SALVAGING THE JURY IN SEXUAL VIOLENCE TRIALS: A REQUIREMENT FOR REASONED VERDICTS

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Trial by jury remains an important expression of democracy and public participation in the New Zealand criminal justice system. However, it can be questioned whether the jury is the appropriate medium by which to ensure a just legal result in sexual violence trials, due to rape myths negatively impacting impartial decision-making. This debate regarding the utility of the jury in sexual violence trials has led several prominent commentators and political figures to advocate for its removal altogether. However, this article argues that the challenges faced by the jury can be addressed by the introduction of a requirement to give reasons for jury verdicts in sexual violence trials. This would avoid the loss of a seminal symbol of democracy, while still ensuring that the presence of rape myths in jury reasoning can be identified and remedied to avoid prejudice to the complainant.

I INTRODUCTION

When asked what works well for complainants in New Zealand sexual violence trials in the 'Strengthening the Criminal Justice System for Victims' (SCJSV) survey, a large proportion of respondents replied "Nothing".[1] Eighty-three per cent of SCJSV respondents disagreed or strongly disagreed that the system was safe for survivors of sexual violence.[2] This suggests that New Zealand's criminal justice system is failing sexual violence complainants. Statistics New Zealand figures support this sentiment, as less than half of the sexual offending cases that went to trial in 2018 ended in conviction.[3]

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1 Chief Victims Advisor to Government *Strengthening the Criminal Justice System for Victims: Survey Report* (Ministry of Justice, Hāpaitia Te Oranga Tangata, August 2019) at 7.

2 Chief Victims Advisor to Government *Strengthening the Criminal Justice System for Victims: Workshop Playback Report* (Ministry of Justice, Hāpaitia Te Oranga Tangata, August 2019) at 4.

3 "It's time to better the odds for victims of sexual crime" *The Dominion Post* (online ed, New Zealand, 11 May 2019).

This failure is not a new development. Described by former Law Commission President Sir Grant Hammond as "a blight on New Zealand society",[4] sexual violence offending is prevalent in New Zealand and regarded as uniquely ill-suited to the adversarial trial process.[5] Sexual violence predominantly impacts women,[6] is under-reported,[7] has severe psychological repercussions, is often committed by perpetrators known to the victim and is associated with socio-cultural biases about "real rape" and female sexuality.[8] The criminal justice system historically and continually fails to address these unique aspects of sexual violence offending, leading to traumatising experiences for complainants and high attrition rates.[9]

Women's rights advocates and proponents of criminal justice reform argue that trial by jury is the primary culprit for these failings. Sexual violence survivor and advocate Louise Nicholas is a prominent proponent of this view in New Zealand,[10] while in the United Kingdom Labour MP Ann Coffey has called for the removal of juries for sexual violence trials on the basis that juries do not make a balanced assessment of cases.[11] A two-year study on alternative methods of resolving sexual violence offending, published as *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand*, also concluded that jury trials were not fit for purpose in the sexual violence context due to issues such as jury bias precluding convictions.[12]

4 Law Commission *The Justice Response to Victims of Sexual Violence* (NZLC R136, 2015) at iv.

5 At 26; and United Nations Development Fund for Women *Progress of the World's Women: In Pursuit of Justice* (United Nations Entity for Gender Equality and the Empowerment of Women, 2011) at 134.

6 See, for example: New Zealand Family Violence Clearinghouse *Data Summary: Adult Sexual Violence* (New Zealand Family Violence Clearinghouse, 2017) at 4. It is also well-recognised that sexual violence disproportionately affects ethnic and gender minorities in New Zealand, see: Joint Venture of the Social Wellbeing Board *Briefing to the Incoming Minister* (3 November 2020) at 8.

7 Less than 10 per cent of sexual violence is reported to police according to estimates in Ministry of Justice *Attrition and progression: Reported sexual violence victimisations in the criminal justice system* (1 November 2019) at 8.

8 Law Commission, above n 4, at 23–25.

9 At 23.

10 Laura Walters "Overdue changes to 'harrowing' court process" *Newsroom* (New Zealand, 3 July 2019).

11 Shehab Khan "Scrap juries in rape trials to stop falling convictions rates, Labour MP says" *The Independent* (22 November 2018).

12 Law Foundation "Law Commission supports study's call for new sex offending responses" (2015) <www.lawfoundation.org.nz>; and Jeremy Finn, Elisabeth McDonald and Yvette Tinsley "Identifying and Qualifying the Decision-Maker: The Case for Specialisation" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 221 at 228.

Both SCJSV participants and advocates such as Nicholas and Coffey argue that bias against the complainant due to pervasive and damaging rape myths are the source of juries' reluctance to convict.[13] Lack of prior training or education in sexual violence leaves jurors to rely on individual societal beliefs about sexual violence, or their "social world" knowledge.[14] These beliefs may include rape myths. Despite this risk of prejudice, jury verdicts are "virtually unreviewable"; jury deliberations are confidential and no reasons are issued for verdicts.[15]

This article proposes to address the challenge of rape myth bias in jury deliberations by proposing a requirement for juries to give reasons for their verdicts in sexual violence trials. This proposal uses the framework of integrated fact-based directions and appellate mechanisms in the Criminal Procedure Act 2011 to require reasoned verdicts to be given in sexual violence trials, alongside increased education on rape myths through judicial directions.

In Part II, the problem of rape myth bias in sexual violence trials is discussed. Part III considers the countervailing benefits of retaining the jury in sexual violence trials, including the democratic and educative function of juries. In Part IV, the components of the reasoned verdict model and its success in civil law jurisdictions are canvassed, noting the commonalities which may allow its integration in adversarial systems. Part V evaluates the appropriateness of the reasoned verdict model for Aotearoa, recognising the need for jury accountability, the possible increased accuracy of reasoned verdicts and the issue of confidentiality of jury deliberations. This article culminates in Part VI's proposal of a reasoned verdict model tailored to New Zealand, aimed at mitigating rape myth bias in sexual violence trials.

II THE PROBLEM

This article focuses on rape myths in trials involving female sexual violence complainants and male defendants, as women make up the majority of sexual violence victims.[16] However, it is important to note that rape myths also apply

13 Chief Victims Advisor to Government, above n 2, at 8–9.

14 Law Commission, above n 4, at 111; and Finn, McDonald and Tinsley, above n 12, at 228.

15 Alice Curci "Twelve Angrier Men: Enforcing Verdict Accountability in Criminal Jury Trials" (JD Dissertation, Washington University School of Law, 2019) at 217–219.

16 Sue Triggs and others *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Ministry of Women's Affairs, September 2009) at 30; and New Zealand Family Violence Clearinghouse *Data Summary: Adult Sexual Violence* (New Zealand Family Violence Clearinghouse, 2017) at 4.

to male complainants. One such stereotype is that men who experience sexual violence must be either homosexual or displaying "effeminate traits".[17] Male-specific rape myth bias is also a concern to be addressed in sexual violence trials, but is outside the scope of this article.[18]

Rape myths are "beliefs about sexual aggression (i.e. about its scope, causes, context and consequences) that serve to deny, downplay, or justify sexually aggressive" behaviour.[19] Some common rape myths relate to conceptions of "real rape", including that rape involves strangers, normally occurs at night, is achieved with force resulting in physical injury and that the victim immediately complains.[20] Damaging views regarding motivations for such offending include that rape is invited by women wearing revealing clothing and having prior sexual relations with the accused or with others, as well as the view that women are likely to make wrongful rape accusations.[21] This formulation of "real rape" has been referred to by commentators as "the rape schema", comprising myths exemplified in antiquated legal requirements for rape offences and perpetuated through societal views.[22]

At the core of these myths is the stereotyping of women as "sexual gatekeepers".[23] In the eyes of jurors influenced by rape myths, the burden falls on the complainant to make her lack of consent clear and to show she did not put herself in a position where she "invited the sexual assault".[24] Female sexual violence complainants therefore interact with the criminal justice system with reduced credibility and increased vulnerability compared to male defendants.[25]

Juror bias is particularly prevalent in sexual violence trials because the evidence is frequently given orally, with the prosecution's case largely relying

17 Nina Burrowes *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors* (NB Research London, 2013) at 8.

18 Scott M Walfield "'Men Cannot Be Raped': Correlates of Male Rape Myth Acceptance" (2018) 1 J Interpers Violence 1 at 7.

