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EDITORIAL — KŌRERO TĪMATANGA

Working on the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine is, in many ways, a privilege. As an editor you have the particular privilege of reading bravely shared submissions, working with a diverse editorial team, learning from the expertise of peer reviewers, guiding authors through preparing articles for publication, and persistently pushing forward vital conversations for not only our profession but our society as a whole.

The disruptions, challenges and hurdles of a global pandemic have prompted deep societal reflection on many aspects of our lives that we may have previously taken for granted — enjoying the company of our colleagues, gathering for celebration or mourning, connecting with friends, reuniting with family, and being able to return home. For the editorial team at the Journal, the year 2020 has highlighted how much we rely on our community of inspiring wāhine to navigate these choppier waters, and that the privilege of working on the Journal rests so heavily on the kind and generous āwhina of that community.

Āwhina — to assist, to help, to support — implies support offered in a spirit of generosity and through collective effort. The concept of āwhina has been a central part of Aotearoa New Zealand's response to COVID-19, where New Zealanders have shouldered new burdens and confronted new challenges as a team, with kindness and empathy. Āwhina is also a central part of the Journal's philosophy. Our publication process is the product of many heads around the (often virtual) table, helping a piece to be the best it can be: many hands, passionate about the kaupapa of the Journal, make incredible work.

A core part of the Journal's kaupapa is to serve and uplift our community of women here in Aotearoa New Zealand. With the disproportionate impact of COVID-19 on women,[1] and exacerbation of inequalities particularly for

1 See 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 and "COVID-19 and women" (28 April 2020) Manatū Wāhine Ministry for Women <www.women.govt.nz>.

wāhine Māori and Pasifika women, this kaupapa will continue to be essential. Women make up the majority of our essential support workers — including in health care workers, and social support — and are on the front line of Aotearoa New Zealand's response to COVID-19. While New Zealand has suffered comparatively minimal health impacts due to coronavirus, we know that the rate of job losses disproportionately affected women, and that women face extra domestic burdens being at the centre of whānau. We know that lockdowns have trapped women at home with their abusers, or women in rainbow communities in unsafe environments. We know that disabled women will face reduced or limited access to disrupted health services. We know that migrant women struggle to access essential information. Our work is done in the hope that these inequities will be addressed.

The impacts of the pandemic were felt far and wide, and the Journal was no different. COVID-19 threw the editorial team additional and complex challenges. This required us to develop new ways of working, share responsibility and work together as one, supporting each other through the life circumstances that would threaten to tip the balance on top of everything else.

Putting together this edition in the midst of an unpredictable year (or rather, year and a half) has also emphasised the many layers of collective effort that sit behind the final product. We thank all of our staff for their patience, support and enthusiastic dedication in a very challenging time for everyone, and the authors in their writing in support of the ongoing conversations that must be sparked and maintained. While we wish we had to speak only once before we were heard, this is not always the case. Every continued voice makes the chorus harder to ignore. It has been an honour to contribute to that chorus.

To all of the authors, editors, peer reviewers, trustees, supporters, and other members of the Journal's community — ngā mihi nui ki a koutou i te āwhina.

None of this would be possible without all of you.

Charlotte Doyle, Katharine Guilford,
Monique van Alphen Fyfe and Tariqa Satherley
Editorial Team
1 August 2021

FOREWORD — KUPU WHAKATAKI

New Zealanders are rightly proud of their place in advancing the rights of women. We were the first to allow all women the vote. Not for the first time, we have an all-female cast in our most important constitutional roles of Governor-General, Prime Minister and Chief Justice. Since the late 1800s, our laws have been revolutionised. In 1884, married women could, for the first time, own property in their own right and just last year, 2020, legislation came into force providing for equal pay for equal but different work. And yet …

Our rates of family and sexual violence are horrifying and show no signs of abating. The reasons for these appalling statistics are complex but, at the core, must be the way women are perceived. The submissions for the National Strategy and Action Plans to eliminate family violence and sexual violence in Aotearoa identified patriarchal views and power structures as being amongst the root causes of such violence. Female archetypes — virgin, mother, whore — remain embedded in our collective subconscious. What can we do to change them? Are we at the point where the law has done all it can, and the focus should now be on engendering a cultural shift, or does the law have more work to do?

Our laws on rape and violence are intended to protect women, however, a number of the articles in this fourth edition of the New Zealand Women's Law Journal — Te Aho Kawe Kaupapa Ture a ngā Wāhine challenge whether this is indeed so. Professor Julia Tolmie questions whether our laws of self-defence serve victims of intimate partner violence, who themselves commit acts of violence against their abusers. She describes "bad relationships with incidents of violence" as the main paradigm used in the criminal justice system. This entrenched understanding of intimate partner violence can lead to injustices where women have responded to their violent circumstances by reacting in a way which does not fit neatly within our law of self-defence. That law, written as it was from a male perspective of what is an appropriate response to violence or a threat of it, combined with embedded notions of how women should behave, has resulted in some questionable verdicts. In some cases, the verdict

has been manslaughter rather than murder but Professor Tolmie argues the proper verdict should have been an acquittal or perhaps no charge should have been laid at all. Our low conviction rates in sexual violation cases raise real issues — not only in terms of whether perpetrators are being held to account — but also in the message the verdicts send. Two thought-provoking articles analyse why this might be so and what could be done about it. Daniel Jackson argues that our courts have failed to provide a clear definition of consent. This in turn, he says, enables defendants to rely on mistakes of the law about consent. Jessica Sutton suggests that, if juries were required to give reasoned verdicts in sexual violence trials, this would assist in identifying the extent to which rape myths persist in jury reasoning and what might be done about it.

The courts are sometimes tasked with the burden of making decisions for women about their reproductive choices. Bella Rollinson writes about difficult cases involving intellectually disabled women ordered to undergo sterilisation or termination of pregnancies without their consent. She suggests that persistent gender stereotypes underpin both the law and some decisions applying it. Equally thought-provoking is Indiana Shewen's article on the role of tikanga in the context of women's issues such as abortion. She explains that, while, through a simple feminist lens, the decision to reproduce is a woman's choice and hers alone, there are other considerations for a wahine Māori who must exercise tino rangatiratanga in her decision-making process.

But, as Hannah Reid confrontingly identifies, women are not always the victim and can be perpetrators of extreme violence. She discusses women's participation in atrocities and their more lenient treatment resulting from the essentialising of women's experiences in conflict as victims. Her work adds another insightful dimension to the narrative about women.

We have come a long way but we cannot rest on our laurels. There is more work to do. The law is important — and while it can reinforce these deeply embedded stereotypes, it can also assist to dispel them. That is our challenge.

Hon Justice Susan Thomas
Chief High Court Judge
23 July 2021

INAUGURAL PROFESSORIAL ADDRESS

Thinking differently in order to see accurately: Explaining why we are convicting women we might otherwise be burying

Julia Tolmie*

Whakataka te hau ki te uru
Whakataka te hau ki te tonga
Kia mākinakina ki uta
Kia mātaratara ki tai
E hī ake ana te atakura
He tio
He huka
He hau hū
Tīhei mauri ora!
Ko te mihi tuatahi ki te atua.
Kia Ann Tolmie, Gaius Tolmie, Uiki Elia, Jim Vivieaere ratou ko Terry Firkin, moe mai ra ki roto i te ringa tapu o te atua.
Hoki mai kia tatou nga kanohi ora, tena tatou katoa.
Ki te whare e tu nei, ki te papa e takoto mai ra, tena korua.
No reira, tena koutou, tena koutou, tena koutou katoa.[1]

I want to start by thanking everyone for taking time out of their busy lives to be here tonight. Some of you, I know, have travelled to be here and I am incredibly honoured by your presence. I want to thank my beautiful family, my talented students and colleagues, particularly members of the Family Violence Death Review Committee (FVDRC) who are here tonight and on whose work my talk tonight is largely based.[2] It is egregious to name names

* Professor, Faculty of Law, University of Auckland. This is a transcription (with minor edits) of Julia Tolmie's inaugural professorial address, delivered in June 2019. A recording can be found on the website of the Faculty of Law, the University of Auckland: <www.auckland.ac.nz>.

1 Mihi by Maukau Firkin.

2 It has most immediately arisen out of work conducted with Associate Professor Stella Tarrant, the University of Western Australia, and George Guidice, Barrister: Stella Tarrant, Julia Tolmie and George Guidice *Transforming Legal Understandings of Intimate Partner Violence* (Australia's National

when I have worked with so many brilliant people over the course of three decades, but I do particularly want to mention Rachel Smith, previously from the FVDRC, Elizabeth Sheehy from the University of Ottawa, Julie Stubbs from the University of New South Wales, and Nicola Gavey and Vivienne Elizabeth from the University of Auckland as people I have been particularly inspired and extended by. And I want to thank my colleagues Associate Professors Khylee Quince and Scott Optican for their generosity on my behalf tonight — I am incredibly proud of my association with each of them.

Tonight I am returning to a subject that I wrote my first academic piece on many years ago as a young lecturer at the University of Sydney.[3] It was not then, but it is now widely acknowledged that the criminal defences are not well adapted to the kinds of circumstances that victims of intimate partner violence (IPV) find themselves in.[4] There have been law reforms in most Australian jurisdictions to try and address that issue[5] and the New Zealand Law Commission has also recommended reforms.[6]

But my thinking on this subject has changed since I wrote that book chapter all those years ago. At that time I naively thought that if the law was operating unjustly then we should change the law. But I do not think that anymore. I now think the problem is in how we think about the facts that we apply the law to.[7]

So what I am going to do in this talk is describe and contrast two different models for understanding facts involving IPV. These are the "bad relationship with incidents of violence" model and the "social entrapment" model.[8] I am going to use a recent murder trial that took place in Western Australia (*The*

Research Organisation for Women's Safety, Research Report 03/2019, June 2019).

3 Julia Tolmie "Provocation or Self-defence for Battered Women Who Kill?" in Stanley Yeo (ed) *Partial Excuses to Murder* (Federation Press, Sydney, 1991) 61 at 61–79.

4 See also Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004) at 60–92; and Tasmanian Law Reform Institute *Review of the Law Relating to Self-Defence* (TLRI R20, 2015) at 54–71.

5 See Crimes Act 1958 (Vic), ss 322J–K; Criminal Code Act Compilation Act 1913 (WA), s 248(4); Criminal Code Act 1899 (Qld), s 304B; and *R v Runjanjic* (1991) 56 SASR 114.

6 New Zealand Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016).

7 For a discussion of this process in relation to sexual violence see Julia Quilter "Reframing the Rape Trial: Insights from Critical Theory About the Limitations of Law Reform" (2011) 35 Australian Feminist Law Journal 23.

8 See Julia Tolmie, Rachel Smith, Jacqueline Short, Denise Wilson and Julie Sach "Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence" [2018] 2 NZ L Rev 181.

State of Western Australia v Liyanage)[9] to show how using a social entrapment paradigm to understand the facts allows us to see a larger and more accurate picture of facts involving IPV.

In doing so I am going to focus on how the law of self-defence operates in relation to women who have been abused and who use lethal force against the person abusing them. For those who are not lawyers in the room, self-defence provides a complete acquittal in respect of a person's use of violence. Basically we (in other words, society) say that if someone is attacking you and you are cornered then you are justified in fighting back to protect yourself. You are not obliged to simply allow yourself to be hurt or killed.

Now of course intimate partner homicides where women who have been abused by their partner kill him are relatively rare. Where women are being abused by their partners they are almost three times more likely to be killed by him as they are to kill him.[10] Hence the title of this talk — when there is an intimate partner homicide most women are being buried, they have not survived in order to be tried in a court of law.[11]

I THE "BAD RELATIONSHIP WITH INCIDENTS OF VIOLENCE" PARADIGM

So what is the main paradigm that we use in the criminal justice system to think about IPV and to understand facts involving IPV? This is what I would call a "bad relationship with incidents of violence" paradigm. I would suggest that it is the theory people use to understand IPV when they are not aware that they are using a theory. They think they are using common sense. It is an amalgam of two things that we do know about or think we know about: dysfunctional adult relationships and crimes of interpersonal violence (which are generally defined as acts of physical violence).

This paradigm has the following features:

i) The parties are in a dysfunctional relationship and both have to take some responsibility for that.

9 *The State of Western Australia v Liyanage* [2016] WASC 12; and *Liyanage v Western Australia* [2017] WASCA 112, 51 WAR 359 [*Liyanage*].

10 Family Violence Death Review Committee [FVDRC] *Fifth Report Data: January 2009 to December 2015* (Health Quality & Safety Commission New Zealand, June 2017) at 27–60.

11 This is a misquote of Elizabeth A Sheehy *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, Vancouver, 2014) at 241.

ii) One party (sometimes both) has engaged in acts of physical violence.

iii) In between those acts the victim is not being abused.

iv) The victim has a number of effective safety options — they could get a protection order, leave the relationship or call the police.

v) The victim is free to exercise these safety options when they are not being abused.

vi) The victim has chosen not to seek safety and instead to tolerate the abuse because they love their partner.

A Why is it a problem to think this way?

Every time we apply the criminal law we have to judge the accused's actions in the context of their circumstances. And that is because behaviour (such as the use of violence) which is unacceptable in most circumstances may be appropriate in some. It follows that if the paradigm we use to understand circumstances involving IPV is wrong then that will affect the criminal justice response to both people using violence and victims of that violence. I would suggest that a "bad relationship with incidents of violence" paradigm is producing a number of injustices in our criminal justice system currently. Some of these include the following:

i) Victims of IPV do not commonly access self-defence even when acting defensively toward the person who is abusing them.[12]

ii) Victims of IPV rarely access the defences of duress and necessity even when under compulsion from their violent partner.[13]

iii) Victims of IPV are convicted for failing to meet their children's needs when their ability to do so is affected by their own experiences of IPV.[14]

12 See Elizabeth Sheehy, Julie Stubbs and Julia Tolmie "Battered women charged with homicide in Australia, Canada and New Zealand: How do they fare?" (2012) 45(3) Australian & New Zealand Journal of Criminology 383 at 388.

13 See Shevan (Jennifer) Nouri "Critiquing the Defence of Compulsion as it Applies to Battered Defendants" (2015) 21 Auckland U L Rev.

14 See *R v DK* [2015] NZHC 2137; and Julia Tolmie, Fleur Te Aho and Katherine Doolin with Sylvie Arnerich and Natanahira Herewini "Criminalising Parental Failures to Act: Documenting Bias in the Criminal Justice System" [2019] NZWLJ 136.

iv) A predominant aggressor's use of violence against a victim can be misread.[15]

v) We are sentencing offending by people using violence and offending by victims of violence as though their culpability is broadly similar.[16]

vi) Victim safety is not a mandatory and prioritised sentencing consideration when sentencing IPV offenders.[17]

Of course, these are bold claims which some might dispute, and I do not have time to defend my position on all of them tonight. I am focusing on the first — but I do want you to understand that the point I am making here has broader ramifications.

B A "bad relationship with incidents of violence" and self-defence

The test for self-defence in New Zealand is contained in s 48 of the Crimes Act 1961 and is a fairly generous legal test. Section 48 provides:

> Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Every legal jurisdiction formulates the test slightly differently but, however you formulate the legal test, the underlying normative judgement is the same. The question you are asking is whether what the defendant did was reasonable in self-defence in these circumstances. And, in answering that question, there are two crucial factual issues:

i) what was the nature of the threat that she faced?; and

ii) what other means did she have to deal with that threat?

If you use a "bad relationship with incidents of violence" paradigm to understand the IPV that a victim is responding to, then you cannot understand

15 See *R v Bevan* [2012] NZHC 2969.

16 Contrast *R v Bevan* above and *R v Paton* [2013] NZHC 21; see also *R v DK*, above n 14; and *M (SC 31/2016) v R* [2016] NZSC 72.

17 Julia Tolmie "Considering Victim Safety When Sentencing Intimate Partner Violence Offenders" in Kate Fitz-Gibbon, Sandra Walklate, JaneMaree Maher and Jude McCulloch (eds) *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, London, 2018) at 199–215.

her defensive actions as being reasonable unless she is being or about to be physically attacked at the time she uses defensive force. And the reason why is that unless she is under attack the paradigm presupposes that she has effective safety options that she can choose to exercise.

This means that women who are victims of IPV can only argue self-defence if they have taken their violent male partner on in hand-to-hand combat. This is what Justice Bertha Wilson in the Supreme Court of Canada said 29 years ago was tantamount to sentencing abused women to "murder by instalment".[18]

But even if a woman attempts to defend herself when she is under attack, if you are using this paradigm to understand her circumstances then it is really difficult not to see her as partially responsible for choosing to allow things to get to that point. In other words, holding her partially responsible for choosing not to exercise her effective safety options before she is attacked.

What we have been doing for the last few decades is introducing expert psychological or psychiatric testimony on battered woman syndrome (BWS) in support of victims' self-defence cases.[19] We initially started introducing this testimony in order to challenge the idea that it was necessarily reasonable to expect women who are victims of serious IPV to leave the relationship. The BWS paradigm has the following features:

i) The violence has three stages that it cycles through: the tension building stage; the acute battering incident (physical violence); and then the loving/contrite stage (what some people call the "honeymoon stage", where the predominant aggressor apologises and promises it is not going to happen again).[20]

ii) Having survived the abuse through several cycles the victim develops trauma. Some people say she develops "learned helplessness", others say the trauma causes the victim to "psychologically bond" with the abuser or that she has a "trauma bonding".[21] In all cases these are ways

18 *R v Lavallee* [1990] 1 SCR 852 at 883.

19 See Elizabeth Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000) at 112.

20 Lenore Walker *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper & Row, New York, 1989) at 42–45.

21 Don Dutton and Susan Lee Painter "Traumatic Bonding: the development of emotional attachments in battered women and other relationships in intermittent abuse" (1981) 6 Victimology: An International Journal at 139; and Dee LR Graham and Edna I Rawlings "Bonding with abusive dating partners: Dynamics of Stockholm Syndrome" in Barrie Levy (ed) *Dating violence: young women in danger* (Seal Press, Seattle, 1991) at 119.

> of understanding how her response to the trauma means that she becomes unable to leave him despite the abuse.

When you think about it, this paradigm is basically a "bad relationship with incidents of violence" paradigm with the victim's mental health issues added in. This approach still involves understanding the abuse in terms of the incidents of physical violence in between which the victim has effective safety options that she illogically chooses not to exercise but only because she has developed mental health issues as a result of being abused.

It follows that the key difference between a "bad relationship with incidents of violence" paradigm and a BWS framework is that the BWS framework excuses rather than blames the victim for failing to exercise her safety options in response to the abuse. In other words, a jury that relies on this testimony would be unlikely to acquit her on the basis that she acted in reasonable self-defence but it might want to excuse her or ameliorate the criminal justice consequences of her actions in recognition of her mental health issues. The result of such evidence is that if she is charged with murder she is likely to be convicted of manslaughter instead. And that is what happens in the overwhelming majority of these cases. It is still happening in New Zealand despite the fact that we have abolished all our partial defences to murder.[22]

So what is my point here? My point is that if we use these theories to frame the facts of these cases then they automatically provide readings of those facts that pre-package the victim's actions as unreasonable defensive force.

They do so despite the fact that neither paradigm has support in the recent research into the nature of IPV, certainly in respect of those cases that escalate to intimate partner homicide.[23]

And they do so despite the fact that when we apply the law on self-defence we are supposed to be judging the circumstances that the defendant was in from how things looked to her at the time. In some jurisdictions, like Western Australia, a defendant has to have reasonable grounds for her beliefs about

22 Julia Tolmie "Defending Battered Defendants on Homicide Charges in New Zealand: The Impact of Abolishing the Partial Defences to Murder" [2015] NZ L Rev 649.

23 For a critique of battered woman syndrome see: Ian Leader-Elliott "Battered but not Beaten: Women who Kill in Self-Defence" (1993) 15(4) Syd LR 403; Isabella Lin-Roark, A Church and Laurie McCubbin "Battered Women's Evaluations of their Intimate Partners as a Possible Mediator Between Abuse and Self-Esteem" (2015) 30 J Fam Viol 201; and Paige Sweet "'Every bone of my body': Domestic violence and the diagnostic body" (2014) 122 Social Science & Medicine 44 at 46. A "bad relationship with incidents of violence paradigm" is not critiqued in the research literature, it simply does not feature as a theory of IPV in this literature: see Appendix One of Tarrant, Tolmie and Guidice, above n 2.

her circumstances.[24] In New Zealand the question is simply what the victim honestly thought about the nature of the threat she was facing and her options for dealing with it.[25]

And finally, it is up to the prosecution to disprove self-defence beyond reasonable doubt. It is not up to the defendant to prove that she was acting reasonably — it is up to the prosecution to prove beyond reasonable doubt that she was acting unreasonably.[26] In other words, if there is any plausible case for self-defence then the defendant is entitled to the benefit of the defence. It is not up to her to prove self-defence because she is assumed to be innocent until the prosecution proves she is guilty. This is basic Criminal Law 101.

C Here is a story to illustrate what we are doing wrong, how we can do it better, and why it matters

I am going to turn now to look at *The State of Western Australia v Liyanage (Liyanage)*[27] to illustrate what I mean. In this case in June 2014 Dr Chamari Liyanage used a heavy object to inflict several blows on her husband, Dinendra Athukorala, whilst he was lying in their bed. Those blows killed him and she was charged with his murder. The jury rejected her self-defence case and she was convicted of manslaughter and sentenced to four years in prison.

Why use *Liyanage* as a test case? Aside from the fact that the case is fairly typical in the seriousness of violence, the abuse strategies, the stories told in the criminal justice process about the facts and the outcome, it has the advantage for me in talking to a New Zealand audience that I cannot be taken to be critical of any particular professional either in the room or known to people in the room. And that is a good thing because my point is not about individual professionals getting it wrong. My point is about the paradigms of thought that we are all inculcated in and have to challenge in ourselves.

I do not have time tonight to run you through the stories told about the facts by all of the professionals in the case. They are all variations of a "bad relationship with incidents of violence" or BWS paradigm. I am going to focus on the case as presented by the prosecution.

24 Criminal Code Act Compilation Act (WA), s 248(4).

25 Crimes Act 1961, s 48.

26 *Woolmington v DPP* [1935] AC 462; and Andrew P Simester and Warren Brookbanks *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at 45–53.

27 *Liyanage*, above n 9.

The story of the abuse and the offending, as narrated by the prosecution, is as follows:

i) The marriage between Chamari and Dinendra was "unhappy".[28]

ii) There were some acts of violence by Dinendra (although perhaps Chamari had exaggerated these).[29]

iii) There had not been any physical violence for at least two weeks prior to the killing because Dinendra "was getting his own way". This meant "the physical levels of violence weren't escalating at all".[30]

iv) If Chamari was afraid of Dinendra she had "other options". She could have left him or called the police.[31]

v) Instead she chose to stay with him and return to him — in other words, to tolerate the abuse — because she loved him.[32]

vi) Having told that story about the facts, the prosecution had to explain why Chamari used force against Dinendra. The explanation was that she killed him because of frustration and jealousy because he was going to leave her to "pursue a relationship" with a 17-year-old.[33] That is a story made familiar to us because it is a scenario that we see in homicides involving men who are using violence against their female partners and whom they end up killing.[34]

If you think you have recognised a "bad relationship with incidents of violence" analysis then you are right.

I want to say a bit more about the two central factual issues: what was the nature of the threat she faced and what means did she have to address it?

1 Chamari exaggerated the physical violence

One of the things that should be apparent is that when you use "a bad relationship with incidents of violence" paradigm it limits a consideration of the nature of the threat that the victim was facing to any acts of physical

28 *The State of Western Australia v Liyanage* Transcript SC/CRI/GN/INS 27/2015, 1 February 2016 at 226–227; 231; 234; 1130; 1139; 1334 and 1352 [*Liyanage* Transcript].

29 At 1353–1354 and 1357.

30 At 1357–1358.

31 At 231; 1353–1354 and 1361–1362.

32 At 1086; 1102–1104; 1109–1110 and 1120.

33 At 227–228; 233; 1077; 1084; 1102; 1120–1122 and 1358.

34 FVDRC, above n 10, at 37–38 and 44–51.

violence and only for so long as they are actually happening. What this means is that if, for example, Chamari is complying with her husband's demands in order to avoid being attacked, then on this analysis she is not being abused in that moment.

But there is something else that happened in this case that I think is also very interesting. As well as confining the nature of the threat to the physical abuse that she experienced, the prosecution also suggested that Chamari was exaggerating the physical violence. The prosecutor did this by saying that the evidence Chamari provided about the violence in the relationship was "scant" and "lacked detail".[35]

What is interesting about that is that one of the unusual features of this case is that Chamari gave very detailed evidence about Dinendra's sexual abuse. This is generally a very hidden part of IPV. We do not often hear about it because it is extremely traumatic and deeply shameful.

Chamari described being used as an exchange commodity on the internet as a swap for pornography that Dinendra wanted to access[36] — this meant that he would rape her on camera in front of complete strangers.[37] She also described being raped whilst being forced to watch videos of women and children being violated, and being hit on the breasts and arms and legs if she tried to turn her face away.[38] She described being anally raped as "punishment".[39] She described this as "sexual torture":[40]

> … it is one of the most unpleasant things in my life … because I did not wanted to look at people having sex with children ... I don't have any interest in sex any more, when I hear ... girls crying and screaming.[41]
>
> So I really couldn't actively participate in sexual acts. So he would get very angry and very very sexually abusive. He would be very powerful and forceful and its gets really really painful ...[42]

35 *Liyanage* Transcript, above n 28, at 1353–1354 and 1357.
36 At 950.
37 At 951–952.
38 At 976 and 1017.
39 At 976.
40 At 976; 1024 and 1115.
41 At 976.
42 At 1116.

> … he would really punish me by having anal sex, … it was very painful and I really, really hate that. …[43]
>
> It became kind of a nightmare ... I just did whatever he wanted to do ... because I just wanted to get it done and over with.[44]

I do not mean to conflate consent with sexual arousal, but I do want to make the point that through the process of sexual arousal, women's bodies physically prepare for penetrative vaginal sexual intercourse as much as men's do. Which means that forcible vaginal penetration without arousal is not "sex" in the absence of a kind of contractual consent. It is an assault on a very sensitive part of the body.

