to men. In the 2011 Canterbury earthquake, 185 people lost their lives, and 123 of these were women.[1] This

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1 New Zealand Police "Christchurch earthquake — List of deceased" <www.police.govt.nz>. The list provided by the police is made of names, some of which are assigned a gender, for others, there is no designation. I have inferred the gender of victims according to their name. For example, I have extrapolated that John stands for a man and Mary for a woman.

means that the mortality rate for women was 81 per cent higher than for men.[2] This disparate number of fatalities can be explained on the basis that a large number of individuals lost their life in the collapse of the CTV building, which hosted a television studio, a nursing school, a language school and a health clinic. As the education and healthcare sectors are female dominated industries in Aotearoa, it is unsurprising that the majority of people working at the CTV building were women.[3] The Canterbury earthquake, however, is not an outlier, with other disasters showing women are more likely than men to be killed during a seismic event. The Kobe earthquake in 1995 killed 1.5 times as many women as men, because a large number of elderly single women were concentrated in poor residential areas susceptible to damage and fire.[4] The 2011 Tōhoku 9.1 magnitude earthquake and tsunami in Japan also killed women in greater numbers than men.[5] Following the 2015 Gorkha earthquake, the government of Nepal reported that the seismic event had a more devastating impact on women than on men. Approximately 55 per cent of fatalities in the Gorkha earthquake were identified as female.[6] Of the 228 deaths in the 2017 Mexico City earthquake, 90 were men (39.5 per cent) and 138 were women (60.5 per cent).[7] In the 2009 L'Aquila earthquake, on average 43 men died to every 50 women.[8]

A 2007 study conducted by Eric Neumayer and Thomas Plümper of 141 countries between 1981 and 2002 showed that natural disasters contributed to lowering the life expectancy of women drastically more than that of men.[9]

2 Shannon Abeling and others "Patterns of earthquake-related mortality at a whole-country level: New Zealand, 1840-2017" (2020) 36(1) Earthq Spectra 138 at 155.

3 See Statistics New Zealand W*omen at Work 1991–2013* (October 2015). Women generally make up a higher proportion of staff at these places.

4 Eric Neumayer and Thomas Plümper "The Gendered Nature of Natural Disasters: The Impact of Catastrophic Events on the Gender Gap in Life Expectancy, 1981–2002" (2007) 97(3) Annals of the Association of American Geographers 551 at 555.

5 A Ishiguro and E Yano "Tsunami inundation after the Great East Japan Earthquake and mortality of affected communities" (2015) 129 Public Health 1390 at 1392–1393.

6 Kay Standing, Sara Parker and Sapana Bista "'It's breaking quite big social taboos' violence against women and girls and self-defence training in Nepal" (2017) 64 Women's Stud Int Forum 51 at 51; and Devi Gurung "Through Women's Eyes: A Study of Vulnerability in 2015 Earthquake" (2019) 13 Dhaulagiri Journal of Sociology and Anthropology 76 at 78.

7 Jorge Alberto Álvarez-Díaz "Género, desastres y mortalidad: Sismo en Ciudad de México, 19/septiembre/2017" (2020) 25(7) Ciência & Saúde Coletiva 2831 at 2832–2833 (translation: "Gender, disasters and mortality: Earthquake in Mexico City, September 19th, 2017").

8 D Alexander "Mortality and Morbidity Risk in the L'Aquila, Italy Earthquake of 6 April 2009 and Lessons to be Learned" in Robin Spence, Emily So and Charles Scawthorn (eds) *Human Casualties in Earthquakes* (Springer, London, 2011) 185 at 188.

9 Neumayer and Plümper, above n 4.

However, an increase in the socio-economic status of women tends to reduce this effect. In other words, greater status of women in society is correlated with reduced relative reduction in life expectancy.[10] This pattern was evident in the Canterbury earthquakes. Women typically have a higher life expectancy than men, but the gap between men and women has been reducing. The earthquakes contributed by accelerating the reduction in this gap. The territorial authorities not directly affected by the Canterbury earthquakes saw a reduction in the life expectancy gap between men and women of 5.2 per cent on average. Whereas the three territorial authorities directly affected saw a larger reduction, namely 6.67 per cent.[11] A similar pattern emerged with the Kaikoura earthquakes; those territorial authorities not directly affected by the Kaikoura earthquakes experienced a reduction in the life expectancy gap of 6.5 per cent between 2013 and 2018, whereas the Kaikoura District experienced a reduction in the life expectancy gap of 8.33 per cent.

In addition to killing women more often than men, earthquakes tend to also injure women in disproportionate numbers. In the 2010 Canterbury earthquake, 1,453 females (64 per cent) were reported to have suffered injuries, compared to 803 males (34 per cent).[12] In the 24 hours after the 2011 Canterbury earthquake, the number of injured people was 6,659, which was made of 2,032 men (31 per cent) compared to 4,627 women (69 per cent).[13] Thus, almost twice as many women compared to men were hurt in both the September 2010 and February 2011 earthquakes in Christchurch.[14] This contrasts significantly to the number of injuries reported in normal times, where men represent the majority of people attending the Christchurch emergency department on any given Tuesday in February.[15] Again, these figures are not outliers, as studies have shown that women, children, and the elderly typically represent the highest

10 Neumayer and Plümper, above n 4.

11 These figures were calculated by Tim Wilson (PHD candidate, Victoria University of Wellington) (research forthcoming) based on the data set out in "Growth in life expectancy slows" (20 April 2021) Stats NZ <www.stats.govt.nz>.

12 David Johnston and others "The 2010/2011 Canterbury earthquakes: Context and cause of injury" (2014) 73 Natural Hazards 627 at 632.

13 Michael Ardagh and others "The Initial Health-system Response to the Earthquake in Christchurch, New Zealand, in February, 2011" (2012) 379 The Lancet 2109 at 2112.

14 Johnston and others, above n 12, at 631.

15 Michael Ardagh and others "A Sex Disparity Among Earthquake Victims" (2015) 10(1) Disaster Medicine and Public Health Preparedness 67 at 72.

number of disaster victims.[16] As discussed by Ying Cao and Nabil Kamel in their study on the role of gender and age in the 2008 Whenchuan earthquake:[17]

> … studies found that more women were injured in the 1994 Northridge, the 1989 Loma Prieta, and the 1987 Whittier Narrows earthquakes in the United States, the 1995 Hanshin earthquake in Japan, the 2002 Afyon earthquake in Turkey, the 2001 Gujarat earthquake in India, the 1990 Luzon earthquake in the Philippines, the 1988 Armenian earthquake, and the 1976 earthquake in Guatemala.

Direct impacts such as high mortality rates, reduced life expectancy and disproportionate injuries only represent one aspect of the gender impact of earthquakes. Other gender impacts include the disproportionate negative economic and social outcomes in all areas, including employment, education, care of dependents, financial situations, housing and access to infrastructure and resources.

In addition, violence against women and girls increases after disasters, and earthquakes are no exception:[18]

> Disasters are known to have direct and indirect impacts on gender-based violence, particularly against women and girls, revealing a pattern of heightened violence and vulnerability in their aftermath.

Statistics show an increase of 53 per cent in family violence offences over the first four days in those areas affected by the 2010 Canterbury earthquake.[19] In addition to increased incidents following the September 2010 earthquake, New Zealand Police reported an increase of 20 per cent in domestic violence in the weeks immediately following the 2011 Christchurch earthquake.[20] Reported cases of domestic abuse only represent about 18 per cent of the total number of incidents of domestic abuse, according to the Police.[21] Subsequent reports by

16 Ying Cao and Nabil Kamel "The Role of Gender and Age in Fracture Distribution Following the 2008 Wenchuan Earthquake" (2011) 59(3) Natural Hazards 1357 at 1358.

17 At 1358–1359.

18 Jacqui True "Gendered violence in natural disasters: Learning from New Orleans, Haiti and Christchurch" (2013) 25(2) Aotearoa New Zealand Social Work 78.

19 Debra Parkinson, Cath Lancaster and Anna Stewart "A numbers game: lack of gendered data impedes prevention of disaster-related family violence" (2011) 22 Health Promotion Journal of Australia 42 at 43.

20 True, above n 18, at 82.

21 At 82.

women's refuge groups confirmed the spike in domestic abuse. Christchurch Women's Refuge noted the severity of incidents and the increase in young women entering safehouses.[22]

Negative impacts on women do not end with the seismic event. Disaster management (response and recovery) tend to further disproportionately disadvantage and ignore women. This further contributes to gender blindness, reinforcing or increasing inequalities and harmful gender stereotypes, ultimately, contributing to female death and injuries.[23] Indeed:[24]

> Sex and gender are never automatically the primary social facts on the ground nor are these ever in play in isolation from other facts of life. But gender is also never irrelevant and must always be examined and reflected in practice, for men and boy as much as women and girls.

Why are earthquakes more likely to kill and harm women compared to men, and what can be done about it to reduce this disparity? This article explores these questions and posits that the disproportionate negative impact of earthquakes on women is directly linked to the patriarchy. Simply put, the more vulnerable a population is, the more likely it is to be killed or injured in a seismic disaster. As women are, on average, more vulnerable than men in a patriarchal society, they are therefore more likely to be killed or harmed as a result of an earthquake.

In order to address these issues, this article is divided into three sections. The first section discusses the idea that earthquakes should be conceptualised as "social disasters" rather than natural disasters because they amplify existing inequalities and oppressions within the existing social structures.[25] Section two considers the relationship between seismic disasters and gender. It contends that the patriarchy contributes directly to producing and reproducing gender inequalities and oppression. Finally, a way forward is considered in the last section, which explores how to frame legal responses of disaster preparedness and planning with a gender-sensitive lens. This last section focuses particularly on the availability of gender-sensitive legal instruments.

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22 At 82.

23 Ilan Kelman *Disaster by Choice: How our Actions Turn Natural Hazards into Catastrophes* (1st ed, Oxford University Press, Oxford, 2020); and True, above n 18.

24 Elaine Enarson "Preface" in Elaine Enarson and PG Dhar Chakrabarti (eds) *Women, gender and disaster: global issues and initiatives* (eBook ed, SAGE Publications, India, 2009) xvi at xvi.

25 True, above n 18, at 79–80.

II CONCEPTUALISING EARTHQUAKES AS SOCIAL DISASTERS THAT MAGNIFY EXISTING INEQUALITIES AND OPPRESSIONS WITHIN THE SOCIAL STRUCTURES

Earthquakes are typically classified as "natural" disasters. Yet in the field of disaster studies, there are increasing contests over the classification of disasters as natural versus human or man-made.[26] A natural disaster is a major adverse event that results from natural processes of the Earth.[27] Earthquakes, along with other disasters such as volcanic eruptions, tsunamis, landslides, extreme weather, floods, droughts and wildfires, are typically classified as natural disasters. The qualification of "natural disaster" however is somewhat artificial and slightly incorrect. In particular, the lines between natural, man-made and man-accelerated disasters are increasingly difficult to draw, given the impact humans have on the environment through their choices in architecture, fire and resource management.[28] Man-made climate change effects can further potentially play a role in increasing the number, or worsening the impact, of disasters. While seismic events could be classified as natural, the choice made by humans to settle and build in earthquake-prone zones, and to use unsuitable material and building techniques, contributes to the resulting disaster being essentially man-made when an earthquake strikes.[29]

Both natural and man-made disasters can cause loss of life and property as well as economic damages. The severity of the impact of any given disaster will depend on the affected population's resilience and on the infrastructure available. This is reflected in the definition of disaster by the International Federation of Red Cross and Red Crescent Societies: [30]

> … serious disruptions to the functioning of a community that exceed its capacity to cope using its own resources. Disasters can be caused by natural,

26 Ksenia Chmutina and Jason von Meding "A Dilemma of Language: "Natural Disasters" in Academic Literature" (2019) 10(3) International Journal of Disaster Risk Science 283.

27 "Natural disaster" (18 April 2022) Wikipedia <en.wikipedia.org>.

28 "Natural disaster", above n 27.

29 See generally, RW Perry "Definitions and the Development of a Theoretical Superstructure for Disaster Research" in EL Quarantelli (ed) *What Is a Disaster? Perspectives on the Question* (Routledge, New York, 1998) 197.

30 International Federation of Red Cross and Red Crescent Societies (IFRC) "What is a disaster?" <www.ifrc.org>.

> man-made and technological hazards, as well as various factors that influence the exposure and vulnerability of a community.

The understanding today is that there is no such thing as a "natural" disaster.[31] Natural and other disasters are disasters only because they affect human lives.[32] The cause of the disaster—natural or man-made—appears therefore to be irrelevant in the face of the impact on human lives. The outcomes of earthquakes and other so-called natural disasters are therefore not so different to those of economic, social or political disasters or crises such as Brexit, financial or market failure or war.[33] Thus, the distinction between natural and man-made disasters is a false one. It is the scale of a disaster that is important, and that scale is defined by its impact on human lives. Large disasters reflect their ability to affect a large number of people.

While the raw number of people affected is important to assess the severity of any disaster, it is equally important to consider the impact a disaster has on different groups (by age, gender, sex, sexuality, race, ethnicity, first language, or ability) and by what proportion each group is affected:[34]

> Natural disasters do not affect people equally as if by an arbitrary stroke of nature. Instead, the disaster impact is contingent on the vulnerability of affected people, which can and often does systematically differ across economic class, ethnicity, gender, and other factors.

Generally, the more vulnerable the population, the more likely it is to suffer from any given disaster.[35] The scale of the impact of a disaster is a function of how we, collectively and our leaders, individually make decisions.[36] Ilan Kelman argues that while we know how to build infrastructures to withstand most disasters, we choose selectively to ignore this knowledge, which in turn results in injury and death to human beings as well as damage and destruction

31 True, above n 18, at 79.

32 See generally, Daniel A Farber "Disaster Law and Inequality" (2007) 25(2) Law & Ineq 297.

33 Helena Molin Valdés "A Gender Perspective on Disaster Risk Reduction" in Enarson and Chakrabarti, above n 24, at 18–28. See also Heather MacRae, Roberta Guerrina and Annick Masselot "A Crisis is a Terrible Thing to Waste: Feminist Reflections on the EU's Crisis Responses" (2021) 58(2) International Studies 184; and Annick Masselot "The EU childcare strategy in times of austerity" 37(3) J Soc Welf Fam Law 345–355.

34 Neumayer and Plümper, above n 4, at 561.

35 True, above n 18, at 80.

36 True, above n 18, at 79–80; see also generally, Niall Ferguson *Doom: The Politics of Catastrophe* (ebook, Penguin Press, United States of America, 2021) at 297–357.

of homes and infrastructure.[37] These selective applications of human knowledge is a result of:[38]

> …actions, behaviours, values, decisions, and choices—not just our own, but also of those with the power and resources to decide for others, with or without their awareness and consent.

These decisions reflect long-term societal organisations and structures, which determine governance, distribution of wealth and decision-making as well as implementation. Ultimately, these wide-ranging actions and values affect the treatment of various groups,[39] and create what is referred to in disaster studies as "vulnerability".[40]

Disasters typically negatively affect groups with lesser capabilities, resources and opportunities.[41] As Jacqui True has explained, "[t]hese negative effects are multiplied for some vulnerable groups and minimised for other, usually better-resourced, groups".[42] Moreover, disaster and vulnerability feed each other. Lack of resources tends to deprive people from choices that, if acted on, would contribute to moderate their vulnerability.[43] Indeed:[44]

> Results of several empirical studies suggest that, generally, disasters reinforce gender stereotypes or even revert to traditional roles of earlier times, as people feel the need to rely on very distinctive and distinct roles in order to face severe challenges and risks. Unfortunately, often this becomes a very stereotyped gender image, where men are expected to protect, while women are expected to set aside their own needs and desires, sacrificing first their right to work. (citations omitted)

Thus, the implementation of law and policies underpinned by principles of

37 Kelman, above n 23, at 43.

38 At 43, citing Kenneth Hewitt (ed) *Interpretations of Calamity from the Viewpoint of Human Ecology* (Allen & Unwin, Winchester, MA, 1983).

39 For example, groups based on class, gender, race, ethnicity, religious affiliation, age, physical and mental health conditions, immigration status: B Wisner, JC Gaillard and I Kelman "Framing Disaster: Theories and Stories Seeking to Understand Hazards, Vulnerability and Risk" in B Wisner, JC Gaillard and I Kelman (eds) *The Routledge Handbook of Hazards and Disaster Risk Reduction* (Routledge, Abingdon, 2012) 15 at 18–19

40 Kelman, above n 23, at 43–44.

41 Neumayer and Plümper, above n 4, at 551.

42 True, above n 18, at 80.

43 Kelman, above n 23, at 78.

44 Teresa Galanti and Michela Cortini "Work as a recovery factor after earthquake; a mixed-method study on female workers" (2019) 28(4) Disaster Prev and Manag 487 at 489.

diversity and equality in society is critical in order to increase resilience and reduce vulnerabilities in times of disasters.

III THE GENDER IMPACT OF SEISMIC DISASTER IN THE CONTEXT OF THE PATRIARCHY

Conjecture as to the reasons why women are more frequently killed and injured in earthquake disasters requires an explanation of female physiological characteristics. Do women's biological make-up put them at a disadvantage compared to men in a disaster? Neumayer and Plümper note that "biological and physiological differences between men and women may at times disadvantage women in their immediate response to a disaster".[45] For example, they might not run as fast as men, or lack strength to pull themselves up on top of a structure. Studies have shown, however, that more often "social norms and role behaviors are important factors that increase the vulnerability of women".[46] For instance, women disproportionately care for others and protect children in the family, in turn limiting their ability to save themselves. Thus, women are "less capable of reacting during crisis situations, not because of factors inherent to being female, but because of the ways in which they are expected to live as females".[47] Vulnerability is therefore less likely to be created and perpetuated by physical factors, but is actually imposed by society through inextricably deep cultural, religious, and social traditions generating norms and expectations.[48]

In other words, while biology might play a role, vulnerability is less reliant on biological than on socio-economic and gender attributes. On average, and in all societies, regardless of their level of development, women are more vulnerable than men. Unequal power dynamics between women and men are historically entrenched and place women in positions of subordination to men in all institutions, including the family, religion, social groups, workplaces, the judiciary and the government.[49] Perceived biological differences, cultural construction of gender and gender roles within the family and within society more generally are codified in legal frameworks, reproduced by social and

45 Neumayer and Plümper, above n 4, at 533.
46 Cao and Kamel, above n 16, at 1358.
47 Kelman, above n 23, at 64–65.
48 At 68.
49 Pam Morris *Literature and Feminism* (1st ed, Wiley-Blackwell, London, 1993).

cultural practices and reinforced by male violence against women.[50] This power structure which overtly subordinates women to men and pervades every aspect of society[51] is referred to as the "patriarchy"[52] and provides an essential analytical tool in feminist scholarship.[53]

While women's vulnerability is shaped by the patriarchal structure, which in turn directly affects women disproportionately during seismic disasters, the degree of harmful effect of a disaster is impacted by the level of pre-disaster inequalities.[54] As noted by True, "as pre-disaster gender inequalities increase so too does the number of women compared with men likely to be killed in a disaster".[55] Further, as stated by Jenny Moreno and Duncan Shaw, "disasters do not cause major social changes but accelerate pre-existing patterns of women's vulnerability".[56] Pre-disaster gender inequity disproportionately increases the harmful effect of a disaster on women. In other words, the more gender unequal a society is, the more likely women are to be killed or harmed in an earthquake. Conversely, "where there is greater gender equality, the gap between men's and women's expected mortality is less".[57] Thus, disasters magnify existing inequalities and oppressions within social structures.[58] Natural, including seismic, disasters reinforce vulnerability and "exacerbate existing patterns of [gender] discrimination that render females more vulnerable to the fatal impact of disasters".[59] The severity of the impact of any earthquake disaster therefore reflects the political, legal and economic conditions of women in society.

This pattern is worse for women who are at the intersection of multiple

50 Catharine MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge, 1989).

51 Morris, above n 49.

52 Sylvia Walby "Theorising Patriarchy" (1989) 23(2) Sociology 213.

53 Cassandra Mudgway "Can International Human Rights Law Smash the Patriarchy? A Review of 'Patriarchy' According to United Nations Treaty Bodies and Special Procedures" (2021) 29 Fem Leg Stud 67 at 69.

54 The patriarchy affects men too in some disasters, principally relating to floods and boating accidents. See Kelman, above n 23, at 67 who describes "[a] macho culture and the mentality that men should sacrifice themselves for women, as in 'women and children first' when ships sink, seem to increase the number of men dying in floods in the USA".

55 True, above n 18, at 80.

56 Jenny Moreno and Duncan Shaw "Women's empowerment following disaster: a longitudinal study of social change" (2018) 92 Natural Hazards 205.

57 True, above n 18, at 80.

58 True, above n 18, at 79 and 83.

59 Neumayer and Plümper, above n 4, at 562.

vulnerabilities.[60] An intersectional understanding of patriarchy recognises that women experience male oppression differently according to the form of hierarchy, and the place where individual women each operate within that hierarchy. This reflects the complex and multifaceted reality of the oppression of women globally. Disasters, including earthquakes, disproportionately affect marginalised women.[61] Men and women are impacted differently by disasters, in a way that compounds women's vulnerability as they are still economically, socially and politically unequal to men. Examples of this in the areas of reproductive health and violence against women are detailed below.

A Reproductive health

Pregnancy and reproductive health constitute a good example to examine the dichotomy between biological and societal factors contributing to increased vulnerability during earthquakes. As stated by Rolina Dhital and others, "an estimated 60 per cent of preventable maternal deaths take place in disaster settings".[62] It is questionable whether pregnancy represents a biological difference between men and women leading to disproportionately harmful outcomes, or whether this is another gender factor. Pregnancy contributes to changing a woman's body by inhibiting mobility, arguably in a way that limits women's physical abilities under stress. Does pregnancy therefore represent an unavoidable and inherent female vulnerability based on a biological trait? Or, on the contrary, is the real cause of vulnerability a societal deficit in relation to care and support for pregnant women?

Access to healthcare may typically be restricted following seismic disasters, and therefore affect women's use of contraception and health care by shifting institutional medical priorities away from reproductive health and toward emergency relief.[63] Pressure on the healthcare system means that women's risk of pregnancy complications and death during childbirth, already common in poor countries, can become heightened when health infrastructure is

60 Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43(6) Stanford Law Review 1241.

61 Shubhda Arora "Intersectional vulnerability in post-disaster contexts: lived experiences of Dalit women after the Nepal earthquake, 2015" (2020) 46(2) Disasters 329.

62 Rolina Dhital and others "Assessing knowledge and behavioural changes on maternal and newborn health among mothers following post-earthquake health promotion in Nepal" (2019) 14(7) PLoS ONE at 2.

63 Julia A Behrman and Abigail Weitzman "Effects of the 2010 Haiti Earthquake on Women's Reproductive Health" (2016) 47(1) Studies in Family Planning 3 at 5.

damaged.[64] In these circumstances, "obstetrical care is often reduced, the number of miscarriages increases, as does maternal and infant mortality".[65] At the same time, increases in pregnancies following earthquake disasters have been observed. Increases in fertility rates have been documented following the 2004 Indian Ocean tsunami, and following high-mortality earthquakes in Turkey, India and Pakistan.[66] Following the 2010 Haiti Earthquake, a lower pregnancy rate was expected because fewer women wanted to have children, however, the opposite happened; pregnancies rates increased.[67] Societal neglect around issues of pregnancy and reproductive health lead to higher female vulnerability.

B Violence against women

Violence against women, including sexual violence, is a further factor which aggravates women's vulnerability in earthquake disasters. Based on data from the Canterbury and Haiti earthquakes and the New Orleans flooding, True shows that sexual violence against women and girls increases during and after disasters.[68] She demonstrates the direct link between the increased fear of and experiences of sexual violence against women during and after disaster on the one hand, and patriarchal structures on the other. Societal factors likely to increase female vulnerabilities include the exclusion of females from groups unconnected to their family or their reliance on male protection. Examples of increased female vulnerabilities are the lack of adequate consideration for women's needs (including health) and safety considerations along evacuation routes or in disaster shelters. Indeed, in many cultures, women, especially if unmarried, are prevented from sleeping near men. Also, menstruation remains a factor of temporary exclusion for many women who are then unable to seek and remain in safe places when they have their period. The objectification of women's bodies, a patriarchal fear of women's anatomy and bodily processes, and the normalisation of psychological, physical, and sexual violence against women, represent examples of rampant and ingrained sexism and misogyny which substantially increase females' vulnerability in disasters. Moreover, these

64 At 5.
65 Neumayer and Plümper, above n 4, at 554.
66 Behrman and Weitzman, above n 63, at 4.
67 At 13.
68 True, above n 18, at 80.

"factors are not well evidenced for disasters, even though they are known for other areas of life".[69]

IV FRAMING THE LEGAL RESPONSE WITH A GENDER SENSITIVE LENS: PREPAREDNESS, PLANNING AND DISASTER MANAGEMENT

What can the law do to contribute to gender equality outcomes following seismic disasters? Can feminist legal thinking make a difference? Short of "smashing the patriarchy",[70] which would involve the transformation of gender power dynamics across all levels of society, there are a number of legal recommendations that can be put forward. If the level of equality in a society pre-disaster directly affects women's vulnerability during and in the aftermath of earthquakes, then strongly embedding equality and care values in the legal framework of a country is likely to set the tone for actions and decisions in relation to disaster preparedness, planning and management. In other words, raising gender equality in society represents the first step towards equality in disaster preparedness and mitigating the loss of life and harm of women.

There is little research in the area of the gendered impact of disasters, particularly with reference to the law. Achieving a more equal legal framework requires a set of feminist legal methods and instruments established with a gender sensitive lens. This section will discuss the application of four such feminist legal methods and instruments, namely adopting gender data collection, achieving gender-balanced representation in decision-making, applying substantive equality and implementing gender mainstreaming strategy.

A Where are the women?

Cynthia Enloe encourages us to start our feminist enquiry by asking a "simple" question: where are the women?[71] It is a simple enough question, although it requires a number of shifts in legal methodology. The essential starting point is an assessment of women's situations. While this might sound like an innocuous step, Kelman points out that little data exists on gender factors in relation to disasters because "they have not been fully accepted as relevant or as important

69 Kelman, above n 23, at 65–66.

70 Mudgway, above n 53.

71 Cynthia Enloe *Bananas, Beaches and Bases* (2nd ed, University of California Press, Oakland, 2014) at 25.

research topics".[72] Systematic sex disaggregated data is lacking across all areas of disasters from prevention to recovery.[73] Yet collection of gender-disaggregated data is indispensable to understand how disaster intersects with gender and to start reflecting on a feminist legal response. Katharine Bartlett's key feminist legal methods of "asking the "woman question"" cannot take place without data.[74] In order to examine and highlight "the gender implications of rules and practices which might otherwise appear to be neutral or objective",[75] one must point to where women are situated in society.