19 Jennifer Temkin "And Always Keep A-Hold of a Nurse, For Fear of Finding Something Worse: Challenging Rape Myths in the Courtroom" (2010) 13 New Crim L Rev 710 at 714–715.

20 Richard T Andrias "Rape Myths: A Persistent Problem in Defining and Prosecuting Rape"(1992) 7 Crim Just 2 at 3; and Julia Quilter "Rape Trials, Medical Texts and the Threat of Female Speech: The Perverse Female Rape Complainant" (2015) 19 Law Text Culture 231 at 234.

21 Andrias, above n 20, at 3.

22 Julia A Quilter "Re-framing the rape trial: insights from critical theory about the limitations of legislative reform" (2011) 35 Aust Fem Law J 23 at 29.

23 Joanne Conaghan and Yvette Russell "Rape Myths, Law, and Feminist Research: 'Myths About Myths'?" (2014) 22 Fem Leg Stud 25 at 39.

24 Andrias, above n 20, at 3.

25 Mary Joe Frug "Postmodern Feminist Legal Manifesto (An Unfinished Draft)" (1992) 105 Harv L Rev 1045 at 1047.

on the evidence of the complainant.[26] Rape has been typified as an allegation "easy to be made and hard to be proved", perpetuating the myth of sexual violence complainants as vindictive liars.[27] This myth may lead juries to put undue weight on "objective" evidence such as medical evidence of physical harm, which is not always present.[28] In acquaintance rape cases, forensic evidence is often less relevant and the competing evidence of the complainant and the defendant is at the forefront.[29] Juries are arguably ill-equipped to deal with this "he said, she said" evidence in sexual violence trials, as the credibility of the complainant's account is disproportionately weakened by reference to rape myths.[30]

The practical consequences of rape myths being employed include possible additional psychological harm to complainants. The intimate and traumatic nature of giving this type of evidence means complainants are vulnerable to being traumatised by cross-examination that reinforces rape myths.[31] This process "replicates the dynamics of sexual violence" by re-victimising the complainant and privileging the offender.[32] Aggressive cross-examination evincing incorrect beliefs about sexual violence may be counterbalanced by evidence of expert witnesses.[33] However, such counter-intuitive expert psychological evidence has been criticised as leading the jury to equate the opinion of the experts with fact, while competing opinions of experts may confuse rather than guide the jury.[34]

Another practical effect of rape myths is the disruption of jury impartiality. Rape myths are acknowledged as having a "corrosive effect" on the impartiality of jurors throughout the trial and during deliberations.[35] Research shows that rape myths may negatively impact jurors in their assessment of the credibility of the complainant.[36]

26 Law Commission, above n 4, at 56 and 58.

27 J Taylor "Rape and Women's Credibility: Problems of Recantation and False Accusations Echoed in the Case of Cathlees Crowell Webb and Gary Dotson" (1987) 10 Harv Women's L J 59 at 75.

28 Quilter, above n 22, at 232.

29 Tasha A Menaker, Bradley A Campbell and William Wells "The Use of Forensic Evidence in Sexual Assault Investigations: Perceptions of Sex Crimes Investigators" (2016) 23(4) VAW 399 at 402.

30 Holly Hill "Rape Myths and the Use of Expert Psychological Evidence"(2014) 45 VUWLR 471 at 474.

31 Law Commission, above n 4, at 26.

32 Chief Victims Advisor to Government, above n 2, at 6.

33 Evidence Act 2006, s 25.

34 Hill, above n 30, at 479.

35 Andrias, above n 20, at 3; and Finn, McDonald and Tinsley, above n 12, at 235.

36 Sokratis Dinos and others "A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?" (2015) 43 IJLCJ 36 at 45–46.

Misconceptions about "real rape" can mean that the complainant's evidence is not approached with the impartial mind it deserves. The trial process, and cross-examination in particular, may reinforce the individual prejudices of jurors, leading to verdicts impacted by rape myths.[37] A meta-analysis of mock trial studies on rape myths and jury decision-making found that in eight out of the nine studies analysed, rape myths were instrumental in reaching a verdict and made a not guilty verdict more probable.[38] Conversely, in a real trial, it is near impossible to know whether jurors have based their reasoning on rape myths. This is because the confidentiality of jury deliberations means that New Zealand juries deliberate in secret and do not need to give reasons for their verdict.[39]

The problem of jury bias is part of a wider systemic failing affecting the way sexual violence allegations are addressed at every stage in New Zealand. Attrition rates are much higher throughout reporting, investigation, prosecution and trial for sexual violence than for other offences.[40] According to the Ministry of Justice's 2019 report on sexual violence attrition, less than 10 per cent of sexual violence offending is estimated to be reported to police.[41] Reasons for not reporting can be complex, but a minimal conviction rate arguably fosters lack of confidence in the system in those who might otherwise report.[42]

The re-traumatisation complainants experience at trial also impacts decisions to report. Both the SCJSV and the Law Commission's *The Justice Response to Victims of Sexual Violence* report (*Sexual Violence* report) paint bleak pictures of the experience of complainants in sexual violence jury trials.[43] One submission to the Commission's Issues Paper described the current process as "horrendous, long, arduous, disempowering, re-traumatising and re-victimising".[44] In short,

37 Hill, above n 30, at 474.

38 Dinos and others, above n 36, at 45–46. See also the research detailed in Vanessa E Munro "Judging Juries: The "common sense" conundrums of prosecuting violence against women" [2019] NZWLJ 13.

39 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 51.

40 Triggs and others, above n 16, at ix.

41 Ministry of Justice, above n 7, at 8; and Bronwyn Morrison, Melissa Smith and Lisa Gregg *The New Zealand Crime and Safety Survey: 2009 — Main Findings Report* (Ministry of Justice, 2010) at 31. An estimate for 2013 reporting rates cannot be provided by the Ministry of Justice due to high sampling error.

42 Yvette Tinsley "Investigation and the Decision to Prosecute in Sexual Violence Cases" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 120 at 120.

43 Chief Victims Advisor to Government, above n 2; and Law Commission, above n 4.

44 Law Commission, above n 4, at 26.

those familiar with the system would only counsel a sexual violence survivor to undergo trial by jury in "the most extreme circumstances".[45]

Attrition rates are also impacted by the decisions of officials whether to proceed with prosecution.[46] Although prosecution rates for sexual violence have improved in the last decade, rates remain low, with less than one third of case files progressing to prosecution in 2015.[47] Decisions to prosecute may be influenced by many factors, including police beliefs around 'real rape' and victim credibility.[48] Prosecution rates may also be negatively impacted by the minimal conviction rates for sexual violence and the risk of juries relying on rape myths.[49] Under the 2013 Solicitor General's Prosecution Guidelines, the Crown will not proceed with prosecution if they do not judge that there is a reasonable prospect of conviction.[50]

Failings at the trial stage have been considered by the New Zealand Law Commission. The Law Commission discussed rape myth bias and concluded that sexual violence cases may be too complicated for lay fact-finders.[51] Although alternative fact-finders were considered, the Law Commission did not finally recommend the removal of juries for sexual violence trials, preferring instead to recommend a special sexual violence court and leave open the issue of removal or retention of sexual violence jury trials.[52] Retention of jury trials for sexual violence offending can be rationalised by reference to the value of trial by jury as a symbolic, educative and participatory institution. These benefits will now be explored.