But let us look at the prosecution's account of what occurred:

i) She "engaged" in "sexual practices" that were "unusual" and which "she did not like". She "went along" because she "wanted to keep her marriage together".[45]

ii) Dinendra "clearly had sexual interests that ran contrary to her values. But she was prepared to put up with ... those actions, because of this bonding".[46]

iii) "… sexual intercourse occurred and Dr Liyanage wasn't happy about that or hadn't — may not have consented".[47]

When you look at his languaging the impression that you get is that this is more in the nature of "bad sex" rather than violence. At worst, it is sex minus some kind of contractual consent but still essentially sex. And I think that is why the prosecution was able to say with a straight face that Chamari's testimony about Dinendra's violence was "scant" and "lacked detail".

This is a much larger problem in terms of how we think and talk about sexual violence, as demonstrated by the fact that the experts in the case and the judges did the same thing.

43 At 976
44 At 1024.
45 At 226–228 and 1348.
46 At 1353.
47 At 1337.

The expert psychiatrist used the following language to describe the offending:

i) "[S]exual behaviour" that Chamari found "unpalatable" and "so distressing".[48]

ii) "[I]ncreasingly unconventional and impersonal sexual behaviours".[49]

iii) Compliance by Chamari with "all manner of … acts".[50]

The trial Judge described Dinendra's offending as making Chamari "have sex against her will".[51]

The Court of Appeal described Dinendra's offending as follows:

i) "The deceased forced the appellant to watch child pornography, sometimes while having sex with him."[52]

ii) "[S]exual activity on skype".[53]

In the first of these comments, the Court of Appeal is referring to Chamari being forced to watch highly distressed children being raped whilst she herself is being raped and hit if she turned her head away.

2 Chamari had effective safety options available to her

Secondly, I want to turn to the issue of what her other safety options were — remembering that it was up to the prosecution to prove beyond reasonable doubt that she was not acting in self-defence. This means that the prosecution had to prove that she had other lawful means of achieving safety. That was essential to prove that Chamari was not acting in self-defence, and it was the prosecution's job to disprove self-defence.

The prosecution devoted days of testimony, including a bevy of experts and professionals, to a minute analysis of the crime scene. There was evidence about the position of the body, the configuration of blood spatter, DNA and fingerprint analysis, every professional's impression of the scene when they attended it, and a forensic IT examination of what was on the computers.

48 At 1290.
49 At 1291.
50 At 1293.
51 At 1397.
52 *Liyanage*, above n 9, at [32].
53 At [40].

However, the prosecution did not call a single piece of testimony to establish that calling the police or leaving the relationship could have provided Chamari with safety in her particular circumstances, as well as her family in Sri Lanka who were also under threat from Dinendra. Not one single piece of evidence was provided to support the prosecutor's simple assertion that these were ways that she and her family could be safe.[54] The prosecution could have called police officers who were experienced in responding to IPV to testify as to what they could realistically have provided Chamari and her family in Sri Lanka by way of safety if she had engaged with their services, but that was not done.

I think this demonstrates that a "bad relationship with incidents of violence" paradigm has a kind of truth power in its very assertion. Not only did the prosecution call no evidence to support its simple assertion that the victim had effective safety options, but no other professional in the case commented on their failure to do so.

One of the difficulties with trying to challenge a paradigm like this at trial is that you have to challenge the paradigm by speaking to people who are hearing what you are saying through the paradigm. And so that makes it very difficult for decision-makers to even hear that you are challenging the paradigm.

So what do I think we should be doing instead?

II THE SOCIAL ENTRAPMENT PARADIGM

In New Zealand, the FVDRC has suggested that we should be analysing IPV as a form of "social entrapment".[55] This requires that when we are approaching situations involving IPV we analyse three dimensions of the facts:

i) The first tier focuses on the specific raft of abuse tactics used by the predominant aggressor. We understand these as far broader and different in nature from just the acts of physical violence. We also look at the impact on the victim over time.

54 *Liyanage* Transcript, above n 28, at 231; 1353–1354 and 1361–1362.

55 Family Violence Death Review Committee [FVDRC] *Fifth Report: January 2014 to December 2015* (Health Quality & Safety Commission New Zealand, February 2016); and Tolmie, Smith, Short, Wilson and Sach, above n 8. James Ptacek *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, Boston, 1999) at 10 originally provided this definition as an articulation of the three elements in the operation of IPV that are common to the thinking of key scholars in the area.

ii) The second tier asks us to realistically look at, rather than simply assume, the safety options that were available to the victim.

iii) The final tier is not really a third tier as it folds into the other two. It is asking us to look at the manner in which structural inequities exacerbate the predominant aggressor's ability to coercively control the victim and weaken the safety responses of those who might otherwise be in a position to help. For example, if she has no money, no car, no credit on her phone, dependent children and is living in a rural area where she is surrounded by his family who all have status in the community then that is really significant in understanding her circumstances. In Chamari's case what was significant are the Sri Lankan cultural norms around marriage and gender roles, the experience of immigration and the experience of being a racialised woman living in white rural Western Australia.

I am going to turn now to analyse the facts of *Liyanage* from a social entrapment perspective. I will focus on the first two dimensions for reasons of time.

A Dinendra's coercive and controlling tactics and their impact on Chamari

This first tier of entrapment draws on Professor Evan Stark who published his ground-breaking book in 2007.[56] In this book, which drew on years of research and around 25 years of clinical experience, he suggested that IPV is not an assault crime. In other words it is not about the physical violence per se. Stark describes it as an attack on the victim's personhood.[57] It is a raft of abuse strategies, developed by trial and error over time, for this particular woman by the person who knows her most intimately.[58] And these strategies are directed at undermining her independence and closing down her "space for action".[59]

When we look at the particular facts of *Liyanage* we can see that over time Chamari began to restrict her own behaviour — she began to put aside

56 Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, Oxford, 2007).

57 This is an argument developed throughout his book, but see 367: "[e]xcept for the use of violence, coercive control bears almost no resemblance to assault: its aim is dominance rather than physical harm; it targets autonomy, liberty, and personhood; and the tactics deployed are far broader and more insidious".

58 At 241.

59 See also Nicola Sharp-Jeffs, Liz Kelly and Renate Klein "Long Journeys Toward Freedom: The relationship between Coercive Control and Space for Action – Measurement and Emerging Evidence" (2017) 24 Violence Against Women 2.

her own personhood on a moment-by-moment basis — to try and manage Dinendra's behaviour because she became exhausted by and terrified of it.[60] This is captured in this quote from her testimony: [61]

> When he is ready to eat, it's ready. When he wants to go out, I'm ready. When he wants to watch movies, I'm doing. When he talks, I'm listening. I minimise expressing my feelings and be a listener to him.

Of course that does not mean she is not still resisting the abuse. It just means that she is no longer at the point where she can afford the high costs of overt resistance.

On this understanding, the nature of the abuse is strategic and retaliatory. This is important to understand because it makes it possible to see that the threat posed by the predominant aggressor is bound up with the options the victim has for dealing with it because the abuse is directed at closing down those options. It is directed at punishing and thwarting any resistance on the victim's part, including seeking help.

When we take this approach we also have to acknowledge the victim's resistance. This is because acknowledging the victim's resistance exposes the nature of the abuse — because it renders visible what the abuse is responding to and attempting to foreclose, so it exposes the nature and extent of the violence used.[62] But it also gives the victim some dignity. We are not presenting her as someone who just passively accepted what was happening to her.

So in this particular case Chamari resisted the abuse right from the beginning of her relationship with Dinendra — although, as already said, her resistance became more and more covert because she could not afford the costs of obviously resisting as time went on. Her acts of resistance included:

i) fighting back until physically subdued;[63]

ii) refusing to have sex with other men;[64]

60 *Liyanage* Transcript, above n 28, at 964 and 966.

61 At 461.

62 Nick Todd and Allan Wade with Marine Renoux "Coming to Terms with Violence and Resistance: From a Language of Effects to a Language of Responses" in Thomas Strong and David Pare (eds) *Further Talk: Advances in Discursive Therapies* (Springer Science & Business Media, New York, 2004) 145 at 159.

63 *Liyanage* Transcript, above n 28, at 457 and 959.

64 At 1045–1046.

iii) disobeying Dinendra's instructions by stopping and speaking to a client on the way home;[65]

iv) refusing to invite vulnerable young women and girls into the relationship with them;[66]

v) privately warning K, a 17-year-old, that she could not protect her from Dinendra;[67]

vi) asking to be rostered on evening shifts at work to avoid Dinendra's internet activities;[68] and

vii) delaying booking study leave by pretending she had been too busy (Dinendra wanted to take K on a holiday with them in order to have "sex" with her).[69]

We can compare this to the previous paradigms where the violence, understood solely in terms of the physical violence, is seen as occurring independent of anything that the victim does. For example, under a BWS framework the violence is taking place in a cycle, like the weather or the seasons. On the psychiatric experts' accounts in *Liyanage,* for example, Chamari's resistance is completely invisible — it is not relevant to the story of what is happening. She is described as:

i) "pleasant, eager to please";[70]

ii) "overprotected and over sheltered";[71]

iii) having "dependency needs",[72] while Dinendra had "dominance needs";[73]

iv) having a pre-existing tendency to "submit to the direction and advice and control of a dominant male";[74]

65 At 456–457; 958–960 and 1068–1069.
66 At 1013–1014.
67 At 1031.
68 At 1017.
69 At 1056–1057.
70 At 1175.
71 At 1284.
72 At 1290.
73 At 1304 it is stated that "for everyone that has dependency needs, there's someone that has dominance needs". In other words, it is implied rather than expressly stated that Dinendra has dominance needs.
74 At 1290.

v) having a "submissiveness and tendency to comply and placate a dominant male figure";[75] and

vi) having a "cult like mentality".[76]

Another important thing to notice is that this analysis highlights the manner in which the abuse tactics utilise the norms of heterosexual sexual intimacy, including the norms of love, sexual desire, marriage and gender roles.[77] To begin with the abuse strategies may even look like expressions of romantic love. For example, Chamari was under Dinendra's surveillance and obliged to account for all her movements — she was obliged to call Dinendra when she left work and stay on the phone on the way home. This was initially presented as being about her safety — in other words it was an expression of protective concern by her male partner. On this analysis, it follows that proving the victim loved the person using violence against her is not the equivalent of proving that she was not being abused. This is because the norms of marriage and heterosexual intimacy are the vehicle for the abuse.

We can contrast such an understanding with the approach taken by the prosecution, who asked Chamari repeatedly if she loved Dinendra. It was as though if she said "yes", which she repeatedly did, the prosecutor was proving that she was not being abused. His questions to Chamari included the following:

i) "The problem was you did love him, wasn't it?"[78]

ii) "You did still love him at the time didn't you?"[79]

iii) "You did still love Dinendra at the time didn't you?"[80]

iv) "And so you loved him, and you went to Kununurra?"[81]

v) "And loved him at the same time. That's why you went, isn't it?"[82]

75 At 1291.
76 At 1293.
77 Stark, above n 56, at 5.
78 *Liyanage* Transcript, above n 28, at 1109.
79 At 1109.
80 At 1110.
81 At 1110.
82 At 1110.

I want to turn now to say a little more about the particular abuse strategies. Understanding them is of particular significance in New Zealand now because we have just enacted a new definition of family violence, which specifically includes coercive or controlling behaviour — directly drawing on the work of Professor Stark.[83]

Stark divides the abuse strategies typically used by predominant aggressors into two categories.[84] First, tactics of control — which he describes as indirect strategies. These are about undermining the victim's independence and fostering a dependence on the person using violence. Indirect control tactics include isolation of the victim and the use of exploitation, deprivation and micro-regulation. Secondly, direct tactics of coercion, which are about forcing compliance — these include violence and intimidation.

1 Control Tactics

I apologise for not making these facts palatable. I think if we are trying to judge someone's behaviour in the context of their circumstances then it is important that we talk about those circumstances truthfully.

(a) Isolation

Chamari met Dinendra in 2009 in Sri Lanka. She was 29 and they were both training to be doctors. Over the next five years he severed Chamari's connections with those around her so that the only close intimate relationship she had left was with him.

He did this in multiple ways:

i) He persuaded her to have sex prior to marriage — in Sri Lanka that meant she was unavailable for arranged marriage to another.[85]

ii) He conducted "loyalty tests" — insisting that she drop friends who warned her about him.[86]

iii) He dominated her time so she had no time for relationships with others.[87]

83 Family Violence Act 2018, s 9(3).

84 See the explanation of the points made in this paragraph in Evan Stark "Coercive Control" in Nancy Lombard and Lesley McMillan (eds) *Violence Against Women: Current Theory and Practise in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers, London, 2013) 17 at 21–22 and 27.

85 *Liyanage* Transcript, above n 28, at 927 and 1474.

86 At 917–920 and 1153.

87 At 453.

iv) He threatened her family so she distanced herself from her family to protect them.[88]

v) He persuaded her to immigrate to Australia where she knew no one but him.[89]

vi) Once she was in Australia he refused to allow her to socialise without him.[90]

vii) He degraded her so that even when she reached out for help she was too ashamed to disclose what was really happening to her.[91]

Probably one of the really key events was persuading her to immigrate to Australia — separating her from her original family and community who were the people most invested in her — and then insisting that she only socialise with him.

The point of isolating the victim is to remove anyone who would provide her with an alternative reality check, anyone whom she could reach out to for help and support in her situation, and anyone who might put boundaries around his behaviour.[92] The person using violence becomes her main source of reality.

(b) Deprivation, exploitation, micro-regulation

This consists of depriving her of basic survival resources, exploiting her and regulating her behaviours to conform to stereotypical gender roles in the minutiae of everyday living.[93] Dinendra's control really became extreme once Chamari was isolated in Australia.

Dinendra determined:

i) what she spent her money on and how much;[94]

ii) when she slept;[95]

iii) when she rang in sick for work;[96]

88 At 408 and 450.
89 At 452 and 454.
90 At 459–460 and 656–658.
91 At 1047–1048.
92 Stark, above n 56, at 27.
93 Stark, above n 84, at 29–30.
94 *Liyanage* Transcript, above n 28, at 464 and 978.
95 At 1018–1019.
96 At 1016 and 1158–1159.

iv) her career directions;[97]

v) what she cooked and what she ate (monitoring her weight so she was "good for skyping");[98]

vi) who she socialised with;[99]

vii) what she thought;[100]

viii) whether she wore jewellery;[101] and

ix) whether she was on contraception and what kind.[102]

The point of these tactics, as Stark suggests, is not to achieve a particular outcome — such as a clean house — but rather to root out a woman's independence and condition her to obey his authority without regard to its substance.[103] The way it works is that compliance with his rules may mean physical safety for her, but since the rules are being constantly revised and reinterpreted it is impossible for her to satisfy him. This leaves her in a state of chronic anxiety:[104]

> He gets angry about the way I cook, the way I walk, talk to other people, the way I do things, way I study, way I plan things. I didn't know what to do, how to behave. …

2 Coercion tactics

(a) Violence

According to Stark, abusers resort to violence in order to establish the high costs of resistance and create a level of fear that disables the victim's will to resist.[105]

Stark points out that most physical violence in coercive relationships is chronic low-level violence that has a cumulative intensity for the victim. He states that the "single most important characteristic of women battering" is

97 At 389; 931 and 1114.
98 At 961 and 996.
99 At 657–658.
100 At 966 and 986.
101 At 657.
102 At 1114.
103 Stark, above n 84, at 30–31.
104 *Liyanage* Transcript, above n 28, at 460–461.
105 Evan Stark *Forensic Assessment for the Purpose of Mitigation* (Forensic Assessment of Jennifer Molyneaux, May 2017) at 10.

that the victim is bearing the "weight of multiple harms".[106] And, of course, every event today is interpreted by the victim in light of what she knows about what the perpetrator is capable of, based on what has happened in the past.

In this case it was not until Chamari was isolated from her family and her culture in Australia that Dinendra began to use physical violence. From the beginning his violence was instrumental — it was directed at getting her to do what he wanted or "punish" her for resisting or trying to be independent. He used violence:

i) to force her to be a "swap" for pornography he wanted;[107]

ii) to force her to assist him in "grooming"[108] teenagers and vulnerable young women; [109] and

iii) because she was "not learning" to do as he required.[110]

Dinendra first used violence in Australia to force Chamari to dress up and sit in front of the camera as a swap so he could access pornography that other people had. Once he found someone who had something he wanted she would be forced to masturbate, use sex toys or he would rape her on camera, with the camera positioned in such a way that she could be seen but he could not. He used physical violence to force her to do this, or to do it whilst looking happy.[111]

He also used violence against Chamari when she refused to assist him in making contact with vulnerable young women and girls whom he wished to have "sex" with, including manipulating their families and the young women/girls over time so he could make that happen.[112] The violence included:

i) Hitting her and hitting her head on the wall.[113]

ii) Driving at excessive speeds — whilst threatening to have a car accident and hitting her.[114]

106 Stark, above n 56, at 94.
107 *Liyanage* Transcript, above n 28, at 975.
108 I have used speech marks here because of the inappropriate nature of the word "grooming" to accurately describe what the activity actually entails.
109 At 460 and 978–979.
110 At 1000.
111 At 950–952; 954; 1017 and 1107.
112 At 460 and 978–979.
113 At 951; 960 and 1108.
114 At 460 and 979.

iii) Using weapons such as a rolling pin, wooden spoons, plates, chairs, boots and a catapult that threw tiny metal balls.[115]

iv) Vaginal and anal rape (whilst tied up, on camera in front of strangers, or whilst forcing her to watch women and children being sexually violated).[116]

There was one terrifying incident of violence in 2012.[117] Chamari was on the phone to Dinendra walking home from work when she stopped to talk to a female client in the street in breach of his instructions not to talk to anyone. He came to meet her and physically felled her from behind. When they got home he attacked her again. She screamed for help and fought back but he overpowered her and hit her so often and so hard that she was winded and left unable to breathe. This experience communicated to her that there was no point in trying to physically resist him and that it would make things worse.

From mid-2013 Dinendra's beatings became frequent.[118] He was using weapons, such as wooden spoons, plates, chairs and boots. He kept the rolling pin in the bedroom in case it was needed. He ordered a catapult that threw tiny metal balls and she would have to stand naked while he used it on her. He told her the violence was because she was "not learning" to do as he required. I have already described the "sexual torture" Chamari was subject to.

By 2014 she described the violence as "constant" and herself as "exhausted".[119] It reached the point where it was enough for him to give her a "look" and she would do as he wanted.[120]

(b) Intimidation

Three types of intimidation tactics complement the use of physical violence.[121] First, threats, which are made credible by what the person using violence has done in the past or what his partner believes he can or will do if she upsets or disobeys him. Second, surveillance tactics, which according to Stark, "aim ... to convey the abuser's omnipotence and omnipresence, letting his partner

115 At 755; 758; 999–1000 and 1067.
116 At 976 and 1115–1116.
117 At 456–457; 958–960 and 1068–1069.
118 At 999.
119 At 976.
120 At 1026.
121 Stark, above n 84, at 23.

know she is being watched or overheard".[122] Third, degradation establishes the abuser's moral superiority to the victim by denying her self-respect. The shame is also an isolating factor.

Dinendra's threats included:

i) To destroy her family if she left him (including by suicide).[123]

ii) To have acid thrown into the face of her sister and two young nephews.[124]

Dinendra's surveillance included:

i) Setting up and monitoring her email, social media, phone and bank accounts.[125]

ii) Forcing her to text or phone her movements when she was away from him.[126]

iii) Making plans to sell her car and being rostered onto her ward and shifts.[127]

Dinendra's degradation of Chamari included:

i) "Sexual torture".[128]

ii) Forcing her to participate in acts (for example, the grooming of teenagers for sex) that violated her deeply held values.[129]

The threats that were most salient to Chamari were the threats to her family. Dinendra had the capacity to use retaliatory violence, money (their combined medical salaries) and connections through his brothers and friends in Sri Lanka. He threatened her that if she left him (even by killing herself) or disclosed the abuse to anyone (including by seeking counselling), he would get acid thrown in the face of her sister and her two nephews in Sri Lanka.

122 At 26.
123 *Liyanage* Transcript, above n 28, at 1051.
124 At 987–988.
125 At 930–931.
126 At 926–927.
127 At 1054; 1292 and 1313.
128 At 1115.
129 At 460 and 978–979.

B The limitations of the systemic safety response to IPV

So here is a woman in a very frightening situation. She is subject to sexual torture and living in constant expectation of painful physical punishment if she does not manage to please her partner. This has gone on for years and she is exhausted and overwhelmed. She knows she cannot physically defend herself against him. He is in the process of manipulating a 17-year-old and that girl's family so he can have "sex" with her, and Chamari's options are to be complicit in the child's violation or experience violent retaliation if she does not assist. She is under his constant surveillance. He is now moving into her workspace (this has always been her safety zone — she is a competent and well-regarded doctor — and he is now on her shifts and in her ward) and removing her independent means of transport (by selling her car so she will be reliant on him for transport).

What were those around her able to do for her? This is the second tier of a social entrapment analysis.

1 Community responses

People in Chamari's community did know what was happening. Chamari made disclosures to three people in Sri Lanka but on each occasion Dinendra's authority to use violence against her if she displeased him was validated.[130] In fact, when Dinendra attacked Chamari in 2012, his family saw the incident as arising from Chamari angering Dinendra to the point that he used violence against her. The fact Chamari screamed as she was attacked was seen as inappropriate on her part because of the potential to get her husband into trouble with the police.

A number of people in Chamari's professional community had noticed that something was amiss — and Chamari made partial disclosures to three people (partial because she was too ashamed to disclose the full horror of what she was suffering) — but these people uniformly failed to take any action in response.[131] One of these witnesses testified that it was up to Chamari what she wanted to do with her private relationship.[132]

2 Agency responses

Obviously Dinendra had committed serious crimes under the Criminal

130 At 457; 765; 767; 960; 1004–1005; 1011 and 1032.
131 At 419; 658–659; 661–662; 898; 1037 and 1163–1165.
132 At 1164.

Code Compilation Act (WA) against Chamari (aggravated sexual penetration without consent and threats to cause grievous bodily harm).[133] However, she testified that if she reported these events to authorities she and her family would be in more danger.

Chamari said that if she contacted the police, Dinendra would be interviewed — that would be the first thing the police would do. He would simply deny the allegations. Most people were under the impression they were a happy couple (there was certainly significant testimony supporting that at trial),[134] so she was unlikely to be believed.[135] Prosecutions were unlikely to take place and, having alerted Dinendra to the fact that she had disclosed the abuse to authorities, she would then be sent home alone to deal with his retaliation (and his family who would consider Chamari's report to police to be unacceptable behaviour on her part).

Even if Chamari survived the immediate fall out from reporting Dinendra's behaviour to the police, and even if there was some kind of criminal justice response (she testified that she thought Dinendra might get a fine or, if there was prison time, he would eventually be released), she said she would be in fear for the rest of her life about what he would do to her or her family because "he would chase me".[136]

Now you might say, "well okay — I accept that she honestly thought that — but it is not reasonable, she should have contacted the police". We can put aside the fact that as a matter of New Zealand law, she does not have to be reasonable — the issue is whether she honestly thought that. This was Western Australia, so at law she had to have reasonable grounds for her perception of her circumstances.[137]

But here is the thing — her assessments of what might happen to her are supported by reports from numerous government authorities. For example, the Law Reform Commission of Western Australia and the Western Australian Ombudsman's Office have documented the limitations of the police response to IPV in Western Australia — police neglecting to provide victims with information on how to access support services, being generally unsupportive or

133 Criminal Code Act Compilation Act (WA), ss 326 and 338A.
134 *Liyanage* Transcript, above n 28, at 421; 480; 572; 577; 579; 652; 666–667 and 683–684.
135 At 1037.
136 At 1037 and 1050–1051.
137 See Criminal Code Act Compilation Act (WA), s 248(4).

unwilling to take action and failing to investigate offences that have occurred on the basis that "it's your word against his".[138]

But even if agency responses to victims seeking help are exactly as they should be, our current repertoire of responses may not be effective for women who are dealing with a dangerous IPV offender. In New Zealand, the FVDRC has mapped the family violence safety system and states that it is not really a safety system — other than by default.[139] It is a fragmented collection of responses that are part of systems designed to deal with things other than IPV, with some underfunded IPV initiatives plonked in. The safety options that are currently available (and I do acknowledge that we are piloting and attempting to develop better ones)[140] — getting a protection order, contacting the police in order to initiate criminal proceedings or going into refuge accommodation — require victim initiation (in other words, we are placing responsibility for achieving safety on someone who is a repeat victim of criminal offending and likely to be in a state of considerable trauma) and generate a one-off reaction to an event that has taken place, which may not address the ongoing danger the victim is facing.

The FVDRC is not alone in saying that we need transformational change in respect of our family violence safety response. The Victorian Royal Commission into Family Violence produced an eight-volume report with 227 recommendations designed to transform that system in 2016 (and we all thought Victoria's system was more advanced than our own).[141]

It is important to remember when a victim is dealing with a dangerous IPV offender, that inadequate responses do not simply fail to provide safety. Such responses can significantly escalate the danger the victim is in because they put the offender on notice that he needs to close down further help-seeking or any enforcement process.

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138 See *Investigation into issues associated with violence restraining orders and their relationship with family and domestic violence fatalities* (Ombudsman Western Australia, November 2015) at 21; Community Development and Justice Standing Committee *A measure of trust: How WA Police evaluates the effectiveness of its response to family and domestic violence* (Legislative Assembly, Parliament of Western Australia, Report No 10, October 2015) at 50–2; and Law Reform Commission of Western Australia *Enhancing Family and Domestic Violence Laws* (Final Report, Project No 104, June 2014) at 62.

139 See FVDRC, above n 55, at 23–33.

140 Elaine Mossman *Evaluation of the Family Violence Integrated Safety Response Pilot Phase II* (Joint Business Unit, Final Report, September 2019).

141 Marcia Neave, Patricia Faulkner and Tony Nicholson *Royal Commission into Family Violence Summary and Recommendations* (March 2016).