B Gender balance representation

The question of "where are the women?" also highlights the importance of representation and the involvement of women in planning and responding to disasters. The first question to ask is whether women are represented in decision-making positions. Despite calls and commitments from various national and international institutions for increasing women's involvement in disaster risk reduction,[76] men continue to control most of the leadership positions in the formal risk reduction sector, including in governmental agencies, academia and response organisations.[77] Women are still marginalised in decision-making relating to disaster issues, even though the United Nation's International Strategy for Disaster Reduction has, for over two decades, stressed the importance of consideration of gender equality in disaster reduction policies and the need to adopt measures designed to promote women in leadership, management and decision-making as well as recognising women's position in their community and the larger society.[78] Yet without representation, women's experiences and perspectives are likely to remain invisible.

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72 Kelman, above n 23, at 66.

73 Valdés, above n 33, at 20.

74 Katharine T Bartlett "Feminist Legal Methods" (1990) 103(4) Harvard Law Review 829 at 831.

75 At 837.

76 See for example Maria Caterina Ciampi and others "Gender and Disaster Risk Reduction: A training pack" (eBook ed, Oxfam GB, Oxford, 2011); United Nation Women "Disaster risk reduction" <www.unwomen.org>; United Nations Office for Disaster Risk Reduction "Women's leadership in risk-resilient development: good practices and lessons learned" (2015) <www.undrr.org>; and United Nations Office for Disaster Risk Reduction Regional Office for Asia and Pacific "Women's International Network on Disaster Risk Reduction: Promoting women's leadership in the Asia-Pacific Region" (2021) <www.undrr.org>.

77 Cheryl L Anderson "Organising for Risk Reduction: The Honolulu Call to Action" in Enarson and Chakrabarti (eds), above n 24, at 44.

78 Valdés, above n 33, at 24.

If full, equal gender participation is required to mitigate disasters, reduce social vulnerabilities and rebuild more sustainable, just and resilient communities, a word of caution is nevertheless required here.[79] Placing women in decision-making power is only the beginning and cannot guarantee that any women in a position of power will make a difference for women in disasters. If the main goal of liberal feminism is to increase women in positions of power, it lacks much reflection on what women could and should do when they reach such positions. Including women in public institutions does not in itself guarantee transformative decision-making, rather, as discussed by Hunter:[80]

> These assumptions about the difference that women in power would make, however, now appear at best naïve and at worst essentialist.

Further, there might be temptation to think of women as a homogeneous group when in fact they might have divergent needs and interests in the context of disasters. Relief workers and victims of a disaster might share the same gender and yet have contradictory views of the way forward.

C Substantive equality

The concept of equality is complex and not always adequate to create a situation of gender equality. Gender-neutral or formal equality policies and laws do not necessarily produce gender-neutral outcomes. The main difficulty with applying a formal equality approach is that it is based on the male benchmark. The male norms are not only the norm but they are also considered to be neutral. As a result, anti-discrimination provisions too often neglect to address structures which perpetuate disadvantages for vulnerable groups. Indeed, White and Greive note within the context of natural disasters:[81]

> [Although] the Government of New Zealand has applied a non-discrimination model to the recovery efforts, ensuring as far as possible that measures taken extend to all people on an equal basis. However, …

79 Anderson, above n 77, at 42.

80 Rosemary Hunter "Can feminist judges make a difference?" (2008) 15 Int J Leg Prof 7 at 7. On Liberal feminism, see Vanessa Munro *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart Publishing, Oxford, 2007).

81 Michael JV White and Andrew Grieve "Human Rights and Dignity: Lessons from the Canterbury Rebuild and Recovery Effort" in Simon Butt, Hitoshi Nasu and Luke Nottage (eds) *Asia-Pacific Disaster Management: Comparative and Socio-legal Perspectives* (Springer, Berlin, 2014) 245 at 262.

> equal treatment in the wake of natural disasters can lead to unequal results. Vulnerable groups continue to be disadvantaged.

In contrast, the application of substantive equality has an obligation to produce results, especially in situations where a particular group is vulnerable. Implementing substantive equality policies would include specific policy related to violence and reproductive health. Arguably, as argued by Hunter, disaster planning should systematically promote: [82]

> … a substantive view of equality—one which seeks to accommodate women's differences, to take account of historic and systemic disadvantages, and to revise norms and standards to incorporate women's positions and experiences.

In reality, such an approach is rare. The New Zealand Human Rights Commission noted the lack of an appropriate gender-sensitive policy designed to tackle the impacts of the Christchurch earthquakes on women.[83] In contrast, following the health crisis of the COVID-19 pandemic, the government adopted a recovery programme which, at least in part, recognises that disasters come with gender specific impacts, and in particular, a rise in violence against women.[84] Challenging traditional gender assumptions and building on existing work, a range of measures was adopted to tackle violence against women in the midst of the pandemic crisis. Such measures include the allocation of substantive funding towards the support of services for victims or survivors of family violence[85] and services for perpetrators to ensure safer and healthier homes.[86]

D Gender mainstreaming

Recording and accounting for where women are, and making sure that women are represented in positions of decision-making power, are initial key steps

82 Hunter, above n 80, at 14.

83 Human Rights Commission *New Zealand Human Rights Commission's Report to the Committee on the Elimination of Discrimination Against Women (CEDAW)* (July 2012).

84 See for example, Annick Masselot and Maria Hayes "Exposing Gender Inequalities: Impacts of Covid-19 on Aotearoa | New Zealand Employment" (2020) 45(2) New Zealand Journal of Employment Relations 57 at 58.

85 "Funding for family violence services through Budget 2020" (11 May 2020) Ministry of Social Development <www.msd.govt.nz>.

86 Hon Poto Williams and Jan Logie "Next steps to end family and sexual violence: Budget 2020" (press release, 11 May 2020).

toward more equal disaster outcomes and responses. This should be completed with basic changes in education, and mainstreaming gender equality in all policies, including mitigating and reducing social vulnerabilities. This approach should be completed with a gender mainstreaming strategy.[87] A gender mainstreaming strategy ensures that "attention to gender perspectives is an integral part of interventions in all areas of societal development".[88] It involves the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men and combating discrimination.[89] As set out by UN Women:[90]

> … Mainstreaming is not an end solution in itself but a strategy, an approach, a means to achieve the goal of gender equality. Mainstreaming involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities – policy development, research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects.

The purpose of the strategy is to overcome gender-neutral practices and procedures. It requires integrating a gender equality objective into all policies and actions by state actors. Such a strategy requires some concepts to be reconsidered with a gender-sensitive lens. For example, infrastructures, which at present are understood to strictly mean transport, building, and energy, could be interpreted in a broader and gender-inclusive way to include the care of others, health and education.

Overall, New Zealand does not practice gender mainstreaming in disaster planning or recovery. As pointed out by Solnit and others, leadership and government response to disasters often fall short of meeting people's post-disaster needs, resulting in an exacerbation of vulnerability.[91] Further, Yumarni and Amaratunga argue that ""gender-blind" reconstruction policies and programs can only lead to an increase in women's vulnerability, a widening of

87 "Gender Mainstreaming" UN Women <www.un.org>.

88 "Intergovernmental mandates on gender mainstreaming" UN Women <www.un.org>.

89 "Gender Mainstreaming", above n 87.

90 "Gender Mainstreaming", above n 87.

91 R Solnit *A paradise built in hell: The extraordinary communities that arise in disasters* (Penguin, London, 2009), cited in Ruth McManus "Women's voices: Solace and social innovation in the aftermath of the 2010 Christchurch earthquakes" (2015) 29 Women's Studies Journal 22 at 31.

gender disparities and the creation of unsustainable development in affected communities".[92] Post-disaster reconstruction policies and programs that neglect to take a gender sensitive approach, decrease opportunities for the development of resilient and sustainable community reconstruction.[93]

The experience of the Canterbury earthquake shows that gender was not incorporated in the recovery strategy: [94]

> Surprisingly, however, there was no systematic, gender-sensitive disaster planning in place in New Zealand, despite the country's high ranking on all gender equality indicators, and despite the fact that poor, single, battered women, typically with children, were extremely vulnerable to further marginalisation and violence in the aftermath of the Christchurch earthquake.

Gender was not a factor considered in the 2012 report by the Canterbury Earthquake Recovery Authority "Recovery Strategy for Greater Christchurch"—the only mention of gender is on page 17, where it notes that an assessment of the Strategy was to be measured through indicators. For example, social recovery indicators may be analysed in terms of age, ethnicity, employment status and gender.[95] Reflecting on the experience of the Canterbury earthquake, a number of reports have stated the need to implement gender mainstreaming in relation to preparedness, planning and disaster management. For instance, recommendation 52 of the New Zealand's National Plan of Action (Mahere Rautaki ā-Motu) states that policies should be considered "in relation to gender mainstreaming, adequacy of housing and access to buildings for persons with disabilities in the post-recovery efforts of the Canterbury earthquakes".[96] The Humans Rights Commission also made a similar recommendation in June 2012:[97]

> The Commission requests the Committee to recommend to New Zealand that gender mainstreaming is essential in the development of government

92 Tri Yumarni and Dilanthi Amaratunga "Gender Mainstreaming as a Strategy to Achieve Sustainable Post-Disaster Reconstruction" (2018) 8(5) Built Environment Project and Asset Management 544 at 544.

93 at 544.

94 True, above n 18, at 84.

95 Canterbury Earthquake Recovery Authority "Recovery Strategy for Greater Christchurch Mahere Haumanutanga o Waitaha" (May 2012) <www.cera.govt.nz>.

96 *Recommendation 52* 18 UPR Cycle 2 (31 January 2014).

97 At 23.

> policies and interventions relating to the Canterbury earthquake recovery process, and that monitoring and evaluation of policies and practices includes gender disaggregation and analysis of gender impacts.

V CONCLUSIONS

Earthquakes and other disasters have a disproportionate impact on women because of increased female vulnerabilities in patriarchal structures. Strengthened gender equality reduces such vulnerabilities. As Kelman states, "[w]e have the abilities and assets to reduce vulnerability and to prevent a disaster … It is a choice—someone's choice—whether or not to do so".[98] Adopting disaggregated gender data collection, achieving gender-balance representation in decision-making, applying substantive equality and implementing gender mainstreaming strategy represent four instruments developed through feminist legal methods to increase equality.

Why would we want to change the system and improve female outcomes following seismic disasters? The lack of gender consideration in disaster planning and management not only has a negative impact on women, but also impacts a wide range of stakeholders in society. Where women are affected, the whole of society is affected. In the bigger picture, these local earthquakes and other disasters are relatively small and contribute to our training for the largest human challenge that is the Anthropocene,[99] including human-induced climate change. The repeated failure to embed gender equality principles into disaster planning and recovery policy will be increasingly significant as more and larger crises are looming. Disasters contribute to a reduction in resources, which in turn leads to political choices about fair distribution. The COVID-19 pandemic is indicative of coming life and death choices that society will be faced with. In times of more serious disasters in the future, lack of equality risks privileging saving lives based on male norms, resulting in uniformity and ultimately unfertile humanity. Without entrenched fundamental principles of gender equality, political choices are likely to become biased in a way that could precipitate human extinction.

98 Kelman, above n 23, at 82.

99 The Anthropocene, or the age of humans, is the widely popularised term referring to the most recent geological epoch, which marks the commencement of significant human impacts on Earth's geology and ecosystems.

TRANSFORMING WOMEN-ONLY SPACES: LAW, POLICIES AND REALITIES OF TRANS INCLUSION IN WOMEN-ONLY SAFE HOUSES IN AOTEAROA NEW ZEALAND

Phoebe Ellen McHardy Moir*

Women-only spaces such as safe houses (or women's shelters) have always been places of safety and freedom for women to come together and empower each other without the influence of men. Recently, there has been a movement to exclude trans women from such spaces. While safe houses in Aotearoa New Zealand are generally inclusive of trans women, there are further practical measures which can be implemented to better support this inclusion.

This paper begins by discussing the law in Aotearoa New Zealand relating to trans rights and comparing this to the law in the United Kingdom, then analyses arguments against trans inclusion and explains why they do not stand under scrutiny. This paper then analyses how to support inclusive policies with practical measures, and how inclusive policies have generally been applied in Aotearoa New Zealand. This paper concludes that inclusive policies benefit everyone, including vulnerable minorities such as trans women.

Trans survivors of IPV should know with certainty, the same as every other survivor, that there are services available to support them should they need it. Trans women are a marginalised and vulnerable group, whose interests have been absent from public consideration for far too long. The analysis in this article reveals that it is time for us to question how we can better serve trans women, because we can do better. All we need to do is open our minds to the fact that our current system is not perfect.

Key Words: *"trans women"; "transgender"; "women-only spaces"; "Intimate Partner Violence"; "inclusion"*

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I INTRODUCTION

Women-only spaces have always been intended to be places of safety and freedom for women to come together and empower each other without the influence of men. Safe houses, or women's shelters,[1] are especially so as they provide a safe place for women and their families to recover, usually from Intimate Partner Violence (IPV),[2] away from their perpetrators.

Recently, there has been a movement to exclude trans women from women-only spaces,[3] seen most prominently in women-only sports, with 36 distinct anti-transgender student athletics bills introduced in the United States in 2021 alone.[4] This article will analyse the law, policy arguments and realities of trans inclusion in women-only spaces such as safe houses, using a comparative analysis between New Zealand and the United Kingdom. Analysis will demonstrate that trans exclusion is unjustified and inclusion should be supported and implemented with practical measures.

While safe houses in Aotearoa New Zealand are generally inclusive of trans women, this article argues that there are further practical measures which can be implemented to better support this inclusion. These measures include partnership with Rainbow and trans communities and proactive advertisement of inclusive policies.

Furthermore, it is argued that there is a need for legal reform for trans rights, both in simplifying the process of legal transition and in better preventing discrimination, including within the IPV sphere. This is unlikely to have a practical impact for most safe houses in Aotearoa New Zealand, but it will remove loopholes which may be used by some organisations to exclude

1 "Safe house" is commonly used in Aotearoa to describe organisations providing safe housing or shelters for women affected by IPV. Overseas, it is more common to see the term "women's shelters", (Email from Philippa (Wellington Women's Refuge) to the author regarding this paper (27 May 2021)).

2 "Intimate partner violence" or "IPV" is used in place of domestic violence or similar terms, as it encompasses a broader range of relationships. This explicitly includes gender-based violence, which is violence for the purpose of enforcing gendered power structures, see Michael Munson *Sheltering Transgender Women: Providing Welcoming Services* (National Resource Centre on Domestic Violence and Force, Technical Assistance Guidance, September 2014) at 2; and Scottish Women's Aid *Guidance For Supporting Trans Women For Women's Aid Groups in Scotland* (May 2015) at 3.

3 "Trans woman" is used to refer to an individual who identifies as a woman, but was assigned male sex at birth. This paper will use gender identity or an individual's internal sense of gender as a marker of transition. Conversely, "cis" or "cisgender" is used where someone's sex at birth conforms with their internal sense of gender. See Munson, above n 2, at 2.

4 "Transgender Exclusion in Sports" (March 2021) American Psychological Association <www.apa.org>.

trans women from women-only spaces. The planned legal reform currently being undertaken will resolve some of these issues.

A Scope and outline

Scholarship has emphasised the importance of including trans voices in conversations regarding trans issues.[5] This article was adapted from an individual research paper, and so it was not possible to work alongside trans individuals in the writing process. However, where possible, I have centred articles written by or involving consultation with trans individuals to balance my own cisgender experiences.

This article chooses to focus on trans women due to the amount of discussion around inclusion of trans women in women-only spaces.[6] While trans men and non-binary individuals may face similar issues, this is not the focus of this article. These important demographics require specific consideration of their own.

This article begins by discussing the law in Aotearoa New Zealand relating to trans rights compared with the law in the United Kingdom. That is followed with an analysis of the arguments against trans inclusion and an explanation of why they do not stand under scrutiny. The article then examines how inclusive policies can be supported by practical measures and how inclusive policies have generally been applied in Aotearoa New Zealand. The concluding section summarises the main points of this analysis—that inclusive policies benefit everyone, including vulnerable minorities. Therefore, this article argues that organisations should support their inclusive policies with practical measures and work with trans individuals and representative organisations to ensure that women-only services are accessible to all women.

II THE LEGAL POSITION IN AOTEAROA NEW ZEALAND COMPARED WITH THE UNITED KINGDOM

A Protection from discrimination

The current legal position in Aotearoa New Zealand towards inclusion of trans women in women-only spaces is vague. Sex is included as a prohibited ground

5 Stonewall and nfpSynergy *Supporting trans women in domestic and sexual violence services: Interviews with professionals in the sector* (Stonewall, 2018) at 2.

6 See P Dunne "(Trans)forming single gender services and communal accommodations" (2017) 26(5) Soc Leg Stud 537 at 539.

of discrimination within New Zealand's Human Rights Act 1993 (HRA).[7] The New Zealand Bill of Rights Act 1990 (BORA) additionally provides the right to freedom from discrimination.[8] Under the HRA this right applies specifically to land, housing and other accommodation.[9]

However, the law also provides exceptions to freedom from discrimination. Section 19(2) of BORA states that "[m]easures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination… do not constitute discrimination". Similarly, s 55 of the HRA provides an exception regarding hostels, institutions and other similar establishments where accommodation is provided only for persons of the same sex. This means, for example, that it would be legal for a women-only safe house to deny accommodation to a man based on sex.

It is not entirely clear where trans women fit within this scenario, particularly as the HRA uses "sex" rather than "gender". The position is especially blurry for trans women who have not "legally transitioned", that is, have not had the sex on their birth certificate altered to match their gender.

However, a recent Cabinet paper recommended the explicit inclusion of gender identity, gender expression, sex characteristics and intersex status in the prohibited grounds of discrimination in the HRA, alongside the primary purpose of the reform, which was to move hate speech protections from the HRA to the Crimes Act 1961.[10] While the Government "has long maintained that transgender and gender-diverse people are covered by the Human Rights Act", explicit inclusion would strengthen the protections and ensure the inclusion of trans women within women-only safe houses.[11]

Explicit inclusion would address the ambiguity of whether trans people are protected under the definition of "sex" in the HRA.[12] According to *Mazengarb's Employment Law*, the Human Rights Commission's suggestion to include "gender", during the passage of the Bill, was not accepted.[13] Instead, "sexual

7 Human Rights Act 1993, s 21(1)(a).
8 New Zealand Bill of Rights Act 1990, s 19(1).
9 Human Rights Act, s 53.
10 Cabinet paper "Proposed changes to the incitement provisions in the Human Rights Act 1993" (13 April 2021) CO (18) 4 at [45]–[50].
11 Marc Daadler "Up to three years in prison for hate speech under reforms" *Newsroom* (online ed, New Zealand, 16 April 2021).
12 *Mazengarb's Employment Law (NZ)* (online ed, Lexis Advance) at [4021.10].
13 At [4021.10].

orientation" was included.[14] This fails to recognise the distinction between gender diversity and sexual orientation. The Solicitor-General provided an opinion stating that discrimination on the grounds of gender identity is already included within the HRA,[15] though where or how is not certain.

In contrast, the United Kingdom Equality Act 2010 currently protects trans people against discrimination who have the characteristic of "gender reassignment", rather than "sex".[16] The Act also clarifies that single-sex services must allow access for trans people in line with their "acquired gender", without needing any legal affirmation of their gender.[17] However, it is legal for single-sex services in the United Kingdom to provide a different service or deny services to trans people if doing so achieves a "legitimate aim", which is similar to the position in Aotearoa New Zealand.[18] According to the Rainbow rights charity Stonewall, safe houses in the United Kingdom do not often use this exception and whether it is useful as a safeguard is debatable.[19] Leaving loopholes like this allows possible discrimination against trans women when they approach safe houses, which fosters uncertainty in a vulnerable climate.

B Legal change of sex

Similar to protection from discrimination, the current process for legal change of sex in Aotearoa New Zealand has recently been reviewed. The Births, Deaths, Marriages, and Relationships Registration Act 2021 received Royal assent on 15 December 2021. This reform will allow trans women to change their legal sex more easily, which will create greater ease of access to women-only spaces by removing any potential for exclusion on the basis of sex.[20]

The previous process for legal change of sex came under ss 28–33 of the Births, Deaths, Marriages, and Relationships Registration Act 1995. Under s 28(3)(c)(i), this was determined by medical transition, often requiring surgical reassignment surgery, either at the time or at a future date.[21] *"Michael" v Registrar-General of Births, Deaths and Marriages* affirmed that some degree of

14 At [4021.10].

15 At [4021.10]; and Opinion letter from Cheryl Gwyn (Acting Solicitor-General) to the Attorney-General regarding the Human Rights (Gender Identity) Amendment Bill (2 August 2006).

16 United Kingdom Equality Act 2010, s 7.

17 Stonewall and nfpSynergy, above n 5, at 19.

18 United Kingdom Equality Act, sched 3, s 28; and Stonewall and nfpSynergy, above n 5, at 19.

19 At 9.

20 Eva Corlett "New Zealand passes law making it easier to change sex on birth certificates" *The Guardian* (online ed, New Zealand, 9 December 2021).

21 See Annabel Markham "Transgender ideology and the law" [2019] NZLJ 14 at 15.

permanent physical change was required, although full gender reassignment surgery would not be required in all cases.[22] The new process does not require medical evidence, which will hopefully establish a more equitable and less costly system.[23] Individuals will be able to apply directly to the Registrar-General with a statutory declaration rather than needing to apply to the Family Court, as was required under the 1995 Act.[24]

These changes were a long time coming, since although the proposed Births, Deaths, Marriages, and Relationships Registration Bill was introduced in August 2017, it was deferred on 25 February 2019. This delay was primarily due to issues around the Governance and Administration Committee adding gender self-identification to the Bill.[25] These changes were too significant and controversial to forego public consultation for, and the Minister also cited issues with the clarity of the changes.[26] There was no update on the progress of the Bill until March 2021 when Minister for Women and Internal Affairs Jan Tinetti committed to getting the Bill moved into law.[27] Now that the new law is in place, this will allow trans women easier access to women-only spaces and reduce the potential opportunities for discrimination.

Adjusting Aotearoa New Zealand's sex-change process to allow for self-identification has brought us in line with the law in the United Kingdom. Under the United Kingdom Gender Recognition Act 2004, a trans person may be issued a Gender Recognition Certificate if they can show that they have gender dysphoria, have lived in their acquired gender for at least two years and intend for this to be permanent.[28] This process for legally changing one's gender does not require any medical or surgical procedures and at the time it was enacted, the United Kingdom was ostensibly the first state to employ such a liberal scheme.[29] Self-identification regimes sever "the link between

22 *"Michael" v Registrar-General of Births, Deaths and Marriages* [2008] 27 FRNZ 58 at [113]; and Markham, above n 21, at 15.

23 Births, Deaths, Marriages, and Relationships Registration Act 2021, ss 23–29; and Corlett, above n 20.

24 Births, Deaths, Marriages, and Relationships Registration Act 1995, s 30; and Department of Internal Affairs *The Births, Deaths, Marriages, and Relationships Registration Bill* (16 December 2021).

25 Hon Tracey Martin MP "Government reduces barriers to changing birth registration" (press release, 1 August 2019).

26 Martin, above n 25.

27 Jason Walls "Mothballed gender self-ID law back as a 'priority' for Govt – will pass this year, Minister says" *The New Zealand Herald* (online ed, New Zealand, 14 March 2021).

28 United Kingdom Gender Recognition Act 2004, s 2.

29 Andrew N Sharpe "A Critique of the Gender Recognition Act 2004" (2007) 4 J Bioeth Inq 33 at 33.

sexed status and the physical body".[30] This is, however, by no means a perfect solution and issues remain with the permanence of the change, the binary structure of the Act and the categorisation of trans status as a mental illness.[31]

In summary, the United Kingdom's law is broader and more fluid when compared to Aotearoa New Zealand's law, and even more so when compared to the previous law. The United Kingdom has removed major barriers to transitioning, such as medical costs, and explicitly protected trans people. However, the United Kingdom's law still allows some room for discrimination against trans people under the Equality Act, regardless of whether they have gained legal recognition of their gender or not. While this exception is not often used, it remains an issue for trans inclusion in women-only spaces.

The current position of Aotearoa New Zealand's law is murky and vague, particularly when contrasted against other legal systems with more robust laws around gender identity.[32] While recent reform has provided some clarity, more is needed. This would give women-only spaces certainty on who is legally included in their services and trans women certainty on where they fit in these services. With some legal reform established and the rest appearing inevitable, all that remains is for planned reform to be followed through, both with enactment and practical implementation.

III ANALYSIS OF ARGUMENTS AGAINST INCLUSION AND REBUTTALS

Since the law is murky as to whether trans women are included in women-only spaces, the default position for services should be inclusion, as supported by the current legal reform. This is especially so as the loophole for same-sex services to discriminate on the basis of sex allows individuals to apply their own prejudices, including against trans people. Arguments for inclusion aim to negate this prejudicial discretion, though there remain some who argue in opposition. Those who argue against inclusion often refer to themselves as "gender-critical".[33] Other terms used in literature include "transphobic", "trans-exclusionary" and "radical feminists". This article will largely use the

30 At 37.
31 At 38–39.
32 World Health Organization *Transgender People and HIV* WHO/HIV/2015.17 (July 2015) at 9.
33 Charlotte Jones and Jen Slater "The toilet debate: Stalling trans possibilities and defending 'women's protected spaces'" (2020) The Sociological Review 68(4) 834 at 835.

phrase "those opposing inclusion", as it is descriptive without importing value judgements.

Arguments made by those opposing inclusion span a variety of topics, which can broadly be broken into: the definition of "woman", the purpose of segregated spaces, cisgender discomfort and privacy, enabling violent men access to women-only spaces, resource shortages and segregation. These arguments are analysed in detail below. All interlink and largely centre around who is included in the definition of "woman". Those opposing inclusion hope that by excluding trans women from the definition of "woman", trans women will also be excluded from women-only spaces.

It is worth noting the pertinence of this debate within the IPV sphere, particularly when there is a potential legal loophole for discrimination by safe houses should they choose to oppose inclusion. The area of IPV is inherently gendered and services are often built on the story of "the stronger/bigger man controlling the weaker/smaller woman".[34] Inclusion of trans women is challenging to the normative gender binary that defines IPV spaces. The following section outlines and rebuts the arguments posed by those opposing inclusion.

A Definition of "woman"

Arguments against inclusion of trans women in women-only spaces tend to centre on the idea that trans women are not "real women". Such arguments are based on the fact that trans women are socialised as male and they have different biology.[35] Aleardo Zanghellini suggests that defining "woman" solely by biology is a political choice and it misconstrues the distinction between gender and sex.[36]

With trans activists now arguing that trans women can live as women without any medical intervention, the idea of determining "women" based on

34 Julia K. Walker "Investigating Trans People's Vulnerabilities to Intimate Partner Violence/Abuse" (2015) Partner Abuse 6(1) 107 at 107.