III REASONS TO RETAIN THE JURY

New Zealand does not afford trial by jury the status of an absolute right.[53] Nor does it have the importance it enjoys in the United States, for example, where it is enshrined in the 6th Amendment to their Constitution.[54] In New Zealand the Criminal Procedure Act limits trial by jury to offences punishable by two

45 At 27.
46 Prosecution rates were collected per case rather than per offence. Triggs and others, above n 16, at 34.
47 Ministry of Justice, above n 7, at 10.
48 Tinsley, above n 42, at 125.
49 Kimberly A Lonsway and Joanne Archambault "The 'Justice Gap' for Sexual Assault Cases: Future Directions for Research and Reform" (2012) 18 VAW 145 at 159.
50 Michael Heron QC *Solicitor General's Prosecution Guidelines* (Crown Law Office, 1 July 2013) at [5.1]–[5.4].
51 Law Commission, above n 4, at 111.
52 At 96–97.
53 Criminal Procedure Act 2011, ss 50, 73, 74, 102 and 103.
54 United States Constitution, amend VI.

years' imprisonment or more, including category three crimes (where trial by jury can be elected) and category four crimes (mandatory trial by jury unless the necessary application is made).[55] Enactment of the Criminal Procedure Act required amendment to s 24(e) of the New Zealand Bill of Rights Act 1990, which previously provided a right to a jury trial for an imprisonable offence of three months or more.[56] Changing the threshold to two years' imprisonment was justified for efficiency reasons, as jury trials are costly, inconvenient for jurors and cause delays that threaten the dispensing of efficient justice.[57]

However, juries have been afforded symbolic importance in New Zealand as a representation of "democracy in action".[58] Trial by jury has been regarded as a "vital buffer" between arbitrary state power and the citizen, even in its restricted form under the Criminal Procedure Act.[59] Interposing laypeople between the state and the individual in court places a check on unfettered governmental interference with the life of the citizen.[60] This symbolic retention of the jury also allows the institution to play a participative and educative role and offers possible advantages over judge-alone trials.

A *Participation and education*

Trial by jury mandates participation of laypeople in a justice system that can otherwise seem arbitrary and mysterious. Without this participation, criminal liability decisions would be made solely by the judiciary — a model which may be vulnerable to corruption and which alienates the public from the criminal justice system to which they are subject.[61]

Jury service provides a rare opportunity for a member of the public to gain first-hand experience of judicial processes. The current flaw with this aspect of the model is that people in a self-employed or management role often defer or "dodge" jury service, leading to over-representation of elderly people, students and unemployed people on juries.[62] Despite this representation issue,

55 Criminal Procedure Act, ss 50, 73 and 74.

56 New Zealand Bill of Rights Amendment Act 2011, s 4; and New Zealand Bill of Rights Act 1990, s 24(e).

57 (4 October 2011) 676 NZPD 21637.

58 Daniel P Collins "Making Juries Better Factfinders" (1997) 20(2) Harv J L & Pub Pol'y 489 at 489.

59 Verónica Michel *Prosecutorial Accountability and Victims' Rights in Latin America* (Cambridge University Press, Cambridge, 2018) at 21.

60 Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998) at 18.

61 Collins, above n 58, at 490.

62 Shabnam Dastgheib "Jury dodgers 'risk undermining justice'" *The Dominion Post* (New Zealand, 28 January 2013).

jurors have diverse life experiences and perspectives that a judge sitting alone may lack, meaning the current jury model "promotes vigorous debate".[63] Participation through jury service is far more direct than other forms of democratic participation, such as voting.[64]

Jury service has also been shown to have positive effects on other forms of public participation. The Jury and Democracy Project of the United States noted a connection between jury service and subsequent increased commitment to exercising voting rights.[65] Citizens who rarely voted before jury service were more inclined to vote following the experience.[66]

In addition, jury service educates the public about the criminal justice system. The Law Commission's preliminary paper *Juries in Criminal Trials: Part One* (*Juries I*) identified direct educative outcomes of being a juror as including greater comprehension of due process, the justice system's procedures and the legitimacy of sentences.[67] This effect can be summarised in the phrase "deliberation improves comprehension".[68]

Individual jurors may make errors, but other jurors with different areas of expertise can correct those errors. This has been described as a common occurrence during deliberations and allows for both robust decision-making and education between jurors.[69] As jury service is not a universal experience, the educative function is limited.[70] But it is still of value, as former jurors may educate others about their experience, thereby broadening the educative effect of jury service beyond those who have served directly.[71]

B "Too important to be trusted to trained [wo]men?"[72]

Trial by jury also enjoys community legitimacy that is not present in judge-alone trials.[73] Decisions are legitimised by the public perception that jury deliberations involve reasoned debate where the values of the community

63 Valerie P Hans and Neil Vidmar "The Verdict on Juries" (2008) 91(5) Judicature 226 at 227.
64 Law Commission, above n 60, at 13.
65 Hans and Vidmar, above n 63, at 230.
66 At 230.
67 Law Commission, above n 60, at 20.
68 Hans and Vidmar, above n 63, at 227.
69 At 227.
70 Albert W Dzur "Participatory Democracy and Criminal Justice" (2012) 6 Crim L & Phil 115 at 127.
71 Law Commission, above n 60, at 20.
72 G K Chesterton "The Twelve Men" in *Tremendous Trifles* (Dodd Mead and Company, New York, 1922) 86 at 86–87.
73 Law Commission, above n 60, at 15.

clash and one perspective prevails.[74] The jury's decision is thus "a verdict of the community", rendering any mistakes more morally acceptable than a mistake made by an individual judge.[75]

Some believe that juries decide more accurately than a judge sitting alone.[76] This view reflects public concern that judges may not weigh evidence correctly or fairly.[77] Although the research findings in the Law Commission's preliminary paper *Juries in Criminal Trials: Part Two* (*Juries II*: *Research Findings*) stated that 35 out of the 48 jury trials analysed evinced a "fairly fundamental misunderstanding" of the law,[78] it was found that most jurors approach their role seriously and conscientiously.[79]

Blackstone's seminal defence of the jury framed jurors (rather than judges) as "the surest guardians of public justice".[80] This was due to the perceived smaller risk of 12 people being biased to the extent that the verdict was compromised.[81] This may be so in certain situations. For jurors compromised by pre-trial publicity, the group decision-making process has been shown to outweigh individual prejudice.[82]

C The "dark side": rape myth bias

Despite the strengths of the jury system, retaining juries in sexual violence trials poses serious concerns due to rape myth bias. Biased jurors can reduce the impartiality of the jury as a whole, demonstrating "the dark side of common-sense justice".[83] Where a misconception is widely held, a majority of jurors may hold that belief and group decision-making may be unable to correct it.[84] Collective decision-making where a majority of jurors is prejudiced can worsen biases, resulting in "group polarisation".[85]

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74 Hans and Vidmar, above n 63, at 227.
75 John Baldwin and Michael McConville "Criminal Juries" (1980) 2 Crime & Just 269 at 271; and Collins, above n 58, at 489.
76 Collins, above n 58, at 490.
77 At 490.
78 Law Commission *Juries in Criminal Trials: Part Two — A Summary of the Research Findings* (NZLC PP37, 1999) at 53.
79 At 53.
80 Collins, above n 58, at 491.
81 At 492.
82 Law Commission, above n 60, at 61.
83 Hans and Vidmar, above n 63, at 228.
84 Finn, McDonald and Tinsley, above n 12, at 235.
85 At 236.

Research across the Western World indicates that worrying proportions of the public subscribe to rape myths.[86] For example, an Irish survey found 40.2 per cent of respondents thought rape allegations were frequently false and nearly 30 per cent believed women wearing revealing clothing invited rape.[87] A similar study in Victoria showed 44 per cent of men surveyed believed rape arose due to uncontrollable passion.[88]

Rape myths employed in the jury room are sheltered from external scrutiny due to the confidentiality of jury deliberations.[89] This "veil of secrecy" is of particular concern in sexual violence trials as the secrecy of deliberations creates an environment where widely held rape myths can thrive undetected.[90] Reasoning based on rape myths may then be legitimised when it forms part of the collective verdict.[91] One way to address rape myth bias, while retaining the benefits of the jury as an institution, is to require that reasons be given for jury verdicts in sexual violence cases.

IV WHAT IS THE REASONED VERDICT MODEL?

The reasoned verdict model requires juries to give substantive reasons for verdicts. This may improve identification and eradication of rape myths in sexual violence trials, without removing the jury altogether. In this section I outline the model's components and its similarity to an existing common law option, and I discuss its success in European jurisdictions.