3 Separation

We often think of separation from the predominant aggressor as the means by which primary victims can keep themselves safe.[142] And we carry on doing that despite the fact that we know that separation is a risk factor for intimate partner homicide when women are dealing with dangerous offenders. This is what Dobash and Dobash have described as the moment in which he "changes the project" from trying to keep her in the relationship and control her, to destroying her for leaving it.[143] The FVDRC has noted that two-thirds of female primary victims (or sometimes their new partners) who were killed by their partners were killed in the time leading up to or following separation.[144]

In this case Chamari left Dinendra twice — once in July 2013 and once in June 2014. On both occasions she did so only after begging him to let her leave. In other words, it is clear that she knew that there was no safety in separation unless he chose to relinquish her.[145] On both occasions, it is clear from the terms that he imposed on his agreement that he had no intention of allowing her to separate. Chamari explained multiple times in court that you have not left your abuser if they have granted you permission, set conditions on your departure that mean that you will be under their surveillance for the rest of your life and they will be accessing your income for the rest of your life.[146]

Whilst that seems obvious to me, she was understood by the prosecution and courts as having left, having achieved safety and *choosing* to return.[147] That only makes sense when you consider that under a "bad relationship with incidents of violence" paradigm so long as she is not being physically attacked, she is not understood as being abused and leaving the relationship is assumed to be synonymous with safety.

III CONCLUSION

Tonight I hope to have demonstrated that the theory of IPV that we use influences the meaning that we give to facts involving IPV. My point in relation to *Liyanage* is that a jury could not fairly conclude beyond reasonable doubt that her actions were unreasonable in self-defence without a proper understanding

142 See Sheehy, above n 11, at 79–80.
143 R Emerson Dobash and Russell P Dobash *When Men Murder Women* (Oxford University Press, Oxford, 2015) at 39.
144 FVDRC, above n 10, at 35–37.
145 *Liyanage* Transcript, above n 28, at 466.
146 At 463 and 994.
147 At 1102–1104.

of the circumstances that she was in — the nature of the threat she faced and the means she had of dealing with it. Further, that a social entrapment framing provides a more complete and accurate picture of those circumstances.

The challenge here is shifting the way we think about intimate partner violence. And this is my challenge to those in the audience who are part of the New Zealand criminal justice system. My challenge to prosecutors is to ask whether we always have to prosecute these women. If we analyse the facts and find a cognisable case for self-defence, is it appropriate not to lay charges?

My challenge to defence counsel is to understand and run defences based on social entrapment[148] and to hold the prosecution to their burden of proof in respect of all the elements of their self-defence case.[149]

My challenge to judges is to let in expertise on "social entrapment" and develop criminal justice responses in ways that better reflect the operation and harm of IPV.[150]

My challenge to everyone else in the audience is to think differently and to convert that into different ways of acting in response to IPV, whatever it is that you do. Thank you.

148 For a list of questions to explore and evidentiary sources see: FVDRC "Appendix to article titled 'Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence'" (Health Quality & Safety Commission New Zealand, August 2018).

149 See *R v Barrett* 2019 SKCA 6 where the Crown *was* put to proof.

150 Since this lecture was delivered, see *R v Ruddelle* [2020] NZHC 1983.

TAHE; TĪKANGA AND ABORTION

Nā Indiana Aroha Christbelle Shewen*

I te urunga o te rā,
tutū ana te puku.
Ringihia kau ana e au, kia tau ai.
Maringi noa ngā roimata.
Ka mōhio nei au,
ki te kuku ana te pōuri, pūkatokato ana a roto,
kia ngaro au i ahau.

Each day, come the rising of the sun, my stomach churns over.
I let it pour forth, so that my wairua may be settled.
Tears flow constantly.
But I know that if my sadness were to be repressed,
I would be riven to endless desolation,
losing myself inside of me.

I INTRODUCTION

The Contraception, Sterilisation, and Abortion Act 1977 was enacted by the thirty-eighth New Zealand Parliament, when there were more Members of Parliament named "Bill" than there were women.[1] In 2020, the fifty-second New Zealand Parliament removed abortion from the Crimes Act 1961.[2]

* I te taha o tōku Māmā, he uri ahau o Te Ati Awa, me Ngāti Mutunga, me Rangitāne o Wairau hoki. I te taha o tōku Papa, he uri ahau o Ngāpuhi. LLB/BA. I am currently working as a Junior Solicitor at the Royal Commission of Inquiry into Abuse in Care, Auckland. The views expressed in this article are my own.

1 (16 December 1977) 416 NZPD 5337.

2 Abortion Legislation Act 2020, which came into force on 24 March 2020. Before the passage of the Abortion Legislation Act, the starting point was any person seeking an abortion in New Zealand was committing a crime under s 182 of the Crimes Act. They would have to rely on a defence set out in s 187A to avoid criminal sanction, which required a person to obtain a referral by their doctor to two medical specialists, who would confirm that the continuation of the pregnancy would result in serious danger to their life, or physical or mental health. The Abortion Legislation Act 2020 allows people to choose to have an abortion without restrictions if they are no more than 20 weeks pregnant.

Proportionately, wāhine Māori accounted for approximately one quarter of the total number of abortions in Aotearoa New Zealand in 2013.[3] There is also evidence indicating that particular regions with large Māori populations suffer from inequitable access to abortion services. The Abortion Supervisory Committee noted in its annual report that there was only one public abortion service provider for the greater Auckland region, and none in the Counties Manukau district.[4]

At the end of 2019, I had an abortion.[5] As a feminist and a young woman studying law in Aotearoa, I once held an unwavering belief that if I ever found myself in a predicament where I had an unwanted pregnancy, I would choose to have an abortion. Of course, when it actually played out, my abortion placed me in a position of severe distress and instability. Looking back, I believe that the core of my struggle was reconciling my decision to have an abortion with my developing cultural identity as a young wahine Māori.

After making my decision to have an abortion, I sought guidance from some of my whānau members about practising a whēnua ki te whēnua tikanga ritual.[6] I was challenged by some of my kuia who implored that having an abortion would breach my obligations of whakapapa, especially because I am currently the only living child and the only living mokopuna on both sides of my whānau. This experience made it apparent to me that I faced additional stigma in getting an abortion as a wahine Māori as a result of a potential breach of my cultural beliefs and identity. My whānau strongly encouraged me to continue with my pregnancy, with the option to whāngai to a close relative if I did not want the child. In the end, I reconciled my decision to have an abortion by engaging in a whēnua ki te whēnua ritual.

3 Linda Holloway, Patricia Allan and Tangimoana Habib *Report of the Abortion Supervisory Committee 2013* (Abortion Supervisory Committee, 2013) at 18.

4 Linda Holloway, Tangimoana Habib and Carolyn McIlraith *Report of the Abortion Supervisory Committee 2017* (Abortion Supervisory Committee, 2017) at 5.

5 I have decided to include this information in my article because in doing so, I position myself explicitly in the work as a young woman who has undertaken an abortion surgery in New Zealand. I also choose to use personal pronouns throughout this article (us, our and we) to position myself as tangata whenua, in order to reject notions of objective and neutral research. This approach is similar to that of Leonie E Pihama "Tihei Mauri Ora: Honouring Our Voices. Mana Wahine as a Kaupapa Māori Theoretical Framework" (PhD Thesis, University of Auckland, 2001) at 26–27 and Linda Tuhiwai Smith *Decolonizing Methodologies Research and Indigenous Peoples* (University of Otago Press, Dunedin, 1999).

6 A ritual where human remains are returned to the land through burial.

In this article, I explore the kaupapa of abortion under a tikanga Māori framework. I begin the work of uprooting some of the colonial philosophies that have embedded themselves in te ao Māori, and which impose a further layer of stigma and trauma on wāhine Māori who navigate decisions about abortion. I argue that it is necessary to re-determine the way our tikanga can inform our abortion practices as wāhine Māori, and develop the abortion process in a way that supports all wāhine on a cultural, social and psychological level.

II RECLAIMING TIKANGA FOR WĀHINE MĀORI

Tikanga may be understood as Māori principles that are used for determining justice, in the same way that law is used in te ao Pākehā. Mason Durie refers to tikanga as "guides to moral behaviour".[7] Tikanga is adapted from, and is inextricably woven into, the religious ideals and everyday structure of te ao Māori. In a wider sense, tikanga can be defined as law, and kawa or kaupapa is the process of how tikanga is exercised.[8]

As our legal practitioners begin to incorporate our tikanga into New Zealand's legal sphere, our pūkenga and practitioners are often asked to consider varying kawa, kaupapa and tikanga while addressing legal issues.[9] While the incorporation of our tikanga into the Westminster system is a delicate task, I am passionate about our practitioners doing so because it allows us to turn to a tool that is 'tried and true'. I love the way our tikanga can cause transformative change. I believe this ability stems from the malleable nature of tikanga, which disregards the rigidity of our Pākehā systems. Our tikanga is grounded but everchanging, it is founded upon critical values such as aroha, pono, tino rangatiratanga and manaakitanga. One of my mentors makes a relevant joke about Māori being "the elite", and in this sense I think that sentiment is true — because our tikanga is based on practises that have existed for generations long before us, and they will be passed on to generations far beyond us. When we speak about our tikanga in legal spaces, we are reaching back to the practises of our tupuna and using those practises to inform our decision-making today. I remain in awe of our tupuna for their ability to produce viewpoints that were

7 Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self Determination* (Oxford University Press, Auckland, 1998) at 23.

8 Law Commission *The Taking into Account of Te Ao Māori in Relation to Reform of the Law of Succession* (NZLC MP6, 1996) at 16.

9 The most recent example of this can be seen in *Ellis v R* [2020] NZSC 89.

progressive and forward-reaching. They critiqued colonial concepts that were inherently racist, sexist (or any of the other ugly 'ists'), and they enabled us now to reject outdated notions and make changes that can better the wellbeing of our people.

The dynamic between tikanga and the law can be seen in the work that is done by our Māori academics, who reclaim our practises in order to address modern day issues. For example, te reo Māori provides a powerful indication that prior to colonisation there was no hierarchy of sexes in te ao Māori, as both the personal pronouns (ia) and the possessive personal pronouns (tāna/tōna) are gender neutral. When early Western settlers arrived in Aotearoa, they brought with them their own understandings of the role and status of women, which largely differed from those held by tangata Māori.[10] Through the re-shaping and re-telling of Māori creation stories, Pākehā men began to erode the mana of wāhine Māori.[11] Doctor Elizabeth Kerekere has discussed this impact in relation to reclaiming a space in te ao Māori for takatāpuhi — a traditional Māori term translated as an "intimate companion of the same sex".[12]

For example, the role and status of wāhine Māori in te ao Māori is illustrated on the marae, where the division of roles is informed by the tikanga of tapu and noa. This can be observed throughout the process of a pōwhiri, where roles are assigned by gender.[13] During the pōwhiri, once everyone is gathered inside a marae, tāne will usually seat themselves on the front benches and perform oratory roles such as whaikōrero. Wāhine usually seat themselves at the back and perform karanga, tangi, and waiata. This division occurs because, at this point of the pōwhiri, men are tapu and therefore qualified to perform oratory activities, and women are noa.[14] The tikanga practice of

10 Kerensa Johnston "Māori Women Confront Discrimination: Using International Human Rights Law to Challenge Discriminatory Practices" (2005) 4 Indigenous LJ 19 at 38–39.

11 Ani Mikaere "Colonisation and the Imposition of Patriarchy: A Ngāti Raukawa Woman's Perspective" in Leonie Pihama and others (eds) *Mana Wahine Reader: A Collection of Writings 1999–2019* (vol 2, Te Kotahi Research Institute, Hamilton, 2019) 4 at 10–11.

12 Elizabeth Kerekere "Part of The Whānau: The Emergence of Takatāpui Identity – He Whāriki Takatāpui" (PhD Thesis, Victoria University of Wellington, 2017) at 160.

13 Anne Salmond *Hui: A Study of Maori Ceremonial Gatherings* (3rd ed, Reed Books, Auckland, 2004) at 126 and 127.

14 At 127. The practice of the tikanga of tapu and noa will vary depending on the kawa, as seen by the practice of East Coast iwi where women have been known to whaikōrero on the marae.

division of roles by sex in accordance with tapu and noa can be understood through the well-known whakataukī:

> He wāhine, he whenua, e ngaro ai te tangata.
> By women and land, men are lost.

Wāhine play a vital role in te ao Māori: without wāhine and without the whenua, humanity would be lost. In a pōwhiri, tāne sit at the front of a marae so that they may perish before any wāhine if the manuhiri turn out to be violent. Through this practice, we can begin to understand that the intentions behind the allocation of roles on a marae are directly linked to the preservation of wāhine Māori and the essential role that we fulfil. Unfortunately, contemporary Western perspectives have failed to understand the values that underpin this tikanga and have therefore misinterpreted it, some criticising the pōwhiri as being anti-feminist.[15]

It is vital that wāhine Māori are the ones to re-assert their roles in te ao Māori and regain our pre-colonial practices. Linda Tuhiwai Smith articulated this when she said:[16]

> As Maori women, we have to be on alert for the possibility of one oppressive agency simply being replaced by another … [o]ur struggle as Maori women is our own struggle. To lose control of that struggle is to lose control of our lives. We are not in a position therefore simply to endorse or graft on to the projects of white women. We have to develop according to the reality and logic of our struggles.

Many wāhine Māori have completed a great deal of work in order to re-discover and re-assert tikanga in relation to the roles of women, while challenging the psyche of the colonised man.[17] I argue that similar work must be done in relation to the kaupapa of abortion. As with other tikanga concepts relating to wāhine Māori, by drawing together strands from traditional Māori practices such as whakataukī, pōwhiri, karakia, mōteatea, pūrakau and whakapapa, we can begin to re-determine the tikanga framework for abortion. In this way, it

15 Katherine Curchin "Pākehā Women and Māori Protocol: The Politics of Criticising Other Cultures" (2011) 46(3) Aust J Polit Sci 375 at 381–382.

16 Linda Tuhiwai Smith "Māori Women: Discourse, Projects and Mana Wahine" in Sue Middleton and Alison Jones (eds) *Women and Education in Aotearoa 2* (Auckland University Press, Auckland, 1997) 33 at 48.

17 At 47.

is possible to both understand the way in which we conceptualised abortion in a pre-colonial context, and how aspects of pre-colonial tikanga should inform contemporary practices around abortion.

III TIKANGA FRAMEWORK FOR ABORTION

The tikanga around abortion is contested. As I have explained above, perhaps due to the predominance of conservative Western thinking about abortion (well-illustrated by the now repealed provisions of the Crimes Act), some Māori believe that abortion breaches tikanga.[18] Abortion is viewed negatively by contemporary mātauranga and tikanga due to its disruption of the spiritual element conferred at the conception of a new life.[19]

While I have heard the argument that abortion was not discussed by our tīpuna, I maintain that it may not have been necessary to articulate the practice of abortion in pre-colonial times as it was an embodied reality for iwi and hapū. Although more research must be undertaken in this area to determine the varying Māori constructs that existed in relation to abortion, some work has already been done to rediscover the pre-colonial tikanga of abortion by Dr Jade Le Grice.[20] She suggests there were known traditional Māori practices that were used to terminate pregnancies arising from deliberate breaches of tapu, such as applying exerted pressure to the abdomen and drinking rongoa made from roots of harakeke, which could cause a loss of pregnancy.[21] There is also evidence in pūrakau which suggests that Maui was aborted by his mother.[22] Māui is the son of Taranga, who is the wife of Makeatutara. Taranga sent her premature infant to sea after wrapping him in hair from her topknot (tikitiki). This is how Māui came to be known as Māui Tikitiki a Taranga.

Doctor Alison Green has also discussed the meaning of Te Māhoe, the name given by Te Atiawa kaumātua Sam Jackson, to the regional abortion services based at Wellington Hospital.[23] The māhoe tree drops seeds that release a chemical inhibitor. The inhibitor has the effect of only allowing the strongest

18 For a similar exploration of the impact colonisation has had on Māori women, and the role Māori women have in te ao Māori, see Johnston, above n 10.

19 See Tariana Turia's Notice of Motion (14 June 2009) 639 NZPD 9887.

20 Jade Sophia Le Grice "Māori and Reproduction, Sexuality Education, Maternity, and Abortion" (PhD Thesis, University of Auckland, 2014) at 35–36.

21 At 36.

22 AW Reed *Treasury of Maori Folklore* (AH & AW Reed, Wellington, 1963) at 118.

23 Te Whāriki Takapou "Submission to the Law Commission on Abortion and Māori" Te Whāriki Takapou <www.tewhariki.org.nz> at [4].

māhoe seed to flourish. In her submission on the Abortion Legislation Bill, Green referred to this name to frame abortion from a Māori perspective, where a wahine may remove a pregnancy that has begun under suboptimal conditions in order to make way for another pregnancy to flourish in the future.

A Lament for Papaka Te Naeroa,[24] composed by Te Heuheu II Tukino from Ngāti Tuwharetoa, is also thought to contain a reference to abortion:[25]

> Taku wai whakatahetahe
> Ki te kauhanga a riri;
> He rīanga tai, he rutunga patu.
>
> All in vain was my water offering
> At the altar to smooth the way in battle;
> The ocean was defied, when weapons were held on high.

The term whakatahetahe has been translated variously as abortion, the clearing of obstructions, and sacred food offered to atua. The term "tahe" can mean menses, abortion or flow.[26] In te reo Māori, the terms abortion and miscarriage are not distinguished from each other, and are both referred to by the terms tahe, whakatahe, materotanga, and taiki.[27] In the Lament for Papaka Te Naeroa, wai whakatahetahe refers to the use of tahe as an offering to atua to ensure protection and success in battle. Interpreted this way, this mōteatea illustrates that in pre-colonial times, it was understood that menstrual blood, miscarriage, or abortion remains could be used as a medium to connect to atua. This speaks to the inherent mana of wāhine and their reproductive bodies, and allows us to understand how wāhine Māori may have informed their decisions surrounding concepts of pregnancy, fertility and abortion.[28]

24 Papaka Te Naeroa is the younger brother of Mananui Te Heuheu, Ngāti Tūwharetoa. Mananui wrote this lament for his brother some time during his life, before he passed on in 1846.

25 AT Ngata and Pei Te Hurinui Jones *Ngā Mōteatea The Songs: Part One* (Auckland University Press, Auckland, 2004) at 284–285.

26 Herbert W Williams *A Dictionary of the Maori Language* (7th ed, GP Publications, Wellington 1971) at 358.

27 Le Grice, above n 20, at 35 and John C Moorfield "Te Aka Online Māori Dictionary" (2003) Māori Dictionary <www.maoridictionary.co.nz>.

28 An interesting point for further research and consideration would be tikanga approaches to wāhine who suffer from infertility issues.

However, the meaning of tahe is not fixed. While in the Lament for Papaka Te Naeroa, it is used to describe an offering to atua, in a waiata aroha from Ngai Te Rangi, it is used as a metaphor for love:[29]

He aroha noa ake
Ki a Te Rewarewa rā,
Nāna tōku aro

I huawaere iho,
I pākaru mai ai, ē,
E te tahe i ahau.

Oh, how I long
For Te Rewarewa now afar off,
He who all my charms
Did fully discover,
And caused to pour forth
The tahe from me.

In this waiata, the writer seeks to describe the overwhelming love that they had for Te Rewarewa. Tahe is used to express this love.

Drawing these threads together, it seems that, in tikanga, the concept of tahe is wide and significant. Tahe had inherent spiritual properties that could ensure protection in battle and could be used as a form of offering or communication to atua. It was also used to express the attraction or bond between lovers. Both of these uses reflect the importance of tahe in te ao Māori. I argue that in a contemporary context, the concept of tahe is wide and significant enough to encapsulate the contemporary practice of abortion.[30]

Reclaiming and developing the tikanga of abortion is important for wāhine Māori who may face additional stigma when seeking to terminate a pregnancy. Beyond this, a deeper understanding of the tikanga around abortion is necessary to ensure that wāhine Māori have access to culturally specific treatment that takes into account the complexities of varying tikanga

29 AT Ngata and Pei Te Hurinui Jones *Ngā Mōteatea The Songs: Part Two* (Auckland University Press, Auckland, 2005) at 228–229.

30 Dr Jade Lee Grice has also expressed this viewpoint in her mahi, above n 20, at 35–36.

obligations.[31] Throughout my abortion process I felt that there was a severe lack of information and culturally appropriate services to help me navigate the varying tikanga perspectives held by my whānau members. In my case, I was grateful to have the option of taking my remains home with me after the surgery so that I could have them buried on my urupā. But for many wāhine Māori, the cultural value of such practices has been lost due to a lack of conversation surrounding tikanga and abortion practice in Aotearoa.

IV CONCLUSION

Wāhine Māori who face the decision of having an abortion must navigate multiple layers of oppression and stigma. Through a simple feminist lens, the decision to continue a pregnancy is a pregnant person's choice alone. However, there are other considerations for tangata Māori, who must exercise tino rangatiratanga in their decision-making process.[32] For me personally, making the decision to have an abortion was not difficult. The difficulty I had was in the process of healing and restoring my whare tangata and holding onto all of the things that make me a wahine Māori — my whakapapa, my ability to create life, and my connection to Papatūānuku as tangata whenua.

The recent changes in abortion legislation have alleviated the outdated processes that people were required to follow to avoid criminal sanction on account of their abortion. Now, it is necessary to re-determine the way tikanga can inform our abortion practices and develop the abortion process in a way that supports all tangata Māori who can become pregnant on a cultural, social and psychological level. However, more evidence-based research needs to be undertaken to fully understand and reclaim the different tikanga that may be adopted by iwi and hapū in relation to abortion practices.

31 See the Code of Health and Disability Services Consumers' Rights Regulations 1996, which state that every consumer has the right to be provided with services that take into account the needs, values and beliefs of different cultural, religious, social and ethnic groups, including the needs, values, and beliefs of Māori.

32 It is well recorded that Article 2 of Te Tiriti o Waitangi guarantees the exercise of tino rangatiratanga. I think the best illustration of this concept can be understood by looking to the tino rangatiratanga flag itself, which is a powerful symbol of Māori self-determination. The black (Te Korekore) represents Ranginui, the sky father and divine male element. The red (Te Whei Ao) represents Papatūānuku, the earth mother and divine female element. The white (Te Ao Mārama) koru between them represents the divine child, and regeneration within Te Ao Mārama, being the physical world of light. This symbol represents balance between genders, and generations, and all that is connected to us through whakapapa.

AUCKLAND WOMEN LAWYERS' ASSOCIATION WRITING PRIZE WINNER

"HER BIAS CLOUDS HER SENSE OF REALISM": JUDICIAL DISCOURSE SURROUNDING THE REPRODUCTIVE CHOICES OF INTELLECTUALLY DISABLED WOMEN

Bella Rollinson*

While many women freely give birth all around Aotearoa New Zealand, the reproductive choices of some women are subject to state approval. Under the Protection of Personal and Property Rights Act 1988, intellectually disabled women can be ordered to undergo sterilisation or termination of pregnancy, or both, without their consent. Focussing on the case study of a woman referred to as "KR", this article argues that societal perceptions of intellectually disabled women unduly influence the legal reasoning process. Despite concern expressed by the United Nations in 2014 that New Zealand's process for sterilisation or termination of pregnancy of intellectually disabled women does not adhere to the Convention on the Rights of Persons with Disabilities — which New Zealand has ratified — there has been no legislative reform. New Zealand's legal approach to the reproductive choices of intellectually disabled women is woefully out of date and risks disregarding women's desires, rights and self-determination.

I INTRODUCTION

This article explores how the intellectually disabled woman is produced and shaped by discourse and the extent to which the courts uncritically accept and integrate that discourse into reasoning processes.[1] To illustrate this, this

* Current BA/LLB(Hons) student at the University of Auckland. I would like to thank Professor Julia Tolmie and Professor Joanna Manning of the University of Auckland Faculty of Law for their law courses which inspired this essay. I would also like to thank the Auckland Women Lawyers' Association for their enthusiasm for and recognition of the article.

1 Because this issue deals with female reproduction and a set of cultural ideas about women, this text's analysis is best applied to those who were deemed to have a 'female' reproductive system at birth and are coded by society as women. This is most likely to be cisgender women. The forced sterilisation of

article focusses on the legal issue of court-ordered non-consensual sterilisation and termination of pregnancy of intellectually disabled women, particularly centring on the experience of KR as a case study.[2] Part II of this article will set out the relevant definitions, establish the historical background and legal framework for non-consensual sterilisation and termination, and outline KR's case history. Part III will discuss the legal test of "capacity", which determines whether a woman is unable to make her own reproductive decisions and thus whether the court has jurisdiction to make orders in respect of her fertility or pregnancy. This Part critically assesses the deployment of the masculine concepts of rationality, reason and logic to guide the courts' reasoning in assessing a woman's ability to understand and make reproductive decisions. Additionally, Part III outlines how narratives about the capability of intellectually disabled women contribute to a lack of educational resources and support, thereby reinforcing their perceived incapacity. Part IV assesses the "best interests" test which is the second step after a court determines a woman lacks capacity to determine appropriate orders. It examines how discourses about intellectually disabled women and their reproductive rights, sexuality and motherhood are employed in assessing her best interests.

II CONTEXT

A Definition of intellectual disability

It is extremely difficult to give a single definition of the term "intellectual disability".[3] Intellectual disability is not a condition or disorder itself, but "a description of society's current judgement on an individual's functioning".[4] However, it is often understood to be "an outcome of a diagnosable biological impairment or medical condition".[5] For example, the Intellectual Disability (Compulsory Care and Rehabilitation Act) 2003 defines a person as having an intellectual disability if the person "has a permanent impairment that results in significantly sub-average general intelligence and results in significant deficits

transgender and gender diverse people is an important issue that, while related, falls outside the scope of this article.

2 *R v R* (2004) 23 FRNZ 493 (FC); *KR v MR* [2004] 2 NZLR 847 (HC); and *R v R (No 2)* [2004] NZFLR 817 (FC).

3 Anne Bray *Definitions of Intellectual Disability: Review of the Literature Prepared for the National Advisory Committee on Health and Disability to Inform its Project on Services for Adults with an Intellectual Disability* (National Advisory Committee on Health and Disability, June 2003) at 28.