35 Scottish Government *Potential impacts of GRA reform for cisgender women: trans women's inclusion in women-only spaces and services (GRA EQIA Literature Search)* (Document 5, November 2019) at 5; Scottish Women's Aid, above n 2, at 8; and Jennifer Earles "The "Penis Police": Lesbian and Feminist Spaces, Trans Women, and the Maintenance of the Sex/Gender/Sexuality System" (2019) 23(2) J Lesbian Stud 243 at 245.

36 Aleardo Zanghellini "Philosophical Problems With the Gender-Critical Feminist Argument Against Trans Inclusion" (2020) 10(2) Sage Publications at 3.

biology is increasingly problematic.[37] "Transitioning" means different things to different people, with Michael Munson identifying three forms of gender transition: social, medical and legal.[38] Individuals will prioritise different forms of transition based on their values, experiences and culture, meaning that the traditional concept of medical transition is only part of the picture, or may not be part of the picture at all.[39] Furthermore, defining "transition" by medical intervention fails to recognise the prohibitive financial barrier of medical transition, as only a small number of transitional surgeries in Aotearoa New Zealand are publicly funded.[40]

This changing definition of "woman" challenges societal ideas of gender roles and those who uphold them. But there are many different ways to be a woman, even if you were assigned male sex at birth.[41] Surely, if feminism is about opposing the oppression of women, widening the definition of "woman" furthers the goal of liberation and, conversely, restricting the definition of "woman" only furthers the goals of the patriarchy.[42] Jennifer Earles affirms that breaking down gender barriers is a direct challenge to the patriarchal framework of gender and furthers the feminist agenda.[43] All women benefit from a society where there is less prescription and expectation of how they should act and appear.

Furthermore, trans women are oppressed under the same system as cis women, they engage with others as women and they may have legal recognition of their status as women.[44] Excluding trans women on the basis of biology is out of step with the law in jurisdictions such as the United Kingdom and will be out of step in Aotearoa New Zealand if the promised reform is undertaken. While trans women experience different types of gender-based oppression and are socialised differently, they are harmed by the same system that harms cis women and they belong in women-only spaces.[45]

37 Belinda Sweeney "Trans-ending women's rights: The politics of trans-inclusion in the age of gender" (2004) 27(1) Women's Studies International Forum 75 at 79.

38 Munson, above n 2, at 14.

39 At 14; and Paula Manners "Trans Inclusion in Women-Only Spaces" (2019) 10(1) CONCEPT at 1.

40 "Health care for transgender New Zealanders" (28 September 2021) Ministry of Health <www.health.govt.nz>.

41 Sweeney, above n 37.

42 Talia Mae Bettcher "Trans Feminism: Recent Philosophical Developments" (2017) 12(11) Philosophy Compass at 2.

43 Earles, above n 35, at 244 and 248.

44 Dunne, above n 6, at 544.

45 Bettcher, above n 42, at 8.

Restriction and prescription of the definition of "woman" leads to exclusion of trans women from women-only spaces. Those who oppose inclusion do not include trans women in their definition of "woman" and therefore equate opening women-only spaces to trans women to "welcoming cisgender males".[46] This has been criticised as it imputes that trans women are men, which is not correct.[47]

A widening definition of "woman" can be seen generally reflected within the IPV sector. Traditionally, many safe houses were designed in a cisnormative, "white, Eurocentric, middle class way".[48] This is now being challenged and the availability of services is being widened. For example, Scottish Women's Aid argues that cis women who step outside gender norms still identify as women and are perceived to be women, but the same courtesy is not extended to trans women.[49] This demonstrates how the IPV sector has expanded their definition of "woman", but there is some work still to be done regarding the inclusion of trans women.

Opening women-only spaces to trans women is challenging to strict definitions of "woman" and requires un-learning of societal and patriarchal expectations. However, reframing of the definition is benefiting and liberating to all women. If we aim to live in a society where we are not defined by what another person thinks a woman ought to be, then it is not appropriate for us to prescribe a strict definition on others. As put by Paula Manners: [50]

> …if those oppressed under patriarchy are busy fighting each other, then we will not have the strength or the resources left to tackle the roots of our oppression at its source…Why must we accept this discourse as it is presented to us?

It is also noteworthy that extending women-only spaces to trans women is only enlarging the definition of "woman" to approximately an additional 1.2 per cent of Aotearoa New Zealand's population.[51]

46 Dunne, above n 6, at 551.
47 Bettcher, above n 42, at 6.
48 Stonewall and nfpSyngery, above n 5, at 27.
49 Scottish Women's Aid, above n 2, at 8.
50 Manners, above n 39, at 12.
51 "Number of Trans People in NZ" (2012) Gender Minorities Aotearoa <https://genderminorities.com>.

B Purpose of segregated spaces

Those who oppose inclusion build on excluding trans women from the definition of "woman" by arguing that inclusion of trans women defeats the purpose of women-only spaces. Women-only spaces were built on "consciousness raising".[52] Women were able to come together and discuss how gender impacted them, without the influence of men. It enabled discussion of rape, IPV, abortion and other gendered issues, which led to a deeper understanding of how the patriarchy oppresses women.[53] Women-only spaces are "a fundamental challenge to the structure of power".[54] Since their conception, these spaces have transformed and grown, with many now being state-funded.[55] Safe houses have become a natural extension of what were initially meeting spaces.[56] While women-only spaces were founded as places of togetherness and consciousness-raising, it is possible for women to be conscious of their own oppression and remain blind to how they privilege from the oppression of others, such as trans women.[57]

Those who oppose inclusion argue that trans women cannot empathise with the experiences of cisgender women, who have been socialised as submissive within a patriarchal society.[58] However, campaigners for trans inclusion argue that trans women are oppressed under the same system of patriarchy for the same reasons as cis women and therefore have a place within the discussion.[59] Relating specifically to safe houses, trans women who are survivors of IPV need the use of safe houses in the same manner that cis women do. If anything, trans women who experience IPV are more oppressed under our patriarchal society as an intersection between two minority identities.[60]

Trans women being socialised for less time as women should not displace them from women-only spaces, in the same manner that girls and young women are not excluded from women-only spaces simply because they have

52 Manners, above n 39, at 3.
53 At 3.
54 Marilyn Frye *The Politics of Reality: Essays in Feminist* Theory (Crossing Press, New York, 1983) at 103 (as cited in Manners, above n 39, at 6).
55 Lorene Hannelore Gottschalk "Transgendering women's space: A feminist analysis of perspectives from Australian women's services" (2009) 32(3) Womens Stud Int Forum 167 at 168.
56 Sweeney, above n 37, at 81.
57 Manners, above n 39, at 4.
58 Sweeney, above n 37, at 82.
59 Manners, above n 39, at 4.
60 Walker, above n 34, at 111.

been socialised as women for less time. Furthermore, the fact that trans women do not identify as male and have deliberately undertaken an often-difficult social transition can be expected to undermine any male socialisation they may have received.[61]

Lorene Hannelore Gottschalk uses her perception of trans women as men to argue that the presence of men prevents women from opening up in women-only spaces.[62] A similar argument could be used to exclude any woman who is not perceived to conform to traditional forms of gender expression. It is not the fault of a trans woman if others perceive her as a man and she should not be removed from a space that she has a right to be in due to the bias of others. This could be compared to if a person with red hair attempted to access a safe house and was asked to leave by someone who did not feel comfortable opening up around a person with red hair. The person in this situation would be confused and think it was unfair.

In this kind of situation, it is possible for accommodations to be made for both parties without either being excluded from the space. For example, one of the safe house providers interviewed by Stonewall explained that they would "support and educate" anyone who expressed an issue with sharing a space with a trans woman, as they would with any equality issue.[63] Women-only spaces can be shared by all women without oppressing trans women.

C Cisgender discomfort

Alongside the purpose of segregated spaces, perhaps one of the most common issues raised by those opposing inclusion is cisgender discomfort, or "privacy" for cis women. Peter Dunne explains how this is perceived: "A trans woman, who accesses her preferred gendered-space, is considered a male interloper whose presence inappropriately subjects occupants to the 'male gaze'".[64]

Trans inclusive scholars have responded to privacy concerns by pointing out that trans users of women-only facilities do not invade privacy more than anyone else who uses the facility.[65] In fact, it would be absurd to force trans people to use gendered facilities according to their sex at birth. This was demonstrated by a social media movement following a trans exclusionary

61 Zanghellini, above n 36, at 9.
62 Gottschalk, above n 55, at 177.
63 Stonewall and nfpSyngery, above n 5, at 15.
64 Dunne, above n 6, at 543.
65 At 543.

bathroom policy in the United States, which showed bearded trans men showering in women-only facilities.[66]

The Scottish Government suggests that cisgender discomfort stems from a feeling of violation of privacy and from potential exposure to "unnatural" bodies.[67] Dunne adds that we do not exclude people who have bodily diversity unless they are transgender. For example, men with gynecomastia (breast tissue) are still men, intersex women are still women and women who have had a double mastectomy are still women.[68] Dunne also explains that trans bodies are "rarely, if ever, visible" due to clothing and cubicles.[69] Dunne recommends that privacy concerns can be addressed by service providers enhancing privacy options for all users, rather than excluding trans women.[70] Cisgender women are equally able to make use of privacy measures such as cubicles in bathrooms and changing rooms, which should alleviate any privacy concerns they may have.

A particular fear raised within the IPV sphere is that a cis woman who has survived IPV by a man may be triggered by the presence of a trans woman if she perceives her to be a man.[71] In response to this argument, Manners points out that this concern could lead to the exclusion of cis lesbians or anyone else who does not conform to one survivor's expectations of what a woman should look like.[72] Imagine if we critically assessed all those who accessed women-only IPV services to check if they appeared "sufficiently woman-like".[73] This would doubtlessly seem subjective and arbitrary and no different to historical patriarchal standards for women, such as not allowing a woman in a church without a dress. In this situation, we are so worried about being subjected to the male gaze that we become its enforcers.

If there is concern about a particular survivor being triggered by her perception of a trans woman as a man, this highlights the need for individual risk assessments within IPV services to respond to the triggers of individual survivors, as will be illustrated in detail later in this article.[74] Manners analogises

66 At 544.
67 Scottish Government, above n 35, at 5.
68 Dunne, above n 6, at 547.
69 At 545.
70 At 539.
71 At 548.
72 Manners, above n 39, at 8.
73 At 8.
74 Scottish Government, above n 35, at 6.

that if a survivor found a particular accent triggering, they would not exclude all people with that accent from their service. Instead, the service provider would "develop bespoke services" to meet the survivor's needs.[75]

Cisgender discomfort or privacy concerns can be sufficiently mitigated by enhanced privacy provision for all users of a service and individual risk assessments. There is no need to exclude users from a service simply because they may make some users uncomfortable. Service providers should instead encourage open-mindedness and inclusion of bodily diversity. Exclusion of trans women based on potential discomfort for some users is a slippery slope to exclusion of others, including those who do not conform with traditional expectations of women.

We would never imagine excluding a queer woman from a safe house because some IPV survivors may only consider heterosexual women to be "true women"; or a woman who wears a head covering like a hijab, or a woman who is infertile, or a woman with a disability. The prejudices of humanity are, unfortunately, boundless and if we are constantly building our systems around potential discomfort based on prejudice, we will ourselves become discriminatory. One person's discomfort is not grounds for another person's exclusion.

D Eroding protection from violent men

Another of the key arguments used by those opposing inclusion is that allowing trans inclusion in women-only services would erode gender boundaries and compromise the integrity of gendered spaces, providing violent men access.[76] This argument is used to oppose law reform that allows self-declaration of gender, as there is fear that violent men will be able to obtain fraudulent recognition as women to gain access into women-only spaces to perpetrate violence.[77]

This argument ignores the fact that many IPV services, including safe houses, have robust risk assessment procedures.[78] Many IPV services report that they have never had a perpetrator of IPV attempt to access their services to continue perpetrating IPV, but they are confident their risk assessment procedures would prevent this from happening.[79]

75 Manners, above n 39, at 8–9.
76 Stonewall and nfpSyngery, above n 5, at 2.
77 Scottish Government, above n 35, at 8; and Zanghellini, above n 36, at 2.
78 Stonewall and nfpSyngery, above n 5, at 18.
79 At 22.

This argument is also linked to the "transgender menace" myth, namely that trans women themselves are a threat to the safety of cis women.[80] These arguments are again based on the misgendering of trans women as men. Dunne explains that those opposing inclusion think that by allowing trans women access to women-only spaces, it will inevitably lead to sexual intercourse, both consensual and non-consensual. This is based on the premise that a man and a woman in an intimate space together will inevitably have sex.[81] Gottschalk argues that "[t]rans-inclusion… is one of the greatest threats faced by women".[82] Dunne disagrees, arguing this view reflects a "deeply engrained social prejudice".[83]

The idea that a trans woman and a cis woman together in a private space will inevitably have sex is profoundly heteronormative. If cis women who are attracted to women can be trusted to share a space together, which they can, then so too should trans women.[84] People are diverse and have diverse sexualities, regardless of their sex and gender. This argument also overlooks that most people when accessing women-only services have other things on their mind aside from sexual intercourse. This is particularly so for IPV services.

The idea that a person with a penis is inherently a sexual predator is therefore sexist and heterosexist.[85] Biology does not define exclusion in any other respect, yet it is used as justification for excluding trans women. While we know men are more likely to pose a risk of sexual assault towards children, we allow them to work in jobs where they come into contact with children because we recognise that only some men pose a real risk, and we can largely identify these men through risk assessments.[86]

Arguments based on the idea that eroding gender boundaries will allow for violent men to gain access to women-only spaces do not stand up under scrutiny because trans women are not men. In fact, they have undertaken a difficult social and sometimes medical and legal transition to *not be* men. This argument also over-exaggerates the extent to which gender boundaries need to be eroded to allow for trans women to access women-only spaces since

80 Dunne, above n 6, at 539.
81 At 550.
82 Gottschalk, above n 55, at 178.
83 Dunne, above n 6, at 551.
84 At 552.
85 At 552.
86 Zanghellini, above n 36, at 6.

trans women are a statistically small minority. Trans inclusion does not erode gender boundaries, it simply broadens them by broadening the category of woman, as discussed above. Additionally, "violent men" arguments ignore the fact that trans women themselves face great risk of sexual assault and require the protection of women-only spaces.[87]

Trans women should not be excluded from services because of the violence of cisgender men, especially when they are survivors of violence themselves. Trans women do not pose an inherent risk to cis women. However, if trans women pose a risk within a safe house environment, this can be established through an individual risk assessment procedure, as is done for every other woman who accesses the service.

E Scarcity of IPV resources

Another concern held by some who oppose inclusion is that allowing trans women into women-only services, particularly IPV services, will drain scarce resources necessary to provide services to cis women or necessitate difficult logistical arrangements. However, Munson argues that often "very minor adjustments" can be made to accommodate trans IPV survivors.[88]

Some who oppose inclusion argue that separate services should be created, or supported, for trans women.[89] However, Stonewall discusses how specialist Rainbow IPV services are at particular risk of funding cuts, meaning that they have limited capacity and resources to support trans women in comparison to "mainstream" women-only IPV services.[90] It is also worth noting that, while specialist Rainbow IPV services exist in some countries, they are often small and cannot keep up with demand. Manners describes the idea of segregated services as a "facetious suggestion [that] ignores the fundamental difficulties of setting up a specialist service for such a statistically small percentage of society".[91]

Perhaps the most problematic part of this argument is the idea raised by Gottschalk that trans women should have separate services and spaces because, while trans women have a right to be free from discrimination, "these rights should not transcend the rights of women born and raised female".[92] This

87 Scottish Women's Aid, above n 2, at 12–13.
88 Munson, above n 2, at 11.
89 Zanghellini, above n 36, at 6.
90 Stonewall and nfpSyngery, above n 5, at 25.
91 Manners, above n 39, at 12.
92 Gottschalk, above n 55, at 170.

discriminates against trans women, no matter how it is worded, and it enforces a social hierarchy in which trans women are at the bottom. The idea that trans women should have separate services because they cannot be equal with cis women is incredibly problematic and it is at odds with the morals of a free and democratic society. This can be analogised to similar "separate-but-equal" programs, which we have learned by now are never equal.[93] Additionally, trans women existing without discrimination does not erode the right of cis women to be born and raised female. In fact, it has very minimal impact on cis women at all.

Trans women must be included in women-only services. Not only is it the most practical approach, it is also the most equal and fair one.[94] Trans women are women; they suffer from similar discrimination and oppression and have the same need for the services provided in women-only centres, such as IPV services.

F Summary

This outline of arguments is not exhaustive, and there are many arguments and rebuttals not within the scope of this article. However, this coverage of some of the key arguments should generally demonstrate how arguments against inclusion are significantly flawed. As put by Jess Phillips MP (UK), it is important that we can have a conversation about this topic, rather than a fight.[95]

IPV organisations are adaptive services that always cater to individual needs. There is room for the necessary adjustments to include trans women in women-only services, and there is no justification for such an exclusion of a vulnerable minority group.[96] The arguments in favour of inclusion are not only more reasoned than those for exclusion, but they also present inclusion as more pragmatic and feasible. It costs cis women minimally to include trans women in women-only spaces and benefits society in general by extending women-only services to most people who are affected by their status as a gender minority. Not only this, but denial of women-only spaces to trans women is a denial of their humanity and is "ipso facto harmful".[97] Further, as the next

93 Zanghellini, above n 38, at 6.
94 At 6 and 12.
95 Stonewall and nfpSyngery, above n 5, at 4.
96 Scottish Government, above n 35, at 1, Dunne, above n 6, at 556; and Manners, above n 39, at 13.
97 Zanghellini, above n 36, at 9.

section discusses, it is entirely possible to implement inclusive policies in these spaces which accommodate both cis and trans women.

IV IMPLEMENTATION OF INCLUSIVE POLICIES

Arguments made by those opposing inclusion tend to ignore that trans women seeking access to women-only services have a very real need for the services provided. This is especially the case for access to IPV services such as safe houses. Munson suggests that "every survivor is a person first" and denying trans survivors' access to services is unprofessional and unethical.[98]

The last thing that trans women need, when seeking help for IPV and abuse, is further questioning of their identities by the people in services intended to help them.[99] "Like all victims of violence, transgender victims want and need to be respected, heard, supported and believed."[100] In particular, trans women may be prevented from expressing themselves as a woman due to IPV, which makes any kind of visual or biological requirements inappropriate.[101]

While there is undisputed need for trans women to have access to IPV services, the statistics for trans women affected by IPV differ greatly to the statistics for cis women.[102] Stonewall suggests that, while 7.5 per cent of all women experience IPV, 16 per cent of trans women experience it.[103] Additionally, 24 per cent of those do not tell anyone about the IPV they are experiencing.[104] Scottish Women's Aid suggests that even as many as 50 per cent of trans women might experience IPV.[105] Sid Jordan, Gita Mehrotra and Kiyomi Fujikawa break this down into 54 per cent of trans women experiencing IPV, 24 per cent experiencing severe physical IPV and 47 per cent experiencing sexual violence.[106] Though the numbers in this area differ, it is clear that trans

98 M Munson and L Cook-Daniels "Transgender Individuals' Knowledge of and Willingness to use Sexual Assault Programs" (unpublished paper, Milwaukee WI, 2011), as cited in Munson, above n 2, at 1.

99 Stonewall and nfpSyngery, above n 5, at 2 and 24.

100 "Resources for supporting transgender victims of relationship violence and sexual assault" (2 October 2014) New Zealand Family Violence Clearinghouse <https://nzfvc.org.nz>.

101 Scottish Women's Aid, above n 2, at 12–13.

102 Sid P Jordan, Gita R Mehrotra and Kiyomi A Fujikawa "Mandating Inclusion: Critical Trans Perspectives on Domestic and Sexual Violence Advocacy" (2019) 26(6–7) Violence Against Women 531 at 533; and Walker, above n 34.

103 Stonewall and nfpSyngery, above n 5, at 6.

104 At 6.

105 Scottish Women's Aid, above n 2, at 4.

106 Jordan, Mehrotra and Fujikawa, above n 102, at 533.

women are particularly vulnerable to IPV, which should be the most persuasive argument for their inclusion.[107]

Trans women also experience a different kind of abuse specific to their trans status. Some ways in which trans abusers may hold power over trans people include:

i) withholding gender-affirming medication;

ii) refusing to use the trans woman's correct pronouns and name;

iii) convincing the trans woman that no one would believe her trans status;[108]

iv) joking about the trans woman's appearance;

v) touching parts of the trans woman's body she is not comfortable being touched; and

vi) isolating the trans woman from her friends and family.[109]

In the United Kingdom, it is also easier for partners of trans women to perpetrate abuse because under the Gender Recognition Act 2004, trans people who married before their transition must get either their partner's consent or a divorce before they are able to obtain legal recognition of their gender.[110] Walker adds that sexual abuse is especially "taboo" for trans people because many suffer from body dysmorphia and fear physical investigations into sexual abuse.[111]

Even for trans-inclusive safe houses, there is more they can do to connect with trans communities and train their staff in inclusive policies.[112] Manners identifies that many trans women "remain unsure if services are willing and able to provide them with the support that they need".[113] Jordan, Mehrotra and Fujikawa also note that safe houses need to be aware of the difficult relationship between the trans community and the Police, which deters trans women from seeking help for IPV.[114]

It is also important to acknowledge that, while safe houses and IPV services

107 Dunne, above n 6, at 549.
108 Stonewall and nfpSyngery, above n 5, at 6.
109 Scottish Women's Aid, above n 2, at 4.
110 Gender Recognition Act 2004, s 4A; and Stonewall and nfpSyngery, above n 5, at 6.
111 Walker, above n 34, at 111.
112 Stonewall and nfpSyngery, above n 5, at 23.
113 Manners, above n 39, at 9.
114 Jordan, Mehrotra and Fujikawa, above n 102, at 534.

often try to be inclusive, their services are inherently cisnormative.[115] Jake Pyne suggests that this is exacerbated by the lack of trans content within the social work curriculum:[116] "Under the assumption of the universality of cis experience, no information is collected or imparted about trans communities."[117] Trans women are marked as outsiders from the moment they enter the cisnormative spheres of women-only spaces, whether this comes from deliberate transphobia or passive cisnormativity.[118] This highlights the importance of producing information about trans people and integrating such resources into social services.[119] It is important that we examine not only discrimination, but also passive exclusion.[120]

This may leave some service providers questioning how they may displace an assumption of cisnormativity and explicitly open their service to trans users. Munson has suggested the following in relation to interacting with trans individuals:

i) using gender neutral terminology when addressing individuals using their services if their pronouns are unknown;[121]

ii) asking individuals using their services for their preferred name and pronouns when meeting them;[122]

iii) requiring the same legal documents from everyone, regardless of their gender history and regardless of whether their preferred name and gender match their legal information;[123]

iv) keeping all personal information confidential, including gender histories;[124] and

v) implementing and upholding an anti-discrimination policy in relation to gender identity and communicating the policy to all service users.[125]

115 Jake Pyne "UNSUITABLE BODIES: Trans People and Cisnormativity in Shelter Services" 28(1) (2011) CSWR 129 at 131.
116 At 131.
117 At 133.
118 At 133.
119 At 133.
120 At 134.
121 Munson, above n 2, at 6.
122 At 6.
123 At 4.
124 At 6.
125 At 12.

In addition, Munson has suggested that safe houses should also implement:

i) private spaces for dressing and washing for all individuals residing in a safe house;[126]

ii) at least one gender-neutral or all-gender bathroom on site;[127]

iii) recognition of the essential nature of gender-affirming interventions to some individuals and helping them to access these interventions where necessary and possible;[128]

iv) explicit communications about their trans inclusive policy in promotional or online material;[129]

v) a clear anti-discrimination policy in relation to sexual orientation and gender identity;[130]

vi) efforts to ensure local LGBT communities and organisations are aware of their inclusivity policy, including;

- undertaking staff training with LGBT specialist organisations; and
- developing relationships and partnerships with LGBT specialist organisations;[131] and

vii) staff training within their inclusivity policy and ensuring that all staff are confident and capable of applying the measures to uphold it.[132]

Manners emphasises that these measures are particularly important because "a majority of LGBT people assume that [safe houses] are not for them…It is therefore incumbent on services to be proactive".[133] Manners adds that it is crucial to work with trans people when constructing inclusive environments.[134]

Stonewall reaffirms that "trans voices need to be at the heart of these initiatives".[135] This avoids making assumptions about the needs and wants of trans people and ensures that the result is effective. Munson adds that this will

126 At 10.
127 At 10.
128 At 13.
129 At 4.
130 At 12.
131 At 11.
132 At 12.
133 Manners, above n 39, at 11.
134 At 14.
135 Stonewall and nfpSyngery, above n 5, at 9.

raise awareness among potential trans users of IPV services that the relevant safe house is welcoming and can be trusted.[136] All this works towards a relationship of trust, respect and empowerment, which is essential within an IPV or safe house service.[137]

It is noteworthy that a lot of safe houses and IPV services have long histories of supporting and working with trans women, even if they do not have an official policy relating to trans statuses. This was supported by Stonewall's survey of IPV services in the United Kingdom.[138] Stonewall has suggested that legal reform often has minimal impact on the running of safe houses since such services carry out thorough risk assessments for every woman who accesses their services, to ensure every woman gets the support she needs in her individual circumstances.[139] Jess Phillips MP (UK) describes:[140]

> I know from my time working at a refuge that every woman who comes through your door will need personalised support. One day you might be helping a woman with uncertain immigration status and no recourse to public funds. Another day you might be supporting a woman whose partner is threatening to make her trans history public if she leaves.

Trans women have a particular set of risks and needs, though nearly every woman who accesses a safe house receives attention for their individual needs; whether they stem from culture, religion, sexual orientation or anything else.[141]

As set out above, risk assessments can be used to address many of the worst fears of those who oppose inclusion. It is difficult to find a template for these robust risk assessments online, due to their personal nature, but all of Stonewall's data suggests that a risk assessment would be more than enough to protect users of a service in a situation such as the following example.[142]

Let us imagine the worst fears of those who oppose inclusion. Bob has been physically abusing his wife, Jane. Jane uses a safe house to escape the situation and Bob finds out from a friend which safe house. He has heard of a new law which means he could get into the safe house if he dresses up as a

136 Munson, above n 2, at 11.
137 New Zealand Family Violence Clearinghouse, above n 100.
138 Stonewall and nfpSyngery, above n 5, at 2.
139 At 2.
140 At 4.
141 At 15.
142 At 2.

woman. So, he dresses up as a woman and approaches the safe house, saying his partner has been abusing him and he is a trans woman. The safe house looks into his records and finds:

i) Bob is financially well-off and could afford to pay for his accommodation. There are other women needing the service who cannot afford to pay for accommodation, so Bob is of low priority.

ii) Bob's name appears on Jane's record as her abuser. The safe house knows they cannot be housed together and Bob is likely to be a threat to other women.

iii) Bob's Police check comes back and they find he has been arrested twice for domestic assault in the last year.