A Special verdicts

A requirement for a reasoned verdict builds on the common law special verdict. The classic jury model New Zealand inherited from the United Kingdom allows judges to request that special verdicts addressing factual sub-issues be given as well as the general verdict, but traditionally only in serious cases.[92] For example, a special verdict was requested in the notorious *R v Dudley* case, which

86 Burrowes, above n 17, at 7.

87 H McGee and others "Rape and Child Sexual Abuse: What Beliefs Persist About Motives, Perpetrators, and Survivors?" (2011) 26(17) J Interpers Violence 3580 at 3586.

88 Natalie Taylor *Juror Attitudes and Bias in Sexual Assault Cases* (Australian Institute of Criminology, 2007) at 6.

89 Camille Wrightson "Judging Juries: Assessing a New Fact-Finder Model for Sexual Violence Trials" (LLB (Hons) Dissertation, University of Otago, 2017) at 22.

90 Baldwin and McConville, above n 75, at 274.

91 At 276.

92 John D Jackson "Making Juries Accountable" (2002) 50(3) Am J Comp L 477 at 505.

established that necessity could not be a defence to murder.[93] This suggests reasoned verdicts are not as incompatible with the common law tradition as they might appear.

The United Kingdom also implemented a "route to verdict", a method now required by Criminal Practice Direction VI 26K.12 unless the case is "so straightforward that it would be superfluous to do so".[94] This method involves providing the jury with a set of yes/no factual questions that make a logical "route" to a guilty or not guilty verdict.[95] This is similar to New Zealand's integrated fact-based directions, which involve the jury completing a question trail based on the components of the offence to be proved.[96]

United Kingdom and United States courts have used special verdicts in rare criminal cases,[97] while Australia, the United Kingdom, Canada and New Zealand use a similar question trail model to guide juries' reasoning processes.[98] The ability to request a special verdict is reflected in New Zealand by convention, although there is no explicit empowering statutory provision.[99] This option has been used solely in civil cases in New Zealand.[100] It is rarely exercised and, arguably, the jury cannot be forced to comply.[101]

Reasoned verdicts are comparable to the special verdict and question trail models, but allow for identification of the adequacy of the jury's reasoning. Several European jurisdictions use a reasoned verdict model and, although not common law systems, Austria, Russia, Belgium and Spain have successfully incorporated reasoned verdicts into a classic jury model.[102] The relationship between the common law special verdict and the use of reasoned verdicts in continental Europe indicates that reasoned verdicts may be able to be

93 *R v Dudley* (1884) 14 QBD 273; and *R v Bourne* (1952) 36 Cr App R 125 at 127.

94 David Maddison and others *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial College, 2018) at 12.

95 Robin Auld *Review of the Criminal Courts of England and Wales* (The Stationery Office London, 2001) at [50].

96 J Clough and others "Judge as Cartographer and Guide: The Role of Fact-Based Directions in Improving Juror Comprehension" (2018) 42 Crim LJ 278 at 283.

97 Jackson, above n 92, at 505.

98 M Comiskey "Tempest in a Teapot — The Role of the Decision Tree in Enhancing Juror Comprehension and Whether It Interferes with the Jury's Right to Deliberate Freely?" (2016) 6(2) OSLS 255 at 270.

99 *R v Storey* [1931] NZLR 417 (CA) at 439–441.

100 Law Commission, above n 78, at 15.

101 *R v Storey*, above n 99, at 439–441.

102 Stephen C Thaman "Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v Belgium*" (2011) 86(2) Chicago-Kent Law Rev 613 at 616.

integrated into the New Zealand jury system. This relationship shows that the "hallowed tradition" of general verdicts and the secrecy of jury deliberations are not fundamental to the success of a classic jury model.[103] The components of the reasoned verdict model will now be explored.

B Question lists

A "question list" verdict format requires the components of the crime, including any defences, to be itemised and addressed individually by jurors. Jurors vote on each element and the jury makes a final vote on guilt or innocence.[104] Switzerland was the first jurisdiction to use question lists, which evolved into juries giving "systematic reasons" for their verdicts after amendments to the Genevan Code of Criminal Procedure in 1996.[105]

In addition, Belgium has used the question list model since 1930 for serious crimes and political and press offences.[106] A question list is submitted to the jury by the bench. It comprises a breakdown of the elements of the offence, possible defences and aggravating and mitigating factors.[107] Spain uses a similar question list model.[108] This allows the court to follow the reasoning process of the jury by identifying the individual decisions on each element of the crime to be proved. This question list element is already used in common law jurisdictions, including New Zealand, in the form of integrated fact-based directions, or question trails.[109]

C The reasons

However, the question list model may serve little purpose if solely yes/no questions are provided. The failings of minimal question lists were exemplified in *Taxquet v Belgium*, leading to the enactment of s 334 of the Belgian Code of Criminal Procedure, which requires juries to "formulate the principal reasons for their decision".[110]

In *Taxquet* the European Court of Human Rights ruled that a conviction for murder violated fair trial rights under art 6 of the European Convention on

103 Richard L Lippke "The Case for Reasoned Criminal Trial Verdicts" (2009) 22 Can J L & Juris 313 at 313.
104 Thaman, above n 102, at 615–616.
105 At 627.
106 Belgian Constitution 1831, art 98.
107 *Taxquet v Belgium* [2010] ECHR 926/05 at [26].
108 Thaman, above n 102, at 628–629.
109 Clough and others, above n 96, at 283.
110 Thaman, above n 102, at 624.

Human Rights, as two questions on the question list relating to the homicide required only a yes/no answer.[111] The Court held art 6 was violated because the questions did not enable "the applicant to understand why he was found guilty".[112]

The Grand Chamber approved *Taxquet* in 2010 but did not make a blanket statement that un-reasoned verdicts from juries violated art 6, subject to the requirement that "the accused … must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness".[113] Whether reasons are adequate for the purposes of art 6 depends on the circumstances. A French jury's question list consisting of an "astonishing" 768 questions was found to be more than sufficient to comply with art 6.[114]

Spain has also identified and addressed the risk of insufficient reasons. Spanish juries must indicate whether votes are unanimous or by majority for each question, give the verdict, outline the evidence on which decisions are based and finally give "a succinct explanation of the reasons why they have declared or refused to declare, certain facts as having been proved".[115]

The articulation of adequate reasons is supported by court personnel in each jurisdiction. In Spain and Switzerland, the clerk of the court aids the jury in drafting reasons.[116] In Belgium, the members of the three-judge bench enter the jury room to assist the jury.[117] This assistance role would not be suitable in New Zealand, where the judge's role is far more passive than a *juge d'instruction* in inquisitorial systems.[118] An independent legal writing clerk as a neutral adviser to juries drafting reasons would be a more suitable option.

D Judicial intervention

Substantive jury reasons can be regulated through judicial intervention. In Spain, the judge can return the verdict to the jury if:[119]

111 *Taxquet v Belgium,* above n 107, at [15].
112 *Taxquet v Belgium* Grand Chamber 926/05, 16 November 2010 at [96].
113 At [90].
114 Peter Duff "The Compatibility of Jury Verdicts with Article 6: *Taxquet v Belgium*" (2011) 15(2) Edinburgh Law Review 246 at 249.
115 Ley Organica del Tribunal del Jurado 1995 (Spain), art 61(1)(d).
116 Thaman, above n 102, at 627–629.
117 At 624.
118 John R Spencer "Adversarial vs inquisitorial systems: is there still such a difference?" (2016) 20 Int J Hum Rights 601 at 611.
119 Thaman, above n 102, at 649–650.

i) there is no decision made as to the facts, or guilt or innocence;

ii) there is a lack of the necessary majority at any point;

iii) any decisions made are contradictory; or

iv) any other mistake exists relating to voting or deliberations.