4 At 28.

5 At 19.

in adaptive functioning … and became apparent during the developmental period of the person".[6] Courts have also used the language of "impairment", "limitations" and "compromised functioning".[7] Older terms used in New Zealand were "intellectual handicap" or "mental retardation", however these are now considered derogatory.[8]

In the context of assessing capacity under the Protection of Personal and Property Rights Act 1988 (PPPRA), intellectual disability has no automatic legal significance. However, this article argues that the court's perception of an individual as having an intellectual disability can bias its assessment of a person's capacity.

B Historical context

The horrific legacy of eugenics remains a critical reference point for discussions about sterilisation.[9] The theory of eugenics sought to shape the human population to retain only those who were "desirable" and "fit".[10] However, the criteria of who was and was not deemed desirable and fit was often based on race, class, disability, "degeneracy", or otherwise "problem populations".[11] Early eugenicists considered "poverty, criminality, illegitimacy, epilepsy, feeblemindedness, and alcoholism" to be genetically transmissible.[12] The now-infamous United States Supreme Court case of *Buck v Bell,* which upheld a compulsory sterilisation law for the "unfit", summarises the eugenic sentiment that we must still be vigilant for when entering this area of discussion:[13]

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind … Three generations of imbeciles are enough.

6 Intellectual Disability (Compulsory Care and Rehabilitation Act) 2003, s 7(1).

7 Hannah Johnston, Mark Henaghan and Brigit Mirfin-Veitch "The Experiences of Parents with an Intellectual Disability Within the New Zealand Family Court System" (2007) 5 NZFLJ 266.

8 Bray, above n 3, at 1.

9 Kristin Savell "Sex and the Sacred: Sterilization and Bodily Integrity in English and Canadian Law" (2004) 49 McGill LJ 1093 at 1120.

10 Phillipa Levine and Alison Bashford "Introduction: Eugenics and the Modern World" in Alison Bashford and Phillipa Levine (eds) *The Oxford Handbook of the History of Eugenics* (Oxford University Press, Oxford, 2010) at 5.

11 At 6–7.

12 Rebecca Kluchin *Fit to be Tied: Sterilization and Reproductive Rights in America 1950-1980* (2nd ed, Rutgers University Press, New Brunswick, New Jersey, 2009) at 1.

13 *Buck v Bell* (1927) 274 US 200 at 274.

The Nazi regime also sought to reduce the burden on the state of "hereditarily tainted persons", leading to the widespread sterilisation of physically and mentally disabled people.[14] This included lower-class women whose promiscuity was seen as a sign of mental deficiency.[15] Other forms of eugenic theories and practices were found across the world.[16]

As put by Levine and Bashford, "[s]ince eugenics was always concerned with reproductive sex, it was also always about gender".[17] Eugenicists were preoccupied with women because of their childbearing capacities.[18] While eugenic theories were seemingly cast into disrepute following the Nazi regime, controlling the reproduction of certain types of women via sterilisation has continued.[19] Sterilisation was seen to be a cost-effective procedure that would prevent women who were "unfit for parenthood" from becoming pregnant without the need for permanent institutionalisation.[20] Ostensibly, the procedure is in the interests of the woman. But the cultural hangover of evaluating her "reproductive fitness" — the quality of an individual and the value of her reproduction — remains.[21] So too do concerns about her burden on the state, or more recently, on private caregivers.

Despite active participation in international dialogues about eugenics, New Zealand never had direct legislative and policy programmes of sterilisation.[22] Rather, eugenics operated informally, such as in healthcare, prisons, and mental institutions, "where innovation without legislative sanction was always possible".[23] New Zealand mostly pursued a segregation approach to reproductive control by institutionalising "incurables", thereby removing any

14 Susanne Klausen and Alison Bashford "Fertility Control: Eugenics, Neo-Malthusianism, and Feminism" in Alison Bashford and Phillipa Levine (eds) *The Oxford Handbook of the History of Eugenics* (Oxford University Press, Oxford, 2010) at 105.

15 At 105.

16 Levine and Bashford, above n 10, at 15–16.

17 At 8.

18 Kluchin, above n 12, at 3.

19 Elizabeth Tilley and others "'The Silence is Roaring': Sterilization, Reproductive Rights and Women with Intellectual Disabilities" (2012) 27 Disability & Society 413 at 415.

20 At 415.

21 Kluchin, above n 12, at 2.

22 Stephen Garton "Eugenics in Australia and New Zealand: Laboratories of Racial Science" in Alison Bashford and Phillipa Levine (eds) *The Oxford Handbook of the History of Eugenics* (Oxford University Press, Oxford, 2010) at 243–244.

23 At 244.

opportunity for reproduction. Sterilisation was still an available care option in these settings.[24]

Today, sterilisation justifications are brought under a medical framework.[25] It is usually claimed that the woman will not cope with the distress of menstruation or pregnancy. However, there is often a clear element of caregivers desiring to manage her sexuality and reproductive capacity, which raises concerns that the medical reasons given may mask underlying non-therapeutic, social reasons for sterilisation.[26] The intersection between medical justification and the social conception is discussed further below.

C Legal framework

Under the Health and Disability Commissioner Code of Rights, no person can be given medical treatment without their informed consent.[27] However, treatment may be provided to those who cannot consent via the PPPRA, which allows the court to order that a person be provided with medical treatment.[28]

The court may only make an order for medical treatment under the Act if it has determined that the person lacks the capacity to make the decision relating to the medical treatment.[29] This is the "capacity" threshold test. The test is enshrined in s 6 of the PPPRA, which provides the court has jurisdiction over a person who:

> i) lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; or
>
> ii) has the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare, but wholly lacks the capacity to communicate decisions in respect of such matters.

24 Carol Hamilton "Sterilisation and Intellectually Disabled People in New Zealand — Still on the Agenda?" (2012) 7 Kōtuitui 61 at 62.

25 At 61.

26 At 61.

27 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, right 7(1).

28 Protection of Personal and Property Rights Act 1988 [PPPRA], s 10(f).

29 Section 6. Sterilisation and termination of pregnancy have been found to be "medical treatment": *Re H* [1993] NZFLR 225 (FC).

There is a presumption in favour of capacity that must be disproved.[30] Additionally, the Act stipulates that jurisdiction cannot be grounded on the basis solely that the person's decision is one a prudent person would not make.[31]

Once jurisdiction is founded, the court has a discretion to make several orders in respect of that person under s 10 of the PPPRA, which is contained in Part 1 of the PPPRA.[32] Enshrined in s 8, there are two explicit primary objectives for making a personal order under s 10. The order should be the least restrictive intervention possible in the person's life, having regard to their degree of incapacity.[33] It should also enable or encourage the person to exercise and develop the capacity they have to the greatest extent possible.[34]

Conversely, under Part 2 of the PPPRA, relating to welfare guardians, the "first and paramount" consideration in the exercise of welfare guardian powers is the promotion and protection of the welfare and best interests of the person.[35] The High Court has suggested the best interests principle is best achieved by having regard to the two primary objectives of s 8 discussed above.[36] Similarly, the Court has held this "best interests" or welfare principle also applies to decisions made under s 10, despite personal orders being under Part 1 of the Act.[37]

In practice, the courts follow a two-stage test in making assessments of incapacity and determining the appropriate orders. First, does the person lack capacity to make the decision about the medical treatment in question? If so, what course of action is in their best interests, having regard to ensuring the least restrictive intervention into the person's life?

There have been calls for this framework to be reformed to bring New Zealand in line with its obligations under art 17 of the United Nations Convention on the Rights of Persons with Disabilities, which affirms the integrity of the person.[38] In 2011, an Office for Disability Issues report

30 Section 5.
31 Section 6(3).
32 Section 10(1): "the court *may* … make any 1 or more of the following orders".
33 Section 8(a).
34 Section 8(b).
35 Section 18(3).
36 *KR v MR*, above n 2, at [62].
37 At [59].
38 United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 17. This was ratified by New Zealand in 2008.

indicated sterilisation without consent is a key issue under the article.[39] In 2014 the United Nations recommended that "immediate steps" be taken in New Zealand to replace substituted decision-making (where the court makes a decision based on the person's best interests) with supported decision-making.[40] This recommendation is crucial, as supported decision-making seeks to maximise the person's potential to exercise their own decision-making to the greatest extent possible.[41]

Despite this, in 2014 the Family Court authorised non-consensual sterilisation of a woman with Down's Syndrome for solely contraceptive purposes.[42] The case did not discuss the developments of disability rights in international law, or how that might affect the application of the preceding case law. Notably, that same year, the United Nation's review of New Zealand's adherence to the Convention expressed concern "that courts may order that adults undergo sterilization without the individual's consent".[43] The review also called for legislation prohibiting the use of sterilisation "on adults with disabilities, in the absence of their prior, fully informed and free consent".[44]

D Case study: KR v MR

KR was a 29-year-old pregnant woman. She had a congenital disorder called Partial Trisomy 8. The evidence given about this disorder is that it involves "mild intellectual disability, developmental delays and certain physical characteristics".[45] Her father, MR, applied to the Family Court to have KR sterilised and her pregnancy terminated. KR gave evidence that her pregnancy was "a dream come true" and that she had deliberately ceased her birth control in order have children.[46] She loved children and had looked after babies at childcare centres she had worked at.[47] In 2004, the Family Court held KR

39 Office for Disability Issues *First New Zealand Report on Implementing the UN Convention on the Rights of Persons with Disabilities* (March 2011) at [116]–[122].
40 Committee on the Rights of Persons with Disabilities *Concluding Observations on the Initial Report of New Zealand* UN Doc CRPD/C/NZL/CO/1 (31 October 2014) at [22].
41 At 3.
42 *Darzi v Darzi* [2014] NZFC 359.
43 Committee on the Rights of Persons with Disabilities *Concluding Observations*, above n 40, at [38].
44 At [39].
45 *KR v MR*, above n 2, at [6].
46 *R v R*, above n 2, at [22].
47 At [22].

lacked capacity and both the termination and sterilisation orders would be in KR's best interests.[48]

KR appealed to the High Court. Her counsel argued that:

i) KR did not have sufficient time to see another psychiatrist. The psychiatrist at first instance, Dr Schuaib, was the same man KR had reacted adversely to in 2003 when he gave evidence on her father's application to become her welfare guardian;[49]

ii) the Family Court did not consider the possibility of KR raising the child in a supported fashion and incorrectly assumed that the choice was between termination or removal;[50] and

iii) the Judge failed to take into account less invasive contraceptive options.[51]

The High Court allowed the appeal but remitted the case back to the Family Court for reconsideration of new evidence.[52]

When considering the new evidence in the Family Court, Judge Fraser preferred the evidence of Dr Schuaib to the new psychiatrist, holding that KR still lacked capacity. However, he found that because of the progression of KR's pregnancy, he had to "reluctantly" decide that the least restrictive intervention was to allow KR to give birth.[53] Furthermore, at the rehearing, evidence of a "third medical possibility with respect to the issue of conception" was given. The Mirena IUD, which was not discussed at first instance, was found to be an appropriate form of contraception which was less restrictive than sterilisation.[54] The next sections of this article discuss in depth how the Family Court assessed KR's capacity under s 6 of the PPPRA and how the "best interests" standard was applied in making orders in respect of her pregnancy.

III CAPACITY

As set out above, the test for capacity in s 6 of the PPPRA requires a court to assess whether a person "lacks, wholly or partly, the capacity to understand

48 At [78].
49 *KR v MR,* above n 2, at [38].
50 At [39].
51 At [44].
52 At 864.
53 *R v R (No 2)*, above n 2, at [81]–[83].
54 At [91].

the nature, and to foresee the consequences, of decisions in respect of matters relating to [her] personal care", or whether the person has that capacity but lacks the ability to communicate decisions in respect of such matters.

A Social construction of incapacity

The test for capacity is vague, invites subjective value judgements from both medical professionals and judges and its reasoning is not routinely reported.[55] One academic describes the determination as "one of the most conceptually and ethically challenging areas of clinical practice".[56] This is because the descriptive language used in the test for capacity, namely whether a person can "understand the nature" and "foresee the consequences" of the decision,[57] obscures the additional "intrinsic normativity of the judgement".[58] The diagnostic tools used by health professionals rely heavily on ostensibly objective theories of cognitive functioning without explicitly recognising that the clinician is making a "normative [judgement] about the quality and content of an individual's beliefs, values and emotions".[59]

Additionally, a determination of mental capacity relies on expert evidence, but it is ultimately a legal test. It therefore is "not 'purely technical'" but has an "ethical" dimension: the judge must make a value judgement as to where to draw the line between respecting a person's autonomy and subjecting them to best interests decision-making.[60] This evaluation can be difficult due to a clash in priorities and perspectives between the medical and legal professions. Doctors are frequently more risk-averse and focused on minimising physical harm to health, whereas legal perspectives tend to give weight to principles such as autonomy that may not necessarily provide the "best" medical outcome.[61] This may explain why reasoning about the patient's best interests may bleed into a judicial assessment of their capacity from the medical expert evidence,

55 Alison Douglass *Mental Capacity: Updating New Zealand's Law and Practice* (New Zealand Law Foundation, July 2016) at 181–195.

56 Natalie Banner "Unreasonable Reasons: Normative Judgements in the Assessment of Mental Capacity" (2012) Journal of Evaluation in Clinical Practice 1038 at 1038.

57 PPPRA, s 6(1)(a).

58 Banner, above n 56, at 1038.

59 At 1040–1041. While this comment is made in respect of the United Kingdom context, it is the author's view these comments apply equally in New Zealand, where the same or similar clinical assessment tools are employed.

60 Paula Case "Negotiating the Domain of Mental Capacity: Clinical Judgement or Judicial Diagnosis" (2016) 16 Med L Intl 174 at 177.

61 At 198–199.

despite the clear legislative proviso that making a "bad" decision is not evidence of a lack of capacity to make the decision.[62]

The Committee on the Rights of Persons with Disabilities has stressed that "[mental] capacity is contingent on social and political contexts", and so too are the "disciplines, professions and practices" that play a dominant role in its assessment.[63] This shows that unchallenged norms, beliefs and judgements about women, especially intellectually disabled women, creep into both medical assessments and legal analysis of capacity.

Intellectually disabled women are often not given the resources and support they need to make decisions because of the assumption they inherently lack capacity to make reproductive decisions. However, "intellectual disability" is not a fixed state, but a descriptor for behaviour which demonstrates difficulty in general learning.[64] Capacity in decision-making is significantly affected by previous opportunities to make decisions, accessible information and the type of support provided.[65] The primary objective, of enabling the exercise and development of capacity, counterintuitively does not apply in the preliminary stages of determining capacity.[66] When evaluating capacity, the woman is often subject to "diagnostic over-shadowing": her difficulties in understanding or foreseeing consequences are attributed to her impairment and not a lack of support.[67]

B The incapacity assessment in KR's case

The social construction of incapacity is clear in the Court's assessment of KR's capacity. For example, at the time of the first interview, KR "could not tell what baby needs were or how those needs would be met".[68] Instead of a lack of capacity, this seems to demonstrate that nobody had ever explained to her, in an accessible manner, information about sexual and reproductive health and rights. The myth that disabled people are forever childlike, or parents' anxieties about their (adult) child becoming sexually active, mean that they

62 PPPRA, s 6(3).

63 Committee on the Rights of Persons with Disabilities *General Comment No 1 (2014)* UN Doc CRPD/C/GC/1 (19 May 2014) at [14].

64 Anne Bray "The Protection of Personal and Property Rights Act 1988: Progress for people with intellectual disabilities" (1996) 2 BFLJ 51 at 4.

65 At 4.

66 PPPRA, s 9.

67 Hamilton, above n 24, at 69.

68 *R v R*, above n 2, at [31].

are never given this information.[69] By the time of appeal to the High Court, KR "thought that babies need clothes, feeding, showering, a home and love".[70]

There was much emphasis put on the fact that KR believed she would be able to keep and look after the baby and have more babies afterwards. The Court appeared to imply that this indicated an inability to foresee the consequences of the decision and thus a lack of capacity. But if KR had never had a child before, how could she be expected to fully understand and foresee all the possibilities of what it might entail?[71] Many women embarking on their first pregnancy have only a vague idea of what raising a child is really like. Her naivety and lack of experience were, however, constructed as a lack of capacity.[72]

This point was largely put before the Court by Dr Bartlett who explained that while KR could not grasp abstract concepts, "when matters were put to her in simple language", she could comprehend the components of complex problems and work through them with time.[73] Dr Bartlett also noted that "[a]s this is her first pregnancy she has no prior experience of the process involved but I see no barrier to providing her with this knowledge in the format she can comprehend".[74] However, as discussed below, the Family Court Judge did not accept Dr Bartlett's evidence, seeing it as subjective and unrealistic.

C Rationality and incapacity

In law and medicine, the concept of "understanding" (as part of the test of capacity) immediately evokes concepts of rationality. In KR's case at first instance, her lack of rationality is mentioned 11 times, predominantly in the expert evidence of Dr Schuaib.[75] It is echoed in both subsequent iterations of the case.

The discourse of rationality is an old and enduring set of ideas stemming from the Cartesian divide of mind and body.[76] In this dualism, men are

69 Brenda Burgen "Still Not Accepted: When Women with Intellectual Disabilities Choose to Become Mothers" (2007) 19 Women Against Violence 54 at 55.
70 *KR v MR*, above n 2, at [16].
71 Bray, above n 64, at 4.
72 At 4.
73 *R v R (No 2),* above n 2, at [51].
74 At [52].
75 *R v R,* above n 2, at [26], [27], [31], [32], [53] and [71].
76 Andrea Nicki "The Abused Mind: Feminist Theory, Psychiatric Disability, and Trauma" (2001) 16(4) Feminism & Disability 80 at 91.

the mind: "the rational, unified, thinking subject".[77] Conversely, women, representing nature, are presumed inherently elemental and emotional, volatile and irrational.[78] This is reinforced by "biological essentialist and determinist paradigms" which define a woman by her reproductive anatomy.[79] A form of irrationality termed "hysteria" was historically attributed to a disturbance in a woman's womb.[80] Historically, this diagnosis was used as a tool to control women who rebelled against social mores.[81] However, early feminists theorised that the cause of hysterical symptoms was more likely the stress and trauma of facing oppression.[82] Women were therefore seen as inherently irrational for responding emotionally to oppressive cultural circumstances that men did not see as a problem.[83] The concept of rationality therefore has problematic gendered associations. However, it continues to shape medical theories of intelligence and cognitive ability.[84] As feminists, we should be acutely alert and suspicious when concepts of rationality are deployed in order to undermine a woman's decisions by constructing her as an irrational subject.

Furthermore, the close association between rationality — a detached, unemotional way of thinking — and capacity implies there is only one reasonable, objective form of making decisions. This fails to take into account that a person's subjective experiences and values may affect how they interpret and understand information.[85] There is a danger of clinicians or judges determining that a person cannot "reason rationally" because the person has used and evaluated the information in a way consistent with their own values but inconsistent with the assessor's values.[86] There is also a risk of inconsistency between different assessors' judgements as to the appropriateness or proportionality of the emotional response a person has to the information given.[87] The idea that rational reasoning must be detached from emotionality

77 Angela King "The Prisoner of Gender: Foucault and the Disciplining of the Female Body" (2004) 5(2) Journal of International Women's Studies 29 at 31.
78 Pam Oliver "What Do Girls Know Anyway?: Rationality, Gender and Social Control" (1991) 1(3) Feminism & Psychology 339 at 339.
79 King, above n 77, at 31.
80 At 31.
81 At 30.
82 Heather Meek "Of Wandering Wombs and Wrongs of Women: Evolving Conceptions of Hysteria in the Age of Reason" 35(3) English Studies in Canada 105 at 124.
83 At 124.
84 Licia Carlson "Feminist Approaches to Cognitive Disability" (2016) 11(10) Philosophy Compass 541 at 545.
85 Banner, above n 56, at 1040.
86 At 1041.
87 At 1042.

risks misdiagnosing a person's anger and frustration at a situation as an inability to rationally reason, and thus as demonstrating a lack of capacity.[88]

Judges therefore need to be particularly cautious that they do not use the fact that a woman is emotional or has different priorities to male clinicians or counsel as the sole justification for a finding of incapacity. The English Law Commission rejected a test based on rationality for the Mental Capacity Act 2005 (UK), as it would deny the patient "the freedom to act irrationally (or at least against reason)" according to the subjective interpretation of the doctor and his or her personal values.[89] In New Zealand, the imperative to take care in assessing rationality is enshrined in s 6(3) of the PPPRA itself, discussed above, which provides:

> The fact that the person in respect of whom the application is made for the exercise of the court's jurisdiction has made or is intending to make any decision that a person exercising ordinary prudence would not have made or would not make given the same circumstances is not in itself sufficient ground for the exercise of that jurisdiction by the court.

D The deployment of "rationality" in KR's case

In KR's case, she is identified as emotional by Dr Schuaib: "very short tempered and at times irritable".[90] (Ir)rationality is prominently employed in the evidence: "most of her decisions may not be based on rational reasoning".[91] Dr Scuaib's evidence immediately continues with, "[s]he has been involved in sexual relationships and though she has been informed of the high chances of getting [Trisomy 8] children, she still is not willing to use any contraception".[92] Similarly, Judge Fraser cites with approval Judge Callinicos' statement that capacity is:[93]

88 Case, above n 60, at 187.

89 United Kingdom Law Commission *Mentally Incapacitated Adults and Decision-making: An Overview* (Consultation Paper 119, 1991) at 48.

90 *R v R,* above n 2, at [26].

91 At [27].

92 At [27].

93 At [29] (emphasis added). Judge Callinicos determined KR's capacity regarding whether she should have a welfare guardian appointed in 2003.

> … the ability to make decisions going to the heart of the ability to function in everyday life to decide whether one should *wisely have children or not*, … In all respects sadly [KR] lacks those capacities …

The Court's value judgement is clear: "[h]ad [KR] the capacity to understand about the *need not to become pregnant* then the issue of sterilisation would not be such a critical matter".[94]

These statements are extremely problematic, as they suggest disabled women who make reproductive decisions that could lead to pregnancy are inherently irrational. Assessing the evidence that KR may genetically pass her disability to her child, the judges involved are careful to explicitly frame this as relevant to whether KR has the capacity to raise the child.[95] However, the spectre of eugenics is present. There appears to be an underlying belief that bringing a disabled child into the world is wrong, hence the need to prevent pregnancy.[96] As Johnson argues, the "presence or absence of a disability doesn't predict quality of life" and people with disabilities build rich and satisfying lives.[97] KR is seen as irrational for wanting to bring a child (potentially) with a disability into the world because of the prejudiced assumption that a disabled life entails so much suffering that it is more bad than good. This societal prejudice is treated as fact and colours the assessment of KR's rationality.

KR's defiance against the decision the doctors and judges think she should make is assessed and measured through the masculine discourse of rationality and determined to be irrational, demonstrating a lack of capacity. This is despite the proviso in s 6(3) above that a person does not lack capacity simply because they are thought to be making imprudent decisions.

In the author's view, the (woman) psychologist in *R v R (No 2)* more closely adhered to the caution contained in s 6. In Dr Bartlett's opinion, KR *understood* what was involved in an abortion and sterilisation.[98] She highlighted that KR could *foresee consequences* related to this decision: KR discontinued her contraception to become pregnant and changed her behaviour when she

94 At [69] (emphasis added).
95 See *KR v MR,* above n 2, at [45].
96 *R v R,* above n 2, at [69].
97 Harriet McBryde Johnson "Unspeakable Conversations or How I Spent One Day as a Token Cripple at Princeton University" *New York Times* (New York, 16 February 2003) at 53.
98 *R v R (No 2),* above n 2, at [49].

learnt that drinking and smoking could harm a fetus.[99] However, Judge Fraser nevertheless preferred Dr Schuaib's evidence:[100]

> While I accept that Dr Bartlett has had more experience dealing with people with intellectual disabilities than Dr Schuaib, it is clear from her evidence that she has a *liberal bias with respect to the abilities of people with intellectual disability*. It may be that *that bias clouds her sense of realism*, forcing a defence of K[R]'s position and creating a block to acknowledging the alternative perspective provided by Dr Schuaib.

Other writers have found this particular piece of reasoning curious, especially given the acknowledgement that Dr Bartlett specialised in disability.[101] It is interesting that Judge Fraser considers Dr Bartlett's perspective of KR's capabilities to be a product of bias but does not consider whether the same might be true of Dr Schuiab's perspective. Dr Schuiab's approach is to assess whether KR's decision-making is "objectively" rational.

KR's naivety about how difficult it may be for her to raise a child by herself is transformed into an unchangeable "lack of understanding" about the decision to have children. In contrast, non-disabled women may be unaware of what raising a child may entail and could even be unfit to parent, without being assumed legally incapable of deciding to give birth. Intellectually disabled women, if challenged by any person entitled to apply for an order under the PPPRA, must proactively prove they are fit to mother a prospective child in a way that no other woman is required to. The rationality of the decision to bear children is uniquely interrogated, disincentivising and preventing intellectually disabled women from becoming mothers. This leads to further stigmatisation and exclusion of women with intellectual disabilities in the intimate and sexual realm, which isolates them from the benefits of these relationships.[102]

This assessment of KR's capacity is rooted in a value-laden question: is it rational to think KR could take care of a child? KR, based on her experiences working with children, believes she could take care of a child. This could be naive, but it is arguably still a reasonable conclusion from her perspective. Dr Bartlett thinks it is reasonable for KR to look after a child if she is given

99 At [52].
100 At [59] (emphasis added).
101 Johnston and others, above n 7.
102 Elizabeth Emens "Intimate Discrimination: The State's Role in The Accidents of Sex and Love" (2009) 122 Harv L Rev 1307 at 1310.

information and support to raise one, recognising the social barriers to disabled women raising children. However, Dr Schuiab (and ultimately Judge Fraser) maintain that KR cannot raise a child, and furthermore that it is irrational or unrealistic to believe she could do so. This is despite the evidence about KR's ability to raise a child being disputed in the case. The Court's analysis demonstrates how the value judgement of what decision is in the "best interests" of the person can influence the assessment of their capacity. If a woman with a disability does not make the "correct" decision based on others' perceptions of her best interests — that pregnancy and child rearing are not in her best interests — she is more likely to be perceived as irrational and thus lacking capacity.