The safe house chooses to deny Bob the service because he is not in financial need and is likely to pose a risk to the women using the service, particularly Jane. They may alternatively help him to access a different service or house him separately from other service users.

This is simply an example of the kinds of risk assessment procedures that safe house services may use. In this example it becomes clear that Bob's ruse would not succeed due to the robust nature of safe house risk assessment procedures.

Alongside the existing risk assessment procedures, implementation of inclusive policies is crucial. It is not enough to simply have inclusive policies; they must be advertised to the people they are there to support. Staff must know about them and be trained to apply them. The policy should be visible and searchable for people wanting to access the service.

Trans survivors of IPV have been through enough and they should not need to be hesitant about whether a service is inclusive to them or not. They should know, with the same certainty as anyone else, that there is a service there to support them and keep them safe.

V APPLICATION IN AOTEAROA NEW ZEALAND

While the laws and policies of trans inclusion in women-only services are clear, it is important to also understand the realities of their application within the Aotearoa New Zealand context. Overseas, there has been extensive consultation with safe houses and IPV services about their trans-inclusive policies and how

they work in reality.[143] A similar study has not been conducted in Aotearoa New Zealand, perhaps because overseas studies were largely triggered by law reform discussions, which have been stalled in Aotearoa New Zealand.

For this article, I emailed a range of safe houses and women-only services across Aotearoa New Zealand to inquire as to their trans-inclusive policies. I could not find any easily accessible information for any of the shelters as to their inclusion policy. This survey was by no means formal and many of the contacted services did not respond. It was simply used to gain policy information that could not be found anywhere else.

Before responses may be analysed, it is important to note how different shelters in Aotearoa New Zealand relate to each other. Most of the safe houses come under the umbrella of the National Collective of Independent Women's Refuges (NCIWR, otherwise known as Women's Refuge). Thirty-eight safe houses are affiliated with NCIWR and about 20 are un-affiliated.[144] All safe houses are non-profit registered charities managed by a trust and they are not completely funded by the government. NCIWR is only 60 per cent funded.[145] The politics of safe houses in Aotearoa New Zealand are not within the scope of this essay, but there is some competition and disagreement between affiliated and non-affiliated organisations.[146]

NCIWR replied to my email by saying:[147]

> In answer to your question we are all inclusive here at women's refuge we welcome all women into our safe houses – including transgender women.

Waitomo Women's Refuge (NCIWR affiliated), answered:[148]

> At our Refuge if you identify as a woman and meet our other criteria then you can be admitted to our safehouse. This includes transgender women.

They also added that if it is not appropriate to admit a woman to their safe

143 See for example Stonewall and nfpSyngery, above n 5.

144 "How Women's Refuges in NZ Operate – and Why Your Local Refuge Needs Your Support" (1 August 2017) The Aunties; and Email from Philippa, above n 1.

145 The Aunties, above n 144.

146 Phone call from Jackie (The Aunties) to the author regarding this paper (21 May 2021).

147 Email from Casey (National Collective of Independent Women's Refuges) to the author regarding this paper (28 May 2021).

148 Email from Wendy (Waitomo Waipa Women's Refuge) to the author regarding this paper (1 June 2021).

house, then they will find an alternative solution such as WINZ emergency accommodation, a different safe house or a motel.[149]

Wellington Women's Refuge (NCIWR affiliated), sent me a copy of their relevant policy:[150]

> WWR understand that gender identity can be non-binary and is open to providing services to cis women, transgender, gender queer, intersex or people who choose to live with a more fluid gender identity.

They added that most safe houses have been supporting all who identify as women for many years. Their representative also noted that "legislation could be overkill and an unusual approach towards a not-for-profit charitable social service" since they are already working hard to ensure inclusivity within NCIWR safe houses.[151]

The Aunties, a non-safe-house IPV service, noted that organisations independent from NCIWR tend to have more freedom to develop their own inclusive policies. Their representative also noted that the safe house system in general was designed for cis Pākehā women and this is reflected in policies and their implementation.[152]

YWCA Christchurch (unaffiliated) has a slightly different approach due to their housing being solely in the form of family units, which was a change implemented in 2021. Due to this structure, YWCA will either house a trans woman with her whānau or in a separate unit depending on the woman's preference. YWCA's representative noted that they have "grown and changed" as an organisation and their policies affirm that trans women are included in women-only services.[153]

Tauranga Women's Refuge (unaffiliated) affirmed they have been providing safe housing for trans women for years.[154]

Women's Centre New Plymouth, an unaffiliated non-safe-house service, is developing a gender policy at the time of writing this article. They have always

149 Email from Wendy, above n 148.
150 Email from Phillipa, above n 1.
151 Email from Phillipa, above n 1.
152 Phone call from Jackie, above n 149. This is refuted by Philippa from Wellington Women's Refuge, who noted that the New Zealand safe house movement has involved Māori women who in the early 1980s set up their own 'by Māori for Māori' safehouses under a parallel development model (Email from Philippa (Wellington Women's Refuge) to the author regarding this paper (2 May 2022)).
153 Email from Tania (YWCA Christchurch) to the author regarding this paper (28 April 2022).
154 Email from Hazel (Tauranga Women's Refuge) to the author regarding this paper (27 May 2021).

operated on "social inclusion with no judgment" and are currently developing policy that affirms their status quo.[155]

From this brief survey, it would appear that safe houses in Aotearoa New Zealand generally affirm the status of trans women as women and include them in their services. However, there is always more that can be done, should the relevant service have the resources to do so. From this informal survey, I suggest that safe houses and IPV services in Aotearoa New Zealand should focus on implementing their inclusive policies in practice. While it is amazing to see that most services are welcoming to trans women, it would be better if this was publicly visible to trans women themselves, as every service needed to be emailed to access this information.

As stated earlier, there are many different ways to implement inclusive policies and most of them take up very few resources. The most important of these implementation mechanisms is working with trans and Rainbow advocacy services to ask what they actually want and need from an IPV service.

VI CONCLUSIONS

Trans inclusion should be encouraged and implemented in safe houses and IPV services. While the law in Aotearoa New Zealand is not particularly friendly to trans individuals, safe houses have largely taken matters into their own hands to ensure inclusion within the IPV sector. Hopefully, the planned legal reform, which appears inevitable, will provide a stronger legal mandate to support the current status quo.

It is gratifying to see that trans-exclusionary myths and arguments have not significantly affected the IPV sector in Aotearoa New Zealand. However, there is always more that safe houses in Aotearoa New Zealand could do to implement their inclusive policies. Safe houses strive to make their users feel safe, supported and welcome. This can best be done proactively by connecting with trans and Rainbow communities to enhance their feeling of inclusion. An example of this could be involving trans people in the development of policies and procedures. Laws are nothing if they are not followed and policies are nothing if they are not implemented.

I also argue that the planned legal reform will be useful within the IPV sector, because it would provide a guarantee of anti-discrimination and remove discretion from individuals who may apply their own prejudices. Safe houses

155 Email from Angela (New Plymouth Women's Centre) to the author regarding this paper (10 June 2021).

and IPV services do great work for women, including trans women. Legal reform would not change what most services do on a daily basis, but it would change things for the minority who continue to apply exclusionary practices.

The status quo of trans inclusion in women-only services in Aotearoa New Zealand should be affirmed by legal reform and services should focus their energy on implementing their already inclusive policies.

Trans survivors of IPV should know with certainty, the same as every other survivor, that there are services available to support them should they need it. If they need to access an IPV service, they should know they will be welcomed and supported from the moment they enter the door.

Trans women are a marginalised and vulnerable group whose interests have been absent from public consideration for far too long. This article has analysed the law, policies and realities of trans inclusion in women only safe-houses, but it is individuals within our IPV services and wider society who can cause meaningful change. It is time for us to look at ourselves and our society and reflect on how we may improve and better serve our trans communities. All we need to do is open our minds to the fact that our current system is not perfect.

RECOGNISING AND UNDERSTANDING FINANCIAL ABUSE: ADDRESSING HOW RELATIONSHIP PROPERTY AGREEMENTS CAN ACT AS A MECHANISM FOR FINANCIAL ABUSE

Freya McKechnie[*] and Emma Phelps[**]

Intimate partner violence is sadly prevalent in New Zealand and can come in many different forms. Often the focus of academia and policy is on the physical, sexual and psychological forms of intimate partner violence. However, there are also other, less-recognised, forms of intimate partner violence, including financial abuse. This article focuses on how relationship property laws that enable people to contract out of default rules for property sharing may be used to perpetrate financial abuse. It then discusses the legal framework and considers the potential for change in this area.

I INTRODUCTION

In 2013, financial abuse was recognised as a form of family violence in legislation. Financial abuse is a form of psychological abuse by way of social entrapment for primary victims of intimate partner violence (**IPV**).[1] The perpetrator of financial abuse uses money or assets to control their partner's actions and freedom of choice. A recent study assessing how often women from Aotearoa experience IPV found that women's experiences of economic abuse had doubled from 4.5 per cent in 2003 to 8.9 per cent in 2019.[2] However, few studies have documented how abusers restrict their partner's finances, ability to work and

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1 Mark Henaghan and Siobhan Reynolds "The use of trusts and trust litigation as a form of financial abuse in Aotearoa New Zealand and what to do about it" (2020) 33 AJFL 303 at 303–304.

2 Janet Fanslow and others "Change in prevalence of psychological and economic abuse, and controlling behaviours against women by an intimate partner in two cross-sectional studies in New Zealand, 2003 and 2019" (2021) BMJ Open at 7.

economic freedom. As a result, financial abuse is under-recognised and not well understood, particularly in the context of agreements under the Property (Relationships) Act 1976 (PRA). The lack of understanding and recognition of possible avenues of financial abuse is leaving women mentally and emotionally exhausted, as well as financially worse off.[3]

Part 6 of the PRA provides a mechanism for parties to a de facto relationship, marriage or civil union to contract out of the property-sharing provisions in the PRA. In many relationships, this enables both partners to have control over their finances and determine their property arrangements. However, if one party to the relationship has more power than the other due to gender, class, education, race or disability, relationship property agreements can be used to coerce or financially abuse the more vulnerable partner. The PRA recognises that relationship property agreements are not simply commercial agreements and that there may be uneven power dynamics between parties entering into these agreements. It also imposes mandatory procedural safeguards.[4]

This article begins in Part II by examining financial abuse, the underlying patterns of harm at play when dealing with psychological abuse, and how the harm of IPV can be invisible while still being detrimental to victims. This Part explores the social science behind financial abuse and paves the way to consider how s 21 contracting out and settlement agreements can be used as a tool to perpetrate IPV.

Part III focuses on how relationship property agreements can lead to financial abuse. Part IV then addresses the current laws that could assist in mitigating the imbalance in power caused by financial abuse. This includes the potential use of duress and undue influence, although they do not provide a conclusive and strong protection mechanism until they are further developed. This Part also considers how Australian jurisdiction provides some insight into how New Zealand's case law may develop to better protect victims from financial abuse. Lastly, Part V addresses prevention and solutions.

This article will refer to agreements under s 21 of the PRA as "contracting out agreements", agreements under s 21A of the PRA as "settlement agreements" and the two types of agreements together as "relationship property agreements".

3 Women's Aid "What is financial abuse?" <www.womensaid.org.uk>.

4 Property (Relationships) Act 1976, s 21F(3).

II FINANCIAL ABUSE AS A FORM OF FAMILY VIOLENCE

Family violence is prevalent in New Zealand. One in two women in New Zealand are likely to experience physical, sexual, or psychological abuse.[5] However, financial or economic abuse in New Zealand is not well understood or researched.[6] Research from the United Kingdom found that over one third of adults in Britain had been subject to some form of financial abuse.[7] Currently, public awareness in New Zealand of financial abuse is 40 years behind the understanding of physical and sexual violence.[8]

While IPV can happen between any combinations of gender, because of historical norms and the statistical and anecdotal evidence, this article will primarily discuss IPV and financial abuse occurring where women are the victims.

A Financial abuse, coercive control and unequal bargaining power

Although economic abuse is becoming more widely understood to be an aspect of psychological abuse, as a phenomenon on its own, it has received little attention relative to its detrimental effect.[9] There is silencing of women's lived experiences of economic violence.[10]

Financial abuse is part of a pattern of "physical and psychological abuse" that an abuser uses "to establish and maintain power and control over their victim".[11] Evan Stark has defined coercion as the "use of force or threats to compel or dispel a particular response" and control as referring to the "structural forms of deprivation, exploitation, and command that compel obedience

5 New Zealand Family Violence Clearinghouse "NZFVC Data Summaries 2017: Family violence reports reach record high" (26 June 2017) <www.nzfvc.org.nz>, as cited in Ayesha Scott "Surviving post-separation financial violence despite the Family Court: complex money matters as entrapment" (2020) 10 NZFLJ 27 at 27.

6 Sandra Milne, Susan Maury and Pauline Gulliver *Economic Abuse in New Zealand: Towards an understanding and response* (Good Shepherd, Abbotsford, 2018) at 8.

7 Nicola Sharps-Jeff *Money Matters: Research into the extent and nature of financial abuse within intimate relationships in the UK* (Refuge, 2015), as cited in Scott, above n 5, at 27.

8 Nicola Sharps-Jeffs *Supporting Survivors of Financial Abuse: Learning for the UK* (Winston Churchill Memorial Trust, London Metropolitan University and Surviving Economic Abuse, 2016), as cited in Scott, above n 5, at 27.

9 Ang Jury, Natalie Thorburn and Ruth Weatherall "What's his is his and what's mine is his": Financial power and the economic abuse of women in Aotearoa" (2017) 29(2) Aotearoa New Zealand Social Work 69 at 69.

10 Scott, above n 5, at 29.

11 Jury, Thorburn and Weatherall, above n 9, at 71.

indirectly".[12] The combination results in the "condition of unfreedom", or the experience of entrapment.[13]

Coercively controlling behaviour encompasses psychological, physical, sexual, financial, and emotional abuse to make a person feel subordinate and dependent.[14] This isolates the victim from support and exploits their resources and capacity for individual gain. The victim is then powerless and deprived of independence and the means to regulate, resist and escape to live their life with freedom and self-control.[15] Often because the victim is complicit with the commands of the perpetrator to maintain peace and perceived safety, the abuse is not visible. This is why it is important to understand the violence as a pattern of behaviour, which creates "harms to autonomy, personhood and decision-making".[16] Assumptions that victims should be able to get out of relationships involving IPV can lead to women not being supported in these situations.

B Law relating to financial abuse

Financial abuse was not specifically recognised in New Zealand's family violence legislation until 2013.[17] The Family Violence Act 2018 (FVA) provides that financial or economic abuse is a form of psychological abuse.[18] It gives examples of unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education.

The FVA emphasises that family violence often is or includes coercive behaviour.[19] Section 9 of the FVA provides that violence means any physical, sexual, or psychological abuse. Violence includes patterns of behaviour, which is coercive or controlling behaviour or behaviour that has the effect of coercing or controlling the person and/or causes the person cumulative harm.[20] Abuse

12 Evan Stark *Coercive control: How men entrap women in personal life* (Oxford University Press, New York, 2007) at 228–229, as cited in Evan Stark and Marianne Hester "Coercive Control: Update and Review" (2019) 25(1) Violence Against Women 81 at 89.

13 At 205, as cited in Stark and Hester, above n 12, at 89.

14 Stark and Hester, above n 12, at 83.

15 At 90.

16 Vivienne Elizabeth, Nicola Gavey and Julia Tolmie "'… He's Just Swapped His Fists for the System' The Governance of Gender Through Custody Law" (2012) 26 Gender and Society 239 at 252; citing Evan Stark "Rethinking custody evaluation in cases involving domestic violence" (2009) 6(3) Journal of Child Custody 287.

17 Domestic Violence Amendment Act 2013, s 5.

18 Family Violence Act 2018, s 11(1)(e).

19 Section 4.

20 Family Violence Act 2018, s 9(3)(a)–(b).

is also defined with reference to the cumulative effects of IPV, as it includes:[21]

> A number of acts that form part of a pattern of behaviour (even if all or any of those acts, when viewed in isolation, may appear to be minor or trivial) may amount to abuse.

Psychological abuse, as included in the FVA, includes threats of physical abuse or sexual abuse and intimidation or harassment.[22] Section 11(4) recognises that psychological abuse does not have to involve actual or threatened physical or sexual abuse nor does it require a physical element to be psychologically abusive.[23] Psychological abuse has been defined as:[24]

i) Behaviour which chips at a person's confidence or is designed to "put a person down" or humiliate that person.

ii) Abuse of power, which by degrees makes another person apprehensive and unsettled.

iii) Exploiting an emotional or psychological vulnerability of another party.

iv) Indulging in behaviour designed to unsettle, antagonise, offend, annoy, provoke or worry another party.

v) Implicit or explicit threats.

Significantly, since the 2013 amendment of the FVA, s 11(1)(e) includes financial or economic abuse as a form of psychological abuse.[25] The inclusion of this within the definition of "family violence" shows that it alone is a form of abuse, and that it is also one facet of psychological abuse, which is often used in combination with other forms of abuse to deny or limit access to financial resources. Actions such as taking away resources or limiting employment or education opportunities are considered financial abuse under the FVA.

In *Arps v Arps*, reducing the money available to the plaintiff to run the household was held to amount to psychological abuse.[26] In combination with

21 Section 10(2).

22 Sections 11(1)(a)–(b).

23 Debra Wilson and Sharon Chandra (eds) *Family Law — Adult Relationships* (online loose-leaf ed, Thomson Reuters) at [FV9.09].

24 *G v C* (1997) 16 FRNZ 201 (FC) at 208.

25 Domestic Violence Amendment Act, s 5. Note that this amended the Domestic Violence Act 1995, which was the predecessor to the Family Violence Act 2018.

26 *Arps v Arps* FC Christchurch FP009/548/02, 11 October 2002.

other factors, this led the Court to make a protection order. Importantly, the Court found that a pattern of harm may not be obvious or visible as a one-off incident. The recognition of psychological abuse, patterns of behaviour, cumulative harm and coercive or controlling behaviour in the FVA has been vital in improving the safety of victims of family violence.

III THE PROPERTY (RELATIONSHIPS) ACT 1976 AND HOW RELATIONSHIP PROPERTY AGREEMENTS CAN PERPETUATE FINANCIAL ABUSE

Financial abuse can come in varying forms. However, this article is focused on how relationship property agreements can be used as a form of financial abuse or to perpetuate financial abuse. This part sets out the legislative framework of the PRA and the issues that can arise when entering into relationship property agreements, as well as at the end of a relationship where a relationship property agreement exists.

A Background to the Property (Relationships) Act 1976

The PRA governs how property is divided at the end of a relationship. The PRA is a piece of social legislation, "aimed at ensuring a just division of property between partners who may be in unequal bargaining positions".[27] The PRA aims to protect the property interests of both parties involved in a de facto relationship, civil union, or marriage.

Being social legislation, the PRA has been updated over the years to adapt to a changing society, albeit slowly. It was recognised by the late 1990s that family property law no longer reflected social reality.[28] For example, since the PRA was enacted in 1976,[29] there has been a significant increase in the number of de facto relationships.[30] In 2001, the PRA was amended to include de facto relationships and to strengthen the entitlement to equal sharing of relationship property when partners have lived together for three or more years.[31]

The purpose of the PRA includes recognising the equal contribution of partners to a relationship and providing for a just division of relationship

27 Law Commission *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [13.3].

28 Nicola Peart "The Property (Relationships) Amendment Act 2001: A Conceptual Change" (2008) 39 VUWLR 813 at 818

29 Matrimonial Property Act 1976, now the Property (Relationships) Act 1976.

30 Peart, above n 28, at 818.

31 Property (Relationships) Amendment Act 2001.

property.[32] There is a strong notion of a relationship being a partnership of equals. The PRA is part of a wider legislative purpose of ensuring the equal status of men and women in society.[33]

There is a presumption under the PRA that relationship property will be shared equally.[34] This is subject to certain exceptions, such as where there are extraordinary circumstances that make equal sharing repugnant to justice,[35] or where courts consider it just to award compensation for economic disparity.[36]

The PRA favours equal entitlement to relationship property while aiming to avoid uncertainty, by providing a settled statutory concept of justice instead of leaving room for abstract and individual notions of justice.[37]

B Contracting out of the Property (Relationships) Act 1976

The PRA allows parties to "contract out" of the equal sharing provisions of the PRA that would otherwise apply by default. It enables parties to enter into agreements as to how their relationship property will be divided that differ from how their property would be divided under the PRA.

The next section of this article summarises the key provisions of pt 6 of the PRA, which deals with contracting out of the PRA. This provides couples with autonomy as to how their property will be divided at the end of their relationship. The risk is that while relationship property agreements have a valid purpose in creating individualised property sharing arrangements, where one partner suffers from financial abuse at the hands of the other, the vulnerable partner may be pressured or coerced into signing an agreement that is against their interests. The PRA does, however, provide some procedural safeguards against this, as well as the ability for the courts to overturn agreements.

1 Section 21

Section 21 of the PRA enables spouses, civil union or de facto partners, or any two people in contemplation of entering a marriage, civil union, or de facto relationship to "make any agreement they think fit with respect to the status, ownership, and division of their property". This enables people to opt out of the default provisions of the PRA. This statutory right has been said to be "one

32 Property (Relationships) Act, s 1M.
33 Section 1N(1).
34 Sections 1C(3) and 11.
35 Section 13.
36 Section 15.
37 *Reid v Reid* [1979] 1 NZLR 572 (CA) at 580–583; and *Martin v Martin* [1979] 1 NZLR 97 (CA) at 99.

of the pillars on which New Zealand's relationship property regime is built".[38] Section 21 agreements, or contracting out agreements, are entered into at the beginning of or during a relationship and govern how property will be divided in the event the parties separate.

2 Section 21A

Section 21A provides that partners "may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make any agreement they think fit with respect to the status, ownership, and division of that property". Agreements under s 21A, namely settlement agreements, are made after separation in order to divide relationship property as an alternative to going to court.

3 Section 21D

The subject matter that contracting out agreements may deal with is prescribed in s 21D. This section provides that by agreement, any property can be deemed relationship property, or any share of the property declared separate property.

C Issues when entering into relationship property agreements

1 Inherent pressured nature of agreements

Relationship property agreements, by their nature, have some inherent pressure attached to them. As noted by the Court of Appeal in *Harrison v Harrison*:[39]

> In the case of a contracting out agreement…the very purpose of the parties is to make provision which differs from the statutory regime.
>
> …
>
> [90] It will almost always be the more affluent party who wants a contracting out agreement and it will often be the case that the other party only signs the agreement given the implications for the relationship if he or she declines to do so.

The Court commented that the parties were in general free to agree to quite different arrangements than those under the PRA.[40] The fairness and reasonableness of the agreement should therefore not be measured against

38 *De Malmanche v De Malmanche* (2002) 22 FRNZ 145 (HC) at [98].
39 *Harrison v Harrison* [2005] 2 NZLR 349 (CA) at [81].
40 At [112].

the outcome if the PRA applied.[41] It was not unfair pressure if the party that wanted the agreement said that he or she would terminate the relationship if the other party did not sign the agreement.[42]

Understandably, there is some pressure to sign an agreement in many situations. Autonomy should be encouraged and respected by law if it is not causing harm and if both parties are able to rationally think through the consequences of such an agreement and come to their own conclusions as to whether they wish to sign it or not. This article is not concerned with the situation where a party wishes to overturn a contracting out agreement simply because it achieves a less favourable result than the PRA. This article is concerned with relationship property agreements that have been made where the vulnerable partner suffers from financial abuse (or some other form of abuse) from the other partner, and because of such abuse, does not feel like they have the ability to make an independent, voluntary and informed decision regarding the agreement.

2 *Lived experiences of relationship property agreements*

A recent study of the experiences of separated people in New Zealand demonstrated some of the issues that arise for people entering into relationship property agreements.[43] The survey found some participants had a strong desire to leave the relationship and knew the split of the property was not even or fair, but accepted it to step out of the conflict.[44] There were acknowledgements of simply "giving up".[45] The following are quotes from participants in the survey, where nearly all were women:[46]

i) "Just wanted to get out and away ASAP."

ii) "I gave up the arguing. I didn't receive any chattels or compensation for them even though I was still paying them off."

iii) "I gave him a bit more to make him shut the fuck up."

The survey also found that some participants experienced a lack of choice in

41 At [93].

42 At [84].

43 Megan Gollop and others "Relationship Property Division in New Zealand: The Experiences of Separated People" (Descriptive Research Report, University of Otago, October 2021).

44 At 135.

45 At 135.

46 At 135.

property division settlement, often due to coercion or feelings of pressure, threat and manipulation from their ex-partners:[47]

i) "He manipulated and blackmailed me until I gave up the money. Also, it became too expensive to continue."

ii) "It was not divided equally because I was forced by the lawyers who wanted to be paid quickly to sign a final agreement which ended the court procedure. It was not fair, but I had to sign it otherwise lawyers were threatening to ask me [for] more money. I could pay until I die."

iii) "Due to the volatile nature of our relationship and the power and control my ex had over the situation."

The Law Commission recently examined why people enter into agreements to opt out of the PRA.[48] Positive reasons included that the agreements seemed fair or made the couple happy.[49] However, more problematic reasons were apparent, such as people not being aware of their property rights, or legal advice being unaffordable or seeming out of reach.[50] Most individuals entering into contracting out agreements during or after a relationship were in their second or subsequent relationship.[51] Understandably, people who entered agreements wished to protect their assets or provide some certainty around what was separate property versus relationship property.[52]

The Commission found that high-net-worth individuals were more likely to enter into agreements than those with fewer assets.[53] High net-worth individuals are not stereotypically perceived as being vulnerable to IPV and financial abuse, which aids in creating a pattern of harm that is invisible. Agreements were a difficult subject to discuss in most relationships, as talking about potential or realised separation and protection of financial interests were not considered easy or natural conversations.[54] Emerging from the research is that discussion of finances is often seen as a taboo topic, and the stigma surrounding financial abuse further perpetuates the silence around it.

47 At 136.
48 Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at 719.
49 At 720.
50 At 720.
51 At 720.
52 At 720.
53 At 720.
54 At 720.