Commentators argue that under 63(1)(d) of the *Ley Organica del Tribunal del Jurado* (Spain) (LOTJ) the trial judge can reject the jury's verdict for substantively inadequate reasons, but on the surface the LOTJ does not permit this.[120] However, in Belgium, the bench may call for a retrial and a new jury if the trial judges unanimously decide that the jury's verdict is clearly incorrect.[121] This is rare, having only occurred three times since the 18th century.[122] To be compatible with adversarial systems, this element would need to reflect the trial judge's role as "umpire" rather than an active intervenor in the substance of the trial.[123]

E Appellate courts

In certain jurisdictions where the trial judge cannot intervene, the appellate courts have responsibility for addressing inadequate or erroneous reasons. The Spanish Supreme Court has on occasion overturned verdicts where the jury's reasoning has been inadequate.[124] The Court's analysis of jury reasons has fluctuated between a flexible perspective requiring simply an outline of the evidence the decision is based on and a more demanding approach requiring reasons "resembling the explanation demanded of professional judges in drafting a judgment".[125] The appellate courts may be the appropriate site for intervention on the basis of jury reasons in an adversarial system.

V EVALUATION: APPROPRIATENESS FOR NEW ZEALAND

Having considered the components of the reasoned verdict model in light of its successful implementation in other jurisdictions, the benefits and disadvantages of applying the model in New Zealand sexual violence trials will now be evaluated.

120 At 649.
121 At 622.
122 At 622.
123 Erin C Blondel "Victims' Rights in an Adversary System" (2008) 58(2) Duke L J 237 at 241.
124 Thaman, above n 102, at 642.
125 At 634.

A Accountability

Requiring jury reasons seems to deny the common law tradition that jury verdicts are inherently legitimate in and of themselves.[126] Judges give reasoned judgments for the sake of the appeal process and administrators give reasons in order for there to be meaningful judicial review, but these same imperatives do not currently exist for juries in an adversarial system.[127] Jurors are not government officials.[128] They are drafted into the criminal justice system via jury service and it may be unduly onerous to impose accountability on members of the public which they have not assented to bearing.[129]

However, jurors could equally be described as "quasi-state officials" during their term of jury service, as they are fulfilling a significant state function as part of the social contract between state and citizen and their verdicts are treated with the significance and finality of any other judicial decision.[130] The verdict of a jury has life-changing impacts for the relevant parties and it seems inconsistent with the significance of the jury's role to exclude its members from requirements of accountability. In other contexts that import serious consequences for the public (involving judges, administrators and review boards) the obligation to give reasons for a decision is essential to the office.[131] The lack of formality of the juror's position is arguably not an adequate reason for the jury to be exempt from the expectation that such decisions should be publicly justified and subject to review in case of bias.[132]

Further, multiple common law commentators note the accountability of juries is an increasingly prominent issue and requiring reasons to be given is one way that jurors can be held accountable for their decisions.[133] The increasing need for accountability, particularly in sexual violence trials where prejudice can dominate, may outweigh adherence to the common law tradition of confidentiality of deliberations. For sexual violence complainants, the giving

126 Law Commission, above n 60, at 15.
127 Mathilde Cohen "When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach" (2015) 72(2) Wash & Lee L Rev 483 at 529.
128 Lippke, above n 103, at 321.
129 At 321.
130 At 321.
131 At 322.
132 At 321.
133 See generally Kate Stith-Cabranes "The Criminal Jury in Our Time" (1995) 3 Va J Soc Pol'y & L 133 at 143; Clifford Holt Ruprecht "Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy" (1997) 146 Univ PA Law Rev 217 at 217–220; and Curci, above n 15, at 217–219.

of reasons may be a vital protection against verdicts based on rape myths. Depending on the model adopted, flawed reasons can be challenged either by the judge at trial, or on appeal. This provides complainants with the possibility of redress for discrimination that is invisible under the general verdict model. As Lippke argues, knowing the reasons for a decision can be conceptualised as a necessary implication of "the moral right to trial".[134]

Arguably, reasons cannot be a universal protection against rape myths. After all, concerns of bias can arise in judge-alone trials despite the presence of reasons.[135] Unconscious bias may be masked by outwardly defensible justifications. Whether the giving of reasons effectively identifies and neutralises rape myths depends on the form reason-giving takes.

However, this caveat is preferable to the current "sphinx-like" general verdict, which provides the complainant with no means to challenge or even identify a flawed reasoning process.[136] A requirement to give reasons puts jury decisions under scrutiny, suggesting jurors will be encouraged to base verdicts on defensible evidential arguments.[137] A model which couples reasoned verdicts with juror education about sexual violence may both address rape myths at the source and provide much needed redress in the case of violations.

Nevertheless, the above benefits are dependent on jurors producing coherent reasons. Requiring jurors to not only grapple with reaching a verdict, but also to create a narrative of their reasoning, may hold them to an unattainable standard. Juries in reasoned verdict jurisdictions have struggled with the drafting of reasons. For example, reasons given by Spanish juries in the early years of the revitalised jury system were often "skeletal and/or conclusory", giving little real guidance as to the reasoning of the jury.[138] Further, requiring juries to give reasons will extend the time of deliberations, in a system that already struggles with systemic delay.[139]

However, the issues of drafting and delay in other jurisdictions have been attributed to the newness of the system and judges becoming familiar with

134 Lippke, above n 103, at 318.
135 Jackson, above n 92, at 485.
136 At 488.
137 Finn, McDonald and Tinsley, above n 12, at 243.
138 Thaman, above n 102, at 630.
139 Ministry of Justice *Court User Survey 2019* (October 2019) at 53; Law Commission *Seeking Solutions: Options for Change to the New Zealand Court System* (NZLC PP52, 2002) at 22 and 118; and Te Uepū Hāpai i te Ora — Safe and Effective Justice Advisory Group *Turuki! Turuki! Move Together!* (December 2019) at 55.

guiding the jury.[140] Such guidance can include giving juries neutral examples of ways to draft their reasons, such as "witness X said this and we feel it is more convincing than witness Y who said the contrary".[141] Giving brief reasons in this form may not excessively extend the time of deliberations. Weak drafting of reasons could also be addressed in New Zealand by creating the role of a legal writing clerk, who assists juries to draft reasons, similar to the Swiss and Spanish models.[142] This role could be filled by an independent clerk who supports a neutral construction of reasons. The individual in this role would not be responsible for preventing the use of rape myths, but could aid jurors to express their deliberation process on paper. This would be a role of significant importance, in which impartiality would be paramount. The question of who would fulfil this role is, it is acknowledged, contentious and would require more in depth analysis before its creation.

B Accuracy

Reasoned verdicts are also possibly more accurate, as jurors are forced to think critically about why they came to a decision in order to articulate it on paper.[143] Scholars suggest the model increases debates between jurors and results in more carefully considered verdicts.[144] This mirrors the justification behind judges giving reasons, as knowing that their decision needs to stand up to public scrutiny and be both comprehensible and defensible means they are more likely to approach problems with "greater meticulousness".[145]

Some research shows that models similar to reasoned verdicts such as special verdicts and question trails improve the accuracy of verdicts. Supporters of special verdicts argue that breaking the decision down into sections simplifies the overwhelming task of reaching a general verdict.[146] A similar effect is seen in New Zealand's fact-based directions and question trails, as a comparative study with Australia has suggested this method results in greater juror comprehension and more structured and efficient deliberations.[147]

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140 Thaman, above n 102, at 631.
141 At 632.
142 At 627–629.
143 Kayla A Burd and Valerie P Hans "Reasoned Verdicts: Oversold?" (2018) 51 Cornell Int'l L J 319 at 332.
144 Mar Jimeno-Bulnes "A Different Story Line for 12 Angry Men: Verdicts Reached by Majority Rule — The Spanish Perspective" (2007) 82 Chi-Kent L Rev 759 at 774.
145 Burd and Hans, above n 143, at 332.
146 At 333.
147 Clough and others, above n 96, at 280; and Lynda Hagen "New Zealand Juries Get Better Judicial Guidance, Study Shows" (29 March 2018) Law Society <www.lawsociety.org.nz>.