IV BEST INTERESTS

Making an order which is in the "best interests" of the woman is not the statutory test for orders under s 10(f) of the PPPRA. However, case law has determined this test should apply, based on the overlap between Part 1 and other sections of the Act.[103]

The imposition of the best interests assessment on the exercise of such orders has the result that, if the court decides a sterilisation or termination order is in the woman's best interests, it is often artificially constructed as the least restrictive intervention. As demonstrated above, there is often a "bleeding in" effect of best interests into the capacity test, and it is sometimes unclear which facts are being applied to which test. Furthermore, the evaluation of medical evidence, legal principles and wider social factors is not immune from discursive power which may change how the woman's body is considered by a court.

A Bodily integrity, pregnancy and menstruation

The common law principle of bodily integrity, that the body is sacred and no one has a right to meddle with anyone else's, conceives of the body as inviolate.[104] This is based on an understanding of bodies as bounded and individual. This conception is thrown into question with pregnancy, as the fetus conceptually

103 In *R v R (No 2)*, above n 2, at [26], the Court decided to deal with the termination under s 18(6) because of the apparent statutory limitations under s 10 preventing the primary application of the best interests test or welfare principle.

104 Savell, above n 9, at 1105–1106.

violates both the boundedness and individuality of the body.[105] The conceptual difficulty of pregnancy and termination has been interpreted in opposite ways by the Supreme Court of Canada and the House of Lords (the latter followed by New Zealand courts).

The Canadian Supreme Court in *Re Eve* saw pregnancy as consistent with bodily integrity, as sterilisation would deprive Eve of "the great privilege of giving birth".[106] This is in line with an understanding of Eve's body as "properly" constructed as a sexed female subject, for whom giving birth is both natural and expected.

Conversely, English courts understand sterilisation of disabled women as protecting bodily integrity from the violation of pregnancy.[107] This approach reflects the difficulties women with disabilities have in gaining social recognition as women.[108] An intellectually disabled woman's right to have children is called into question because she is assumed to be unable to perform "proper" womanhood. Her (perceived) inability to perform gender roles means that her body becomes culturally unintelligible; her womanness and her humanness, and thus whether she should have rights, are called into question.[109]

Sterilisation is often supported by doctors and judges as a convenient form of menstrual management. Experiencing menstruation is uncritically accepted as traumatic and undesirable, often without any evidence that a particular woman does in fact find it traumatic.[110] Handsley questions why a lack of understanding necessarily implies trauma — when applied to other bodily functions or organs, it does not make sense.[111] It is often unclear whether the desire for a "clean" way to manage periods comes from a pressing medical or psychological need of the woman, or whether it is simply related to the stigma, shame and disgust associated with the female body.

The stigma and lack of understanding by (mostly male) judges about the female body may also be contributing to the common and bewildering

105 At 1107.

106 *E (Mrs) v Eve* [1986] 2 SCR 388 at [6] and [92].

107 Savell, above n 9, at 1141.

108 Rachel Mayes, Gwynnyth Llewellyn, and David McConnell "'That's Who I Choose to Be': The Mother Identity for Women with Intellectual Disabilities" (2011) 34 Women's Studies International Forum 112 at 114.

109 Judith Butler *Bodies That Matter: On the Discursive Limits of Sex* (Routledge, New York, 1993) at xvii.

110 Susan Brady "Sterilization of Girls and Women With Intellectual Disabilities: Past and Present Justifications" (2001) 7 Violence Against Women 432 at 443.

111 Elizabeth Handsley "Sterilisation of Young Intellectually Disabled Women" (1994) 20 Mon L Rev 271 at 289.

conclusion that sterilisation is the least restrictive intervention possible out of all contraceptive options. In KR's case, the Family Court determined that because KR was unwilling to continue Depo-Provera injections (due to side-effects and a desire to have children), sterilisation was the least restrictive option possible.[112] The Judge did not consider any other contraceptive options. However, it appears in further discussion of the original evidence (found in the High Court's decision on appeal) a doctor gave evidence that an IUD would be inappropriate because the wearer can dislodge it, and so the Depo-Provera injection that KR was reluctant to take due to side effects was the "only reliable option".[113] Except, as it turns out in *R v R (No 2)*, the strings of the IUD could simply be removed (to avoid tampering) and an IUD would become a viable option.[114]

Instead of seriously interrogating the "icky business" of women's reproductive options and asking for more evidence (perhaps from someone with specialist expertise in contraception), courts defer to the judgement of medical practitioners.[115] Hamilton argues that unless we move past the feelings of shame and disgust about the female body, rights claims may not be enough to protect disabled women from being subjected to treatment to "modify the person rather than the custom".[116]

B Fitness to be a mother

Most courts examine whether the woman is fit to be a mother as a primary consideration of whether sterilisation is in her best interests.[117] This involves subjective values about what a good mother is, and who it is appropriate for mothers to receive support from.[118]

The discourse of the "ideal mother" dictates that the mother must be solely responsible for raising the child and always immediately present to care for them.[119] This ideal is imported into a court's evaluation of whether a woman is fit to be a mother based exclusively on her own capabilities as of the

112 *R v R,* above n 2, at [66].
113 *KR v MR*, above n 2, at [30].
114 *R v R (No 2)*, above n 2, at [90]–[92]. Of course, this coercive approach is still less than ideal, and working with KR to find a contraceptive option she would be happy with would have been better.
115 Brady, above n 110, at 439–440.
116 Hamilton, above n 24, at 70.
117 Savell, above n 9, at 1137.
118 Burgen, above n 69, at 56.
119 Claudia Malacrida "Performing Motherhood in a Disablist World: Dilemmas of Motherhood, Femininity and Disability" (2009) 22 International Journal of Qualitative Studies in Education 99 at 101.

time of the hearing. However, mothering often realistically occurs in a social context, with fathers, wider family, or communities participating in child-rearing, which "suggests that something other than engaging in the physical and emotional care of children is relevant to assuming the mother identity".[120] Therefore, requiring social support should not preclude intellectually disabled women from performing a valid form of motherhood.

C KR's "best interests"

At first instance, the Family Court did not hear evidence about support available to KR should she give birth.[121] Further information was given in the appeal before the High Court about support services available to KR. Two individuals provided a detailed service proposal for KR: Ms Gordon and Ms Cameron. Ms Gordon was a service manager who supported 18 families where women with intellectual disabilities had children in their care. Ms Cameron was a community services manager with the IHC which provides services to people with intellectual disabilities and knew KR personally for 15 years.

Dr Schuaib observed in his affidavit that the proposal for support "confirms she lacks the cognitive skills to keep herself safe".[122] This is an example of dependency negating a woman's perceived ability to be a mother, which precludes most disabled women from ever being able to fit into the "mother" role.[123] This is compounded by a lack of resources, information and support, which is cyclically perpetuated by the belief that intellectually disabled women make "bad" mothers.[124]

In the rehearing, the further evidence did not change Judge Fraser's decision that KR was not fit to be a mother. The Judge concluded:[125]

> Whilst support may be available to [KR], enabling her to care for her child after birth, if history is any reliable predictor of the future, then [KR] will soon become hostile and non-cooperative with the service providers. This will mean that her child would be removed from her for care and protection reasons.

120 Mayes, Llewellyn and McConnell, above n 108, at 113.
121 *KR v MR,* above n 2, at [39].
122 At [41].
123 Mayes, Llewellyn and McConnell, above n 108, at 114.
124 Burgen, above n 69, at 54.
125 *R v R (No 2)*, above n 2, at [82].

It is concerning that the Judge made this assumption about KR, especially when her hostile behaviour in the past was with people who sought to take away her personal freedoms and questioned her ability to raise a child, rather than those who were trying to enable her to achieve what she desired.[126] The Judge appears to engage in the stereotype that intellectually disabled women are more likely to abuse or neglect their children, predicting that it is inevitable that KR's child will be removed from her.

Intellectual disability has little bearing on parenting ability or outcomes, it is not inevitable that intellectually disabled parents will abuse or neglect their children, and parenting skills can be learnt if education is tailored.[127] Additionally, wider social concerns, such as poverty and isolation, often create the most difficulties for disabled parents, rather than an innate impairment.[128] However, non-disabled people are routinely able to have children in difficult or impoverished conditions, so long as the children are not abused or neglected. Research has consistently reported that the prevalence of abuse and neglect is not higher among intellectually disabled parents.[129]

Moreover, it is often assumed that removal of the child (i.e. through adoption) will be more traumatic than the abortion and sterilisation of the pregnant person with an intellectual disability. This does not seem to take into account the fact that these procedures are extremely invasive and permanent. They can also be extremely traumatising, especially if the woman is opposed to the surgery and may physically resist. People with disabilities often view sterilisation as a signifier of reduced or degraded status, and this can have a significant negative psychological impact.[130] Dr Bartlett points out that undermining KR's clear desire and wish to have a child would lead to disempowerment, a loss of self-determination and a grief reaction.[131] These factors should be more clearly and deeply examined in respect of the particular person on a case-by-case basis, rather than uncritically accepting the claim that it would be more traumatic to undergo removal than termination.

126 *KR v MR,* above n 2, at [25]–[26].
127 Burgen, above n 69, at 56.
128 Johnston and others, above n 7.
129 Johnston and others, above n 7.
130 *E (Mrs) v Eve,* above n 106, at [80].
131 *R v R (No 2),* above n 2, at [75].

V CONCLUSION

In making orders as to sterilisation and termination of pregnancy of intellectually disabled women under the PPPRA, New Zealand courts must critically evaluate medical evidence, and avoid adopting prejudices against women with disabilities when undertaking the capacity and best interests assessments.

This is still a live and pressing issue. In 2014, ten years after KR's case, Swati, a woman with Down's Syndrome, was sterilised, largely relying on *KR v MR* as a leading case.[132] *KR v MR* remains a leading authority in the application of the provisions of the PPPRA to the sterilisation and termination of pregnancy of women with intellectual disabilities. The lack of progress in this area, despite repeated urges from the United Nations, is similarly worrying. Our decisions in this area continue to adopt discourses that perpetuate demeaning and incorrect ideas about intellectually disabled women. While sterilisation and termination may be appropriate in *some* instances, the use of gendered discourses to paternalistically undermine women's desires, reproductive rights and self-determination is a cause for concern.

132 *Darzi v Darzi*, above n 42.

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

Jessica Sutton*

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]

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]

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.

SIX MISTAKES OF LAW ABOUT CONSENT

Daniel Jackson*

Consent is a crucial concept in the law regarding rape, but New Zealand lacks a clear definition of it in either statute or case law. This article explains two different conceptions of consent and how New Zealand courts have failed to choose clearly between them. It considers the conceptual confusions that have resulted from the law's lack of clarity, and how defendants are therefore being allowed to rely on a mistake of law about consent. It then discusses the principle that a mistake of law is not a defence. It identifies six mistakes of law about consent and explains how these conceptions of consent illustrate why they are mistakes. It then discusses cases where the New Zealand courts have failed to recognise these mistakes as mistakes of law and allowed defendants to rely on them. It concludes by proposing some reforms to address these issues.

I INTRODUCTION

Consent lies at the heart of the law regarding rape.[1] Consent, or reasonable belief in consent,[2] is the most common issue in rape trials. Given this, it might be thought that consent would be a well-understood and clearly defined concept, but in New Zealand neither Parliament nor the courts have given a clear definition of consent as an element of sexual offences. The courts have also failed to recognise the significance of the well-established principle that a mistake of law is not a defence as applied to the context of sexual consent.

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1 While I speak of "rape" in this article, the issues discussed in it also apply to other forms of sexual assault, such as unlawful sexual connection and indecent assault. Indecent assault does not require a belief in consent to be reasonable (*R v Nazif* [1987] 2 NZLR 122 (CA) at 128; and *R v Aylwin* [2007] NZCA 458 at [35]), but, as I will explain, this does not affect the applicability of my argument about mistake of law.

2 While the statutory language refers to the defendant "believing on reasonable grounds that [the complainant] consents" (Crimes Act 1961, s 128(2)), the convenient short-hand expression "reasonable belief in consent" is widely used in case law and commentary. I adopt it.

This has resulted in defendants being allowed to rely on legally erroneous ideas about consent, including rape myths.

I proceed in several sections. First, I describe the absence of a statutory definition of consent in New Zealand and the circularity of judicial definitions. Second, I explain two conceptions of consent:

i) the Mental View, whereby consent is a mental state; and

ii) the Performative View, whereby consent is constituted by a communicative act.

Each view has some support in New Zealand case law, contributing to conceptual confusion about consent. Third, I discuss the principle that a mistake of law is not a defence. This principle extends to mistakes about the interpretation or application of the law and holds that mistakes of law cannot be relied on to negate mens rea. I explain that this means a belief in consent that is based on a mistake of law cannot be relied on in defending a rape charge. Fourth, I set out six mistakes of law about consent and describe how the two conceptions of consent illustrate why they are mistakes. The six mistakes are that:

i) passivity or failure to protest can constitute consent;

ii) believing that the other person would probably, or might, agree to or welcome the sexual activity is a belief in consent (that is, believing that actual agreement is not required);

iii) consent can be at a time other than when the sexual act occurs;

iv) sexual desire or pleasure is the same as consent;

v) "no" means yes; in other words, that an expressed lack of agreement to a sexual act can amount to consent; and

vi) there can be consent to sexual activity while a person is asleep, unconscious or so drunk that they cannot choose whether or not to have sex.

Fifth, I examine some cases that have allowed defendants to rely on these mistakes of law and show the courts relying on rape myths. In these cases the courts have:

i) held that a defendant can have a reasonable belief that a sleeping person has consented;

ii) relied on the notion of "relationship expectations" to convert passivity into consent; and

iii) conflated desire and consent.

I conclude by suggesting some reforms to prevent reliance on mistakes of law and rape myths:

i) a statutory definition of consent (which the Government is considering);[3]

ii) a statutory provision making clear that a belief in consent based on a mistake of law cannot be relied upon by a defendant;

iii) model directions for juries on mistake of law; and

iv) judicial training on sexual violence and rape myths.

II THE LACK OF A DEFINITION OF CONSENT

Sexual violation by rape has three elements in New Zealand law:[4]

i) A penetrates the genitalia of B with A's penis; and

ii) B does not consent to the penetration; and

iii) A does not believe on reasonable grounds that B consents to the penetration.

Element (iii) involves two different enquiries:

i) Did A believe that B consented?

ii) If so, did A have reasonable grounds for that belief?

3 Cabinet Paper "Improving the justice response to victims of sexual violence" (3 April 2019) at [81]–[83]; and Cabinet Minute "Improving the justice response to victims of sexual violence" (3 April 2019) SWC-19-MIN-0031 at [17.3].

4 Crimes Act 1961, s 128(2).

The Crown can prove this element of the offence by establishing beyond reasonable doubt that the answer to either of these questions is "no".[5]

The Crimes Act 1961 does not contain any definition of consent. It does contain a list of circumstances that do not amount to consent:[6]

i) A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

ii) A person does not consent to sexual activity if he or she allows the activity because of —

  a) force applied to him or her or some other person; or

  b) the threat (express or implied) of the application of force to him or her or some other person; or

  c) the fear of the application of force to him or her or some other person.

iii) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.

iv) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

v) A person does not consent to sexual activity if the activity occurs while he or she is affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he or she cannot consent or refuse to consent to the activity.

vi) One person does not consent to sexual activity with another person if he or she allows the sexual activity because he or she is mistaken about who the other person is.

vii) A person does not consent to an act of sexual activity if he or she allows the act because he or she is mistaken about its nature and quality.

viii) This section does not limit the circumstances in which a person does not consent to sexual activity.

5 *Kumar v R* [2014] NZCA 58 at [38].

6 Crimes Act 1961, s 128A.

This is helpful regarding the particular situations dealt with in each subsection, but it does not tell us what consent is. It does not even tell us in general terms what consent is not, given the express provision that the list is non-exhaustive. So while it clarifies the position in these specific categories of cases, it does not give a general definition of consent.

Judicial definitions of consent are not much more helpful. The question trail provided to juries in rape trials says: "'[c]onsent' means true consent freely given by a person who is in a position to make a rational decision".[7] Similarly, a model direction frequently used by judges in directing juries states: "[c]onsent means true consent if it is freely given by a person who is in a position to give it".[8]

Unfortunately, these definitions are circular: consent is defined as "true consent freely given". The self-referential nature of the definition means that it fails to answer the fundamental question of what consent is.

In *R v Brewer*, the Court of Appeal upheld a direction in very similar terms to that now used in the question trail: "consent means a consent freely and voluntarily given by a person in a position to form a rational judgement".[9] The trial Judge had provided some explanation of what this meant, in response to a jury question:[10]

> A consent would not be a genuine consent only if the degree of coercion was so great that the complainant was not in a position to make a decision of her own free will.

But while this tells us when consent will not be accepted as valid, it does not define it.

In *R v Annas*, the Court of Appeal likewise focused on the qualities consent must have to be valid: "it must be voluntary and deliberate",[11] "it must not be coerced"[12] and it "must be genuine, informed, and freely and

7 "Sexual violation by rape (Section 128 Crimes Act 1961)" Courts of New Zealand <www.courtsofnz.govt.nz> at [2].

8 Stephanie Bishop and others *Garrow and Turkington's Criminal Law in New Zealand* (online ed, LexisNexis) at [CRI128.4].

9 *R v Brewer* CA516/93, 26 May 1994 at 7.

10 At 10.

11 *R v Annas* [2008] NZCA 534 at [23].

12 At [23].

voluntarily given".[13] But the Court noted that the Crimes Act provided no general definition of consent[14] and did not offer one itself.

In *R v Isherwood* the trial Judge had again given a circular definition:[15]

> Consent means a consent given by a woman who is able to understand the significance of what is about to happen and is able to make an informed and rational decision as to whether or not she consents. Consent must be a true consent freely given.

The Court of Appeal approved this direction[16] and added that "a valid consent [required] that a complainant has understood her situation and was capable of making up her mind when she agreed to sexual acts".[17] No general definition of consent was offered.

The courts seem reluctant to venture beyond the specific issues and particular facts of the case at hand to provide a general definition of consent. Having reviewed cases in search of a definition, I have not found any case where a New Zealand court has provided a clear, non-circular and general definition of consent.

III TWO CONCEPTIONS OF CONSENT

The confusion as to the definition of consent is compounded by the existence of two quite different conceptions of consent, which have been extensively debated by philosophers and legal theorists. They have been termed the Mental View and the Performative View.[18]

The Mental View holds that consent is a mental state.[19] Advocates of the Mental View disagree about the nature of the relevant mental state.

13 At [25].
14 At [24].
15 *R v Isherwood* CA182/04, 14 March 2005 at [31].
16 At [36].
17 At [35].
18 Hubert Schnüriger "What is Consent?" in Peter Schaber and Andreas Müller *The Routledge Handbook of the Ethics of Consent* (Routledge, Abingdon, 2018) 21 at 21. See also Peter Westen *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate, Aldershot, 2004) and Jesse Wall "Justifying and Excusing Sex" (2019) 13 Criminal Law and Philosophy 28 for a similar distinction between "attitudinal consent" and "expressive consent".
19 Some scholars have argued that consent should be termed a "mental act" instead of a "mental state", but nothing turns on this terminological distinction for the purposes of this article.

One possibility is that to consent to something is to desire it.[20] But we frequently choose not to do things that we desire to, and we frequently choose to do things that we do not desire to. We may do, or refrain from doing, these things for moral, religious, familial or social reasons. So it seems that it is possible to desire something but not consent to it, or vice versa.

This has led most scholars to reject the consent as desire approach. Those who continue to defend it have defined desire very broadly, arguing that it can encompass everything from unconditionally welcoming the act to regarding it as the lesser of two evils in the circumstances.[21] But this still struggles to account for the fact that consent appears to be a choice that a person makes,[22] whereas we do not choose our desires and may even wish that we did not have them.

The more popular approach is to treat consent as a choice or act of will, but there is still disagreement about what sort of choice it involves. The two most prominent accounts are those of Heidi Hurd and Larry Alexander.

Hurd argues that choosing an action means that the person intends the action. She therefore proposes that to consent to another person's actions is "to intend to allow or enable those actions by means of some act or omission of one's own".[23] This is problematically vague. Given the reference to omissions, it fails to clearly distinguish consent from doing nothing. A person can do nothing and intend thereby to allow someone to do an act, but not have chosen to agree to it.

Alexander provides a more specific and satisfactory account. He argues that consent is waiving one's right not to have an act performed: "mentally accepting without objection another's crossing one's moral or legal boundary".[24] Importantly, Alexander suggests that consent is a mental act and requires the mental state to be positively present. Doing nothing, even though the person may be allowing the other person to do an act, is not consent unless the person has decided to waive their right not to have the act performed.

In contrast to the Mental View, the Performative View takes consent to be a communicative act, as opposed to an internal mental state. It draws on

20 Westen, above n 18, at 29.

21 At 29.

22 Heidi Hurd "The Moral Magic of Consent" (1996) 2 Legal Theory 121 at 126.

23 At 130.

24 Larry Alexander "The Ontology of Consent" (2014) 55 Analytic Philosophy 102 at 108. See also Larry Alexander "The Moral Magic of Consent (II)" (1996) 2 Legal Theory 165.

JL Austin's theory of performative speech acts, which are utterances that bring about the state of affairs they refer to (rather than just describing the state of affairs).[25] For instance, a speaker who says "I name this ship Queen Elizabeth" while smashing a bottle against the stern is not simply describing themself as naming the ship; they are performing the very act of naming the ship by saying those words.[26]

Similarly, on this view a person who says "I consent to X" is actually consenting to that act by that utterance; they are not merely reporting their mental state of consent.

Despite its roots in speech act theory, the Performative View does not require that consent be given by words. It can be given in any way that communicates that the person is consenting, from bodily acts like nodding or handing an item to a person who has asked if they can use it, to signing a contract or medical consent form.

In both the Mental View and the Performative View consent must positively exist, either as an expressive act or as a mental state. However, the Mental View and Performative View of consent will produce different results in some cases. Each will treat a person as giving consent in some cases where the other would not. Where a person mentally agrees to sexual activity but does not communicate their agreement, the Mental View will treat them as consenting but the Performative View will treat them as not consenting. Conversely, where a person expresses consent but mentally does not agree to the sexual activity, the Performative View will treat them as consenting, whereas the Mental View will treat them as not consenting.

Of course, in certain circumstances, such as when the expressed consent is the result of threats or fear, the Performative View may treat an expressed consent as vitiated. But where such circumstances do not exist an expressed consent will be treated as valid despite any mental lack of agreement. The likelihood of expressed consent being vitiated will depend upon how broadly the law defines the circumstances vitiating consent. One possible example is that a person may say yes to sexual activity without mentally agreeing to it because of a feeling of social pressure. There is evidence that some women experience feelings of social pressure to have sex, which sometimes result in them feeling that they have no real choice even as they express their agreement

25 JL Austin *How to Do Things with Words* (2nd ed, Harvard University Press, Cambridge, 1975) at 4–6.
26 At 5.

to sex.[27] Because this pressure comes from the broader social context, rather than the other person engaging in the sexual activity, the law might not treat it as vitiating consent.

In New Zealand there are cases supporting both views. In general, the courts appear to have proceeded on the assumption that the Mental View represents the law. The Supreme Court's finding in *Christian v R* that a positive expression of consent is not always necessary[28] supports the Mental View, as does the statement in *Isherwood* that "the approach is subjective, and the jury is required to assess the actual state of mind of a complainant to decide whether or not the complainant truly consented".[29]

While *Christian* is currently the leading authority on consent, there have previously been statements that support the Performative View. In *R v Cook* the Court of Appeal said:[30]

> If a woman is asked for intercourse and agrees to it a subsequent declaration by her that she had not consented to it, in the absence of any other circumstances, could not be accepted as evidence of non-consent. If she consented at the time it will not be to the point that she later states that she did not mean to or that her mind did not go with her consent unless there are circumstances which make it reasonably open to the jury to decide that her consent was vitiated by one of the features set out in s 128(1).

This statement appears to treat an expression of consent as providing valid consent even if the person mentally did not consent, unless it is vitiated by circumstances such as threats. The statement could alternatively be read as laying down a rule of evidence: while consent is mental, a subsequent declaration that the woman did not mentally consent will not constitute sufficient evidence of non-consent if she expressed her consent at the time. The use of the words "could not be accepted as evidence of non-consent" could be seen as supporting this view. But when the Court says "[i]f she consented at the time" and "her mind did not go with her consent", "consent" is clearly being used to refer to her expressed consent. In the latter reference "consent"

27 Nicola Gavey *Just Sex? The Cultural Scaffolding of Rape* (Routledge, Abingdon, 2005) at 9–10. For further discussion, including particular examples from interview research, see Chapter 4 of the same book.

28 *Christian v R* [2017] NZSC 145, [2018] 1 NZLR 315 [*Christian (SC)*] at [43].

29 *R v Isherwood*, above n 15, at [36].

30 *R v Cook* [1986] 2 NZLR 93 (CA) at 98. These features are now set out in s 128A of the Crimes Act.

is expressly contrasted with her mental state. So the better view is that the Court's statement does support the Performative View.

While the position of New Zealand courts has fluctuated as to what consent is, it appears that the Mental View has currently taken hold as the dominant conception of consent. However, our courts have failed to grapple with how these conceptions of consent allow defendants to rely on mistakes of law.

IV CONSENT AND MISTAKE OF LAW

A Defining a mistake of law

Section 25 of the Crimes Act provides: "[t]he fact that an offender is ignorant of the law is not an excuse for any offence committed by him or her". This codifies a venerable common law principle, expressed in the maxim *ignorantia juris non excusat* ("ignorance of the law is no excuse").[31]

Section 25 applies to mistakes of law as well as simple unawareness of the law. In *Cameron v R*, in the context of drug offending, the Supreme Court said:[32]

> Generally, however, s 25 and its equivalents in other jurisdictions have been applied with rigour and have been seen as excluding defences based on mistake as well as ignorance of law. In particular we are not aware of cases where a mistake as to the existence or application of the criminal law in respect of the defendant's conduct has been held to be a defence.