Interdisciplinary researcher Ayesha Scott explores the impact of financial and economic abuse in intimate partnerships.[55] Overall Scott's research indicates that silence increases women's vulnerability and creates a largely invisible problem in New Zealand. Complex financial institutions, costly legal processes and lack of education also perpetuate this.[56] Scott's research and interviews discuss lived experiences. This included an example of a victim who was influenced to sign a relationship property agreement in circumstances where she wanted to have a child and her partner said he would be willing to reverse a vasectomy if she signed the agreement.[57] He was a lawyer and drafted the agreement. She was advised against signing the agreement, but ultimately decided to enter into it. This situation shows how a contracting out agreement can be used as leverage against the vulnerable party. It also illustrates a situation where the current law is illequipped to provide the vulnerable party with a remedy, as this situation is unlikely to meet the standard of duress required to set aside the agreement.

Financial abuse linked to relationship property agreements can occur during a relationship, when a couple is entering into a contracting out agreement, or post-separation, when the parties are dividing their relationship property, either through a settlement agreement or litigation.

D Post-separation financial abuse

Further, Scott argues that "post-separation financial violence appears to sit comfortably in a 'business as usual' judicial setting, as seemingly benign methods of household money management exacerbate unequal power dynamics".[58] This form of financial violence may occur after a couple split in the form of a relationship property agreement. Due to the difficult nature of any separation, manipulation during the relationship breakdown and post-separation (for example in the process of dividing assets) is more likely to go

55 Ayesha Scott "Legal system perpetrates financial abuse" (5 November 2019) AUT <www.news.aut.ac.nz>.

56 Scott, above n 55.

57 Scott, above n 5. Scott's work also touches on aspects of abuse that are outside the scope of this article but important to recognise, such as complicating financial set ups to further isolate the victim from having financial independence and control, for example through the use of trusts to add a layer of complexity to someone who lacks legal or financial education. Other stories in Scott's work highlight the dangers of trying to leave an abusive relationship and the need for the Family Court to recognise what different forms of abuse can look like.

58 Scott, above n 5, at 28.

unnoticed.[59] Scott's work also explains that it is "logical that finances are used to entrap women" considering the complexity of power dynamics in intimate partnerships and how financial resources can shape individuals' lives.[60] Scott's work adds to a line of feminist research that critiques the social, cultural, societal and institutional norms that enable violence against women.[61]

The adversarial nature of the legal system can also benefit perpetrators of abuse. It is common for perpetrators of financial abuse to engage in lengthy litigation with their expartner.[62] Vivienne Elizabeth used the term "paper abuse" to describe how coercive control is maintained through court processes,[63] or: [64]

> …the use of legal and other bureaucratic procedures by coercively controlling partners to continue to attack, harass and control their former partners through "exerting power over them by forcing them to have contact, and financially burdening them with the costs associated with litigation".

The law and legal proceedings may seem expensive and incomprehensible to an abused person, which can perpetuate IPV.

IV MITIGATING POTENTIAL POWER IMBALANCES AND FINANCIAL ABUSE

The ability for parties to enter into any agreement they think fit regarding their relationship property means the contracting out provisions of the PRA can be used as a form of financial abuse. The PRA recognises this and includes procedural safeguards in s 21F to try to mitigate that risk. A court also has the power under s 21J to overturn relationship property agreements where it considers giving effect to the agreement would cause serious injustice. This section of the paper discusses the laws in place to mitigate the potential for abuse, particularly where there is a power imbalance between the partners.

59 At 28.
60 At 28.
61 At 28.
62 At 28.
63 Vivienne Elizabeth "From Domestic Violence to Coercive Control: Towards the Recognition of Oppressive Intimacy in the Family Court" (2015) 30 New Zealand Sociology 26, as cited in Henaghan and Reynolds, above n 1, at 304.
64 Vivienne Elizabeth "Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation" (2017) 25 FLS 185 at 187, citing Susan L Miller and Nicole L Smolter "'Paper abuse": When all else fails, batterers use procedural stalking" (2011) 17(5) Violence Against Women 637 at 637–650.

A Procedural safeguards — s 21F

Section 21F of the PRA contains procedural requirements in order for agreements to be legally binding, which act as safeguards against abuse. The agreement must be in writing and signed by both parties and their lawyers. Both parties must receive independent legal advice. Each of their lawyers must certify that they have explained the effects and implications of the agreement to their client.

Because avoiding the statutory regime requires a conscious decision, s 21F is in place to ensure as best as possible that each partner's choice is voluntary and fully informed.[65] Failure to comply with the terms in s 21F deems the agreement void unless the court is satisfied that noncompliance has not materially prejudiced the interests of any party to the agreement.[66]

When the PRA was amended in 2001, there was debate about whether the requirement for independent legal advice was too costly.[67] However, the Government and Administration Select Committee considered that it would ultimately cost more to go without it, as it could lead to more agreements being challenged through the courts.[68]

The courts have considered what constitutes adequate legal advice on several occasions.[69] In *Coxhead v Coxhead*, the wife had successfully overturned a s 21A agreement in the High Court on the basis that she did not receive proper legal advice.[70] She had rushed into signing the agreement. Her lawyer advised that the timing did not allow for proper consideration of the agreement and the extent of her rights to her husband's property. The agreement provided for a relatively large disparity between what the wife would have received under the PRA and what she was to receive under the agreement. Despite this, the wife signed the agreement. She later argued it was void as she had received inadequate legal advice.[71] The Court of Appeal found the advice given was adequate but set the agreement aside on the basis that it would be unjust to give effect to it. This was because the wife would have received only slightly

65 Peart, above n 28, at [PR21F.01].
66 At [PR21F.01].
67 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 2000 (109-3) (select committee report) at 24–25.
68 Law Commission *Part J – Can partners make their own agreement about property? Chapter 30 – Contracting out of the PRA* (IP41 Part J, 2020) at 736.
69 At 711.
70 *Coxhead v Coxhead* [1993] 2 NZLR 397 (CA).
71 At 404.

more than 25 per cent of the parties' relationship property, the lawyer had inadequate information available to him at the time, and the wife was under pressure to sign, which meant she was "not able to consider her position in an informed and dispassionate manner".[72]

While the requirement for independent legal advice provides some protection by ensuring both parties are informed of their rights, partners who are subjected to financial abuse may still enter an agreement that is not in their best interests. Accordingly, s 21F alone may not be enough to protect against relationship property agreements being used in situations of financial abuse.

B Setting aside agreements

There are options available for parties to set aside agreements on the ground of "serious injustice". Further, the procedural requirements in s 21F do not affect any rule of law or equity that makes a contract void, voidable or unenforceable on any other ground.[73] Accordingly, there are several common law claims that can be used to set agreements aside. This section of the article discusses the doctrines of duress, undue influence and unconscionable bargain, including reference to the Australian jurisprudence.

1 Serious injustice

A court may set aside an agreement under s 21J if satisfied that giving effect to the agreement would cause serious injustice. In *Wood v Wood*, the High Court held that there must be solid grounds for intervention into relationship property agreements and commented that it "is a serious matter to cast aside a formal agreement upon the strength of which people have entered relationships and ordered their lives".[74] The High Court recognised that contractual certainty and party autonomy were important values to be upheld. However, there are numerous factors for the court to have regard to, including whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made or has become so due to changes in circumstances. There is no reference to potential financial abuse or patterns of harm. However, the court must have regard to "any other matters that the court considers relevant".[75]

72 At 404–405.
73 Property (Relationships) Act, s 21G.
74 *Wood v Wood* [1998] 3 NZLR 234 (HC) at 242.
75 Property (Relationships) Act, s 21J(4)(f).

The High Court recently set aside a contracting out agreement under s 21J in a situation involving allegations of abuse. In *White v Kay*, Ms Kay claimed that Mr White was physically and psychologically abusive.[76] The contracting out agreement provided that Mr White was to receive all the parties' relationship property following a relationship of 28 years. The Court set aside the agreement under s 21J on the basis that it was seriously unjust, referring to the length of the relationship, the parties' roles in the relationship and the power imbalance.[77] The parties met when Ms Kay was 22 and she gave up her job one year later.[78] Mr White's age at the time was not made clear but he had previous relationships and a child, whereas it was Ms White's first serious relationship.[79] Ms Kay's evidence was that "Mr White was physically and psychologically abusive to her throughout the relationship … she felt like a slave and was totally controlled by him".[80]

This case did not discuss the alleged abuse in detail, potentially as it had not been proven and the Judge did not need to make a finding on this to set aside the agreement.

It seems this case was only analysed on the surface of what would be a "serious injustice". Analysis of potential financial abuse, coercive control, or patterns of harm is lacking. This may because in this case, abuse had only been alleged and not proven. It may also be because such considerations are not specifically listed as factors under s 21J or because these issues were not pleaded. Further, where agreements are looked at in isolation at the time of signing, it may lead to insufficient consideration of the underlying dynamics of the parties' relationship.

2 Duress

An agreement will be voidable where there is duress. Economic duress involves an improper threat or pressure, such that a victim's will is overborne, and they cannot exercise free will or judgment. As a result, they enter into the agreement as they had no reasonable alternative.[81] This makes the agreement voidable, provided the victim has not otherwise affirmed the agreement.[82] These

76 *White v Kay* [2017] NZHC 1643, [2017] NZFLR 592.
77 At [80].
78 At [6] and [8].
79 At [6].
80 At [15].
81 *Pharmacy Care Systems Ltd v Attorney General* (2004) 2 NZCCLR 187 (CA) at [98].
82 At [98].

circumstances of duress may be present in the instance of financial abuse, but it is a difficult standard to establish.[83] There is a two-stage test to establish duress, being the presence of illegitimate pressure and the victim being compelled to enter the contract as a result of that pressure.[84]

In *Starr v O'Meehan*, the appellant sought to set aside a s 21 agreement on the ground of duress.[85] She contended that the Family Court made incorrect assumptions about abusive relationships, including that a victim can leave a violent relationship.[86] The High Court acknowledged that "physical and psychological abuse of the appellant is a factor that may be significant in determining whether there has been duress or undue influence" and "other factors may also be significant".[87] But the High Court found that the Family Court had not erred in upholding the agreement:[88]

> [47] The Judge accepted that the appellant was under significant pressure to sign the agreement but this was within the bounds contemplated by the legislation as recognised by the Court of Appeal in *Harrison v Harrison*.

JCF v DWG is an example where duress was found, despite the applicant not relying on this claim and instead applying to set aside the agreement under s 21J.[89] The judge discussed the following points as support for duress being made out:[90]

> … the applicant was very anxious to be able to purchase a new house and that she needed the $100,000 in order to be able to conclude that purchase. The flat she was living in was very small and damp. There were gang members and dope smokers next door and she felt her children were at risk. They did not want to come and stay there with her. She said she was getting threats from the respondent.
>
> …
>
> … it is clear that the applicant felt under a lot of pressure and part of that

83 David Neild "Using duress, undue influence and unconscionable bargain to set aside relationship property agreements" (2014) 8 NZFLJ 10 at 10.
84 *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [20].
85 *Starr v O'Meehan* [2017] NZHC 1889.
86 At [18].
87 At [25].
88 At [47] (footnotes omitted).
89 *JCF v DWG* [2012] NZFC 5854.
90 At [220] and [222].

> pressure was the respondent's attitude to her and her claim. That was the result of a campaign of psychological abuse over the previous 24 years.

This decision shows that duress can be made out even where refusing to sign a relationship property agreement would not necessarily result in violence or abuse. However, courts can instead set the agreement aside on the broader ground of serious injustice under s 21J of the PRA. Duress—as a contractual claim—gives rise to a greater range of remedies, including damages, which are not available under the PRA. The PRA only enables the use of contractual remedies available to enforce contracts.[91] Applying under s 21J is a procedurally easier option, as this can be done with an application to divide relationship property and is easier to plead than a claim for duress.

3 Undue influence

It is also possible to rely on undue influence as a means of setting aside an agreement. Undue influence involves one person taking advantage of a position of power over the other, namely "the exercise of pressure, directly or indirectly, by the stronger party on the weaker party to enter into the impugned transaction".[92] It has a slightly lower standard than duress.

A party can prove actual undue influence or presumed undue influence. The latter requires a relationship that gives rise to a presumption of trust and confidence, as well as a transaction calling for explanation in the light of that relationship.[93] Once these are established, "the evidential onus shifts to the defendant to demonstrate the absence of undue influence".[94]

The High Court has commented that a de facto relationship is one in which trust and confidence should be inherent and a partner could be vulnerable to undue influence.[95] However, whether there is undue influence will depend on the circumstances of the agreement.

In *Marston v Moor*, a claim for undue influence (as well as duress and unconscionable bargain) was unsuccessful where there was alleged psychological abuse. The High Court had to consider whether the relationship was "as Dr

91 Property (Relationships) Act, s 21L.

92 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA) at [70], as cited in *Marston v Moor* [2013] NZHC 2249 at [27].

93 *Marston v Moor*, above n 92, at [29].

94 *Attorney-General for England and Wales v R*, above n 92, at [72], as cited in *Marston v Moor*, above n 92, at [29].

95 *Marston v Moor*, above n 92, at [32].

Moor contends, a relationship of complete equals? Or was it, as Ms Marston contends, one in which he dominated her and exploited her vulnerability?"[96] Ms Marston filed evidence from a psychologist that there were events during the relationship that amounted to psychological abuse. However, Keane J was reluctant to rely on this evidence as it "relies largely on Ms Marston's own account".[97] His Honour also commented that:[98]

> … while I do accept and take into account that Ms Marston's decision to terminate her pregnancy and to be rendered sterile is a decision she has regretted ever since, and I accept that Dr Moor's infidelity to her must have been extremely distressing, the question remains what effect that could have had in 1998. To my mind it is implausible to suppose that these sources of distress would continue to have affected her so adversely then. It is even more implausible to suppose that they, and any other more general sources of stress for which Dr Moor is answerable on the evidence, could have accounted for the decisions that she made in the years after.
>
> [120] In short, I do not find that the psychological evidence called for Ms Marston assists her. I find that despite the evident difficulties she and Dr Moor experienced, she did enter into the 1998 agreement, however reluctantly, because she wanted to secure their relationship; and that their relationship remained important to her until they separated in 2009.

This case demonstrates the difficulty in setting aside an agreement based on duress, undue influence or unconscionable bargain, even in circumstances of potential abuse. It is potentially troubling that Keane J found Ms Marston's reaction to distressing events "implausible", though it appears this is because his Honour preferred the expert evidence Dr Moor had filed.[99]

In *Hewett v First Plus Financial Group Plc*, the England and Wales Court of Appeal held that hiding an affair breached the relationship of trust and confidence and was satisfactory to establish a finding of undue influence.[100] Importantly, this was because the husband convinced the wife to agree to mortgage their family home as security for his separate debts. This had led to

96 At [5].
97 At [115].
98 At [119]–[120].
99 At [115], referring to evidence of Dr Blackwell.
100 *Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312 at [30]–[33].

a company, First Plus Financial Group Plc, seeking an order for possession of their home. The Court found that the wife:[101]

> … reposed a sufficient degree of trust and confidence in her husband to give rise to … an obligation of candour and fairness owed to her … [and] [the] purpose of an obligation of candour is that the wife should be able to make an informed decision (with or without the benefit of independent advice) properly and fairly appraised of the relevant circumstances.

Hewett has not been discussed in New Zealand cases, potentially due to the relatively rare facts involved.

4 Unconscionable bargain

The doctrine of unconscionable bargain is of a more limited use, as it requires the vulnerable party to be under a disability. This means it would not assist in a case of financial abuse and IPV where the vulnerable party was not also disabled.

5 Australian jurisdiction

There is more Australian case law on duress and undue influence in the context of relationship property agreements. Section 90K(1)(b) of Australia's Family Law Act 1975 (Cth) gives courts the power to set aside a financial agreement that is "void, voidable or unenforceable". Equitable relief can be used to set aside agreements, including remedies such as estoppel, undue influence, duress, unconscionability and mistake.[102]

Financial abuse as a form of undue influence was successfully argued in *Raleigh & Raleigh*.[103] Watt J found the husband was in a controlling position financially and put extreme pressure on his wife to sign the agreement.[104] The wife was pregnant and in a weak financial position. She would have signed the agreement no matter what advice her lawyer gave her. While a romantic relationship is a presumed relationship of influence, the facts met a claim of undue influence as the wife was in a compromised position due to the disparity in financial positions. She was vulnerable to the extent that her

101 At [29].
102 Simon Marks and Jamie Burreket "Setting Aside a Financial Agreement in Equity" (Seminar paper, October 2016) at [3.6].
103 *Raleigh & Raleigh* [2015] FamCA 625.
104 At [170]–[172].

capacity to protect her interests was affected. Her husband knew this and took advantage of it.

In contrast, a similar claim failed in *Saintclaire v Saintclaire*.[105] While the wife succeeded in setting aside an agreement in the first instance, on appeal the Court found her claim fell short of establishing undue influence and unconscionable bargain.[106] Commentary on this case suggests that the evidence to support the wife's claim was lacking, for example the lack of medical evidence regarding the wife's mental state and that "there was no attempt to create any connection between recent historical events like the domestic violence and postnatal depression and the execution of the financial agreement".[107]

In *Parkes v Parkes* the wife applied to have the couple's financial agreement set aside, relying on the grounds of duress or undue influence.[108] The wife claimed that the time leading up to their wedding was "hectic" and, despite her lawyer advising her against signing the agreement, she signed anyway due to the pressured nature of her situation.[109] The wife's parents had paid for the wedding reception and the husband threatened to cancel it if the agreement was not signed. These events took place three days ahead of the wedding, after a relationship of six years and an engagement of 11 months.[110] The husband drove the wife to her appointment with a lawyer to sign the agreement, waiting outside while this took place.[111] The wife claimed his mother went with them, but the husband denied this.

The Federal Circuit Court of Australia effectively acknowledged the emotional and economical reliance one partner can have on another and held that the wife was in a position of "special disadvantage".[112] The Court drew an inference that, due to the "late production of a completed and signed agreement … he wanted to give the wife no choice and he knew that if it was presented to her days away from the wedding she would have no choice".[113] This meant that the threatened wedding cancellation subjected the wife to duress.[114]

105 *Saintclaire v Saintclaire* [2015] FamCAFC 245.
106 Marks and Burreket, above n 102, at [5.5.5].
107 Marks and Burreket, above n 102, at [5.5.6].
108 *Parkes v Parkes* [2014] FCCA 102, at [46].
109 At [53]–[56].
110 At [67].
111 At [56]
112 At [67].
113 At [69].
114 At [68]–[70].

The Australian cases show reasoning and insight at a slightly deeper level than New Zealand case law. They indicate how New Zealand case law could be developed to provide more just outcomes for partners suffering from financial abuse, particularly where relationship property agreements are used to further the abuse.

V POTENTIAL FOR DEVELOPMENT IN THIS AREA

This section discusses where there is potential for development and improvement in this area. Namely, in relation to the role of lawyers, potential legislative change, development of case law and through better access to justice.

A Lawyers' role

Greater consideration of the role of lawyers advising on ss 21 and 21A agreements could assist in dealing with financial abuse. A lawyer's role, in relation to these agreements, is to provide their client with independent legal advice on the effects and implications of the agreement. They can assist their client by negotiating the terms of the agreement, but they are ultimately bound to act on their client's instructions. They can advise a client against signing but will ultimately need to certify the agreement if the client chooses to enter into it.

However, lawyers can help to emphasise that their clients should not rush into agreements. They can raise concerns with clients where they see signs of financial abuse and discuss options such as obtaining a protection order or refer the client to family violence support services. Lawyers could undertake training to recognise signs of coercive control or financial abuse. It would be helpful for lawyers to ask comprehensive questions about the relationship and take detailed file notes about the circumstances of the relationship. This would assist in spotting potential abuse and also be useful in the event the lawyer was called to give evidence in relation to a claim to overturn an agreement.

B Legislative change

The language of the PRA could address financial abuse more specifically. Section 21J refers to "any other relevant factors". Coercive control, power dynamics and cultural norms can all be factors in a party choosing to sign an agreement that is not in their interests. The factors relevant to the test of serious injustice could include coercive control or financial abuse. The Law Commission recently considered whether family violence should be addressed in relationship property legislation, insofar as whether it should have a bearing

on the division of relationship property.[115] It recommended that the Government should consider the relevance of family violence to the division of relationship property in the context of its wider response to family violence, rather than making provision for it in largely unrelated legislation.[116] However, including financial or other abuse as a factor relevant to setting aside an agreement does not go as far as making the courts consider the existence of family violence as a relevant factor that impacts the division of relationship property. While courts may take financial abuse into account under s 21J under the catchall provision of "any other relevant factors", express inclusion would ensure this is taken into account where relevant.

C Development of case law

Further analysis of financial abuse in case law would help to shed more light on an issue that is underrecognised. The Australian case law includes a more comprehensive analysis of financial abuse in the context of setting aside agreements. This demonstrates how New Zealand case law could develop, with judges having a more nuanced understanding of the elements financial abuse and how relationship property agreements can perpetuate this abuse.

Further, expert evidence relating to financial abuse could assist in developing the case law. Academics have argued for the need for family violence experts in the criminal court.[117] Family violence experts would also be helpful in proceedings to overturn agreements. However, judges having a thorough understanding of financial abuse would assist when parties do not file expert evidence. Obtaining expert evidence can be expensive and it is not desirable that a victim of financial abuse should have to fund this in order to demonstrate abuse. Alternatively, courts could use s 38 of the PRA to direct that an expert report be filed and that the cost of this be met by the abuser or from public funds.

D Access to justice

Providing better access to justice would also help to improve outcomes for victims of financial abuse. The cost and time to bring court proceedings to set aside agreements will often mean many do not go ahead with this. This

115 Law Commission, above n 27.

116 At 214.

117 Mark Henaghan, Jacqueline Short and Pauline Gulliver "Family violence experts in the criminal court: the need to fill the void" [2021] Psychiatry, Psychology and Law 1.

reduces the strength of this mechanism to act as a remedy for financial abuse. More public education about relationship property laws would also promote access to justice. It would assist parties at the outset of relationships and when entering into relationship property agreements. The Law Commission has recognised the need for greater public awareness of and education about the PRA.[118] The Commission's recommendations included the following options:[119]

i) A public education campaign.

ii) Education in secondary school programmes and for professionals such as financial planners, business advisers and chartered accountants.

iii) Providing of information at different points of interaction with government departments, such as when applying for a marriage or civil union licence, when applying for state benefits or Working for Families Tax Credits and when applying for New Zealand residency.

iv) Introducing requirements on registered professionals or organisations such as real estate agents and banks to provide some form of prescribed information to clients when buying or selling property, applying for credit or opening joint bank accounts.

v) Producing and providing information online, in Family Courts around New Zealand and to community organisations such as Citizens Advice Bureau and Community Law Centres.

Support systems for people in vulnerable positions are crucial to ensure that they have the help and resources necessary to leave abusive relationships. Leaving the abusive relationship will be the difficult first step before the person even goes on to consider challenging a relationship property agreement. Family violence services such as Shine and Women's Refuge provide practical support, which would seem to go further in helping victims of financial abuse than some of the purely legal avenues for change discussed above.

These practical solutions would go a long way in helping people to understand the law in this area, so they are aware of what their rights may be. This may make people less susceptible to financial abuse. It would also make it easier for people to seek help if they are already suffering from financial abuse.

118 Law Commission, above n 27, at 69.

119 At [2.72](a)–(e)

Someone who is stuck with an unfavourable relationship property agreement would not try to challenge it if they were unaware that it was unfavourable.

VI CONCLUSION

There is tension between ensuring relationship property agreements provide certainty to the parties that choose to enter into them, and ensuring that relationship property agreements protect vulnerable parties. The law needs to strike a balance between these competing concerns. There are procedural safeguards to ensure that parties are aware of their legal position, but these may not fully protect victims of financial abuse. There are options available to apply to set aside agreements, but many people would face an uphill battle in order to do so. They would need to convince a court that the agreement should be set aside and take on the significant burden that is the time, cost and stress associated with litigation.

There are some areas where change can be made, with the most effective mechanisms being greater awareness, education and support for those who have been subjected to financial abuse. There is also potential for case law to be developed. Patterns of coercive control and financial abuse can be better identified and analysed so that courts can ensure that a just outcome is achieved.

SPEAKING ILL OF THE DEAD WHEN "EROTIC ASPHYXIATION GOES WRONG": NEW ZEALAND'S NEED FOR A CONSISTENT APPROACH TO SEXUAL HISTORY EVIDENCE FOR FATAL AND NON-FATAL SEXUAL CASES

Nadia Murray-Ragg*

Sexual history evidence with respect to deceased victims of sexualised killings is admissible in New Zealand. Arguing the death occurred during consensual "erotic asphyxiation gone wrong" is a popular defence strategy which emphasises the deceased's sexual history. Section 7 of the Evidence Act 2006 provides that evidence is only admissible when, in logical terms, it tends to prove or disprove a material issue. However, it is logical that a woman can have previously consented to erotic asphyxiation, and not have consented to erotic asphyxiation in a later sexual experience. There are good reasons to doubt whether consensual sexual history is ever relevant, both when the victim is deceased, and when the complainant is living. This article analyses why having different rules for the admissibility of sexual history evidence in fatal and non-fatal sexual cases is harmful, using Grace Millane's case as an example. Drawing on submissions made in the Peter Ellis appeal, this article argues for a consistent approach to the admissibility of sexual history evidence whether the victim is deceased, or the complainant is living. This article suggests that the current evidence admissibility rules can exclude sexual history evidence if applied consistently with the modern definition of consent. However, influenced by gendered stereotypes and rape myths, courts are finding that the deceased's sexual history evidence is relevant. This precedent is unlikely to be expeditiously changed. Therefore, this article recommends that Parliament amend the Evidence Act to exclude sexual history evidence with respect to deceased victims of femicide.

* Nadia submitted her article for the Bachelor of Laws with Honours degree at Victoria University of Wellington in 2021. Nadia is grateful to her research supervisor, Dr Zoë Prebble, for her helpful feedback on drafts and support throughout the year.

I INTRODUCTION

Imagine the following scenario: it is a murder trial for the sexualised killing of a woman, known as femicide.[1] The defence present evidence showing the deceased previously consented to a sexual partner restricting her breath for her sexual pleasure, known as erotic asphyxiation.[2] As a result, the jury finds her accused killer not guilty. It might appear a significant logical leap to move from evidence of consent to erotic asphyxiation on previous occasions to the conclusion that the deceased consented on the occasion she was killed. However, such evidence is admissible and defence strategies that emphasise the deceased's sexual history are often effective.[3]

Sexual history evidence purports to give credibility to the defence's "erotic asphyxiation gone wrong" (EAGW) narrative or strategy. The EAGW narrative is a subset of the broader "rough sex gone wrong" (RSGW) narrative.[4] Notably, while RSGW defence strategies are open to defendants in cases where the victim has died, in sexual violence cases with living complainants, legislation presumptively excludes evidence of complainants' sexual history.[5] This presumption recognises the irrelevance of sexual history evidence and that its high risk of unfair prejudicial effect outweighs its low probative value.