The separation of issues in special verdicts and question trails may also address unconscious bias such as rape myths.[148] Jurors overwhelmed by the lack of guidance in a general verdict model tend to rely on what "feels right", whereas separating the components of the offence dissuades jurors from deciding "according to some desired outcome".[149]

Psychological research on jury deliberations is not unanimous as to whether this positive effect applies to reasoned verdicts. The dominant theory of juror decision-making is the "Story Model", which posits that jurors construct a story that best suits the evidence in their mind and then debate with other jurors based on that narrative.[150] General verdicts are advantageous under this theory as they allow jurors to view the evidence holistically and create their own narrative of the trial.[151]

Pennington and Hastie's mock trial experiments demonstrate that mock jurors who relied on a narrative approach decided with more confidence and produced verdicts "more faithful to the preponderance of the evidence".[152] Narrative creation is disrupted when the verdict is broken down into discrete issues in special verdicts and reasoned verdicts.[153]

The Story Model can be critiqued, as Pennington and Hastie's mock jurors were more likely to remember information incorrectly to "shoehorn it into their story narrative".[154] The rates of memorisation of information that supported their narrative were higher than for evidence contrary to their view, and facts of cases were misremembered in a distorted manner to support their narrative.[155] Question lists and substantive reasons therefore may reduce mischaracterisations of evidence to suit a narrative incorporating false beliefs about rape.

148 James A Henderson, Fred Bertram and Michael J Toke "Optimal Issue Separation in Modern Products Liability Litigation" (1995) 73 Tex L Rev 1653 at 1673.

149 At 1673.

150 Lora M Levett and Dennis Devine "Integrating Individual and Group Models of Juror Decision Making" in Margaret Bull Kovera (ed) *The Psychology of Juries* (American Psychological Association, Washington DC, 2017) 11 at 13.

151 Nancy Pennington and Reid Hastie "Evidence Evaluation in Complex Decision Making" (1986) 51 J Personality & Soc Psychol 242 at 252.

152 Burd and Hans, above n 143, at 337.

153 At 337.

154 At 337.

155 Nancy Pennington and Reid Hastie "Explanation-based Decision Making: Effects of Memory Structure on Judgment" (1988) 14 J Experimental Psychol: Learning, Memory & Cognition 521 at 527.

However, moral psychologist Haidt argues that giving reasons after the fact only provides an "illusion of objectivity".[156] His theory is that jurors largely participate in "verdict-driven" debate (deciding on a verdict before discussion) rather than "evidence-driven" debate (discussing evidence before voting).[157] Should this be true, providing reasons may be a façade to justify intuitive decisions, rather than a means to combat the pitfalls of the Story Model. The Law Commission's *Juries II*: *Research Findings* was inconclusive as to which form of debate jurors predominately followed and which was most desirable for accurate decision-making.[158]

Nevertheless, the Law Commission's research reinforced the importance of guidance and structure for deliberations.[159] The reasoned verdict model provides structure through clear drafting of the question list. Further, if reasons for a verdict are given, verdict-driven debate and the associated lack of deliberative reasoning are more likely to be identified and addressed either by the trial judge, or through appellate review, than if confidentiality of deliberations remains.[160]

C Departure from confidentiality

However, confidentiality of jury deliberations is a cornerstone of trial by jury in New Zealand and other common law jurisdictions.[161] No disclosure of deliberations during or after the trial is permitted.[162] The Contempt of Court Act 2019 makes disclosure of jury deliberations an offence.[163] This is subject to certain exceptions, including reporting juror misconduct and when information is sought by an appellate court.[164] Thus, it would be a serious change in tradition and policy to differentiate sexual violence trials from other trials via jury reasons. However, the legislature has already envisaged exceptions to confidentiality, including for the purposes of appeals, although exceptions are rarely implemented.[165]

156 Burd and Hans, above n 143, at 339.
157 At 343.
158 Law Commission, above n 78, at 28.
159 At 28–29.
160 Burd and Hans, above n 143, at 339–340.
161 *Solicitor-General v Radio New Zealand Ltd*, above n 39, at 51.
162 Law Commission *Reforming the Law of Contempt of Court: A Modern Statute* (NZLC R140, 2017) at 4.
163 Contempt of Court Act 2019, s 14.
164 Section 15.
165 See generally Jesse Slankard "Jury Secrecy, Contempt of Court and Appellate Review" (LLM Dissertation, Victoria University of Wellington, 2017) at 12–18.

Further, the three key factors justifying the confidentiality of jury deliberations in *Solicitor-General v Radio New Zealand Ltd* (finality of decisions, free and frank discussion amongst jurors and privacy considerations), are arguably not threatened by the sexual violence reasoned verdict model.[166]

First, discussion of jurors' perceptions of the trial and the credibility of the defendant and complainant must be open and honest.[167] The possibility of their words becoming public knowledge may disincentivise jurors from thinking critically about the trial and forming their own opinion on the evidence.[168] Fear of public backlash might dissuade jurors from challenging the popular view in the public eye.[169] However, as the reasoned verdict model preserves the anonymity of jurors, with dissents in opinion only recorded numerically, this is unlikely to have a chilling effect on free and frank discussions. The reasoned verdict model also preserves juror privacy. Juror identities remain confidential, only jury reasons are released. Jurors are therefore no more vulnerable to harassment from the media or the public than under the confidential deliberations model.[170]

The implications for finality of decisions require more discussion. Putting the reasoning of jurors on public display could result in verdicts being revisited due to public disapprobation of the reasoning process. On one view, this demystification of jury decision-making might undermine public confidence in the jury system. As the Law Commission stated in its *Reforming the Law of Contempt of Court: A Modern Statute* report:[171]

> A verdict does not get its legitimacy from the reasoning or deliberation process taken by individual jurors, but because it is supported by a substantial majority of the jurors, irrespective of the different routes by which individual jurors came to agree on that verdict.

However, it can equally be argued that a regulated form of reason-giving for sexual violence trials would increase public confidence in the jury system. Even if public opinion were against the verdict, the presence of reasons may

166 *Solicitor-General v Radio New Zealand,* above n 39, at 53.
167 "Public Disclosures of Jury Deliberations" (1983) 96 Harv L Rev 886 at 889–890.
168 *Attorney-General v Fraill* [2011] EWCH 1629 (Admin) at [33].
169 Jennifer Tunna "Contempt of Court: Divulging the Confidences of the Jury Room" (2003) 3 Canta LR 79 at 82.
170 *Solicitor-General v Radio New Zealand Ltd*, above n 39, at 54.
171 Law Commission, above n 162, at 80–81.

satisfy the public that the decision was reached legitimately.[172] Public access to reasoned verdicts for sexual violence cases may also increase societal discussion of due process and avoiding victim blaming. The model thus serves both an educative and a progressive function.[173]

Further, reasoned verdicts may aid the court to identify juror misconduct. Currently juror misconduct can be reported by other jurors in exceptional circumstances under s 15(b) of the Contempt of Court Act. Such circumstances include conduct such as in the United Kingdom case of *R v Young,* in which jurors consulted a Ouija board to guide their verdict.[174]

Another example is *Smith v Western Australia,* where a juror reported they were physically intimidated by another juror, who forced them to agree with the majority verdict.[175] If, due to intimidation, apathy or lack of knowledge, juror misconduct is not reported, confidentiality of deliberations shields this misconduct from court intervention. Requiring reasons to be given in sexual violence trials would compel jurors to follow a legitimate process and produce defensible reasons for a verdict. This scrutiny reduces the risk of a verdict largely based on misconduct or contrary to the evidence.[176]

D Effective protection for complainants?