As the Supreme Court said, the mistake of law doctrine extends to mistakes about the application of the law. Even when the application of a statutory provision is treated as a question of fact for the purposes of appellate jurisdiction,[33] it will still be treated as a question of law for the purposes of the mistake of law doctrine.[34]

A Canadian case about whether certain investment contracts were securities provides an example of the mistake of law doctrine being applied to a mistake about the application of the law:[35]

31 Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [25.01]; and Bryan A Garner (ed) *Black's Law Dictionary* (9th ed, West, St Paul, 2009) at 815.

32 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [78].

33 See *Brutus v Cozens* [1973] AC 854 (HL) at 861 per Lord Reid.

34 *Taylor v O'Keefe (The Nordic Clansman)* [1984] 1 Lloyds Rep 31 (QB) at 36.

35 *R v MacDonald* (1983) 42 AR 228 (ABCA) per McGillivray JA.

> It seems clear to me that Mr. MacDonald was not mistaken as to the existence of any facts. He was aware of exactly what he was doing. Every facet of what was occurring was present to his mind. What he did not know was that the very thing he was doing amounted to trading in securities.

Vandervort provides a helpful test for distinguishing mistakes of law and fact that makes clear the broad scope of the mistake of law doctrine:[36]

> "Was the accused aware in the requisite sense of what, described in empirical or socio-factual terms, he or she was doing or not?" If the accused had the requisite awareness, then any "mistake" or misapprehension of the legal status, legal description, or legal consequences of what he or she was doing is irrelevant to culpability.

While the principle is usually stated in terms of mistake of law not being a defence, it applies to elements of the offence as well as defences. For instance, in *Cameron* it was an element of the offences that the substance the appellants had imported, sold and possessed was a "controlled drug analogue",[37] but the Court held that the defendants could not rely upon a mistake about the interpretation of this definition.[38]

Generally a mistake of law will not negate mens rea. As the principle that a mistake of law is not a defence applies to the defendant's mental state, it is relevant to mens rea rather than the actus reus. Accordingly, allowing mistakes of law to negate mens rea would deprive the doctrine of any effect.

There are exceptional cases where a mistake of law will negate mens rea, such as where an offence requires a person to have acted without claim of right.[39] Claim of right means a belief that the defendant had a legal right to act as they had done.[40] As the offence is specifically defined to allow a mistaken belief about the law to be relied upon, the principle that a mistake of law is not a defence will not apply. The Supreme Court said in *Cameron* that there "may also be some leeway where the mistake involved a mixed issue of fact and law or relates to status", giving the example of a defendant who thought the

36 Lucinda Vandervort "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987) 2 Can J Women & L 233 at 256.
37 See Misuse of Drugs Act 1975, s 2(1)
38 *Cameron*, above n 32, at [80].
39 At [78].
40 See Crimes Act, s 3(1) (definition of "claim of right").

property he was damaging was his own (because of a mistake of law).[41] It noted that "[s]ituations in which such mistakes may provide a defence typically involve mistakes as to civil law, for instance as to ownership to, or other rights over, property".[42] The Supreme Court said it was not aware of cases outside these categories where mistake of law had been successfully relied on to negate mens rea.[43]

The effect of the mistake of law doctrine is that, if a belief in X will exculpate a defendant, the belief must be in X as defined by the law. If the defendant's belief was in something that is not-X as a matter of law, then it will be treated as a belief in not-X and will not exculpate the defendant. The fact that the defendant regarded it as a belief in X will not prevent the court from treating it as a belief in not-X.

B Mistake of law in the context of consent

A mistake about whether a person has consented to sexual activity can be either a mistake of fact or a mistake of law.[44] Where a defendant makes a mistake as to what the complainant said or did (for instance, because of mishearing or misunderstanding the meaning of a word), that will be a mistake of fact. That mistake of fact will be able to be relied on in defence of a criminal charge. But where a defendant misapprehends the legal meaning of consent, that will be a mistake of law. The defendant is not mistaken regarding the facts of what occurred, but whether those facts amount to consent in law. They have misunderstood the law regarding sexual consent, not what happened.

The Supreme Court of Canada has repeatedly applied the principle that a mistake of law is not a defence to issues of sexual consent.[45] As it said in *R v Barton*:[46]

> … to the extent an accused's defence of honest but mistaken belief in communicated consent rests on a mistake of *law* — including "what counts as consent" from a legal perspective — rather than a mistake of *fact*, the defence is of no avail …

41 *Cameron*, above n 32, at [78].
42 At [78].
43 At [78].
44 Vandervort, above n 36, at 287–298.
45 *R v Ewanchuk* [1999] 1 SCR 330 at [51]; *R v Barton* 2019 SCC 33, (2019) 435 DLR (4th) 191 at [96]–[100]; and *R v JA* 2011 SCC 28, [2011] 2 SCR 440 at [118].
46 *R v Barton*, above n 45, at [96]. The reference to "communicated consent" reflects the Canadian statutory provisions, but does not affect the general point.

A defendant thus cannot rely on a belief in consent that relies on a mistake of law. A defendant's belief in consent must be a belief in some factual circumstances that can constitute consent under the law. A defendant's belief that the factual circumstances constitute consent cannot be relied upon to defend a charge on the basis of mistake of law if it is not what the law regards as consent. Just as the defendants in *Cameron* could not rely on the belief that the substance was not a "controlled drug analogue" because it rested on a misinterpretation of the meaning of that term, a defendant cannot rely on a belief in consent that rests on a misinterpretation of the meaning of consent.

The mens rea of the offence is still met because there is no belief in consent as defined by the law. The law requires a belief in consent, but because the belief is not in consent as defined by the law it is treated as a belief in not-consent. None of the exceptions recognised in *Cameron* (to the principle that a mistake of law does not negate mens rea) are applicable in the case of mistakes of law about sexual consent. Allowing a mistake of law about sexual consent to negate mens rea would be inconsistent with the Supreme Court's recognition that, outside of these exceptional cases, a mistake of law will not negate mens rea.[47]

This is distinct from an approach which treats a mistake of law as making a belief in consent ipso facto unreasonable. The question of whether a defendant had a belief in consent is logically prior to whether the belief was reasonable: there can be no reasonable belief in consent without a belief in consent. If the defendant's putative belief in consent is based upon a misinterpretation of the legal concept of consent, the question of the reasonableness of the belief does not arise because the defendant had no belief in consent as the law defines it. Mistake of law goes to whether the belief is actually a belief in consent, not to its reasonableness. Most serious offences, after all, do not require a defendant's belief to be reasonably held in order to exculpate: their mens rea is subjective. Yet a mistake of law does not negate their mens rea. This also means that the principle that a mistake of law is not a defence will apply to sexual offences that do not require a belief in consent to be reasonable, such as indecent assault.

It is therefore crucial to understand what consent means when considering whether a defendant had a belief in consent. As McLachlin J has said, "[m]uch of the difficulty occasioned by the defence of honest but mistaken belief is related to lack of clarity about what consent entails".[48]

47 *Cameron*, above n 32, at [78].

48 *R v Esau* [1997] 2 SCR 777 at [64].

Unlike in Canada, there has been a lack of consideration by New Zealand courts of mistake of law in the context of sexual consent. The failure of the courts to consider this issue has, as I will show in the next section, allowed mistakes of law about consent to be relied on in defending rape charges.[49]

V THE SIX MISTAKES

I start by setting out the six mistakes of law about consent that I will discuss in this section:

i) that passivity or failure to protest can constitute consent;

ii) that believing the other person would probably, or might, agree to or welcome the sexual activity is a belief in consent (that is, believing that actual agreement is not required);

iii) that consent can be given at a time other than when the sexual act occurs;

iv) that sexual desire or pleasure is the same as consent;

v) that "no" means yes (that is, an expressed lack of agreement to a sexual act can amount to consent); and

vi) that there can be consent to sexual activity while a person is asleep, unconscious or so drunk they cannot choose whether or not to have sex.

A Passivity or failure to protest

Passivity or a failure to protest is expressly defined as not amounting to consent in s 128A(1) of the Crimes Act: "[a] person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity". Accordingly, it should be a mistake of law to treat silence or passivity as consent. But unfortunately, as I will discuss in Section VI(B) below, the courts have eroded this principle by introducing the notion of "relationship expectations" as a justification for treating silence or passivity as consent.

The Supreme Court of Canada has recognised this mistake of law. In *R v Ewanchuk* it said "a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence".[50] The essence

49 The defendant, of course, only needs to raise a reasonable doubt to be acquitted.

50 *R v Ewanchuk*, above n 45, at [51].

of this mistake of law is the failure to recognise that consent must actually exist. That is because consent legitimises acts that would otherwise be wrongful. A person has a right to bodily autonomy. Sexual touching violates this right unless the person has given consent to it. The default state is that touching is not permitted. This mistake of law wrongly reverses the burden. It treats people as having a right to sexually touch others unless they have been told not to; but there is no such right. It also reflects the rape myth that victims will always resist or protest. In reality, many victims freeze, or fear the consequences of resisting or protesting.[51]

On the Performative View, there must be a positive communicative act constituting consent. Silence is not a communicative act. Similarly, on the Mental View the mental state must positively exist. Even if one could infer from a failure to protest or resist that a person does not have a mental state of objecting to the sexual act, this would not show that the person had a positive mental state consenting to the act. On both views, resistance or protest is therefore unnecessary for an absence of consent.

B Actual agreement

Consent requires actual agreement. A belief that a person would probably, or might, agree to or welcome the sexual activity if asked is not a belief in consent. Consent must be actual, not hypothetical. A person cannot give consent when they are unaware of the activities in prospect.

This follows from the Mental View's requirement that a person has to have the relevant mental state in order to consent. A person who lacks the mental state is not consenting even if they would consent if they were asked or were aware of the proposed sexual activity. Similarly, the Performative View requires an actual communicative act constituting consent, not just that the person would communicate their consent if they were asked or were aware of the proposed sexual activity.

As L'Heureux-Dubé J said in *R v Park*:[52]

> … it can be dangerous to assume that evidence capable of founding an honest belief on the part of the accused that the complainant *would* consent

51 Anna Möller, Hans Peter Söndergaard and Lotti Helström "Tonic immobility during sexual assault — a common reaction predicting post-traumatic stress disorder and severe depression" (2017) 96 AOGS 932.

52 *R v Park* [1995] 2 SCR 836 at [23].

> to sexual activity is informative of the real question at issue, which is whether the accused believed that the complainant *in fact* consented to that activity.

In *R v JA*, the majority of the Supreme Court of Canada emphasised that the complainant's actual consent is fundamental:[53]

> The jurisprudence of this Court also establishes that there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred. It is not open to the defendant to argue that the complainant's consent was implied by the circumstances, or by the relationship between the accused and the complainant. There is no defence of implied consent to sexual assault …

And, in *R v Getachew*, the High Court of Australia agreed:[54]

> An accused's belief that the complainant *may* have been consenting, even *probably was* consenting, is no answer to a charge of rape. It is no answer because each of those forms of belief demonstrates that the accused was aware that the complainant might not be consenting or, at least, did not turn his or her mind to whether the complainant might not be consenting.

It might be suggested that this decision depended on the wording of the Victorian legislation, which defined the fault element for rape as "being aware that the person is not consenting or might not be consenting" or "not giving any thought to whether the person is not consenting or might not be consenting".[55] However, the same result can be justified on ordinary principles of criminal law. As McLachlin J said in *R v Esau*, ambiguity cannot be taken as the equivalent of consent:[56]

> If a person, acting honestly and without wilful blindness, perceives his companion's conduct as ambiguous or unclear, his duty is to abstain or obtain clarification on the issue of consent. This appears to be the rule at common law. In this situation, to use the words of Lord Cross of Chelsea in *Morgan*, *supra*, at p. 203, "it is only fair to the woman and not in the least unfair to the man that he should be under a duty to take reasonable care

53 *R v JA*, above n 45, at [47].
54 *R v Getachew* [2012] HCA 10, (2012) 248 CLR 22 at [27].
55 Crimes Amendment (Rape) Act 2007 (Vic), s 38(2).
56 *R v Esau*, above n 48, at [80].

> to ascertain that she is consenting to the intercourse and be at the risk of a prosecution if he fails to take such care". As Glanville Williams, *Textbook of Criminal Law* (1978), at p. 101, put it: "the defendant is guilty if he realised that the woman might not be consenting and took no steps to find out".

C The temporal dimension

Consent must exist at the time the sexual act occurs. On the Mental View, the relevant mental state must exist at the time the act occurs. On the Performative View, the relevant communicative act must have occurred at the time the act occurs. This reflects the fact that sexual consent is situation-specific. As Lady Hale has said:[57]

> My Lords, it is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.

In *R v Adams*, the Court of Appeal (quoting the *Criminal Jury Trials Benchbook*) said: "[t]he material time when consent, and belief in consent, is to be considered is at the time the act actually took place".[58]

Similarly, in *Ewanchuk* the Supreme Court of Canada found that consent is determined at the time the sexual act occurred.[59] In *JA*, where the defendant had choked the complainant during sex but claimed she had given prior consent to the sexual activity that occurred while she was unconscious, it affirmed "there is no substitute for the complainant's actual consent to the sexual activity at the time it occurred".[60] And in *Park*, L'Heureux-Dubé J stated:[61]

> … it is important to recall that the two individuals' stories are only relevant to guilt or innocence of sexual assault in so far as they relate in some way to the circumstances affecting the parties at the time of the alleged assault.

57 *R v C* [2009] UKHL 42, [2009] 1 WLR 1786 at [27].
58 *R v Adams* CA70/05, 5 September 2005 at [48].
59 *R v Ewanchuk*, above n 45, at [26].
60 *R v JA*, above n 45, at [47].
61 *R v Park*, above n 52, at [23].

Consent therefore cannot be inferred on the basis of prior sexual activity or the complainant's promiscuity. In *Barton*, the Supreme Court of Canada identified this as a mistake of law:[62]

> The law prohibits the inference that the complainant's prior sexual activities, by reason of their sexual nature, make it more likely that she consented to the sexual activity in question … Accordingly, an accused's belief that the complainant's prior sexual activities, by reason of their sexual nature, made it more likely that she was consenting to the sexual activity in question is a mistake of law.

In *B (SC12/2013) v R*, the majority of the Supreme Court likewise identified the idea that the complainant "is the kind of person who would be more likely to consent to the activity which is the subject of charges" as one of the "erroneous lines of reasoning" that the rape shield law contained in s 44 of the Evidence Act 2006 was designed to prevent.[63]

Consent must exist throughout the sexual activity. As L'Heureux-Dubé J said in *Park*, "consent, even if given at one point, may be withdrawn at any time".[64] A person who fails to stop having initially consensual sex after the other person withdraws consent is guilty of rape. This is made clear by the definition of "sexual connection" (which is used in defining the offence of sexual violation) as including "the continuation of connection of a kind described in [the other paragraphs of the definition]".[65] This codifies the decision of the Privy Council in *R v Kaitamaki*.[66]

The converse point is perhaps less well appreciated. The fact that a person gives consent during the activity does not prevent it from having initially been an assault. This means that consent must have been obtained when the sexual act begins or else it will be an assault. For instance, if a person initiates a sexual act that takes the other person by surprise, the fact the other person reacts

62 *R v Barton*, above n 45, at [100].

63 *B (SC12/2013) v R* [2013] NZSC 151, 1 NZLR 261 at [53]; citing *Bull v R* [2000] HCA 24, (2000) 201 CLR 443 at [53]. Section 44 renders inadmissible evidence about "the sexual experience of the complainant with any person other than the defendant" unless it "is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it".

64 *R v Park*, above n 52, at [24].

65 Crimes Act, s 2(1).

66 *R v Kaitamaki* [1984] 1 NZLR 385 (PC).

positively once they have realised what is happening does not change the initial lack of consent.

This is because, on the Mental View, consent does not exist until the relevant mental state has been formed. When taken by surprise, a person will not have the relevant mental state at the first moment of the act. They will not have it until they realise what is happening, which will take time, however short that may be. Likewise, in the Performative View consent will not exist until a communicative act constituting it has occurred, which will not have happened at the outset of the sexual activity if the person is taken by surprise.

Of course, if someone has welcomed the sex despite their lack of initial consent, they are unlikely to make a criminal complaint. But the point may have a broader significance for cases where there is a contest between the complainant and defendant as to whether the complainant consented. Focusing on whether consent existed when the sexual act began may shift the focus from the complainant's behaviour during the sexual activity (for instance, when they resisted) to whether the defendant had sought consent beforehand.

D Desire and pleasure

As discussed in Section III, desire and consent are not the same. Among advocates of the Mental View, attempts to analyse consent in terms of the mental state of desire have given way to a view of consent as a choice or act of will. On the Performative View, a communicative act constituting consent does not depend on whether the person desires the sexual act.

Sexual consent illustrates the distinction between desire and consent well. To take some common examples, someone may desire to have sex with a person but not consent to it because:

i) they (or their prospective partner) are in a relationship and would be cheating on their partner;

ii) they believe that sex before marriage is immoral;

iii) they are worried about the risk of pregnancy or sexually transmitted infections;

iv) they are afraid of social or familial disapproval or stigma.

Conversely, a person may not desire to have sex but nevertheless consent to it because:

i) it would give their partner pleasure;

ii) they will receive money or other benefits for having it;

iii) they feel it would be awkward to decline the invitation to have sex;

iv) they feel social pressure to have sex.

As Robin West has argued, undesired sex may be harmful in many cases.[67] However, the harm of undesired but consensual sex is distinct from that of non-consensual sex.[68]

Pleasure is yet another distinct phenomenon. It is possible to derive pleasure from something that you do not desire to do and certainly do not consent to doing. This can happen in the sexual context. As stimulation of the genitals can produce an involuntary response, victims of sexual violence may experience sexual pleasure while they are being assaulted. This can often result in feelings of guilt, shame and confusion. It has also been used to discredit their accounts of sexual violence. One rape myth is that that someone who is truly being assaulted will not feel sexual pleasure and that pleasure indicates consent.[69]

The Court of Appeal has recognised the difference between desire and consent. In *Cook*, it said: "[t]here is a difference between not wanting intercourse and consenting or agreeing to it".[70] The converse is equally true: there is a difference between wanting intercourse and consenting to it.

Research indicates that men confuse women's sexual desire with consent.[71] It also suggests that men misperceive women's friendly behaviour as sexual interest or desire.[72] This means that, in the absence of directions from judges on the difference between consent and desire, there is a risk that jurors may treat friendly behaviour by the complainant as indicating consent. Desire is also an internal and subjective state that can exist, or be absent, without any

67 Robin West "Sex, Law and Consent" in Franklin G Miller and Alan Wertheimer (eds) *The Ethics of Consent: Theory and Practice* (Oxford University Press, Oxford, 2010) 221 at 233–240.

68 At 227–228.

69 David Finkelhor and Kersti Yllö *License to Rape: Sexual Abuse of Wives* (Free Press, New York, 1985) at 122–126.

70 *R v Cook*, above n 30, at 98.

71 Ashton M Lofgreen and others "Situational and Dispositional Determinants of College Men's Perception of Women's Sexual Desire and Consent to Sex: A Factorial Vignette Analysis" (2017) 36(2) J Interpers Violence 1064.

72 Coreen Farris and others "Sexual coercion and the misperception of sexual intent" (2008) 28 Clin Psychol Rev 48.

external manifestation. This makes it very easy for defendants to claim that they thought the victim desired sex, whether or not they actually did believe this. These factors make this a particularly dangerous mistake of law.

E "No means yes"

In *Ewanchuk*, the Supreme Court of Canada observed it was a mistake of law for a defendant to "rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact".[73]

The Canadian Criminal Code contains a provision stating that consent does not exist if "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity".[74] New Zealand does not have an equivalent provision. It might therefore be thought that this is not actually a mistake of law in New Zealand. After all, on the Mental View consent depends purely on the relevant mental state. It is theoretically possible for someone to have that mental state while expressing a lack of consent.

In contrast, on the Performative View this clearly involves a mistake of law. Whether consent has been given is determined by the communicative act, which here expressed a lack of consent. But the defendant is ignoring this communicative act and instead presuming that internally the complainant is actually consenting. In other words, the defendant is relying on the Mental View, not the Performative View.

There are several reasons why it should still be regarded as a mistake of law, even if the Mental View is preferred by New Zealand courts.

First, the idea that women say no but mean yes is a rape myth.[75] Our rape law has been reformed to combat rape myths in various ways, including through the rape shield law and the provisions specifying when consent does not exist. While more work undoubtedly remains to be done to combat rape myths, these provisions reflect a legislative policy that rape myths have no place in our criminal justice system. The courts have also recognised this.[76]

73 *R v Ewanchuk*, above n 45, at [51].

74 Criminal Code RSC 1985 c C-46, s 153.1(3)(d).

75 Gavey, above n 27, at 166; Lynne Henderson "Rape and Responsibility" (1992) 11 Law and Philosophy 127 at 141–142.

76 See *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [79]; and *R v Taylor* [2018] NZDC 4854 at [14](d).

Reasoning about consent that is based on a rape myth should therefore be regarded as a mistake of law.

Secondly, it would be odd if treating failure to protest as consent was a mistake of law (under s 128A(1)), but treating protest as consent was not. There is no reason that Parliament would have sought to proscribe the former but not the latter. It is more likely that Parliament thought it went without saying that no did not mean yes.

Thirdly, "no means yes" reasoning will almost invariably involve other mistakes of law. It will frequently involve reasoning based on the past sexual activities or promiscuity of the victim, or other things they have done in the past. This involves the mistake of law that consent can be at a time other than when the sexual act occurs. As illustrated in the two cases that I discuss in Section VI(C), it may also result from the conflation of sexual pleasure or desire with consent.

Even if no means yes reasoning is not strictly a mistake of law, it cannot be reasonable to believe that someone is consenting when they are telling you that they are not.[77] Nor can reliance on rape myths be reasonable. It should therefore not be possible to claim a reasonable belief in consent in the face of the victim saying no.

F Capacity to consent

It is a mistake of law to think that there can be consent to sexual activity when a person is asleep, unconscious or so drunk that they cannot choose whether or not to have sex. This is made clear by s 128A(3) and (4) of the Crimes Act:

> i) A person does not consent to sexual activity if the activity occurs while he or she is asleep or unconscious.
>
> ii) A person does not consent to sexual activity if the activity occurs while he or she is so affected by alcohol or some other drug that he or she cannot consent or refuse to consent to the activity.

That this is a mistake of law follows, on the Mental View, from the fact that a person in this situation cannot form the necessary mental state to consent and, on the Performative View, from the person's inability to perform the necessary

77 An exception is in the context of BDSM with safe words. In this context, the participants have changed the linguistic conventions so that "no" does not have its normal meaning and the safe word has the meaning usually expressed by "no".

communicative act. The notion of "advance consent" — that consent could validly be given before the person becomes unconscious, asleep or too drunk to consent — runs into the temporal mistake of law discussed in Section V(C).

The relevance of a mistake of law in this context was noted by Fish J in the Supreme Court of Canada in *JA*, a case where the defendant claimed the complainant had given him advance consent to have sex with her when she was unconscious. The majority of the Supreme Court rejected the notion of advance consent to sex. The defendant did not rely on reasonable belief in consent (as opposed to actual consent), but Fish J commented in his dissenting opinion on the majority's approach:[78]

> The *mens rea* would be conclusively established as well. An honest but mistaken belief in consent, however reasonable in the circumstances, would neither preclude prosecution nor bar conviction. If my colleague's view is correct, the accused's error would constitute a mistake of law, which cannot avail as a defence.

VI THE SIX MISTAKES (NOT) APPLIED

A R v S *and consent when asleep or unconscious*

Unfortunately, New Zealand courts have not followed their Canadian counterparts in recognising the relevance of mistake of law in the case of sleeping or unconscious complainants. In *R v Pakau*, the Court of Appeal did state that there could not be a reasonable belief in consent when the complainant was asleep or unconscious, though it did not frame this in terms of mistake of law: "If sexual intercourse took place when the complainant was asleep or unconscious she could not have consented and Mr Pakau could not reasonably have considered that she did consent".[79]

But in *R v S* a Full Court of the High Court retreated from this position. The defendant said the complainant had told him that he could continue to have sex with her if she fell asleep or became unconscious during it, provided he woke her up before he ejaculated. The complainant denied saying this.[80] The Court unconvincingly distinguished *Pakau*:[81]

78 *R v JA,* above n 45, at [118].
79 *R v Pakau* [2011] NZCA 180 at [30].
80 *R v S* [2015] NZHC 801 at [14].
81 At [30]–[31].

> These comments need to be viewed in light of the facts of the case. …
> … The Court of Appeal therefore made the observations upon which the Solicitor-General now relies in the context of a case involving a complainant being sexually assaulted by a total stranger after being accosted in the street whilst she was extremely drunk. We consider they need to be viewed in that context. There is nothing in the judgment to suggest that the Court intended to establish a principle of universal application in cases where a defendant is charged with sexually violating a complainant who is asleep or unconscious.

The Court said:[82]

> Generally speaking, however, it should not be difficult for the Crown to prove absence of reasonable belief in consent in cases where the sexual activity occurs whilst the complainant is asleep or unconscious.
> … Cases in which a defendant will be able to successfully advance a defence based on reasonable belief in consent where the complainant is asleep or unconscious are likely to be extremely rare. It is difficult, in fact, to conceive of many situations in which it will succeed. It will probably only be available in unusual circumstances such as the present, where the particular nature of the relationship between the parties means that they have had cause to discuss and reach agreement about what should occur if either of them should fall asleep or become unconscious during sexual activity.

This case provides a particularly clear example of a failure to consider the relevance of mistake of law. It was accepted that any advance consent given by the complainant to sexual activity while asleep or unconscious was not legally valid, as consent had to be assessed at the time the act occurred.[83] Yet the High Court allowed the defendant to found a reasonable belief in consent on this advance consent. Considered through the lens of mistake of law, the matter becomes clear: the defendant could not have a reasonable belief in consent because he did not have a belief in something that could constitute consent as a matter of law.