In the recent Peter Ellis appeal, the Supreme Court heard arguments on the tikanga Māori perspective that individuals' interests and mana continue after death.[6] If the Court accepts those submissions, the legal system's distinction between living and deceased appellants may become less defined. Such a precedent may influence consistent approaches to living and deceased persons in other areas of the law, including sexual history evidence. The Court has allowed the appeal to continue after Peter Ellis's death.[7]

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1 Elizabeth Yardley "The Killing of Women in 'Sex Games Gone Wrong': An Analysis of Femicides in Great Britain 2000–2018" (2021) 27(11) VAW 1840 at 1842.

2 Asphyxia is the deprivation of breath resulting from strangulation. For more detail, see Elisabeth Sheff "Kinky Sex Gone Wrong: Legal Prosecutions Concerning Consent, Age Play, and Death via BDSM" (2021) 50(3) Arch Sex Behav 761 at 765.

3 See generally Yardley, above n 1; and, for worldwide examples, see "The Women & Girls" We Can't Consent to This <www.wecantconsenttothis.uk>.

4 For a detailed analysis of rough sex narratives, see generally Ciara Connolly "Should Defendants Be Allowed to Rely on the 'Rough Sex Defence' in New Zealand Trials?" [2021] NZWLJ 123; and Julia Tolmie and others *Criminal Law in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 315–320.

5 Evidence Act 2006, s 44.

6 *Ellis v R* [2020] NZSC Trans 19 [Ellis Transcript 2020] at 28–31.

7 *Ellis v R* [2020] NZSC 89 [Interim Ellis judgment] at [4]. The Court's reasons are to be provided in the judgment to the substantive appeal which has not been released at this time of finalising this article.

There is a gap in scholarly discourse with respect to analysing the admissibility of the deceased's sexual history evidence in New Zealand femicide trials in which the defence advances the EAGW strategy. A moderate volume of research on sexual history evidence in rape trials exists in New Zealand and other jurisdictions.[8] Although some research has analysed RSGW narratives in femicide trials, it has predominantly focused on cases in England and Wales.[9] Beyond that English scholarship, there has been little academic consideration of how sexual history evidence regarding the deceased in femicide cases is, or should be, treated.[10] Within this minimal scholarship, a notable 1988 United States article proposed extending rape shield provisions to deceased persons.[11] This article speaks to this gap in the literature.

This article has six parts. Part II explains how EAGW narratives work in the context of trials. It draws on the case study of Jesse Kempson's trial for Grace Millane's murder in which the defence advanced the EAGW narrative. This case study illustrates the harm that such defence strategies can cause the deceased, her family and the wider public. Part III examines the exclusion of sexual history evidence from non-fatal sexual cases. Part IV and Part V critique the logic in admitting evidence of sexual history in EAGW femicide trials. Part VI analyses the Supreme Court's opportunity to soften the distinction between living and deceased parties to proceedings. Part VII proposes reform to New Zealand's sexual history evidence laws.

II UNDERSTANDING "EROTIC ASPHYXIATION GONE WRONG" NARRATIVES

A The burden of proof

In all criminal trials, including murder, the prosecution has the burden of

8 See for example Susan Easton "The Use of Sexual History Evidence in Rape Trials" in Mary Childs and Louise Ellison *Feminist Perspectives on Evidence* (Cavendish Publishing, London, 2000) 167; Clare McGlynn "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81(5) JCL 367; Aileen McColgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16(2) OJLS 275; and Regina A Schuller and Patricia A Hastings "Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions" (2002) 26(3) Psychol Women Q 252.

9 See for example Yardley, above n 1, at 1841; Susan SM Edwards "Consent and the 'Rough Sex' Defence in Rape, Murder, Manslaughter and Gross Negligence" (2020) 84(4) JCL 293; and Hannah Bows and Jonathan Herring "Getting Away With Murder? A Review of the 'Rough Sex Defence'" (2020) 84(6) JCL 525.

10 Bows and Herring, above n 9, at 532.

11 Joan L Brown "Blaming the Victim: The Admissibility of Sexual History in Homicides" (1988) 16(2) Fordham Urb L J 263 at 265.

proving all offence elements beyond reasonable doubt.[12] The first element is the actus reus: the defendant must have done the act that causes the death. The second element is the mens rea: the defendant must have intentionally killed the deceased, or intentionally caused them bodily harm, knowing that this harm was likely to kill them and being reckless as to whether their death ensued.[13]

The defence has no legal burden of proving, or disproving, any element of the offence. However, in practice, the defence usually presents evidence and advances a narrative about the facts and evidence. Advancing a narrative accords with the Story Model proposed by Professors Nancy Pennington and Reid Hastie in 1991.[14] According to the Story Model, jurors tend to understand evidence by constructing stories.[15] The story the jurors accept is the one that makes the evidence make the most sense to them.[16] The jury make their verdict decision according to how the story suits the verdict options.[17] The parties in the trial can influence the jurors' story construction by advancing their own narrative about how the evidence fits together.[18] Given the potential that narrative has to influence a jury, the defence may attempt to raise reasonable doubt about one or more offence elements by advancing the EAGW narrative.

B The modern definition of sexual consent

The EAGW narrative is difficult to reconcile with the modern moral and societal definition of sexual consent expressed in New Zealand legal literature.[19] Modern understandings of sexual consent reflect that the very nature of consensual sex is an activity that is in the moment. While consent education once advocated that "no means no", consent is now framed as "yes means yes".[20] This framing illustrates that consent is not presumed. Rather, when

12 Courts of New Zealand "Murder or manslaughter or self-defence (Sections 48, 167 and 171 Crimes Act 1961)" <www.courtsofnz.govt.nz>.

13 Crimes Act 1961, s 167(a)–(b).

14 Nancy Pennington and Reid Hastie "A Cognitive Theory of Juror Decision Making: The Story Model" (1991) 13 Cardozo L Rev 519.

15 At 521–523.

16 At 522–523.

17 At 530–531.

18 Richard Lempert "Telling Tales in Court: Trial Procedure and the Story Model" (1991) 13 Cardozo L Rev 559 at 561–562.

19 See for example Rosa Gavey "Affirmative Consent to 'Sex': Is It Enough?" [2019] NZWLJ 35.

20 Katie Mettler "'No means no' to 'yes means yes': How our language around sexual consent has changed" *The Washington Post* (online ed, Washington, 15 February 2018).

consent is given, it is unequivocal, enthusiastic, ongoing and reciprocal.[21] Therefore, consent is independent of previous sexual experiences. A person can give consent and withdraw consent during a single sexual experience. According to this level of nuance during a single occasion, it is even more the case that consent on a previous occasion, with a different partner, does not mean that person consented at the later date. This definition is central to critiquing the logic of finding relevance and probative value in the deceased's sexual history evidence.

New Zealand case law has not been as expressive of the modern social definition of sexual consent as legal literature. In the 2017 case of *Christian v R*, the Supreme Court did not adopt the affirmative model of consent advocated by the modern definition.[22] The legislative position is that consent requires more than an absence of protest.[23] For consistency with legal literature and feminist theory, this article uses the lens of modern social understandings of sexual consent. Further, this article encourages courts and Parliament to revisit the definition of sexual consent in the near future. It is important that the legal definition of sexual consent achieve consistency with the feministic social definition of sexual consent.

C Grace Millane and the harmfulness of sexual history evidence

The recent decision of *K v R* exemplifies the implications of the EAGW narrative.[24] In *K v R*, the Court of Appeal dismissed Jesse Kempson's appeal of his conviction and sentence for the murder of Grace Millane.[25] Kempson's trial and appeal illustrate the EAGW narrative playing out in New Zealand courts. The facts were that Millane and Kempson met for drinks arranged via Tinder,

21 See generally Eithne Dowds "Rethinking affirmative consent: A *step* in the right direction" in Rachel Killean, Eithne Dowds and Anne-Marie McAlinden (eds) *Sexual Violence on Trial: Local and Comparative Perspectives* (Routledge, New York, 2021) 162; Gavey, above n 19, at 40–41; Daniel Jackson "Six Mistakes of Law About Consent" [2020] NZWLJ 97 at 110–119; and, for how youth and Millennial culture understand consent, Sinead Gill "Calling Out Consent" *Critic Te Arohi* (online ed, Dunedin, 4 April 2019); Kim Vinnell "New Zealand rape survivors, in their own words (WATCH)" (1 May 2017) The Spinoff <www.thespinoff.co.nz>; and De Elizabeth "Enthusiastic Consent is Changing How We Have Sex" (3 April 2019) MTV <www.mtv.com>.

22 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 at [5(c)]; see also Gavey, above n 19, at 42; and see also Emily Blincoe "Yes, no or maybe? The 'odd' result in *Christian v R*" [2018] NZWLJ 265.

23 Crimes Act, s 128A(1).

24 *K v R* [2020] NZCA 656.

25 *K v R*, above n 24; and for the High Court sentencing judgment, see *R v K* [2020] NZHC 233 [Kempson sentencing judgment].

New Zealand's most popular dating application.[26] Later that evening, at Kempson's apartment, they engaged in sexual activity during which Kempson killed Millane. The cause of Millane's death was manual strangulation lasting between five and 10 minutes.[27] This strangulation left a six-by-three centimetres pre-mortem deep bruise on Millane's neck from the application of "sustained and prolonged pressure".[28] After Millane's death, Kempson viewed pornography, including content relating to slaves and teenagers, and took sexualised photographs of Millane's deceased body.[29] The following day, Kempson met with another woman he met on Tinder before burying Millane's body in a suitcase in the Waitākere Ranges.[30]

The defence attempted to raise reasonable doubt about Kempson's mens rea using the EAGW narrative. Kempson accepted the actus reus element of homicide: he killed Millane by allegedly consensual manual strangulation.[31] Kempson denied he had done so intending to kill Millane and denied he was reckless as to the possibility of her death.[32] Rather, he argued that he had intended to engage in consensual erotic asphyxiation during rough sex that went accidentally wrong.[33] Kempson claimed he lacked experience with sex involving domination and sadomasochism (BDSM) and that it was Millane who had initiated the erotic asphyxiation.[34]

The defence used Millane's sexual history, particularly her past interest in erotic asphyxiation, to add credibility to those arguments. One of Millane's previous sexual partners had a statement read about his historical sexual interactions with her.[35] A friend of Millane's, with whom she had discussed her sexual interests relating to erotic asphyxiation and submission, also had her

26 *K v R*, above n 24, at [12].
27 At [122]–[123], but see [111]–[120].
28 At [111]; and Kempson sentencing judgment, above n 25, at [52].
29 Kempson sentencing judgment, above n 25, at [65]–[67].
30 At [64] and [69]–[70].
31 *K v R*, above n 24, at [17].
32 Catrin Owen "Grace Millane murder trial: Accused didn't intend to kill backpacker, defence says" (19 November 2019) Stuff <www.stuff.co.nz>.
33 *K v R*, above n 24, at [37]; and *Kempson v R* [2021] NZSC 74 [SC leave judgment] at [10].
34 *K v R*, above n 24, at [18]–[19].
35 Edward Gay "The complete evidence in the Grace Millane murder trial: Inside the case that gripped a nation" (21 February 2020) Stuff <www.stuff.co.nz>; and see also Connolly, above n 4, at 134.

statement read.[36] In addition, the defence presented evidence about the dating websites and mobile phone applications that Millane had used. As highlighted by the media, one of these applications was Tinder.[37] Others included Fetlife, a social networking website used by people in the BDSM community, and Whiplr, a BDSM-focussed dating website.[38] The defence presented evidence detailing Millane's messages with men she had "matched" with—meaning both persons liked the other's profile, creating a private chatroom—in those applications and on those websites. The connotations of these websites and applications about users' proclivity for BDSM sexual practices purported to give credibility to the defence's narrative about Millane's sexual proclivity for erotic asphyxiation.

Unconvinced by Kempson's EAGW narrative, the jury found him guilty of murder.[39] Despite this guilty verdict, hearing Millane's sexual history evidence harmed Millane and her family. While Kempson initially benefitted from name suppression, Millane's name, with sensitive and private details of her sexual history, were detailed at length in open court and in the international media.[40] In contrast, the law would have protected Millane from such harms if she had survived the strangulation.[41] The Kempson trial and appeal provide an illuminating case study of the harmful inconsistency between the way New Zealand law treats the sexual history evidence of femicide victims as compared to complainants in non-fatal sexual violence cases.

36 Sam Hurley "Grace Millane murder trial: Sexual culture expert testifies, evidence about Whiplr sex app" *The New Zealand Herald* (online ed, Auckland, 20 November 2019); Sam Hurley "Grace Millane murder trial: Sexual preferences and accused's 'life through Tinder' canvassed" *The New Zealand Herald* (online ed, Auckland, 20 November 2019); and Sam Hurley "Grace Millane murder trial: Jury to hear Crown, defence closing arguments" *The New Zealand Herald* (online ed, Auckland, 21 November 2019).

37 See for example Amber Hicks "How Grace Millane's dream trip turned to tragedy after Tinder date with sick killer" *The Daily Mirror* (online ed, London, 22 November 2019).

38 Hurley "Grace Millane murder trial: Sexual culture expert testifies, evidence about Whiplr sex app", above n 36.

39 *K v R*, above n 24, at [37]–[38].

40 See for example Zoe Drewett "Grace Millane belonged to BDSM sites and asked ex-boyfriend to choke her, defence claims" *Metro* (online ed, London, 19 November 2019); Bernard Lagan "Grace Millane trial: backpacker liked choking during sex, says ex-lover" *The Times* (online ed, London, 20 November 2019); Lee Brown "Killed backpacker Grace Millane was into choking, BDSM: court evidence" *New York Post* (online ed, New York, 20 November 2019); Chiara Giordano "Grace Millane: British backpacker gave list of fetishes to man on BDSM website, murder trial told" (20 November 2019) The Independent <www.independent.co.uk>; and Catrin Owen "Grace Millane murder trial hears from past date and men she messaged online" (20 November 2019) Stuff <www.stuff.co.nz>.

41 Evidence Act, s 44.

D Grace Millane's case indicates greater dangers

For reasons of space, this article is tightly focussed on the treatment of sexual history evidence in femicide by strangulation cases in which a male defendant advances the EAGW narrative. However, male-against-female is not the only gender dynamic where such violence can play out. Women can perpetrate fatal and non-fatal strangulation offences.[42] Men can be fatally or non-fatally strangled. Not all femicide cases involve manual strangulation. While the broader RSGW narrative encompasses those other dynamics, this article's focus is EAGW femicide because of its statistical prevalence. In fatal strangulation incidents, women comprise the majority of victims.[43] Male perpetrators are most often convicted of perpetrating fatal strangulation.[44] In femicide cases in England and Wales, manual strangulation is a common circumstance.[45] In addition, exclusively male defendants have argued RSGW narratives to defend homicide in England and Wales.[46] The murder of Grace Millane reflects this gender dynamic and the cause of death.

Millane was a "perfect victim".[47] She was white, middle-class, tertiary-educated, photogenic and heterosexual. Part of what is striking about the example of the Kempson trial is that although Millane's access to certain privileges made her less likely to fall foul of racist and classist stereotypes,[48] the legal system still treated her harmfully. Admitting her sexual history evidence allowed for unfair and illogical inferences to be made about Millane as a person. The hearing of this evidence made it seem as if she were the person on trial.[49]

42 Crimes Act, ss 168(1)(c) and 189A.

43 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, June 2014) at 100; and in an England and Wales context, see Yardley, above n 1, at 1841.

44 Family Violence Death Review Committee, above n 43, at 100.

45 Bows and Herring, above n 9, at 526.

46 "Who Claims 'Sex Games Gone Wrong'" (3 July 2019) We Can't Consent To This <www.wecantconsent tothis.uk>.

47 For more literature on the "perfect victim" construct, see generally Elizabeth L MacDowell "Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence" (2013) 16(2) J Gender Race & Just 531; Adele M Morrison "Changing the Domestic Violence (Dis)Course: Moving From White Victim to Multi-Cultural Survivor" (2006) 39(3) UC Davis L Rev 1061; and Jan Jordan "Perfect Victims, Perfect Policing? Improving Rape Complainants' Experiences of Police Investigations" (2008) 86(3) Pub Adm 699.

48 For more literature on the impact of racist and classist stereotypes in Aotearoa's criminal justice system, see generally 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.

49 Anna North "She was fatally strangled. The media is making it about her sex life" (21 November 2019) Vox <ww.vox.com>.

This caused her family intense distress.[50] Millane's case indicates that sexual history evidence admissibility may present even greater dangers for persons disadvantaged by intersectional challenges.

III THE RAPE SHIELD: EXCLUSION OF COMPLAINANTS' SEXUAL HISTORY EVIDENCE

A The rape shield's legal effect

Section 44 of the Evidence Act 2006, known as the "rape shield", presumptively excludes complainants' sexual history with persons *other than* the defendant.[51] This presumption is rebuttable when the judge is satisfied that the evidence is of "such direct relevance to facts in issue in the proceeding … that it would be contrary to the interests of justice to exclude it".[52] When the rape shield is rebutted, defendants effectively construct narratives based on spurious background assumptions, stereotypes or myths.[53] Two of these are that sexually experienced women are "up for it" and are likely to consent to sex, and that they are likely to be untruthful when they say they did not consent.[54]

Section 44 does not exclude all of a complainants' sexual history evidence. Complainants' sexual history *with* the defendant is subject to the standard evidence admissibility rules discussed in Part IV of this article. However, the recently enacted Sexual Violence Legislation Act 2021 amends s 44 of the Evidence Act to restrict the admissibility of evidence of sexual history between the complainant and defendant in non-fatal sexual violence cases.[55] Such evidence is limited to establishing the fact that there is sexual history between

50 Ireland Hendry-Tennent "Grace Millane's family call for NZ Government to follow UK's lead and ban 'rough sex defence'" (8 July 2020) Newshub <www.newshub.co.nz>; and Charlie Jones "Grace Millane: Family welcome ban on 'rough sex' murder defence" (1 May 2021) BBC News <www.bbc.com>.

51 Law Commission *The Second Review of the Evidence Act 2006* (NZLC R142, 2019) at [3.1]–[3.2]; and Elisabeth McDonald and Yvette Tinsley "Reforming the Rules of Evidence in Cases of Sexual Offending: Thoughts from Aotearoa/New Zealand" (2011) 15(4) E&P 311 at 320.

52 Evidence Act, s 44(2).

53 For examples of specific stereotypes and myths, see Elisabeth McDonald *In the Absence of a Jury: Examining judge-alone rape trials* (Canterbury University Press, Canterbury, 2022) at 24–25; and Elisabeth McDonald *Rape myths as barriers to fair trial process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Christchurch, 2020) at 43–44.

54 Law Commission, above n 51, at [3.45]; (11 February 2021) 749 NZPD 775–776; McDonald *Rape myths as barriers to fair trial process*, above n 53, at 44; illustrating the nature of this idea in New Zealand's law, in relation to the Evidence Act 2006's predecessor, (18 August 1976) 405 NZPD 1753–1754; and see generally Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act & Analysis* (4th ed, Thomson Reuters, Wellington, 2018) at 362–363.

55 Sexual Violence Legislation Act 2021, s 8.

the complainant and the defendant,[56] or to proving an act or omission that is an offence element or, in a civil proceeding, the cause of action.[57] At the first reading of the Sexual Violence Legislation Bill, Jan Logie MP explained that the reform provides for sexual cases to be tried on their facts and evidence instead of "myths and stereotypes" that dispirit and confuse complainants.[58] Although the kaupapa of the Sexual Violence Legislation Act is commendable, further law reform with respect to deceased victims of sexual violence is necessary.

B Preventing illogical leaps in reasoning

The rape shield reflects that on any given occasion, the factual question of whether a person either does or does not consent to a sexual experience is logically independent of whether, on past or future occasions, he or she did or did not consent to other sexual experiences.[59] In turn, the rape shield reflects modern understandings of consent by shifting the focus from previous sexual activity to ongoing, reciprocal and enthusiastic consent for each sexual act.[60] Hon Andrew Little MP emphasised this understanding of consent at the first reading of the Sexual Violence Legislation Bill. According to Little, the presumptive inadmissibility of complainants' sexual history reinforces that it is too much of a logical leap to infer the complainant consented to the sexual activity at issue from their sexual history.[61] Such concerns led to Parliament enacting s 44 of the Evidence Act. As argued throughout this article, an equivalent provision for fatal sexual violence would be a logical provision.

C Conviction and sentencing outcomes

Further, case law from England and Wales illustrates that sexual history evidence presented as part of a RSGW defence narrative can affect the outcome of a sexual assault trial.[62] The hearing of sexual history evidence can result in the defendant receiving a lesser charge and sentence than they would have

56 Evidence Act, s 44(1)(a)(i).

57 Section 44(1)(a)(ii).

58 Sexual Violence Legislation Bill 2019 (185-1); and (14 November 2019) 742 NZPD 15140.

59 McGlynn, above n 8, at 369–370; Bridget Alice Foster Sinclair "New Zealand Rape Shield and the Need for Law Reform to Address Substantial Harm: When Politics and the Law Must Address Social Injury" (LLB(Hons) Dissertation, Victoria University of Wellington, 2016) at 18; and McDonald and Optican, above n 54, at 361.

60 Sinclair, above n 59, at 4–5; and McDonald and Optican, above n 54, at 361.

61 (14 November 2019) 742 NZPD 15136; and see in relation to the Evidence Act 2006's predecessor, (18 August 1976) 405 NZPD 1753–1754.

62 In relation to England and Wales, see for example Easton, above n 8, at 173.

otherwise received, or no conviction at all.[63] These conviction and sentencing outcomes justified the enactment of the rape shield.[64]

IV FEMICIDE: NO EVIDENCE SHIELD

"[W]hen people play consensually, they do not die."[65]

A The evidence shield discrepancy

New Zealand does not have a sexual history evidence shield provision for the deceased in femicide cases. Parliament does not appear to have an impetus to enact such a provision. The new rules that the Sexual Violence Legislation Act creates for admitting sexual history evidence continue to separate deceased victims from living complainants.

This discrepancy between the treatment of sexual history evidence in sexual violence trials with living complainants, and in femicide trials with deceased victims, raises the question: why? Do principled differences justify the discrepancy between those two crimes? Both crimes are sexual cases by definition.[66] A material issue in both murder and non-fatal sexual violence cases is whether the defendant acted with the requisite mens rea. Although the mens rea in the different crimes pertains to intention or recklessness to do different acts, both concern an intention to harm the alleged victim. The difference between the outcomes is that with rape, the complainant survives the violence inflicted upon them, and with femicide, the deceased does not survive the violent interaction. This article argues that those differences in outcome are not significant enough in principle to justify the different admissibility approaches to sexual history evidence between the respective crimes. Reflecting this argument, three submissions to the Justice Committee on the Sexual Violence Legislation Bill recommended that Parliament enact a consistent approach to sexual history evidence admissibility.[67] Those submissions recommended

63 Bows and Herring, above n 9, at 527; and Elisabeth McDonald "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 Crim LJ 321 at 322.

64 McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 322–323.

65 Franki Cookney "The 'rough sex' defence was a gross perversion of BDSM, I'm delighted it's finally been banned" (17 June 2020) The Independent <www.independent.co.uk>.

66 Nikki Pender "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at [7].

67 Pender, above n 66, at [6]–[11]; Office of the Privacy Commissioner "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at [5]–[14]; and Ruth Money "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at 4.

extending the rape shield to murder cases[68] such as the Kempson trial.[69]

B Conviction and sentencing outcomes

The inconsistent approach to sexual history evidence for deceased and living victims is concerning given similar outcomes with respect to favourable convictions and sentencing can arise in femicide. In RSGW femicide cases in England and Wales, the deceased's sexual history evidence to has led to convictions for lesser included offences such as manslaughter and favourable sentencing.[70]

The Story Model offers an explanation for these trial outcomes. By definition, in advancing the EAGW narrative, the defence aims to latch onto gendered myths, stereotypes and biases reposed by the jurors.[71] The Kempson trial illustrates the gendered myths the defence's EAGW argument relied on. If the defence had persuaded the jury that Millane consented to erotic asphyxiation in the past and that she enjoyed being dominated during sex, the jury could have extrapolated conclusions. Namely, that she was more likely to have consented, or in fact did consent, to the manual strangulation during the interaction at issue. Understanding sexual consent as the "yes means yes" modern definition is inconsistent with that belief. Judges have discretion to issue a judicial direction to the jury to control these inferences.[72] However, this practice is insufficient given the variance between trials as to whether, and if so, to what extent, directions are provided. When the judge does not provide such a direction, according to Professor Elisabeth McDonald, "sexual history evidence allows juries to make verdict choices based on rape myths".[73] If the jury had accepted Millane's alleged sexual proclivity, then the defence narrative that Kempson only intended to engage in consensual erotic asphyxiation, and had no intention to hurt or kill Millane, would have been likely to strike the jury as more credible. To jurors, this conclusion would have suited the verdict

68 Office of the Privacy Commissioner, above n 67, at [10]–[14]; and Money, above n 67, at 4.

69 Pender, above n 66, at [7]–[8].

70 "Does Claiming a 'Sex Game Gone Wrong' Work?" (18 February 2020) We Can't Consent to This <www.wecantconsenttothis.uk>.

71 For discussion on rape myths generally, see McDonald *Rape myths as barriers to fair trial process*, above n 53, at 47; and Abuse and Rape Crisis Services Manawatū "Submission to the Justice Committee on the Sexual Violence Legislation Bill 2019" at 2; and McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 324.

72 See for example Evidence Act, s 122(1)(b).

73 McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 322. For more information on rape myths, see McDonald *In the Absence of a Jury*, above n 53, at 23–27.

options of not guilty or guilty of a lesser offence. As a result, it would have been more likely that Kempson would be convicted of a lesser offence, such as manslaughter, rather than the more serious murder charge he initially faced.[74]

Kempson received a murder conviction and sentence imposing a minimum period of imprisonment of 17 years.[75] In the Court of Appeal, Kempson appealed against his conviction for murder on the primary ground that the Crown should have been required to disprove consent, or an honest belief in consent, in order to prove murder.[76] He also appealed against his sentence on the ground that his sentence was manifestly excessive and that the trial judge erred in finding s 104(1) of the Sentencing Act 2002, which required a minimum period of imprisonment of at least 17 years, applied.[77] Although neither of those grounds were successful, the outcome of *K v R* could have been different if the High Court trial jurors had been more sympathetic to Kempson and his EAGW narrative and therefore found him not guilty of murder.