The process of articulating reasons may go some way to reducing the impact of rape myth bias in the minds of jurors. But this psychological effect alone is not sufficient protection for complainants. Reliance on rape myths must be able to be exposed through review. If the Belgian approach were accepted in New Zealand, the trial judge would return the verdict to the jury if they found the reasoning to be fundamentally flawed.[177] This goes against the very core of the adversarial system in New Zealand where, as in the United States and the United Kingdom, judicial intervention is regarded with suspicion as a threat to the independence of the jury.[178]

On the other hand, if the Spanish approach of overturning verdicts on appeal were adopted, the New Zealand appellate courts would be able to attack

172 Lippke, above n 103, at 320.
173 At 320.
174 *R v Young (Stephen)* [1995] QB 324.
175 *Smith v Western Australia* [2014] HCA, 3 (2014) 250 CLR 473.
176 Isla Callander "The jury is an inappropriate decision-making body in rape trials in Scotland: Not Guilty, Not Proven, Guilty?" (LLM(R) Thesis, University of Glasgow, 2013) at 65.
177 Thaman, above n 102, at 622.
178 Law Commission, above n 60, at 57.

finality of decisions based on inadequate jury reasons.[179] This undermines the notion of "inherent legitimacy" of the jury verdict as sourced from the United Kingdom, which mandated that jury verdicts were above justification; they were even above appellate challenge in the United States until 1889.[180]

However, if New Zealand implemented reasoned verdicts but made no provision for review, a verdict clearly based on rape myths could not be challenged either by the trial judge or the appeal courts. Requiring jury reasons then serves little purpose. Retaining the status quo, or implementing reasoned verdicts without the possibility of review, would be an unacceptably apathetic position in light of the harm caused by rape myths disrupting the impartiality of juries. A proposal for reasoned verdicts in New Zealand sexual violence trials needs to ensure the giving of reasons is a means to revalidate the jury in the eyes of complainants, rather than being mere window-dressing. This proposal will now be outlined.

VI PROPOSED MODEL FOR NEW ZEALAND

A Jury reasons

The requirement to give reasons in New Zealand sexual violence trials will need to avoid placing an impractical burden on juries. Reasons will need to be sufficiently detailed, as a yes/no question list will not identify the content of the reasoning processes and thus cannot protect complainants from biased verdicts.[181] The Spanish model's requirement for substantive reasons behind each decision is the best option for identifying flaws in jury reasoning.[182] Although some unconscious bias against complainants would still be eclipsed under this approach, it ensures that juries have to advance defensible reasons for the verdict. The presence of a justifiable foundation for the verdict will increase the legitimacy of decisions in sexual violence trials and may raise confidence in the system on the part of complainants.[183] The components of a reasoned verdict, taking into account the different jurisdictions discussed earlier in this article, would include:

179 Stephen C Thaman "Spain Returns to Trial by Jury" (1998) 21(241) Hastings Int'l & Comp L Rev 241 at 391.
180 Thaman, above n 102, at 613.
181 Baldwin and McConville, above n 75, at 276.
182 Thaman, above n 102, at 628–629.
183 Wrightson, above n 89, at 37.

i) a question list identifying the components of the sexual offence(s) to be proved, including defences;

ii) decisions by the jury on each of the components, with the proportions of jurors on each side of a decision if it is not unanimous (for example in an '11-12' format);

iii) an indication of the evidence on which each conclusion is based; and

iv) brief substantive reasons by which the jury justifies the decisions and ultimate verdict.

As giving juries question trails and employing integrated fact-based directions is routine in New Zealand, a framework exists around which a reasoned verdict requirement can be built.[184] This framework already involves the court fulfilling most of the above functions — drafting the components of the crime and defences, creating a logical question list based on the facts and providing this to the jury to guide their deliberations.[185] The only addition to this method for reasoned verdicts is that jurors will be required to provide substantive reasons in response to the question list.

An independent legal writing clerk can assist jurors in drafting their reasons, similar to the Swiss and Spanish approaches.[186] This avoids the trial judge entering the deliberation room as in civil law jurisdictions such as Belgium, a step which would likely be seen as too far outside the common law judicial role and over-interventionist.

Arguably, giving reasons is not an unduly onerous requirement for laypeople to fulfil as part of their jury service. Reasoned verdicts merely make concrete what is already expected of jurors under the current jury system: jurors are obligated to weigh evidence carefully, try to remain impartial and make a logical decision based on the evidence.[187] Making these implicit expectations explicit through a question list and substantive reasons seems a proportionate response to the high risk of bias in sexual violence trials.

184 Clough and others, above n 96, at 283.
185 At 283.
186 Thaman, above n 102, at 629.
187 Lippke, above n 103, at 316.

B Education

Giving reasons is, without doubt, a complex addition to the existing framework. Jurors will need support in their new role during both the trial and the drafting of reasons. Pre-trial education in the form of a specialised jury video,[188] or a sexual violence information pack, was canvassed by the Law Commission in both the *Juries in Criminal Trials* report and its 2015 report.[189] The practicality of these options has been questioned by researchers, including concerns that large deposits of information for short-term use are confusing and ill-suited to a random selection of jurors,[190] and that these approaches could prejudice juries against the defendant.[191]

Another option is increased educational guidance via directions given by the trial judge. Discretionary judicial directions aimed at rape myths are available in New Zealand under s 127 of the Evidence Act 2006 to address misconceptions around a complainant's delay or failure to report. The efficacy of judicial directions in neutralising rape myths is unclear. A mock-trial study conducted by Ellison and Munro had positive results for one subset of subjects receiving judicial instructions on possible explanations for the complainant's calm demeanour in court.[192] Hearing from an authority figure that lack of emotion might signify "emotional numbness" following trauma made certain mock-jurors feel they became "more objective" in their approach.[193]

Other research suggests there is little evidence of reduced jury bias in response to judicial directions.[194] The Law Commission noted its weaknesses and concluded more research was required before the option could be supported.[195] Furthermore, issues arise regarding juror comprehension of directions,[196] whether repetition of rape myths reinforces them and the static nature of statutory directions.[197]

188 Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at 109.
189 Law Commission, above n 4, at 120.
190 Finn, McDonald and Tinsley, above n 12, at 240.
191 Law Commission, above n 4, at 120.
192 Louise Ellison and Vanessa E Munro "Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials" (2009) 49 Brit J Criminol 363 at 379.
193 At 369–370.
194 Finn, McDonald and Tinsley, above n 12, at 238.
195 Law Commission, above n 4, at 118.
196 Finn, McDonald and Tinsley, above n 12, at 238.
197 Temkin, above n 19, at 725.

However, research on judicial directions in this context largely addresses directions as a stand-alone option. In conjunction with a reasoned verdict requirement they may be more effective. It seems incongruous that the New Zealand legislature recognises the benefit of judicial directions for one rape myth in the Evidence Act and not for the other myriad of rape myths that need to be addressed at trial. Section 127 could be expanded to include mandatory directions warning against reliance on other rape myths mentioned in the first section of this article. This would indicate to jurors that such myths are not appropriate bases for their reasons.

Mandatory directions addressing rape myths are compatible with common law jurisdictions. For example, Scottish legislation requires mandatory judicial directions on the significance of both a complainant's delay or failure to report and their lack of physical resistance in rape cases.[198] New South Wales also proposed directions regarding complainants who forget details of their assault.[199]

Positive educative effects may increase if such directions are given before evidence, as jurors are likely to regard the first information heard at trial as most authoritative.[200] Also, issues regarding juror comprehension of directions and repetition of rape myths could be countered by simply drafted directions outlining basic reasons why the rape myth is irrelevant or incorrect.[201] Education via judicial directions need not bear the full burden of eradicating rape myths. Instead, directions would be supplementary to the safeguards provided by the reasoned verdict. This option requires further research but appears to be a promising means to support the reasoned verdict proposal.

C Trial judge's role

In addition to the trial judge's role in giving directions, some supervision will be required at trial to ensure that reasons are in fact given. The trial judge can appropriately occupy this gatekeeping role in New Zealand sexual violence trials, as the role only requires intervention where the reasons are clearly deficient. Judges in adversarial systems already have the power to intervene in certain circumstances, for example when an "agreed version" of facts is

198 Abusive Behaviour and Sexual Harm Act 2016 (Scotland), s 6.
199 Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW), s 293A.
200 Temkin, above n 19, at 725.
201 Finn, McDonald and Tinsley, above n 12, at 238.

considered "implausible".[202] Should reasons not be given at all, or should the reasons include simply a reference to the standard of proof, the presiding judge will return the verdict to the jury and require substantive reasons.[203]

It is preferable that the trial judge does not have the power to intervene in cases of substantively flawed reasons. This is to preserve the independence of the jury from the judge at trial and to avoid the role of the trial judge becoming overly-interventionist, similar to the judicial role under an inquisitorial system.[204] However, an avenue for redress in the event of inadequate reasons can be provided by the appellate courts.