82 At [36]–[37].
83 At [15].

B Christian, Jones *and "relationship expectations"*

1 Christian v R

Christian v R concerned the implications of s 128A(1) of the Crimes Act in the context of reasonable belief in context.[84] That section provides a "person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity".

Prior to the Court's decision in *Christian*, the Court of Appeal in *R v Tawera* had said s 128A(1) was irrelevant when considering reasonable belief in consent:[85]

> … we find it difficult to see how on an objective appraisal it can be said absence of belief in consent on reasonable grounds has been established beyond reasonable doubt. On analysis, there is nothing in the complainant's evidence, the surrounding circumstances, or the appellant's evidence which objectively indicated that the complainant was not consenting. … It may be that the jury became unduly concerned about the direction (correctly given) on s 128A and the fact that a failure to protest or offer physical resistance does not by itself constitute consent. That kind of consideration may of course be highly relevant to whether there was consent, but it does not really bear on the critical issue of belief in consent.

In *Ah-Chong v R*, a majority of the Supreme Court (McGrath, Glazebrook and Arnold JJ) questioned the correctness of this decision in obiter comments. Their Honours stated:[86]

> It is arguable that to allow an honest belief in consent based simply on the complainant's passivity or failure to resist to operate as a defence would undermine significantly the policy that underlies s 128A(1).

After quoting the passage set out above from *R v Tawera*, their Honours observed:[87]

> The Court's focus in this passage on there being nothing to indicate that the complainant was not consenting is arguably at odds with the principle that

84 *Christian v R* [2016] NZCA 450 [*Christian (CA)*]; and *Christian (SC)*, above n 28.
85 *R v Tawera* (1996) 14 CRNZ 290 (CA) at 293.
86 *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [55].
87 At [55].

> s 128A(1) appears to be based upon, namely, that consent to sexual activity is something which must be given in a positive way.

Referring to a hypothetical case where an accused said they believed the complainant was consenting because of their passivity, their Honours said:[88]

> It might be said in such a case that the accused's belief was not based on reasonable grounds given that lack of protest cannot, by law, constitute consent, so that the accused could not rely on it. But even if this analysis does apply where the charge is sexual violation, it may not where an accused is charged with indecent assault, because a belief in consent in that context need only be honestly held to provide a defence — the reasonable grounds requirement does not apply.

However, the point is that if lack of protest cannot constitute consent as a matter of law, a belief that the complainant was consenting because they did not protest is not a belief in consent as it is defined by law. Whether the offence allows for acquittal on the basis of honest belief in consent or only reasonable belief in consent is irrelevant, because there is no belief in consent as the law understands it.

In *Ah-Chong* their Honours referred to the Supreme Court of Canada's conclusion in *Ewanchuk* that a belief in consent based on a failure to protest involved a mistake of law and therefore could not be relied upon.[89] This appears to be the only occasion on which a New Zealand court has mentioned mistake of law in the context of sexual consent. However, their Honours did not endorse or comment on this approach.

The Court of Appeal in *Christian* overruled *Tawera* and endorsed the observations in *Ah-Chong*:[90]

> A lack of protest or resistance will not, on its own, suffice. There must be some evidence of positive consent, either by words or conduct, to provide a narrative capable of supporting the possibility of a reasonable belief in consent.

88 At [54].
89 At [56].
90 *Christian (CA)*, above n 84, at [60].

The Court explained:[91]

> … if lack of protest cannot, by law, constitute consent, it is illogical and inconsistent to hold nonetheless that silence or physically passivity can still provide a sufficient platform for a reasonable belief in the same consent.

However, on appeal, the Supreme Court retreated from this position.

In a minority judgment, Elias CJ considered that "[s]ection 128A is concerned with consent, not with reasonable belief in consent".[92] While its policy might be relevant in assessing reasonableness, it was not determinative:[93]

> A reasonable belief in consent may exist even though s 128A makes it clear that the complainant's actual consent is not given "just because" of failure to protest or resist. Whether the defendant has a reasonable belief that the complainant consents turns on what he believes and whether it is reasonable in context (in which the policy of choice behind s 128A may well be relevant). It does not depend on the meaning of consent.

Chief Justice Elias' statement that whether a defendant has a reasonable belief in consent "does not depend on the meaning of consent" ignores the relevance of the mistake of law doctrine. Given that a mistake of law is not a defence, the existence of a reasonable belief in consent does depend on what consent means.

The majority (William Young, Glazebrook, O'Regan and Ellen France JJ) rejected the approach taken in *Tawera*:[94]

> The word "consent" must have the same meaning when referring to the existence of consent and to the existence of a reasonable belief in consent. If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent.

Their Honours' observation resonates with the mistake of law analysis, without explicitly referring to it.

91 At [50] (footnote omitted).
92 *Christian (SC)*, above n 28, at [105].
93 At [105] (footnotes omitted).
94 At [32].

The majority also rejected the Court of Appeal's approach, which "went too far in stating that consent must be expressed in a positive way, as if that was a requirement regardless of the circumstances".[95] Their Honours held that the wording of s 128A(1) means that consent cannot be inferred only from the fact a person does not protest or offer physical resistance:[96]

> There must be something more in the words used, conduct or circumstances (or a combination of these) for it to be legitimate to infer consent. As mentioned earlier, we see this as equally applicable to the evaluation of the issue of reasonable belief in consent.
>
> One such factor could be a positive expression of consent. But there could be others. For example, if the participants in the sexual activity are in a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

The only circumstance referred to in either *Christian* or subsequent cases as transforming passivity into consent is relationship expectations, and I find it difficult to see what other circumstances could do so. But, as I explain in the following section, the idea of relationship expectations relies on several mistakes of law.

2 *Jones v R*

The Court of Appeal relied on *Christian*'s notion of relationship expectations in *Jones v R*, which was a pre-trial appeal against the exclusion of certain evidence.[97] At issue was whether the evidence was relevant to consent and/or reasonable belief in consent. Judge Paul declined to admit all the evidence referred to in Mr Jones' application.[98] Mr Jones appealed, with leave, to the Court of Appeal.[99]

Mr Jones, his partner (Ms E) and the complainant were all close friends. The complainant said that, after an evening celebrating a significant occasion at a restaurant and a friend's flat, she became heavily intoxicated and was put

95 At [43].
96 At [45]–[46] (footnote omitted).
97 *Jones v R* [2018] NZCA 288 at [2].
98 At [15].
99 At [3].

to bed at that flat by a friend. Mr Jones later woke her and invited her to spend the night at the apartment he shared with Ms E. The complainant accepted his offer and returned to their apartment. She got into bed next to Ms E (who was asleep) and went to sleep, but awoke to find Mr Jones removing her pants and saying she could not sleep in her clothes. She fell asleep again, but soon awoke to find Mr Jones getting into bed beside her. Mr Jones then "fondled her bottom and breasts … and digitally penetrated her" while "she lay still and pretended to be asleep".[100]

Mr Jones' case was the complainant engaged in a consensual threesome with him and Ms E or, in the alternative, that he "honestly and reasonably believed she was consenting".[101] He denied digitally penetrating her and said the other sexual activity was consensual.[102] He said that, when they returned to the apartment, the complainant and Ms E embraced before the complainant took her pants off. Mr Jones went to have a shower and, when he returned, found the complainant and Ms E "making out". He got into bed and the complainant kissed him. He alleged the sexual activity that followed was consensual.[103]

Mr Jones sought leave to lead evidence and question the complainant about various matters relating to the history of her friendship with himself and Ms E. This evidence was said to demonstrate her flirtatious behaviour towards them and her interest in having a threesome with them.[104] Mr Jones' principal submission was that the proposed evidence was "relevant to the critical trial issues of consent or reasonable belief in consent".[105] He also advanced a secondary argument that the evidence was relevant to the complainant's credibility, as she had made a statement to police saying that she had no sexual interest in women.[106] However, the Court did not address this secondary argument.

The evidence included:

i) When out socialising with Mr Jones and Ms E, the complainant referred to it as being a "date" and described herself as their

100 At [5]–[7].
101 At [8].
102 At [1].
103 At [9].
104 At [13].
105 At [22].
106 At [22].

"girlfriend". She often referred to herself as the third member of their relationship.[107]

ii) During another occasion in 2017 when the complainant was having dinner at the apartment, Ms E and Mr Jones told the complainant of their plans to experiment more by inviting another woman into their relationship. They revealed how they had been exploring the "swing lifestyle" during a recent overseas trip and how they were considering doing the same in New Zealand. The complainant was very interested in this and started being flirtatious whenever she was in their company.[108]

iii) During another occasion in 2017 Ms E mentioned to the complainant that a mutual female friend would be staying the night. The complainant responded that Ms E had denied the complainant a couple of times. The complainant said to Mr Jones and Ms E that she would have a threesome with them.[109]

iv) On the night of the alleged offending, the complainant and Ms E had kissed at the flat party and then engaged in sexual intimacy at the apartment.[110]

The Court admitted all this evidence. As to (i), it said this evidence helped establish Mr Jones' contention about the close friendship and that it was developing into a sexualised relationship:[111]

> These statements mark the beginning of this development. They form part of an unbroken chain of events which must be considered in their entirety to properly assess whether Mr Jones reasonably believed the complainant willingly participated in a sexual encounter with him and Ms E. Adopting the Supreme Court's formulation in *Christian v R*, quoted at [35] above, Mr Jones' case is that "the participants in the sexual activity [were] in a relationship in which expectations [had] developed over time and the sexual activity [was] in accordance with those expectations". We are therefore satisfied the evidence is relevant.

107 At [21](d).
108 At [13](g). The evidence about what Ms E and Mr Jones had said was not opposed, but the evidence about the complainant's reaction was.
109 At [21](h).
110 At [49].
111 At [38].

It admitted the evidence in (ii) based on similar reasoning.[112]

The Crown submitted that the evidence about the complainant's expressed interest in having a threesome with Mr Jones and Ms E could not support a reasonable belief in consent because it was not contemporaneous.[113] The Court rejected this argument, stating there: "was nothing to indicate that the complainant's previously expressed interest in participating in a threesome with them had changed".[114] The Court concluded:[115]

> … it is difficult to see how a statement by the complainant that she was willing to engage in a threesome with Ms E and Mr Jones could be anything other than highly relevant to the issue of honest or reasonable belief in consent on these unusual facts.

The Court admitted the evidence regarding the kissing and sexual intimacy between the complainant and Ms E, stating:[116]

> It bears directly on the issue of whether the Crown can prove that Mr Jones did not honestly and reasonably believe the complainant consented to participate in a threesome at the apartment a short time later.

3 Discussion

The idea of relationship expectations involves a combination of three mistakes of law, that:

i) consent can be at a time other than when the sexual act occurs;

ii) believing that the other person would probably, or might, agree to or welcome the sexual activity is a belief in consent (that is, believing that actual agreement is not required); and

iii) passivity or failure to protest can constitute consent.

Relationship expectations are generated by past conduct or statements, but this fails to respect the principle that consent is situation-specific and must

112 At [43].
113 At [46].
114 At [47].
115 At [48].
116 At [49].

be determined at the time of the act in question. Judge Paul put this well, saying that the "divide between those events and the critical time for consent or reasonable belief simply cannot be bridged by reliance on those facts".[117] It involves the impermissible inference that prior sexual activity means that the person is consenting. Another mistake is suggested by the name "relationship expectations": an expectation that someone would consent is not the same as actual consent. Past conduct may be able to generate expectations, but it cannot generate actual consent. Without these two mistakes of law we are left simply with passivity or failure to resist, which it is a mistake of law to treat as consent.

Jones stretches the concept of relationship expectations to breaking point. It is no exaggeration to say that there was neither a relationship nor expectations in *Jones*. The complainant and Mr Jones were not in a sexual or romantic relationship, notwithstanding her light-hearted comments about being the third member of the relationship. It is difficult to understand how expectations about sexual activity can "have developed over time" if the parties have never engaged in sexual activity.[118] If past expressions of interest in a threesome and flirting can give rise to "relationship expectations", then it would seem that the bar is so low that any sexual activity or expression of sexual interest with a person can give rise to relationship expectations.

The Court's reasoning undermines the idea that previous flirtation or sexual interaction between the parties does not mean that there is consent. It risks taking us back to a time when "date rape" or acquaintance rape was not recognised as "real rape".[119] Decades of feminist activism and law reform have sought to change this perception. It is concerning that some judges still appear to cling to the idea that prior flirtation justifies a defendant presuming that the complainant consents to sexual activity.

The Court of Appeal repeatedly focused on Mr Jones' belief in consent and its reasonableness when considering whether the evidence should be admitted. But even insofar as the evidence was relied upon to prove that the complainant

117 *R v Jones* [2018] NZDC 9461 at [29].

118 The phrasing used in *Christian (SC)*, above n 28, at [46].

119 See Susan Estrich *Real Rape* (Harvard University Press, Cambridge, 1988); Lois Pineau "Date Rape: A Feminist Analysis" (1989) 8 Law and Philosophy 217; David M Adams "Date Rape and Erotic Discourse" in Leslie Francis (ed) *Date Rape: Feminism, Philosophy, and the Law* (Penn State University Press, University Park, 1996) at 27; and Peggy Reeves Sanday *A Woman Scorned: Acquaintance Rape on Trial* (University of California Press, Berkeley, 1997).

had actively participated in the sexual activity, this involved the impermissible inference that the Supreme Court of Canada identified as a mistake of law in *Barton*: "that the complainant's prior sexual activities, by reason of their sexual nature, make it more likely that she was consenting to the sexual activity in question".[120]

The risk of impermissible reasoning by a jury was particularly great in *Jones* given the evidence involved less conventional sexual activity; a threesome and sexual activity with people in a relationship. There was a risk the jury would decide that the complainant was promiscuous and therefore would have consented, which is a mistake of law. Judge Paul was alive to this. The Court of Appeal noted the Judge "was particularly concerned that the admission of this evidence would risk impermissible reasoning by the jury".[121] The Judge considered that evidence and questioning about the complainant and Ms E being engaged in sexual activities at the time Mr Jones got into bed "invites illogical thinking that just because those women were kissing each other they must naturally be inviting [Mr Jones] to join them in their sexual activity".[122]

The evidence about sexual activity between the complainant and Ms E should have been presumptively excluded by the rape shield law, which applies to "the sexual experience of the complainant with any person other than the defendant".[123] However, the Court of Appeal said the rape shield law did not apply to evidence about the threesome:[124]

> This evidence relates to the complainant's sexual experience with Ms E and Mr Jones together. The sexual experience is the same and is not divisible. It is not sexual experience of the complainant *with a person other than the defendant*, as required to engage the section.

But, on the plain words of the section, it does apply. Ms E was a "person other than the defendant". The sexual activity was with her. The fact that Mr Jones was also involved in the threesome does not change this. If the sexual activity was indivisible, it should all have been subject to the rape shield. The Court's

120 *R v Barton*, above n 45, at [100].
121 *Jones v R*, above n 97, at [15].
122 *R v Jones*, above n 117, at [30].
123 Evidence Act 2006, s 44(1).
124 *Jones v R*, above n 97, at [40].

decision rewrites the section by effectively adding "unless the defendant was also involved in the sexual activity" to the provision.

The Court also held that evidence of the sexual activity between the complainant and Ms E in the bed was not covered by the rape shield law, even though Mr Jones was not present at that time, and observed "'[s]exual experience' indicates something that happened on a previous occasion".[125] This statement is inconsistent with many Court of Appeal decisions applying the rape shield law to sexual activity with another person that occurred subsequent to the offending.[126] The wording of the section makes no reference to the time at which sexual activity occurs. The broader interpretation is supported by the purpose of the provision, as the rape myths that it seeks to combat are not limited to sexual activity before the alleged offending. Further, the Court of Appeal had said earlier in its judgment in *Jones* that the provision was to be interpreted broadly so as to fulfil its purpose.[127]

It is concerning that the Court of Appeal narrowed the rape shield law to make it easier to introduce evidence about threesomes, which are particularly likely to involve a risk of prejudicial reasoning about promiscuity. As such reasoning involves the temporal mistake of law by basing a belief in consent on past behaviour, the Court should have been trying to prevent it.

The admission of irrelevant and prejudicial evidence in *Jones* shows that the extension of the rape shield law to sexual experience with the defendant, as proposed in the Sexual Violence Legislation Bill that is currently before Parliament,[128] cannot come too soon. However, this may not eliminate the problem, given there would remain a judicial discretion to admit evidence where it is of such direct relevance that exclusion would be contrary to the interests of justice. As Elisabeth McDonald has noted, the existence of a judicial discretion to admit sexual history evidence is problematic if judicial assessment of evidence is infected by rape myths.[129] Indeed the Court in *Jones* indicated it would have admitted some of the evidence even if it had decided that the rape shield law applied.[130] If judges are still relying on mistakes of law

125 At [50] (footnote omitted).

126 See *Singh v R* [2016] NZCA 552; *Wallace v R* [2018] NZCA 2; *Cowx v R* [2013] NZCA 571; and *R v Palmer* CA202/05, 11 April 2006.

127 *Jones v R*, above n 97, at [32]; citing *Nguyen v R* [2011] NZCA 8, [2011] 2 NZLR 343 at [20]–[24].

128 Sexual Violence Legislation Bill 2019 (185–2), cl 8.

129 Elisabeth McDonald "From 'Real Rape' to Real Justice? Reflections on the Efficacy of More Than 35 Years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 493–494 and 500–503.

130 *Jones v R*, above n 97, at [48]–[50].

and rape myths to treat prior flirtation and sexual interaction as providing a basis for a reasonable belief in consent, the presumptive exclusion in the rape shield law may not stop them from admitting evidence of this.

C Sharma *and* B *on desire and no meaning yes*

In *Sharma v R*, Mr Sharma had been acquitted of two charges of unlawful sexual connection but convicted on one charge of rape.[131] He appealed on the basis that the verdicts were inconsistent.[132] The Court of Appeal rejected this argument:[133]

> The jury could well have accepted that the complainant said "No" and "Stop" during the first episode, but found that the appellant reasonably believed that she was consenting since the flatmate also thought that consensual sexual activity was taking place.

The flatmate had testified that he heard "pleasurable noises" coming from the bedroom.[134]

But the only evidence here was of sexual pleasure or at most desire, not of consent. If Mr Sharma thought that this meant there was consent, he had made a mistake of law. Concerningly, the Court has given credence to the rape myth that real victims do not experience sexual pleasure. It has also allowed reliance on the rape myth that women say no but mean yes.[135] This should have been recognised as another mistake of law. The appellant's supposedly reasonable belief was based on nothing more than two legally impermissible rape myths.

B (CA862/2011) v R was also an appeal on the ground of inconsistent verdicts.[136] The appellant had been found not guilty of unlawful sexual

131 *Sharma v R* [2019] NZCA 462 at [1].
132 At [1].
133 At [19].
134 At [17].
135 Mr Sharma unsuccessfully sought leave to appeal to the Supreme Court, arguing that the Court of Appeal's view that "reasonable belief in consent in the first episode can co-exist with "no" and "stop" is a rape myth". He contended that the jury must not have believed the complainant's evidence beyond reasonable doubt, which would have affected their decision in relation to the second episode: *Sharma v R* [2020] NZSC 12 at [6].
136 *B (CA862/2011) v R* [2012] NZCA 602 at [4].

connection, but guilty of rape.[137] He and his wife were friends of the complainant.[138]

The complainant testified about what she had said to the appellant:[139]

> The gist of the complainant's evidence at the time Mr B had gone down and was licking her genitalia was to say things like "just stop it, don't be … stupid" and to tell Mr B "to stop it, … go away … don't do this". In particular, she said that she repeatedly told Mr B to think of his wife and family, to which on one occasion she said he responded: "Oh that's all gonna be over with soon anyway".
>
> By contrast, the complainant gave evidence that when Mr B put his penis into her vagina she told him "stop, stop, stop".

The complainant also said that she had tried to push the appellant away.[140]

The Court rejected the argument that the verdicts were inconsistent, stating that the jury could have found that there was either consent or reasonable belief in consent for the oral sex but not the sexual intercourse.[141] In relation to reasonable belief in consent, the Court explained:[142]

> In particular, the jury's not guilty verdict on the first count is explicable on the basis that the jury found Mr B had a reasonable, but mistaken, belief that the complainant was consenting to the oral sex by virtue of what she did — or did not do — despite what she was saying. As to her protestations, [counsel for the Crown] pointed out that most of them were directed toward her concern for Mr B's wife, who was one of the complainant's "closest friends". Those protestations could reasonably have been construed by Mr B as the guilty remarks of a willing, albeit conflicted, adulterer.

This confuses desire and consent. A person can desire to have sex with someone but not consent because the other person would be cheating on their partner. A "no" because it would involve cheating is no less valid than a "no" because of a lack of sexual desire. The complainant's references to her friend explain why she was not consenting; they do not cast doubt on her lack of consent. Even if

137 At [2].
138 At [6].
139 At [12]–[13].
140 At [14].
141 At [16].
142 At [39].

it could be inferred from this that the complainant desired to have sex with the appellant, his belief in consent would be based on a mistake of law resulting from the confusion of desire and consent.

This case again perpetuates the rape myth and mistake of law that no means yes. Telling the appellant "to stop it" and "just stop it" during the oral sex was just as unequivocal as saying "stop, stop, stop" during the sexual intercourse, yet the Court found a "contrast" in this. The Court focused on the complainant pushing the appellant away during the sexual intercourse, but ignored her statement that she tried to push him away during the oral sex. The only difference appears to be the references to his wife and children during the oral sex. The Court of Appeal has sent the very dangerous message that it is acceptable to ignore a woman's protests and even resistance if the defendant thinks "she really wants it".

Unusually, in these cases rape myths were deployed to uphold convictions and challenged by the defence. They illustrate Elisabeth McDonald's point that prosecutors can also reinforce rape myths.[143] As she notes, sometimes rape myths can help prosecutors in an individual case, but giving credibility to rape myths has wider costs to rape victims generally.[144]

VII A WAY FORWARD

How can we address the mistakes discussed in this article? I have four suggestions.

First, enact a statutory definition of consent. Even a definition based on the Mental View would be an improvement by reducing confusion and encouraging judges to focus on the meaning of consent. An example is the English definition of consent, which provides that "a person consents if he agrees by choice, and has the freedom and capacity to make that choice".[145] A definition based on the Performative View would be better. By providing that consent was constituted by a communicative act, the scope for a defendant to argue that they were mistaken about consent would be reduced. It would be harder to rely on mistakes of law and rape myths to form the basis of a reasonable belief.

143 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 469. The book is available online at <www.canterbury.ac.nz>.

144 At 469.

145 Sexual Offences Act 2003 (UK), s 74.

Secondly, add a statutory provision clarifying that a belief in consent based on a mistake of law about consent cannot be relied upon. The mistakes of law discussed in this article could be included as examples of mistakes of law about consent. A statutory provision would force judges to pay attention to mistake of law in the sexual violence context.

Thirdly, develop model directions for juries on mistake of law. As juries decide most rape cases, it is necessary to explain clearly to them that mistakes about what consent is cannot provide a reasonable belief in consent. They should be given examples, such as the ones discussed in this article.

More broadly, some of the judgments considered in this article display a worrying lack of understanding of the dynamics of sexual violence and even rely on rape myths. Further education of judges on these matters is necessary. This could be done internally through courses and seminars run by the Institute of Judicial Studies. But a statutory requirement for such training would give greater security that it will occur. The Canadian Government currently has a bill before the House of Commons that would require this.[146] Despite suggestions to the contrary,[147] judicial independence is not threatened by requiring judges to undergo training to combat prejudices or ignorance. Indeed the rule of law and public confidence in the judiciary require that judicial biases be addressed.

Nobody knows how many defendants are being acquitted because the courts are failing to apply the doctrine of mistake of law. There are many reforms that are needed to address our woeful rate of sexual violence convictions. But this, unusually, does not require a change in the law — it just requires courts to apply existing legal doctrines.

146 An Act to amend the Judges Act and the Criminal Code 2020 Bill C-3.

147 See Rosemary Cairns-Way and Donna Martinson "Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada" (2019) 97 Can Bar Rev 367 at 391–395.

BEYOND VICTIMHOOD: WOMEN'S PARTICIPATION IN ATROCITIES

Hannah Reid*

The attention paid to violence against women in former Yugoslavia and Rwanda in the 1990s sparked important developments in international law, particularly the criminalisation of sexual violence committed during conflict. This attention also added to the mountain of discourse on atrocities that classifies women as "victims" and men as "perpetrators". This article explores how gendered assumptions about participation in atrocities have affected the way society thinks about, talks about, and responds to women who participate in war crimes, crimes against humanity and genocide. Shedding light on women's involvement in atrocities, this article argues that it is organisational factors, rather than biology, that drives violence in armed groups. When women are subject to the same organisational and societal pressures as men, they have the same capacity for violence. Ignoring women's contributions to atrocities risks leaving women out of disarmament, demobilisation and reintegration processes, thus derailing accountability efforts and rendering women's categories of experience in conflict incomplete. A gap in understanding has been created by essentialising women's experiences in conflict as "victims". This article aims to confront that gap and draw attention to the further research needed into women's roles in atrocities.

I INTRODUCTION

The vast majority of discourse on atrocities in conflict focuses on women as "victims" and men as "perpetrators".[1] When women commit atrocities, their conduct is generally portrayed in a way that paints them as apolitical, irregular,

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1 Sabrina Gilani "Transforming the 'Perpetrator' into 'Victim': The Effect of Gendering Violence on the Legal and Practical Responses to Women's Political Violence" (2010) 1 AUJIGendLaw 1 at 1. "The oppositional concepts of victim and perpetrator, and the attached notion of victims having no agency, are so all-pervasive in humanitarian discourse that they are difficult to completely avoid": Chris Coulter "Female Fighters in the Sierra Leone War: Challenging the Assumptions?" (2008) 88 Feminist Review 54 at 66. See also Linda Åhäll "The Writing of Heroines: Motherhood and Female Agency in Political Violence" (2012) 43(4) Security Dialogue 287.

and lacking agency. Dismissed as unusual, women's contributions to atrocities are often ignored or entirely erased from historical memory.[2] But women have played a larger role in conflicts, and in the perpetration of atrocities, than generally assumed.