Although not the case for Kempson, case law from England and Wales shows that even when the defendant is convicted of murder, the EAGW narrative *can* lead to reduced sentences for murder convictions when sexual history evidence is admitted into the trial.[78] Consequently, Professor Susan Edwards argues that with the EAGW narrative, defendants "disguise what is essentially cruel and misogynist conduct as a strategy to manipulate trial and sentencing outcomes".[79] Similarly, Dr Hannah Bows and Professor Jonathan Herring have questioned whether such defence tactics lead to defendants "getting away with murder".[80]

Kempson's conviction and sentence may seem out of step with those outcomes. However, in England and Wales, early relationship situations comprising first dates and "just-met" circumstances are more likely to result

74 Theodore Bennett "A Fine Line Between Pleasure and Pain: Would Decriminalising BDSM Permit Nonconsensual Abuse?" (2021) 24(2) Liverpool LR 161 at 170.

75 Kempson sentencing judgment, above n 25, at [83].

76 *K v R*, above n 24, at [4].

77 At [4].

78 For examples of the case law, see We Can't Consent to This, above n 70; We Can't Consent to This "Submission to the Constitution Committee on the Domestic Abuse Bill 2019–21" (June 2020) at [1.37]–[1.39]; and Bennett, above n 74, at 170.

79 Susan S M Edwards "Assault, Strangulation and Murder – Challenging the Sexual Libido Consent Defence Narrative" in Alan Reed and others (eds) *Consent: Domestic and Comparative Perspectives* (Routledge, London, 2016) 88 at 89.

80 Bows and Herring, above n 9, at 534.

in severe convictions and sentences than when the defendant and the deceased were in an established relationship.[81] Professor Elizabeth Yardley suggests that this trend is explained by the "backdrop" an established relationship provides of "the myth of a level playing field".[82] With respect to established relationships, if the jury believes the defence argument that the defendant and the victim had "regularly engaged in consensual BDSM", the jury may be more inclined to believe the RSGW narrative that the death was a tragic accident.[83] In contrast, in first date circumstances, the defence cannot support their RSGW narrative with arguments of a consensual BDSM history between the alleged victim and the defendant. Therefore, the fact that Millane's murder occurred during a first date may account for the outcome of *K v R*.[84]

However, even in a case such as Millane's in which the admission of sexual history evidence did not result in an acquittal or sentence reduction, the decision to hear the evidence was not without harmful consequences. Millane's sexual history, a matter which most people regard as intimate and private, was laid bare in court and in the media. This added harm to the fatal injury Millane and her family had already experienced.[85]

V THE RULES OF EVIDENCE: WHY THE DECEASED'S SEXUAL HISTORY IS ADMISSIBLE AND ISSUES WITH THIS LOGIC

Given the same motivations for enacting the rape shield are reflected in femicide cases, New Zealand should take a consistent approach to the treatment of sexual history evidence in fatal and non-fatal sexual cases. One way to achieve this consistency is by applying the rules for admitting evidence in a manner consistent with the modern social definition of consent and without the influence of gendered myths and stereotypes. If courts did this, they would exclude sexual history evidence for its irrelevance in both fatal and non-fatal sexual cases without the need for evidence shields. This article examines why the

81 Yardley, above n 1, at 1850–1851 and 1857.

82 At 1857–1858.

83 At 1857–1858.

84 *K v R*, above n 24, at [12].

85 For examples of the harmful media coverage of Millane's sexual history, see Drewett, above n 40; and Giordano, above n 40. This issue is not isolated to Millane: see for example John Siddle "'It Broke My Heart' Brother of mum, 33, strangled to death during sex reveals '50 Shades' defence 'made losing her a million times worse'" *The Sun* (online ed, London, 4 March 2020).

deceased's sexual history is currently admissible, contrasted with an alternative way the courts could apply New Zealand's evidence admissibility rules.

It must be noted here that it is unclear whether there was a pre-trial ruling about the admission of sexual history evidence in the Kempson trial.[86] Therefore, the following discussion about whether sexual history evidence is admissible is based on the defence EAGW strategy in the Kempson trial.

A Relevance

Under New Zealand's rules for admitting evidence, relevance is a necessary condition and the lowest common denominator for admissibility.[87] Section 7 of the Evidence Act establishes that evidence that is not relevant is inadmissible. Section 7(3) defines relevant evidence as that which "has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".

Relevance is a matter of logic.[88] When the defence seeks to admit evidence of the deceased's sexual history, they claim that such evidence is relevant to the question of whether or not she consented to the erotic asphyxiation that caused her death. This, in turn, is relevant to the question of whether the defendant intended to kill or harm her, or instead only intended to engage in consensual erotic asphyxiation. However, there are reasons to be sceptical of whether evidence of sexual history is either material (in the sense of relating at all) or probative (in the sense of having a logical tendency to prove or disprove) to whether the deceased consented to the strangulation that killed her. This is because consent to sexual experiences, including erotic asphyxiation, are logically independent**.** The modern understanding of consent demonstrates this independence. It follows from consent being enthusiastic, ongoing and reciprocal, that past consent does not indicate a likelihood of future consent.

Previous case law has rejected illogical inferences within chains of reasoning. In *Alletson v R*, the appellant sought the admission of propensity evidence. Propensity evidence is adduced to show a person's proclivity to act in a certain way, and therefore to give credibility to arguments that the person likely acted in that way on the occasion at issue in trial.[89] The appellant argued

86 From searches on Westlaw, Lexis Advance, the New Zealand Legal Information Institute and the Courts of New Zealand website, a pre-trial case, if it exists, is not available to review.

87 McDonald and Optican, above n 54, at 53.

88 At 54.

89 Evidence Act, s 40(1).

that evidence about his history of religiousness and a reverend viewing him as a "decent person" should be admissible because such evidence was relevant to whether or not he committed sexual offences against young girls.[90] The Court of Appeal found that admitting the evidence would ask the jury to accept the chain of reasoning that:[91]

> … the appellant was a religious person in his younger days and considered by a reputable figure in religious circles to be a decent person; a boy who is religious and is considered by a reputable person to be of good character is unlikely to commit sexual offences against young girls; therefore, it is less likely that the appellant did so in this case.

The Court considered the flip side of such a finding: it would begin a slippery slope into concluding that it is logical "that someone who has no religious beliefs and is not highly thought of by an authority figure is more likely to commit sexual offences against young girls".[92] The Court found that conclusion to be illogical. The evidence did not illustrate a lesser likelihood of sexually abusing children as the defence argued. Given the evidence's irrelevance, the Court excluded it.

1 The "relevance" of sexual history

It can be argued that the Kempson trial featured propensity evidence as well. In *Alletson*, the propensity evidence concerned the defendant. However, in the Kempson trial, the propensity evidence concerned the deceased victim. As in *Alletson*, admission of the deceased's sexual history in the Kempson trial asked the jury to adopt a chain of reasoning that similarly appears to rely on illogical inferences. Namely, that Millane was an experienced practitioner of BDSM with a sexual predisposition to engage in consensual erotic asphyxiation, and women with erotic asphyxiation sexual preferences are more likely than the "average" woman to engage in consensual erotic asphyxiation. Therefore, it is likely she consented to the manual strangulation during the occasion at issue and that her death was due to an accident during that consensual sexual encounter, rather than due to murderous intent.[93]

90 *Alletson v R* [2009] NZCA 205 at [36].

91 At [43]; and see also 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(3) VUWLR 487 at 496–497.

92 *Alletson v R*, above n 90, at [44].

93 See generally SC leave judgment, above n 33, at [7].

This chain of reasoning has poor logic and is prejudicial for three reasons. First, this type of reasoning made it seem as if Millane herself were on trial.[94] There is a stigma around BDSM preferences and risky sex that Millane was accused of having a history of engaging in.[95] Given this stigma, and because the defence argued she contributed to her death through "asking for" manual strangulation on the material occasion,[96] this shifted the focus from Kempson's mental state to Millane and her history. Similarly, complainants in rape cases reported feeling as if they were the person on trial before Parliament enacted the rape shield.[97] However, the deceased's sexual history is not relevant. Millane's alleged propensity for consenting to erotic asphyxiation does not go to the issue of whether Kempson acted with the required mens rea. Kempson and Millane are different people. Kempson's mental state at the material time cannot be inferred from past, different actions of Millane. It follows that the deceased's sexual history evidence derives relevance from a convoluted chain of reasoning about what the defendant believed and whether he acted with mens rea. It could be true that Millane consented to erotic asphyxiation with a certain person (person Y) at a certain point in time in the past. However, it is not accurate that the conclusion from that fact is that Millane consented to manual strangulation during sex, in the same or in a similar way as she did with person Y, with Kempson at another time.

The notion that present consent is logically independent of previous consent is not a product of any particular political ideology.[98] It is also not exclusive to sexual consent. The popular cup of tea analogy illustrates this point. The fact that a person wanted a cup of tea on one occasion does not mean, nor make it more likely, that the same person wanted a cup of tea on a different occasion.[99] A plethora of factors can influence why a person does or does not want a cup of tea on any given occasion. A person can want a cup of tea and change their mind before drinking it or part-way through drinking that tea. They are not obliged to finish that cup of tea. This logic

94 North, above n 49.
95 Bennett, above n 74, at 164.
96 *K v R*, above n 24, at [19].
97 (18 August 1976) 405 NZPD 1753 and 1756.
98 For examples of the illogicality of treating present consent as logically connected to past consent, see Alli Kirkham "What If We Treated All Consent Like Society Treats Sexual Consent?" (23 June 2015) Everyday Feminism <www.everydayfeminism.com>.
99 (11 February 2021) 749 NZPD 776; and Rob McCann "Consent explained with a cup of tea" (12 July 2015) White Ribbon <www.whiteribbon.org.nz>.

also applies to sexual consent. Therefore, consent to BDSM practices, such as erotic asphyxiation, on one occasion, tells the jury nothing about consent on a later occasion. The admissibility of Millane's sexual history evidence in the Kempson trial illustrates that there is a problem at this most basic level: the deceased's sexual history evidence is irrelevant to whether she consented to erotic asphyxiation, and whether Kempson acted with the requisite mens rea.

Secondly, consent lapses once a person becomes unconscious. Pursuant to s 128A(3) of the Crimes Act 1961, no one can legally consent to sexual activity once they become unconscious. Whether erotic asphyxiation constitutes "sexual activity" in the sense defined in s 128A(9) is yet to receive a definitive legal position. It is likely that erotic asphyxiation will come under s 128A(9)(b) as strangling a person in a sexualised manner can be viewed as an indecent act while that person is unconscious. In addition, New Zealand case law sets out that it will only be in very rare situations where a person could have a reasonable belief that their sexual partner was consenting while that other person is unconscious.[100] Therefore, in the Kempson trial, even assuming that Millane had initially consented to strangulation, as soon as she lost consciousness, that consent would have lapsed. At this point, Kempson could have no longer had a reasonable belief that Millane was consenting.[101] Although Kempson should have then stopped applying pressure to her neck, he continued applying pressure for several more minutes.[102] Rather than suggesting Kempson did not intend to hurt or kill Millane as he argued, the fact her consent lapsed (if there was consent to erotic asphyxiation from the beginning) but Kempson continued, suggests he acted with the requisite mens rea. It is therefore illogical for the defence to use Millane's alleged consent in their chain of reasoning about why the jury should have reasonable doubt about whether Kempson acted with mens rea.

Thirdly, adopting the chain of reasoning would be a slippery slope into confining consent into patterns and formulae. If what a woman consents to on a given sexual occasion can be inferred from her sexual history, it would appear that her sexual history would predict consent on future occasions. This challenges whether women could consent to experimenting in their sex lives

100 *R v S* [2015] NZHC 801 at [36]–[37]; but see *R v Pakau* [2011] NZCA 180 at [30].

101 It was common ground that Millane would have lost consciousness and gone limp at some point during the strangulation: Kempson sentencing judgment, above n 25, at [51].

102 At [51].

and exercising sexual agency.[103] Ultimately, as discussed in Part II, past consent does not predict future consent. This is particularly the case for sex involving BDSM. Erotic asphyxiation involves a restriction of breath. Therefore, consent relies on prior communication between the sexual partners of their respective boundaries.[104] For Millane, one of her previous sexual partners said that they used the safe word "turtle" and agreed on a tapping action to communicate withdrawal of consent.[105] Sexual partners who are not in a relationship, and indeed those who have just met, can engage in consensual sex involving BDSM, coloured by effective communication. However, whether sexual partners did so is not a conclusion which can logically be extrapolated from sexual history evidence showing past consent to erotic asphyxiation. Consent is specific to each partner on each occasion. Communicating consent to BDSM practices involves more layers than merely saying "yes" or "no".[106] The law should reflect that that someone who has engaged in erotic asphyxiation in the past does not automatically, presumptively, or even probably, consent to similar BDSM-focussed or rough sexual activity on a different occasion. For Millane, given the purported lack of safety precautions with Kempson in comparison to her sexual history, it is even more accurate that such evidence could not have illustrated that she consented to Kempson applying prolonged pressure to her neck.

Understanding the nuance of consent suggests that sexual history does not illustrate a propensity to consent to sex, including erotic asphyxiation. Sexual history evidence is irrelevant. Similar to excluding religious history evidence in *Alletson*, courts should also exclude the deceased's sexual history evidence in femicide trials. Such evidence does not illustrate a proclivity for enjoying erotic asphyxiation as the defence argues.

Even if sexual history evidence is relevant, which this article argues it is not, it does not follow that the deceased's sexual history evidence should be admissible. New Zealand's other rules for admissibility decisions should catch such evidence.

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103 See McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 331; and McGlynn, above n 8, at 369.

104 See generally Cara R Dunkley and Lori A Brotto "The Role of Consent in the Context of BDSM" (2020) 32(6) Sexual Abuse 657 at 660–664.

105 Connolly, above n 4, at 134; Stephen D'Antal and Matthew Dresch "Backpacker Grace Millane 'used a safe word while practising BDSM' her ex tells court" *The Daily Mirror* (online ed, London, 19 November 2019).

106 See Dunkley and Brotto, above n 104, at 661.

B Balancing probative value and prejudicial effect

Section 8 of the Evidence Act sets out a balancing test determining the *legal* relevance of the evidence.[107] The judge *must* exclude evidence when "its probative value is outweighed by the risk that the evidence will … have an unfairly prejudicial effect on the proceeding".[108] Evidence has probative value when it proves or disproves a matter in the trial. Evidence carries a risk of prejudicial effect when it could inappropriately influence the fact finder, being either the judge or the jury, in the trial.[109] In applying this balancing test, the judge must also "take into account the right of the defendant to offer an effective defence".[110]

1 The prejudicial value of sexual history significantly outweighs any probative value

In relation to complainants' sexual history evidence, the Law Commission has recognised the low probative value in such evidence.[111] Earlier in Part IV, this article argued that the differences between fatal and non-fatal sexual cases are insufficient to justify the different evidence admissibility rules for the respective crimes. Further, as discussed above, the probative value of previous evidence of consent to sexual encounters or erotic asphyxiation is minimal, because it has no bearing on current or future consent. According to that reasoning, the deceased's sexual history evidence also has low probative value.

K v R illustrates that taking into account the defendant's right to offer an effective defence, courts have found that the probative value of the deceased's sexual history evidence is not outweighed by the risk of unfair prejudicial effect. This article argues that the way courts have struck that balance excludes the modern definition of sexual consent. The calibration should instead recognise that the risk of the deceased's sexual history having a prejudicial effect on the trial is high whilst that evidence has relatively little probative value. This calibration is not new to legal scholarship. In 1994, Professor McDonald argued that "[a]lthough there is low probative value in sexual history evidence, there

107 See generally McDonald and Optican, above n 54, at 65–66.
108 Section 8(1)(a).
109 McDonald and Optican, above n 54, at 66–67.
110 Evidence Act, s 8(2).
111 Law Commission, above n 51, at [11]; and see also Law Commission *Evidence: Reform of the Law* (NZLC R55, 1999) at [184].

is a high potential for prejudice when such evidence is admitted to show the victim's consent".[112]

A potential reason for the current miscalibration is the courts' obligation to preserve the defendant's right to offer an effective defence under s 8(2) of the Evidence Act. This article argues that the defendant's right to offer an effective defence should not support the defence's arguments that the deceased's sexual history evidence should be admissible. This is because the low probative value is outweighed by the high risk of prejudicial effect. Judges must be careful determining the admissibility of evidence adduced by the defendant. This is because judges must not compromise defendants' fair trial rights[113] or increase the omnipresent power imbalance between defendants and the state. However, sexual history evidence should not bolster the effectiveness of a defendant's EAGW defence strategy given such evidence does not illustrate a likelihood of consent. Therefore, such evidence should not raise reasonable doubt about the defendant's mens rea which is the objective of the EAGW defence strategy. Even if the deceased's sexual history evidence does bolster the effectiveness of a defendant's defence somewhat, admitting such evidence with its high risk of prejudicial effect is an excessively cautious approach which causes significant harm to the deceased and her family.

C Logically speaking: evidence shields are unnecessary

This article proposes legislative reform in Part VII. Legislative reform would create a new provision and definitively alter the rules of sexual history evidence admissibility. However, ss 7 and 8 of the Evidence Act can already exclude sexual history evidence.

Unlike the explicit exclusion of sexual history evidence for sexual cases, there is no legislative requirement that judges exclude such evidence. Nor is there a legislative requirement that such evidence meet a heightened relevance test as there is for sexual history evidence in non-fatal sexual violence cases.[114] It follows from Millane's sexual history being admissible that the precedent courts follow with respect to the deceased's sexual history is that such evidence is admissible. Without principled differences justifying departure from precedent, judges are bound, or highly persuaded, by previous judgments. The admission of the deceased victim's sexual history evidence in the Kempson trial

112 McDonald "Her Sexuality as Indicative of His Innocence", above n 63, at 322.
113 Specifically, the right to present a defence: New Zealand Bill of Rights Act 1990, s 25(e).
114 Evidence Act, s 44.

endangers the future application of ss 7 and 8 with respect to the deceased's sexual history. New Zealand is a small jurisdiction and only a limited number of appeals are heard in New Zealand's highest courts. A judgment with enough precedential weight to change this admissibility and require courts to exclude the deceased victim's sexual history evidence is therefore unlikely to enter the common law quickly.

However, there are good reasons to query judges' logic in relation to the status quo application of ss 7 and 8 to evidence of the deceased's sexual history. *K v R* illustrates that judges are not applying ss 7 and 8 in a manner consistent with the modern social definition of consent, nor with the application of logic and relevance discussed in this article. Moreover, Parliament has legislated against this application of relevance in the context of non-fatal sexual violence. Parliament noticed a problem in allowing judges to decide to hear complainants' sexual history despite the logical gap between sexual history evidence and whether that person consented on the later occasion. Rather than leaving judges to work through this gap, Parliament enacted the rape shield. In 2021, Parliament bolstered this shield with the Sexual Violence Legislation Act.

If judges were free of all biases, the application of New Zealand's evidence admissibility rules could potentially produce a different result. According to the application of ss 7 and 8 that this article has set out, sexual history evidence is irrelevant, has low probative value and carries a high risk of prejudicial effect. Particularly in light of the modern understanding of sexual consent, an alternative application would hold there is no logical link between past consent and the separate question of whether there was consent on the occasion at issue. Furthermore, there is no logical link between the deceased's past consent and the defendant's mens rea. Therefore, such evidence should be inadmissible under ss 7 and 8. There should be no need for an evidence shield for both femicide and non-fatal sexual cases when courts apply ss 7 and 8 in accordance with the modern understanding of consent.

However, this is not the current precedent. This article argues that given the need for the law to treat sexual history evidence consistently in fatal and non-fatal sexual cases because of their lack of principled differences, reform should come from Parliament. This recommendation is with the qualification that, logically speaking, such legislative intervention should be unnecessary. Certainly, a consistent approach could already occur under the current evidence admissibility rules.

VI MOVING TOWARDS CONSISTENCY: DECEASED AND LIVING PARTIES TO PROCEEDINGS

A Ellis *submissions*

When an appellant in a trial dies, New Zealand's legal system has typically treated their interest in the case as having died with them.[115] A current high-profile case in the Supreme Court, *Ellis v R*, shows that New Zealand's law could be moving to shift this orthodox view. This article argues that if this shift occurs, it could begin to break down the current distinction between living and deceased parties to proceedings. That change would further support this article's argument that the law should have consistent sexual history evidence admissibility rules for the deceased in femicide trials and living complainants.

In 1993, Ellis was convicted of 16 counts of child sex offences involving seven child complainants who attended the childcare centre he worked at.[116] Ellis always maintained he was innocent.[117] The Supreme Court granted Ellis leave to appeal his convictions.[118] Ellis died just over one month after the Court granted him leave.[119] The Court then had to consider in light of Ellis's death whether it still had jurisdiction to hear his appeal. At the direction of Glazebrook and Williams JJ, counsel made submissions on the relevance of tikanga Māori.[120] The Solicitor-General argued for revoking the leave to appeal according to the orthodox position that a person's interests in their appeal die with them.[121] According to Williams J, in a tikanga Māori context, a deceased person becomes an ancestor with more mana than a living person.[122] One of Ellis's lawyers, Natalie Coates, later argued that because Ellis's mana continued when he died, Ellis and his whānau had just as much of an interest in his appeal posthumously as they would have had if he were still alive.[123]

The Court concluded that it did have jurisdiction to hear Ellis's appeal in spite of his death.[124] The Court's substantive reasons for this decision are yet to

115 Canterbury Legal "A new evolution in New Zealand law from the Peter Ellis case" (16 November 2020) <www.canterburylegal.co.nz>.
116 *Ellis v R* [2019] NZSC 83 at [1].
117 At [11].
118 At [20].
119 Interim Ellis judgment, above n 7, at [3].
120 *Ellis v R* [2019] NZSC Trans 31 [Ellis Transcript 2019] at 20 and 52–54.
121 At 19–22.
122 At 53.
123 Ellis Transcript 2020, above n 6, at 28–31.
124 Interim Ellis judgment, above n 7, at [4].

be released. If the Court's reasoning accepts Coates' submissions, this would represent an important change in the law. It would show a move in the common law of New Zealand away from its orthodox position about deceased persons' interests ending with their death. This would be an important dimension of tikanga Māori being recognised within the Western state legal system.

The facts of *Ellis* do not align precisely with the facts of Millane's murder. Millane was the *victim* of a sexualised killing. This is different to *Ellis* where Ellis was the appellant appealing his conviction for *perpetrating* child sexual offences. However, the underlying policy reasoning and tikanga Māori justifications are applicable to both cases. Both Millane and Ellis's interests were fundamental to the proceeding despite them being deceased. As ancestors or tūpuna, they had greater mana after their deaths.[125]

B Interests after death according to tikanga Māori: setting a precedent?

Tikanga Māori is an important thread in the legal system.[126] If the Court's substantive reasons reflect Coates' submissions and the tikanga Māori view on posthumous interests takes precedence in the common law, it is possible that the current distinction between deceased and living persons in relation to proceedings could become less defined. This reduction in distinction could produce two crucial results. First, an appellant being able to proceed with their appeal posthumously. Coates argued for this result for Ellis. If the Court recognises that deceased appellants have interests and mana continuing after death, this will set a precedent extending to appellants beyond Ellis. Potentially, that precedent could hold that there are no principled differences between deceased and living appellants. Therefore, the law should take a consistent approach, and the same rules should apply to both.

Secondly, other areas of the law which currently distinguish deceased and living persons could also take a consistent approach. Arnold J raised concerns

125 Ellis Transcript 2019, above n 120, at 53.

126 See generally Natalie Coates "The Rise of Tikanga Māori and Te Tiriti o Waitangi Jurisprudence" in John Burrows and Jeremy Finn (eds) *Challenge and Change: Judging in Aotearoa New Zealand* (LexisNexis, Wellington, 2022) at 65–87; Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZ L Rev 1; Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1; and Ellis Transcript 2020, above n 6, at 5–8. A recent example is *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 at [168]–[169] and [297]; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [177].

that if the Court accepts the logic of Coates' submissions and endorses the tikanga Māori perspective on interests after death in the context of criminal appeals, there is a risk of creating inconsistency in other areas of the law.[127] His Honour drew attention to how defamation appeals cannot proceed after death. Coates' response to Arnold J framed this risk as an opportunity to reconsider the law in New Zealand beyond the issue in the proceeding of criminal appeals.[128]

Another area where extending this view on interests and mana after death could be a logical step forward is in evidence law. Creating consistent evidence admissibility rules for the sexual history evidence of the deceased in femicide trials and the complainant in non-fatal sexual violence cases would be consistent with the tikanga Māori view advanced by Coates in Ellis's appeal.

This article recommends that the Supreme Court adopt Coates' submissions on interests after death in its substantive reasoning in order to reduce the present distinction between living and deceased parties to proceedings. Such parties should include appellants as well as deceased femicide victims and living sexual violence complainants.

VII PROPOSED REFORM

Amending the Evidence Act would provide a consistent approach to sexual history evidence in fatal and non-fatal sexual cases. At a minimum, Parliament should enact an evidence shield equivalent to the rape shield for femicide cases. To achieve this, one submission to the Justice Committee on the Sexual Violence Legislation Bill recommended that Parliament replace the word "complainant" in s 44 of the Evidence Act with "complainant or deceased person".[129] The submission also recommended that Parliament extend s 40(3)(b) of the Evidence Act to include the deceased in homicide cases.[130] According to s 40(3)(b), propensity evidence about "a complainant in a sexual case in relation to the complainant's sexual experience … may be offered only in accordance with section 44", the rape shield. This change would largely limit propensity evidence's admissibility to that which illustrates a pattern of offending on part of the defendant, rather than that which draws illogical and prejudicial

127 Ellis Transcript 2020, above n 6, at 20.
128 At 21.
129 Pender, above n 66, at 3.
130 At 6.

conclusions from the deceased's historical sexual experiences.[131] Parliament did not adopt those recommendations in the Sexual Violence Legislation Act.

However, merely extending the rape shield would be insufficient. The rape shield does not exclude sexual history evidence entirely. Sexual history evidence between the defendant and the complainant is admissible, although only in limited circumstances.[132] In addition, defendants can rebut the rape shield to admit complainants' sexual history if such evidence is of heightened relevance. To this extent, the rape shield buys into the notion that there can be, in some circumstances, a logical connection between past consensual sexual history and consent on the occasion at issue in the trial. According to the modern understanding of sexual consent, that notion is inaccurate. Therefore, the rape shield does not provide protection against the use of sexual history evidence in non-fatal sexual violence trials in a manner that is wholly consistent with logic. In EAGW femicide trials, there is an evidentiary lacuna given the deceased cannot be present in court. She therefore cannot provide her own narrative, testify about her subjective experience of the events and refute the defence's narrative. In principle, complainants have those options. However, such options are often inaccessible in practice given the extreme re-traumatisation that adversarial rape trials can impose on complainants.[133] The additional challenges of the victim being deceased justify legislative protection going beyond the presumption that femicide victims' sexual history is inadmissible.