D Appellate process

Higher courts may be the appropriate institutions to determine whether jury reasons are inadequate due to rape myth bias. This would require a new legislative provision specifically governing appeals from sexual violence jury trials. This could be modelled on s 232(2)(b) of the Criminal Procedure Act, which governs appeals from judge-alone trials for convicted persons.

Currently, the right of a prosecutor to appeal following an acquittal is strictly limited. The question of law raised on appeal must not arise from a jury verdict.[205] The defendant's right to appeal is much wider from both trial by jury (s 232(2)(a)) and trial by judge-alone (s 232(2)(b)), recognising the inherent power imbalance between state and citizen.[206] Nevertheless, a stronger right of appeal for jury trials in sexual violence cases can be justified due to the established risk of rape myth bias and the poor rates of conviction for sexual violence offending.

It has a complicated legislative history, but the Supreme Court has stated the legislature intended s 232(2)(a) appeals to be addressed in line with s 385(1)(a) (now repealed) of the Crimes Act 1961.[207] Under s 385(1)(a) the issue was whether the jury arrived at a verdict that was not reasonably open to it.[208] This suggests an appeal from trial by jury is not by way of rehearing.[209] The

202 Spencer, above n 118, at 611.
203 Lippke, above n 103, at 316.
204 Law Commission, above n 60, at 57.
205 Criminal Procedure Act 2011, s 296.
206 Verónica Michel *Prosecutorial Accountability and Victims' Rights in Latin America* (Cambridge University Press, Cambridge, 2018) at 21.
207 *Sena v New Zealand Police* [2019] NZSC 55 at footnote 43.
208 At [20].
209 At [20].

court will instead assess whether the jury's verdict was unreasonable, a "less intensive" approach.[210]

Unreasonableness in this context requires the court to conclude that no jury could reasonably have reached the verdict it did on the evidence.[211] This is a "review function", deferring to the jury's decisions on credibility of witnesses.[212] Thus, in *Tahau v R,* the existence of a possible explanation for consistency between the verdicts and that the jury deliberated for "some time", were factors going towards the verdicts being reasonable.[213] This reflects one end of Lippke's spectrum of appellate intervention for reasoned verdicts, where judicial intervention is rare and only acceptable in egregious cases.[214] This level of review would not be intense enough to identify and remedy rape myth bias, as it defers to the jury's views on credibility.

In contrast, under s 232(2)(b) an appeal from a judge-alone trial is allowed if the Judge "erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred". The Supreme Court in *Sena v New Zealand Police* found that an appeal under s 232(2)(b) is by way of rehearing, as was the treatment for judge-alone trials under s 119 (now repealed) of the Summary Proceedings Act 1957.[215] Section 119 appeals allowed a rehearing in which the court reached its own opinion on the evidence.[216] This approach "presupposes the existence of reasons" for a decision.[217] Thus, the Supreme Court has made appeals due to inadequate reasons a live issue. In *Sena,* the trial Judge omitted to identify an inconsistency between the evidence of the children and the evidence of the appellant's witnesses.[218] This amounted to a miscarriage of justice, resulting in the Supreme Court quashing the decision and directing a new trial.[219]

Section 232(2)(b), as interpreted in *Sena*, would be a more effective level of review for the purpose of mitigating the impact of rape myth bias and could be applied with reference to jury reasons. It can be argued that sexual violence

210 At [30].
211 *Tahau v R* [2018] NZCA 538 at [21].
212 At [21].
213 At [22].
214 Lippke, above n 103, at 316.
215 *Sena*, above n 207, at [26].
216 At [21].
217 At [28].
218 At [55].
219 At [58].

jury trials should be dealt with similarly to judge-alone trials under s 232(2)(b), through an amendment to the Criminal Procedure Act specifying the same level of review. The appellate court would need to come to the same view as the jury on the evidence for the verdict to stand. A new provision on this basis would be controversial, as it gives the state an enlarged right of appeal, going against a legislative history of a prosecutor's right to appeal being limited and rare. However, the adversarial system's failures in the context of sexual violence offending justify jury verdicts in sexual violence trials being subject to this level of review. The justification for judges being subject to this scrutiny also applies to juries in sexual violence trials: that if "reasons are deficient, the conclusion is flawed and unsubstantiated".[220]

Assessing jury reasons by the same standards as judges may seem incongruous, but limits can be applied to reflect realistic expectations of untrained jurors. As with judge-alone appeals, the onus will be on the appellant to show a mistake has been made.[221] Further, the appellate courts exhibit "customary caution" where the issue relates to conflicting oral evidence, as they do not have the jury's advantage of seeing witnesses in person.[222]

Currently, whether a judge's reasons are adequate is assessed according to the type of case and the issues that are implicated.[223] Even for judges, "imperfection of expression" is accepted as inevitable.[224] The case in question being an appeal from a jury trial will clearly be relevant to this inquiry. Appellate judges will lower their expectations of the written reasons accordingly. Juries will nevertheless be expected to advance defensible reasons in light of the evidence, addressing the "substance" of the complainant's case.[225] To support the effectiveness of this appellate process, increased education for judges on identification of rape myths will also be required.[226] This may be forthcoming in any case due to the Institute of Judicial Studies' pilot judicial education programme.[227]

220 At [35].
221 At [38].
222 At [38].
223 At [38].
224 At [37].
225 At [37].
226 Law Commission, above n 4, at 92.
227 "New Initiatives to Help Victims of Sexual Violence" Ministry of Justice (30 August 2017) <www.justice.govt.nz>.

VII CONCLUSION

The model proposed in this article builds on integrated fact-based directions and existing appellate mechanisms in the Criminal Procedure Act to introduce a requirement for juries to give substantive reasons in sexual violence trials, supported by education on rape myths in the form of judicial directions.

It has been said by former Chief Justice Elias that the criminal justice system is like a cat's cradle, meaning "you cannot pull on one thread without causing movement in the whole structure".[228] However, by building on existing frameworks at the trial and appellate levels, implementing reasoned verdicts for sexual violence trials will not threaten the integrity of the system.

This model would not provide a flawless panacea. Attrition rates suggest a large percentage of potential complainants give up on the criminal justice process early, fearing traumatic cross-examination and expecting little prospect of securing conviction.[229] One view is that the only way to eradicate rape myths and reduce attrition is long-term public education to effect wide societal change.[230]

However, this proposal will likely promote societal change. A reasoned verdict model will provide increased education to the public on sexual violence due to jury service and publicly available jury reasons. Increased attention to rape myth bias during trials through jury reasons and judicial directions may incentivise defence counsel to minimise reliance on rape myths in their advocacy, thereby improving the experience of complainants. Further, weaknesses at the trial stage should not be neglected on the basis that societal norms must change before the criminal justice system can. Positive change to encourage complainants being treated with dignity is valuable at every stage of the process.[231]

More research is required to substantiate the promise of this proposal. Practical trials are needed to analyse the suitability of a reasoned verdict model for New Zealand juries, particularly with regards to the drafting of reasons. These trials will need to test the practical production of reasons, including the role of the legal writing clerk as an independent point of assistance for juries. Psychological studies corroborating the efficacy of reasoned verdicts in

228 Sian Elias "Managing Criminal Justice"(2017) 21 NZ Crim Law Rev 316 at 320.
229 Wrightson, above n 89, at 37.
230 Finn, McDonald and Tinsley, above n 12, at 241.
231 Chief Victims Advisor to Government, above n 2, at 8.

combatting the pitfalls of the Story Model will also be important, along with inquiry into further use of judicial directions to enhance juror education on rape myths. These studies will need to identify whether there is a relationship of causation between a requirement to articulate written reasons and a reduction in rape myth bias.

This proposal strikes an appropriate balance between the symbolic importance of the jury and the interests of the complainant with regards to accountability, accuracy, redress and respect. Implementing reasoned verdicts would demonstrate a commitment from the legislature and the judiciary to better providing for survivors of sexual violence by shifting the focus to identifying jury bias and thus to convicting perpetrators.[232] A requirement to give reasons is therefore a compelling option in order to retain and remedy trial by jury in sexual violence trials and merits further research.

232 Wrightson, above n 89, at 37.