Parliament should explicitly exclude the deceased's sexual history from murder trials. This provision should apply to the deceased's sexual history with persons *other than* the defendant as well as *with* the defendant. According to Joan Brown, such reform would move the focus to the defendant's "actions and culpability" rather than the deceased's "moral worth".[134] In turn, this would reduce instances of the deceased's sexual history evidence being used to give unfair credibility to the defence's EAGW arguments and thereby producing lesser sentences and convictions for lesser included offences.

131 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 31.

132 Evidence Act, s 44(1)(a).

133 Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at 26–27.

134 Brown, above n 11, at 293.

VIII CONCLUSION

In femicide cases, the deceased's sexual history evidence is extraneous to consent and the defendant's mens rea. This article analysed New Zealand's rape shield provision. It explored the policy reasoning behind Parliament's decision to exclude complainants' sexual history. It compared these reasons to concerns currently abounding about the evidence admissibility rules in femicide trials which are discordant with non-fatal sexual cases. This article then analysed courts' application of the femicide trial evidence admissibility rules. It set out why sexual history evidence appears to fall short of the current admissibility rules in light of modern understandings of sexual consent. Contrasts to case law, jurisprudence and statutory provisions supported this analysis. This article analysed the underlying influences in the application of the rules which contribute to the admissibility of sexual history evidence. It concluded that reform of New Zealand's evidence laws is necessary.

This article proposed that courts should refine their application of the evidence admissibility rules to reflect relevance and logic given the modern definition of sexual consent. To provide for the event that this does not occur, this article argued that Parliament should reform the Evidence Act. It found support for this change in tikanga Māori, drawing upon submissions made to the Supreme Court. The time is apt to learn from the harms the EAGW narrative in the Kempson trial caused Millane and her family. New Zealand law should evolve to create a consistent approach for living complainants and deceased femicide victims' sexual history evidence.

TUAKANA-TEINA WHAKAWHITI KŌRERO

WE ARE NOT HERE TO BLESS THE FOOD OR CONDUCT ACCESSIBILITY AUDITS

Reina Vaai and Alice Mander

This tuakana-teina discussion was born out of the "Law and Gender: Beyond Patriarchy" Symposium, where both Alice and Reina spoke about their experiences in the legal profession. Reina is a Samoan lawyer and journalist from South Auckland. Alice is a Law and Arts student, and a passionate advocate for the disabled community. She currently serves as Co-President of the National Disabled Students' Association. In this kōrero, Alice and Reina discuss three topics that have shaped their experiences in the legal world: belonging, tokenism and being the exceptional anomaly.

I BELONGING

Alice: As a disabled woman, I've learnt that belonging is a more complex process than simply accessing a space.[1] I'm unsure whether non-minorities or women without intersecting identities understand the extra burden of looking for a place of work that isn't just accessible but is also welcoming of us as whole people. It's one battle finding a place of employment with a lift, an accessible bathroom, and a carpark. But it's a whole other battle finding employment with colleagues who don't become sheepish and quiet when disability is mentioned, or who don't organise work drinks and coffees at the inaccessible bar down the road. To fully participate as myself in the legal sector, I need to find a place that is more than just accessible—a place in which I belong as a disabled woman.

I am in my fifth and penultimate year of a law degree, and my first experience of seeing or hearing about a disabled lawyer was in second year. I had to attend an Auckland High Court hearing for a law paper, something

1 Throughout this paper I use the term "disabled person/people". While some disability studies literature advocates for "person-first" language (ie, "person with a disability"), "identity-first language" is more in line with social models of disability. Calling myself a "disabled woman" gives credence to the idea of disability as an identity that is capable of being politicised, and allows me to reclaim often stigmatised language.

which my non-disabled peers could do easily. For me, attending the High Court—an inaccessible building with the protective label of "heritage"—was an entire day's event, causing anxiety and requiring preparation the few days before. While waiting for the hearing, we began talking to a policeman. He told us about a Crown prosecutor who had to be carried into the court room because it was inaccessible for her, a wheelchair user. Whenever I tell this story, people are shocked and disgusted. However, I was just disappointed. Disappointed to think that I could one day be at the top of my game and still face stark reminders that a person like me was never intended or envisioned to exist in a space like this.

In some ways, however, I was also relieved to hear that disabled lawyers actually *do exist*. You only need to look at the New Zealand Law Society website to discover the complete erasure of disabled lawyers in Aotearoa.[2] We are invisible in the statistics and invisible in the profession. Ironically, we are disproportionately represented in statistics on the other side of legal justice. For instance, 49 per cent of inmates in prisons in the Lower North Region experienced significant dyslexia. This is compared to approximately 10 per cent in the general population.[3] It has been found that 40 per cent of disabled women experience physical violence from an intimate partner over their lifetimes, compared with 25 per cent of non-disabled women.[4] My future career in the law—or in any field—is not free from this context and history.

Unfortunately, erasure is a self-confirming habit. It's something I continue to impose on myself—sitting out of young lawyers' social events, dreading pre-interview functions with firms, avoiding common areas in the law school. Why? Because I am acutely aware that I do not fit in these spaces. They may be accessible on the surface, but my body and my identity are still a misfit with the polite society of the legal profession: "[i]ndeed, much of the disability rights movement grew from solidarity born of misfitting".[5]

2 See for example the Snapshot of the Profession 2021, which does not include any reference to disability or disabled lawyers, other than reference to seven lawyers who speak New Zealand Sign Language: James Barnett, Marianne Burt and Naveeth Nair "Snapshot of the Profession 2021" (2021) 984 LawTalk 36 at 40.

3 Michael Stewart "Supporting neurodiverse learners in New Zealand Prisons" (2019) 7 Practice: The New Zealand Corrections Journal 45 at 45–46.

4 Janet L Fanslow and others "Lifetime Prevalence of Intimate Partner Violence and Disability: Results from a Population-Based Study in New Zealand" (2021) 61 Am J Prev Med 320 at 324.

5 Rosemarie Garland-Thomson "Misfits: A Feminist Materialist Disability Concept" (2011) 26(3) Hypatia 561 at 597.

With all this in mind, thinking about my future post-graduation is a constant oscillation between wanting to be a role model while raging against the system from within, and staying in my safe academic bubble where my identity is a source of power and knowledge.

I'm quickly learning that, as a minority, finding a career is not only a matter of finding a place where I belong, but finding a place where *I should be.*

Reina: I've been a lawyer for seven years, mainly working in criminal law, and there have been many moments when I've questioned whether I truly belong in this profession. As a Samoan woman I've become accustomed to microaggressions such as being asked whether I am "here to see a duty solicitor", assuming, of course, that I'm appearing in court as a defendant. I've also had clients ask me: "when can I speak to a real lawyer?"

I recently completed qualitative research exploring the experiences of Pacific female lawyers in New Zealand's criminal justice system.[6] From the group of lawyers I interviewed, I was both comforted and disturbed to confirm that I was not the only woman of colour who has been questioned like this on a regular basis. Even as I'm writing this, I'm reminded of the time I immediately regretted talking about my experiences in an interview after a lawyer stopped me in court and said, "I've never done that to you and I've never seen that happen". Such comments prevent minorities from speaking out and holding members of the profession accountable for racism, sexism and ableism. Tiptoeing around egos is a tiresome exercise and further perpetuates attitudes and comments that are harmful to minorities.

My family migrated from Samoa to New Zealand when I was very young and like most Pacific parents, they hoped that I would have access to opportunities that were not available to them when they were growing up. From a young age however, I viewed the legal profession as something that I couldn't access or reach. This was because I didn't know many lawyers who looked like me or who had similar life experiences. The closest contact I had to lawyers was watching the TV shows Boston Legal and The Good Wife, neither of which highlighted characters that I could relate to. Unfortunately, How to Get Away with Murder and Jessica Pearson from Suits came a little

6 Reina Vaai "Smashing the concrete ceiling: Experiences of Pacific female lawyers in New Zealand's Criminal Justice System" (MSt in Applied Criminology, Penology and Management, University of Cambridge, 2022).

too late for my childhood. My views of the legal world were largely shaped by popular culture and mainstream media, in particular the representation of Māori and Pacific defendants in New Zealand media. Māori and Pacific peoples' interactions with the legal profession in mainstream media were (and still are) predominantly as criminal defendants. Their lawyers were also almost always white (and still are). As a proud daughter of South Auckland, I knew which side mainstream New Zealand society expected me to be on.

In 2008, Reynolds-Dobbs et al discussed how professional women of colour that break the mould and progress to become leaders in their field are often viewed as the lone exception.[7] We are now in 2022 and for me, this statement still feels accurate. A number of people that I grew up with did not have the privilege of attending university because their priorities were to help their families, often working full-time to provide financial support without the luxury of sparing hours to attend classes or study. I acknowledge the privilege that I had because my parents were able to encourage me to attend university, without fear of cost or sacrifices. Hence, when I became a lawyer, I knew that I wasn't just going to be a lawyer for the firm I was working for. I was going to be the lawyer for my entire family, my entire neighbourhood, anyone that knew me from primary school, anyone from my village, anyone that knew my parents and any Pacific person that interacted with me on social media. This is a responsibility that I never think twice about. It's my commitment to my community. When you belong to a community that does not have equal access to opportunities, resources, and ultimately power, there is an obligation for those of us who have received some level of privilege to open these doors.

While managing a busy workload as a criminal defence lawyer, during my lunch breaks, I visited schools in South Auckland to encourage Māori and Pacific students to consider a career in the law. I still prioritise these visits, regardless of my schedule. I take phone calls from friends of friends or complete strangers from Instagram asking for advice on how to get into law school or what to expect for their first court appearance. There were times when I had to use my annual leave days to fulfil family commitments. I know that many other Pacific lawyers have similar responsibilities too. The *Pacific Economy Research Report on Unpaid Work and Volunteering in Aotearoa* in 2021

7 Wendy Reynolds-Dobbs, Kecia M. Thomas and Matthew S. Harrison "From Mammy to Superwoman: Images That Hinder Black Women's Career Development" (2008) 35 Journey of Career Development 129.

estimated that 27,000 hours of unpaid work and volunteering were being carried out by Pacific peoples every week,[8] including assisting with church and family activities and duties. At law school, I witnessed many Pacific students sacrificing time away from their studies to uphold their cultural, community and family obligations, often balancing multiple hats at once, which would naturally impact their grades. When law firms place such a strong emphasis on grades, students that have extraordinarily different responsibilities outside of law school are immediately excluded from employment opportunities. Unless of course, they personally know a lawyer that can vouch for their character and integrity, one that isn't a fictional character. For minorities navigating a wide range of circumstances, this means that they are already behind before they have even begun.

I must also acknowledge the pay equity gap. Pacific women are the lowest paid group in the entire country.[9] Drawing from my own experiences, the interviews I conducted from my research and the evidence produced by Mind the Gap, it must be noted that Pacific female lawyers are more susceptible to marginalisation in the profession because of their race, class and gender. As a Pacific female lawyer, I acknowledge that I am in a more privileged position than other Pacific women in Aotearoa. Although I cannot be considered a vulnerable member of this group, I am not completely excluded from this issue. There are cultural expectations that I am expected to fulfil such as supporting family members that fall at the lower end of the pay gap, assisting my family's obligations to our villages in Samoa and providing support for members of the wider Pacific community. The responsibility to uplift Pacific families in Aotearoa often falls on Pacific family members that have been able to pursue careers and obtain financial security. While I was working in Manukau, I remember speaking with my Samoan colleagues about the collective responsibilities we shared within our own families. Two of my colleagues were living in intergenerational households to help pay for rent, groceries and school fees for their entire family, as well as trying to manage how they would pay for a new suit for court. These experiences are particularly unique to Pacific lawyers, yet they are rarely acknowledged in the profession. Although I recognise there are barriers for people from low socio-economic

8 Ministry for Pacific *Peoples Pacific Economy Research Report on Unpaid Work and Volunteering in Aotearoa* (July 2021) at 38.

9 Mind the Gap *Ethnic and Gender Pay Reporting for Aotearoa / New Zealand: The Case for Change and Policy Recommendations* (December 2021) at 5.

backgrounds, it is important to make clear that these are not the same as the barriers that Pacific women and people face.

Ensuring that our profession does not exclude minorities goes beyond saying "Mālō e lelei" during Tongan language week or telling a young Fijian lawyer about your holiday in Fiji in 1988. It requires genuine acknowledgement that racism, sexism and ableism are well and truly alive in New Zealand's legal profession. Acknowledgement must be followed with action. Leaders in the profession have a responsibility to continuously speak out against behaviour, practices and processes that enable racism, sexism and ableism to grow. All workplaces, organisations and networks must review their processes and cultural practices which continue to foster exclusivity and oppression. During this review process, minorities must be consulted and protected. If authority figures lead by example, others will follow.

I must acknowledge that there has been progress for Pacific peoples in the legal profession with the appointment of several Pacific judges and the first Pacific President of the New Zealand Law Society, Tiana Epati. I am immensely grateful for the barriers that they have managed to break through because their courage has enabled many of us to move forward. The work however is not over until every single person in the profession feels acknowledged and seen. There is much work to be done.

II TOKENISM

Alice: Up until recently, disabled people haven't been viewed as a minority group facing *external* structural and social oppression. Historically, disabled peoples' disproportionately poor life outcomes were blamed on our disability and health as opposed to ableist structures. We're used to being left out of discussions about diversity in employment. This is something that is slowly changing, and firms are making a conscious—albeit, at times, minimal—effort to encourage disabled applicants to apply. With that, of course, comes the danger of tokenism.

As is common for many people involved in social justice advocacy, my personal and professional life has never been strictly delineated. My resume is speckled with a strong indication that I work for the disabled community, and I am proud of this passion and the work that I have done. I'm also not ashamed that this work increases my employability in some fields—it's not necessarily tokenistic to hire someone with the understanding that they have

knowledge and experience as a strong advocate for their community. I've been lucky enough to experience work in a firm which recognises this as a strength—and has encouraged me to carve out a niche in the law where I can explore this passion. However, this is not the case for all places of employment. Recognition of a tendency for advocacy can become a problem when it is used to take advantage of that employee's desire to achieve equity. Disabled people are all too familiar with the extra burden of educating those around us. In jobs not at all connected to our disability, we are often expected to be the spokesperson for office accessibility, and help the organisation improve its disability awareness. This puts us in an awkward position—a large part of me wants to help improve spaces around me so that they are more accessible for disabled employees that follow me. On the other hand, should the onus of accessibility fall on disabled employees? Furthermore, should I be expected to do work that I wouldn't be asked to do if I wasn't openly disabled?

Tokenism is dangerous, and can often leave the impression that organisations only see accessibility and disabled employees as a marketable tool. While accreditations like the Accessibility Tick indicate that a firm is at least considering disability and accessibility, they don't necessarily indicate that I will feel a sense of belonging in the workplace. The legal profession shouldn't see accessibility as a "nice to have", nor should it be marketed as an indication of how unprejudiced a firm is. I'm tired of our inclusion being congratulated as the exception, as opposed to being expected as the norm. Disabled employees have a lot to offer the workforce—and are currently utterly underutilised.[10] We have unique insights and empathy, we are born advocates for ourselves and our families, and we are innovative problem solvers. Physical accessibility is an important step, but we need to move away from the notion that it is the 'charitable' or 'right' thing to do, and move towards the notion that it is the smart thing to do.

The main issue with tokenism is it is another reminder that I am a misfit in this space. It sends the message that to the legal sector, I am quite literally a token—a tangible representation of disability that can be exchanged for social capital.

10 In the June 2021 quarter, the unemployment rate for disabled people between 15–64 years was 9.6 per cent, compared with 4.0 per cent for non-disabled people: "Labour market statistics (disability): June 2021 quarter" (18 June 2021) StatsNZ <www.stats.govt.nz>.

Reina: There have been plenty of times where I, along with my other Māori and Pacific colleagues, have been called on to bless the food at various work events. If you are only inviting us into the kitchen to bless the food but not arranging a seat for us at the table when discussing pay equity, promotions and ensuring that the workplace is a culturally safe environment, then please, just bless your own damn food. I'm not particularly interested in hearing what percentage of Māori and Pacific staff are in the workplace or admiring the happy brown faces on a firm's website. If minorities in the workplace are not completely celebrated for bringing their whole selves, or are not reflected in the leadership within the firm, or there are no targeted processes in place for promotions and opportunities, then any attempt to publicly celebrate us is tokenism. Publicly celebrating minority lawyers while privately disregarding them as professionals is worse than making no attempt at all. The public celebration of our languages and cultures without providing adequate support is dangerous because our mana, traditions and histories are only being used to increase an institution's social capital. Plastic lei, an upbeat waiata and pork buns for morning tea are not solutions.

Recently, I spoke to a friend about her promotion and rather than feeling ecstatic about this new milestone, she seemed very upset. One of the first remarks she received from another lawyer when her promotion was announced was that she was only promoted because she "ticks all the boxes". This was followed up with: "you're the token brown lawyer. It looks good for them". It's difficult to celebrate or share career achievements when there's a genuine risk that colleagues may suspect that the only reason for a Pacific lawyer's success is due to pity and ticking a diversity box. Similarly, when I announced that I would be attending a university overseas, a colleague asked "was there a brown quota?" I was asked the same question when I was starting law school more than 10 years earlier. These interactions can discourage Pacific female lawyers to put their hands up for opportunities because of the fear that their intelligence, qualifications and experiences will be overlooked and mistaken as a handout in the name of diversity.

It's amusing that some view diversity as being synonymous with lack of merit. In actual fact, diversity requires merit. In criminal justice for example, a lawyer without any lived experiences similar to the clients they are representing risks having a limited view of how to approach, communicate and effectively advocate for those clients from different backgrounds. We often hear discussions

on the importance of diversity in the workplace, however, there must also be an emphasis on the harmful effects that a lack of diversity can have on the profession and the communities that the profession serves. Approaching vulnerable clients with a genuine understanding of the community they are part of, the families they were raised in and the cultural environments that they exist in, are marks of an effective advocate. Effective advocacy is therefore rooted in the depths and richness of cultures, experiences and backgrounds.

When hiring effective advocates, it's also imperative to understand the needs of the communities that we are serving. I've watched firms hire lawyers from minority backgrounds simply because they were the top of their class or because they attended an Ivy League university; their cultural backgrounds are merely a convenient coincidence. Ticking one of the Pacific ethnicity boxes on the census does not always mean that these lawyers genuinely reflect the needs of their communities. A non-tokenistic recruitment process is one that acknowledges that there will be hardworking Pacific students that may not have the best grades and have not had the opportunity to attend Harvard, Oxford or Cambridge. However, they are actively involved in their communities, they know how to manage multiple pressures because of their upbringing, and they value the importance of service, resilience and diversity. These are the students that should be provided the opportunity to learn, train and develop in a firm, because beyond their grades, they will have other important skills that cannot be taught in a classroom. Their lived experiences alone will make them valuable assets. These are the students that will not only contribute to the profession but most importantly to their communities.

III THE EXCEPTIONAL MINORITY

Alice: With visibility comes responsibility, as cliché as that sounds. This is something I've become particularly cognisant of as I've been applying for legal jobs. Yes, I am a disabled woman. However, I am a physically disabled woman. In many ways, I fit the normative image of disability, being neuro-typical and not having a learning disability. I'm also an Honours student who has received awards for my academic performance. I am a Pākehā woman, from a financially privileged background and privileged education.

Despite this, *I've* still struggled to find employment in the past. It's been implied by firms that I'm too liberal and people-driven for them. On the surface, it seems that people with lower or the exact same GPAs than me have

had greater employment success. It's important to recognise that if I face these barriers, other disabled people have it much, much worse.

Many disabled people share the experience of spending their youth striving to counter low expectations. We've been told by the media, the education system and sometimes even our family and friends—that completing simple tasks is an achievement for us in itself. Many of us feel a need to overcompensate through perfection and overachievement, to somehow eschew our disabled identity, to prove the world wrong, and to show we can go above and beyond. I've found myself feeding into this ableist narrative: "it doesn't matter that I'm disabled because I have so much else going on for me!" While I work to throw off this internalised ableism, the need to overachieve remains.

For a firm looking to increase their diversity, a disabled student like me is therefore a prime candidate. I am disabled, yes, but I don't challenge many of their other norms. I've been described as a "workaholic", and I enjoy working at a fast pace—something some disabled people do not have the spoons for.[11] I've received top grades in "typical" law papers by using "typical" legal analysis and argument, because the Pākehā notions of our legal system come naturally to me. Ultimately, when sat behind a desk in a courtroom, I will appear to be just like any other well-spoken, young, Pākehā lawyer.

With my own increasing visibility, I fear that I will become the litmus test for disabled inclusion in the legal profession. This is dangerous because I already fit within many of the existing power structures of the profession, requiring only a few adjustments and arrangements. This is particularly relevant in Aotearoa, where there is a higher proportion of Māori who are disabled than Pākehā.[12]

It is critical that firms, universities, and the judiciary do not consider disabled people like me to be the extent of the disability community. I want to see a legal sphere with greater representation of neurodiverse disabled people, and people experiencing mental ill health. I want to see tāngata whaikaha in the judiciary,[13] and I want to see their laws and tikanga upheld in the New Zealand

11 "Spoons" is a metaphor used in the disability community referring to the amount of mental or physical energy a person has. For more see Christine Miserandino "The Spoon Theory" (2003) But You Don't Look Sick? <www.butyoudontlooksick.com>.

12 "Key facts about disability in New Zealand" (1 December 2016) Office for Disability Issues <www.odi.govt.nz>

13 Tāngata whaikaha was the term developed to describe a Māori person with a disability. For more see Ministry of Health *Whāia te Ao Mārama 2018 to 2022: The Māori Disability Action Plan* (March 2018) at 4.

system. I want more space and support for disabled Pacific communities. I want to see nonbinary disabled lawyers celebrated and respected in the Court room. We need increased visibility of people in the learning (intellectual) disability community, and lawyers should be able to practice in New Zealand Sign Language.

I want to help open the door to legal education and the profession for other disabled people. My project will have failed if they all look, speak, and act like me.

Reina: While I have experienced and continue to experience several barriers in my career, I am privileged in many ways. I was employed right out of university, my previous employer was a judge and I have had the opportunity to name her as my referee when applying for jobs and other opportunities. I also studied and worked overseas. I was able to do this because my family did not financially depend on me. There were no expectations for me to take on any responsibilities at church and I shared family obligations with three of my other siblings. These circumstances that commonly exist for many of my Pacific colleagues were removed for me. I would not have been able to pursue any career opportunities without the removal of these particular conditions. I acknowledge that I also do not struggle to socialise or network in the mainstream legal world; English is now considered my first language, I am not disabled, and I am comfortable holding lengthy conversations with different people because I have been exposed to various networks and professional opportunities. I should not however be viewed as the quintessential Pacific female lawyer. There are other barriers that I have not confronted because I haven't needed to, and this has contributed to my ability to progress in my career and communicate with others in the profession. I am conscious that I will not always be the most appropriate person to take up an opportunity or speak on an issue. There are plenty of exceptional Pacific lawyers that may never have had the opportunity to be asked and would be better qualified. I have a responsibility to constantly be aware of when I need to pass the microphone, because being a genuine ally means valuing the importance of sharing space and power to ensure that other voices are heard too.

I know that many of my incredible Pacific colleagues have been overlooked because it's not always in our nature to put our names forward or to speak up. This can be a daunting task for minorities who are typically

excluded or not supported. From my observations, lawyers who tend to progress successfully are lawyers that have wide networks that can speak their names in rooms filled with opportunities. Learning how to network is a skill that many lawyers value, despite the fact that networking events, from my perspective, are often culturally unsafe and uncomfortable environments. An African-American lawyer, Tsedale Melaku, used the term "invisible labour" to emphasise the efforts that female lawyers of colour must pursue to engage with their colleagues on a social level.[14] For example, taking on hobbies that are stereotypically accessible to rich people such as skiing, or discussing private schools that they will send their children to, so that there is some common ground in the breakroom. A lack of interest or relevant experience to engage in topics that are valued by the majority can perpetuate further exclusivity and isolation for lawyers of colour. In the Pacific context, attempts to fit into the daily world of the law can be a double-edged sword. Melaku's invisible labour could easily result in rejecting aspects of our cultural identities, such as our appearances or attempting to hide our own lived experiences and backgrounds. I've learned that sharing my personal experiences of being a brown woman and growing up in circumstances that were vastly different from my colleagues has been one of the most powerful pillars for me throughout my career. It has helped me to decide the different lawyers I want to work with, and work environments and projects that I want to be part of, because these have been people and workplaces that are willing to accept me for bringing my whole self. Throughout the difficult moments in my career so far and my life generally, I have leaned on my cultural values as a source of strength and clarity.

As a Pacific female lawyer, we are constantly navigating these two worlds. One of the complex aspects of the Pacific female lawyer experience is that there are unique barriers for us; we are minorities in both the profession as brown women, and we are minorities in our own communities as lawyers. This cultural shift is very rarely acknowledged. While I might be standing in court and advocating for clients on Monday, on Tuesday evening at a family gathering, I know that I may not be called on to speak at all. I accept speaking engagements and advocate for vulnerable people in my professional life, however in my personal life as a Samoan woman, I understand that there are different roles and expectations because it is a completely different context.

14 Tsedale Melaku *You don't look like a lawyer: Black women and systemic and gendered racism* (The Rowman and Littlefield Publishing Group Inc, Maryland, 2019), at 16–17.

When I see professional organisations that are aimed at supporting women, some of the principles and approaches do not always reflect my values as a Samoan person. The Western approach to feminism is not easily applied in Pacific cultures due to a variety of reasons, including cultural traditions and expectations. In cultural settings such as a Samoan *fono*, if you do not hold a *matai* title, the opportunity to speak may not be provided, regardless of professional backgrounds and experiences. Being a Pacific female lawyer means constantly striking a balance between being accepted in the workplace by peers and genuinely attempting to contribute our skills while remaining connected to our cultural identities without compromising our values and beliefs.

I am aware that my reflections will not be accepted by some, and I have been advised that sharing my experiences in this way may limit my career opportunities in the profession. Any project, workplace or network that does not embrace change, honesty and diversity is not something that I wish to be part of anyway. As members of this profession, we must act now. Every single lawyer, judge, advocate and ally can contribute towards building a profession that values everyone. Working towards transformative change requires consultation and collaboration with people that rarely receive an opportunity to share and engage in these conversations. If all the representatives at the decision-making table look, speak, think and act alike, then change will never happen. '*E felelei manu ae ma'au i o latou ofaga*' is a Samoan proverb that translates to 'Birds migrate to environments where they survive and thrive'. Addressing racism, sexism and ableism in the profession requires everyone to be accountable and aware because we all deserve to thrive.