The stereotypes of men as aggressors and women as victims are often accompanied with the rationalisation that women are inherently more peaceful than men.[3] When women are involved in the perpetration of atrocities, popular responses have been a melding of "awe-inspired fascination and deeply disdainful judgment".[4] There is a certain shock when women are militarised, even more when they commit atrocities. Women in the military are sometimes seen as unconventional, so women committing acts of brutality when serving in armed forces are viewed from a starting point that already labels them "unusual".

In this article, I explore how gendered assumptions about violence and aggression have affected the way society thinks about, talks about, and responds to women's participation in atrocities.[5] The article has two main goals. The first is to shed light on the involvement of women in atrocities, the roles they play, their motivations, and whether women, when facing similar social and political pressures as men in conflicts, have the same capacity for violence as men do. The second is to examine the consequences of the gap in understanding that has been created by society focusing discussions about women's experiences in conflict on their experiences as "female victims". There is a paucity of research and commentary on women's roles as participants in conflict-related atrocities. This article briefly canvasses the consequences of this lack of attention, but significantly more research is needed in this area before substantial analysis of these consequences can occur.

2 Meredith Loken "Rethinking Rape: The Role of Women in Wartime Violence" (2017) 26(1) Security Studies 60 at 63.

3 Alette Smeulers "Female Perpetrators: Ordinary or Extra-Ordinary Women" (2015) 15 Int'l Crim L Rev 207 at 209. As Laura Sjoberg and Caron Gentry contend, "[w]omen's violence is often discussed in terms of violent women's gender: women are not supposed to be violent": Laura Sjoberg and Caron E Gentry *Mothers, Monsters and Whores: Women's Violence in Global Politics* (Zed Books, New York, 2007) at 2.

4 See Loken, above n 2, at 63.

5 I note at the outset that many of the gendered assumptions and stereotypes canvassed in this article have Western roots. While more research is needed into women's experiences in conflict, even more is needed into the intersections of gender, ethnicity, race, sexuality and violence in the perpetration of atrocities in conflicts.

Part II explores the roles women have played in the perpetration of atrocities, from tacitly supporting brutal regimes to instigating mass atrocities as political leaders. Part III weighs theories that purport to explain how gender affects participation in atrocities. Part IV sets out some of the practical, political and legal consequences when the focus on women's experiences in conflict as victims overshadows women's participation in atrocities.

This article argues that the "socialisation" theory is the soundest for explaining why women participate in atrocities. It is organisational factors, rather than biology, that drives violence in armed groups. When women are subject to the same organisational pressures as men, research shows that they have the same capacity for violence. This article focuses on four key consequences of the essentialisation[6] of women as victims of atrocities: rendering their categories of experience in conflict incomplete; leaving women out of disarmament, demobilisation and reintegration (DDR) processes; creating pockets of impunity; and inadvertently reinforcing tired stereotypes.

II THE ROLES WOMEN HAVE PLAYED IN CONFLICTS

The attention on violence against women in former Yugoslavia and Rwanda in the 1990s put wartime sexual violence on the international agenda and sparked developments in international criminal law to criminalise and prosecute sexual violence used as a tool for genocide, war crimes and crimes against humanity. The attention on this aspect of women's experience in conflict has, however, had the effect of reducing women in former Yugoslavia and Rwanda to "rape victims" in popular discourse.

The perception of women in conflict as exclusively "victims" disregards their experiences as combatants, leaders and, in some cases, participants in the commission of atrocities. As Alette Smeulers states, "[t]here is no role required for mass atrocities that women have not played".[7] Women have been bystanders tacitly supporting brutal regimes,[8] and at the other end of the

6 "Essentialising" a group consists of assigning the group certain essential, or definitive, characteristics which all or most members have.

7 See Smeulers, above n 3, at 226.

8 For example, the men who joined the ranks of the Nazi regime's SS could not marry without specific approval of the SS organisation, and wives were expected to believe in the same ideas as the SS. Women used Jewish labour to maintain households near concentration camps and were recipients of property stolen from Jews. Women were also heavily involved in the administrative aspects of the Nazi regime, providing labour to staff the supportive and bureaucratic arms of the Nazi war machine. An estimated 12 million women worked in Nazi organisations, which constituted approximately one third of the female population: Smeulers, above n 3, at 211–213.

spectrum of participation have been political leaders directing that their forces commit atrocities. This section canvases the various ways in which women have participated in atrocities, disrupting deeply entrenched gendered essentialisms and the universalising of women's experiences as victims.

A Indirect participation

The atrocities committed in Rwanda in 1994 indirectly involved a considerable number of women. Many Rwandan women have been described as "cheerleaders" who sang songs while Tutsis were raped and killed.[9] One woman stated "I am accused of being there when people were being killed, singing … I joined the animation just as I would join any other choir".[10] As the International Criminal Tribunal for Rwanda (ICTR) tried those most responsible for orchestrating and carrying out the genocide, lower-level perpetrators were tried in the traditional Gacaca courts set up in Rwanda. Of the two million suspects tried in the Gacaca courts, around six per cent were women.[11] Studies in Rwanda found that female detainees in the Gacaca courts have argued that "women did not carry pangas so they were not as involved as men" and "women did not kill because they only called out".[12]

During the Rwandan genocide, women also played the "informer" role, betraying the hiding places of Tutsis. Two Rwandan nuns, Sister Gertrude and Sister Kisito, stood trial in Belgium in 2001 for their role in the genocide. They had chased Tutsis who had sought refuge in their monastery outside and handed them over to the Interahamwe (the extremists) knowing they would immediately be killed.[13] Women looted the property of Tutsis, revealed their hiding spots and supported the men directly involved in the killings by bringing provisions to the roadblocks. Although the nature of that kind of participation in atrocities is indirect, the conduct of women in Rwanda nonetheless challenges the assumption that women are naturally peaceful and violence averse.

9 Yvonne Leggat-Smith *Rwanda: Not So Innocent: When Women Become Killers* (African Rights, London, 1995) at 45. See also Reva N Adler, Cyanne E Loyle and Judith Globerman "A Calamity in the Neighborhood: Women's Participation in the Rwandan Genocide" (2007) 2 GSP 209 at 233.

10 At 72.

11 Nicole Hogg "Women's participation in the Rwandan genocide: mothers or monsters?" (2010) 92 Int'l Rev Red Cross 69 at 81.

12 At 80. A 'panga' is a broad-bladed knife used as a weapon or cutting implement.

13 Smeulers, above n 3, at 215.

B Guards

In Nazi Germany, over 3,500 women served as concentration camp guards, mostly receiving their training and being stationed at Ravensbrück.[14] Several female Nazi guards were infamous for their cruelty.[15] Women took part in selections at concentration camps, nurses assisted decision-making on fitness to work and in some cases nurses gave lethal injections. Following the Second World War, approximately 60 female camp guards were put on trial at war crimes tribunals between 1945 and 1949 and 21 of these women were executed for their crimes.[16]

In former Yugoslavia, female camp guards abetted and directly committed atrocities. Indira Vrbanjac Kamerić was indicted for crimes committed while she was commander of a detention camp.[17] Witnesses at her trial recounted that she would point out women in detention to be taken to the front lines to be raped. Monika Simonović, who was arrested in December 2011, beat and maltreated the prisoners she guarded.[18] Witnesses have stated that Simonović took part in some of the worst atrocities in the Luka detention camp and one former prisoner stated "[s]he wasn't a woman, she was a monster",[19] a quote which reaffirms the common line of thought that women, owing to their gender, cannot commit atrocities.

Notorious examples of women committing atrocities were seen during the United States' "War on Terror". The photos published by the CBS "60 Minutes" television programme featured images of women humiliating, harassing and sexually abusing Iraqi prisoners at Abu Ghraib prison. Prisoners of Abu Ghraib have described sexual harassment and abuse both as part of and outside of interrogations.[20] About 20 per cent of the guards at Guantanamo

14 At 217. Sarah Helm's book titled *Ravensbrück: Life and Death in Hitler's Concentration Camp for Women* provides a compelling account of the prisoners and guards of Ravensbrück, a concentration camp for prostitutes, abortionists, "asocials", socialists, habitual criminals, communists and resistance fighters: Sarah Helm *Ravensbrück: Life and Death in Hitler's Concentration Camp for Women* (Anchor, New York, 2016).

15 According to one witness at the trial of Irma Grese, the guard would often kill about 30 prisoners a day: Daniel Patrick Brown *The Beautiful Beast — The Life and Crimes of SS-Aufseherin Irma Grese* (Golden West Historical Publications, California, 1996). Joanna Borman was known as "the woman with the dog", because she set off her dog to kill exhausted prisoners: Smeulers, above n 3, at 217.

16 Smeulers, above n 3, at 217.

17 At 218.

18 Merima Husejnovic "Bosnian War's Wicked Women Get Off Lightly" *Balkan Insight* (online ed, 7 February 2011).

19 Smeulers, above n 3, at 218.

20 Kristine A Huskey "The Sex Interrogators of Guantanamo" in Tara McKelvey (ed) *One of the Guys — Women as Aggressors and Torturers* (Seal Press, California, 2007) at 176.

Bay have been women.[21] Erik Saar, an interpreter at Guantanamo Bay, described female interrogators provoking devout Muslim prisoners by using interrogation methods that amounted to "pure humiliation".[22] The attention to sexual violence against men in Abu Ghraib, committed by women, destabilised the primacy of the idea that women exclusively are victims of sexual violence.[23]

C Soldiers

Data suggests that women have composed a substantial proportion of armed combatants in nearly a quarter of civil wars fought in the past thirty years.[24] Women have been particularly active in non-State armed groups.[25] In certain armed forces, women are crucial in combat roles specifically. For instance, the Kurdistan Workers' Party (PKK) relies heavily on female combatants, and between 25 and 30 per cent of the Eritrean People's Liberation Front were women.[26] In Liberia, 71 per cent of women who went through DDR programs and approximately 60 per cent of young female survey respondents who were members of armed groups in Uganda reported their primary or secondary role as combat fighters.[27]

The impact of the conflict in the Democratic Republic of the Congo (DRC) has been horrendous for women, with high rates of sexual violence being a feature. Amidst this narrative of brutal rape, women's participation

21 Paisley Dodds "Guantanamo Bay: Female interrogators' tactics aired" *The Seattle Times* (online ed, 28 January 2005).

22 In one account, a female interrogator smeared on the prisoner's face what he believed to be menstrual blood and then turned off the water in his cell so he could not wash. Strict interpretation of Islamic law forbids physical contact with women other than a man's wife or family, and with any menstruating women, who are considered unclean. See Erik Saar *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantanamo* (Penguin Press, New York, 2005) at 228.

23 There have also been recent advances in raising awareness of the existence of male victims of wartime rape and the difficulty those victims face coming forward, seeking assistance and participating in accountability measures such as criminal trials.

24 Loken, above n 2, at 64–65.

25 See Miranda Alison "Women as Agents of Political Violence: Gendering Security" (2004) 35(4) Security Dialogue 448; Medina Haeri and Nadine Puechguirbal "From helplessness to agency: examining the plurality of women's experiences in armed conflict" (2010) 92(877) International Review of the Red Cross 103 at 110. Women have participated in irregular forces of countries including: Colombia, El Salvador, Eritrea, Nepal, Sri Lanka, Kosovo, Sierra Leone, Uganda, Mozambique, Angola, Liberia, South Africa, Peru and Palestinian fighters in Lebanon and Israeli-Occupied Territories, see Shana Tabak "False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Colombia" (2011) 44(1) NYU Journal of International Law and Politics 103 at 132.

26 Loken, above n 2, at 64–65.

27 At 65.

as combatants and rapists has been largely ignored.[28] Based on surveys of survivors in the eastern DRC, it is estimated that 41 per cent of female and 10 per cent of male rape victims were sexually assaulted by female perpetrators or mixed gender groups.[29] A woman named Marie recounted being sexually and psychologically abused for four days by a woman, explaining "[w]hen I saw a woman, I thought I was safe".[30]

This conduct by women in conflict is not confined to the DRC. Evidence from the Sierra Leone civil war showed that groups that included women perpetrated nearly one in four incidents of reported gang rape.[31] Dara Cohen studied gang rape in Sierra Leone and reported that committing a gang rape was considered a means of combat socialisation and women participated alongside men.[32] Socialisation is a key tool in bringing individuals together into a cohesive combat unit and in Sierra Leone, gang rape was a feature of this socialisation.

Although women in Rwanda tended to play supportive roles more than directly participating in the killing, there were some women who killed. Some women's involvement included killing victims with guns or machetes.[33] A United Nations Assistance Mission for Rwanda (UNAMIR) officer reportedly stated "I had seen war before but I had never seen a woman carrying a baby on her back kill another woman carrying a baby on her back".[34] Speaking to a reporter during the Yugoslav wars, Bosnian soldier Mirsada Hromo said "[i]t's a nice feeling to kill a man, especially when you know he is about to kill you. You get this special feeling when you see him walking toward you, wanting to kill you and you just shoot him" to which another female soldier added "[m]aybe we should charm them so they'll

28 At 62.

29 Dara Kay Cohen "Female Combatants and the Perpetration of Violence: Wartime Rape in the Sierra Leone Civil War" (2013) 65 World Politics 383 at 385.

30 Loken, above n 2, at 62.

31 Cohen, above n 29, at 384.

32 At 384.

33 See Leggat-Smith, above n 9. For instance, on the hilltop of Kabuye, in Butare, a pregnant former gendarme shot at thousands of unarmed people and threw grenades, and witnesses reported seeing a woman who had a hairdresser's shop in Kigali kill a wealthy Tutsi businesswoman with "a big masu": Smeulers, above n 3, at 223.

34 Alison Des Forges *Leave None to Tell the Story — Genocide in Rwanda* (Human Rights Watch, New York, 1999) at 261.

walk a little closer".[35] Similarly, women in the ranks of the Khmer Rouge committed many of the same atrocities as men.[36]

The use of female suicide bombers has increased in recent decades. According to Laura Sjoberg and Caron Gentry, 81 per cent of suicide attacks in Chechnya were perpetrated by women.[37] Thousands of women have travelled to Iraq and Syria to voluntarily join the Islamic State and are frequently referred to as "jihadi brides". In reality, women in ISIS hold a variety of roles which include assisting with the captivity of captured Yazidis, enforcing adherence to ISIS' strict interpretation of Shariah law and fighting on the front lines.

Female fighters are frequently depicted as hyper-feminised, with a focus on the physical attractiveness of female fighters as opposed to their agency and political autonomy.[38] However, "such a devaluation of the militarized roles of women constructs a false notion of female experience".[39] Empirical evidence shows that women have willingly engaged with violence on the front lines and been willing participants in atrocities during conflict.

D Commanders

Due to the underrepresentation of women in political and military leadership, it is not surprising that the number of men charged in international criminal courts far exceeds the number of women charged. Nevertheless, looking closely at those cases where women have been responsible for participating in atrocities from leadership positions is important.

So far, the only two women convicted by international criminal tribunals have both been political leaders. Biljana Plavšić was Vice President of Republika Srpska and her role was to encourage participation in the conflict and publicly justify the violence. On 27 February 2003, Plavšić pleaded guilty to persecution as a crime against humanity before the International Criminal Tribunal for the former Yugoslavia (ICTY). She was the first woman to be convicted by one of the ad hoc international criminal tribunals.

Pauline Nyiramasuhuko was the Minister for Family and Women's Affairs and a member of the inner circle of power holders who planned the Rwandan

35 Loken, above n 2, at 87.
36 James Waller *Becoming Evil: How Ordinary People Commit Genocide and Mass Killings* (Oxford University Press, Oxford, 2002) at 300.
37 Sjoberg and Gentry, above n 3, at 98.
38 Loken, above n 2, at 63.
39 At 63.

genocide. On 24 June 2011, Nyiramasuhuko was found guilty and sentenced to life imprisonment by the ICTR for her leading role in the genocide and commission of widespread rape in Butare.[40] This was the first time a woman was convicted by an international criminal court for genocide and sexual violence.

In Rwanda's domestic courts, the Minister of Justice Agnes Ntamabyaliro was convicted for her role in the genocide,[41] but one of the architects of the genocide, Agathe Kanziga, has not yet been arrested for her role. Ieng Thirith was indicted by the Extraordinary Chambers in the Courts of Cambodia (ECCC) for her role as Minister of Social Affairs for the Khmer Rouge, but the ECCC ordered a stay of her prosecution because she was deemed unfit to stand trial.[42] In the International Criminal Court, Simone Gbagbo has an outstanding arrest warrant for playing a central role in post-election violence in the Ivory Coast, including by organising death squads.

III THE THEORETICAL FRAMEWORK FOR ANALYSING GENDER AND VIOLENCE

Having canvassed the involvement of women in atrocities, this section addresses some of the explanations for involvement. Overwhelmingly, the common message has seemed to be that women who perpetrate atrocities must be either mentally disturbed, unnatural, abnormal, not a "real woman", or must have been forced to commit the atrocities.[43]

Sjoberg and Gentry studied the portrayal of female perpetrators of atrocities in conflict.[44] They concluded that these women are either portrayed as mothers, monsters, or whores. The mother narrative explains women's violence as "motherhood gone awry", with violence being committed because of a need to belong and a yearning to nurture men. The monster narrative describes violent women as insane, denying their own femininity, and being no longer a "woman". The whore narrative blames violence on the evils of female sexuality. The media coverage of female perpetrators in the Second World War

40 *Prosecutor v Nyiramasuhuko (Sentencing Judgement)* ICTR Trial Chamber II ICTR-98-42-T, 24 June 2011.

41 See Clement Uwiringiyimana "Life sentence for Rwanda's genocide-era justice minister upheld" *Reuters* (online ed, Nairobi, 28 February 2015).

42 *Prosecutor v Thirith (Decision on Ieng Thirith's Fitness to Stand Trial)* Trial Chamber 002/19-09-2007/ECCC/TC, 17 November 2011.

43 Smeulers, above n 3, at 228.

44 Sjoberg and Gentry, above n 3, at 13.

described the women as "beasts", "sadists" and "seductresses".[45] All of these narratives exclude the possibility of women behaving rationally, motivated by politics or ideology. The only agency afforded to women in conflict by the generalisation that women are naturally non-violent is the inclusion of women as pacifiers, with women having seats at the tables discussing peace talks but not atrocities.[46] However, as illustrated in the first section, there is ample evidence to contradict the generalisation that women have a natural affinity for peace.

Some theories exploring connections between sex and violence approach the matter with biological explanations, a common explanation being that men are naturally more aggressive, and women have a natural affinity for non-violence. Some theorists posit that a major factor contributing to destructive aggression in males is the hormone testosterone, as men produce 10 to 20 times as much testosterone as most women do.[47] However, the vast majority of scientific studies have documented the relative failure of biological determinism on the hormonal level to predict or explain immediate individual behaviour such as attacking a rival, let alone more abstract social behaviour such as participating in conflict or committing atrocities.[48] Some studies have concluded that it is testosterone deficiency, rather than excessive levels of testosterone, that can more often be associated with aggression,[49] and other studies have found that it is the combination of high testosterone and low serotonin that seems to be a more accurate indicator of aggressive behaviour.[50]

Rather than being explained by biological arguments, violence and aggression seem to have other roots. The most effective way to approach the matter of the origin of violence is to begin from the standpoint that a person of any gender can commit acts of brutality in certain circumstances.

45 Smeulers, above n 3, at 228.

46 Despite the assumption that women are naturally non-violent, women are also frequently excluded from peace talks and ceasefire negotiations. See, for example, Swanee Hunt "The Critical Role of Women Waging Peace" (2003) 41 Columbia Journal of Transnational Law 557; Margaret E McGuinness "Women as Architects of Peace: Gender and the Resolution of Armed Conflict" (2007) 15(1) Michigan State Journal of International Law 63; and Allanah Colley "More than a seat at the table: the role of women in international peacebuilding" (LLB (Hons) Dissertation, University of Auckland, 2016).

47 Allan S Mohl "Growing Up Male: Is Violence, Crime and War Endemic to the Male Gender?" (2006) 33 J Psychohistory 270 at 271.

48 At 272.

49 At 272.

50 At 272.

A Socialisation into extreme violence by organisational factors

Scholars such as Raul Hilberg and Hannah Arendt have argued that most perpetrators in the Second World War were rather ordinary and committed evil crimes for banal reasons.[51] However, despite it being generally accepted that the Nazi crimes were perpetrated by ordinary people who were driven to commit extraordinary crimes, when the perpetrators being discussed are women the language changes and it is the gender of the perpetrators that is "extraordinary".

Within club-like atmospheres such as militaries, norms of "highly concentrated masculinity" may empower and reward violence as the most effective means of demonstrating one's power to others and to themselves.[52] Evidence from Sierra Leone has indicated that rather than women interrupting this power display by men in armed units, women were instead integrated into these instrumental practices.[53] Green has concluded that within military units, commanders valorise violence and demand obedience through conformity and exhibitions of traditional masculinity. She argues that militaries instil a set of cultural norms that valorise violence in general, and that strongly discourage criticism of group norms, goals or actions.[54]

When Baaz and Stern interviewed female soldiers as part of their research, the vast majority of interviewees "described themselves as having equal propensity for and agency in the violence committed in comparison with their male colleagues".[55] One explanation for women's participation in atrocities could be that in units where women are culturally considered in some way inferior to men, women tend to be more inclined to prove themselves and show that they are "one of the guys".

The most compelling explanation for why women participate in the commission of atrocities has been articulated by Cohen, who argues that female perpetrators of wartime atrocities, rape in particular, are best explained by many — though not all — of the same reasons that men become perpetrators.[56]

51 Raul Hilberg *Perpetrators, Victims, Bystanders — The Jewish Catastrophe* (Harper Perennial, New York, 1992). See also Hannah Arendt *Eichmann in Jerusalem — A Report on the Banality of Evil* (Penguin Classics, New York, 1964).

52 Smeulers, above n 3, at 233.

53 Loken, above n 2, at 70.

54 At 89.

55 Maria Eriksson Baaz and Maria Stern "Fearless Fighters and Submissive Wives: Negotiating Identity Among Women Soldiers in the Congo (DRC)" (2012) 39 Armed Forces & Society 711 at 713.

56 Cohen, above n 29, at 386–387.

When women are part of a radicalised society, part of the ranks of an armed force, or in a position of authority, they face similar social pressures that men do and, given similar sets of circumstances, are just as likely as men to commit violence.[57] Having examined the intragroup social dynamics of armed groups, Cohen found that armed groups with low levels of internal cohesion, such as groups that rely on abduction to recruit fighters, turn to group violence to create a coherent armed unit.[58] In cases such as Nazi Germany, where armed groups had high levels of internal cohesion, many members felt strong social pressure to obey all orders, and were trained to be desensitised to obeying orders to commit extreme violence. The argument is that under certain conditions, fighters of both sexes may face enormous social pressure to commit violence and both sexes are likely to respond to this kind of pressure in a similar way.[59]

Similarly, Loken argues that organisational factors, not individual characteristics, drive violence in armed groups and that women are subject to the same organisational pressures as men.[60] Loken points to organisational factors, particularly culture, as driving violence in armed groups, because these mechanisms operate by way of obedience to commands, group social identity, and norm internalisation.[61] These mechanisms encourage conformity irrespective of individual characteristics.

Individuals, regardless of sex, have the capacity to obey commands, conform to group norms and participate in activities that foster intra-unit cohesion. Interestingly, these arguments place some emphasis on the influence of romantic notions of collective identity and fighting for a collective, rather than focusing on individual attributes, such as gender or sex, to explain mass violence.[62] These "socialised into violence" explanations for women's participation in atrocities are the most compelling partly because they are the explanations that, most accurately, portray women as having agency in conflict — the same agency attributed to men.

Research into perpetrators (regardless of gender) has shown that many perpetrators are socialised into violence. They get progressively more involved

57 At 386.
58 At 386.
59 At 387–388.
60 Loken, above n 2, at 62.
61 At 82.
62 See George Fletcher *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton University Press, 2002).

until they are gradually transformed from ordinary people into perpetrators of atrocities.[63] Inmates from Nazi concentration camps have reported that although the more inexperienced female guards seemed to care about the welfare of the prisoners, those guards became more brutal the longer they worked in the camps.[64] Green has observed that:[65]

> Recruits enter armed groups with widely varying 'preferences' over violence, but socialization processes break down these initial preferences and build, in their places, norms and preferences that better serve group goals.

Social psychologists have offered two explanations for the perpetration of violence: obedience and conformity. Several renowned experiments, such as those conducted by Stanley Milgram, have demonstrated that individuals will obey authority and inflict violence on command with little resistance in certain circumstances, even if this violence conflicts with their personal values or beliefs.[66] Notably, in these experiments, there was little evidence that women were less violent than men.[67] Conformity to group identity is a relatively simple set of conditions to create. The Henry Tajfel experiment demonstrated that individuals group together based only on their estimation of the number of dots on a slide, and that individuals will favour their group members and discriminate against members of other groups, with no differentiation based on sex.[68]

During conflicts, populations are divided based on political ideology, religion, ethnicity, economic standing, and fear. Creating in-groups and enemies in society is a process that is then heightened when individuals join armed forces based on their beliefs or identity. Women and men are equally susceptible to fear of external threats and the power of organisational doctrine. A female ex-fighter in Liberia stated "I went fighting because of my religion.

63 Alette Smeulers "What Transforms Ordinary People into Gross Human Rights Violators?" in S Crey and S Poe (eds) *Understanding Human Rights Violations: New Systemic Studies* (Ashgate Publishing, 2004) at 239.

64 At 246.

65 Loken, above n 2, at 85.

66 Stanley Milgram *Obedience to Authority: An Experimental View* (Harper & Row, New York, 1974).

67 Loken, above n 2, at 83. See also Thomas Blass "The Milgram paradigm after 35 years: Some things we now know about obedience to authority" in Thomas Blass (ed) *Obedience to authority: Current perspectives on the Milgram paradigm* (Taylor & Francis, 1999) 35 at 46–50 who found no evidence of a gender difference in eight out of nine conceptual replications of Milgram's studies he reviewed.

68 Henri Tajfel and others "Social Categorization and Intergroup Behavior" (1971) 1 Eur J Soc Psychol 149 at 149.

You see if you are a Muslim or Mandingo in this country, they say you don't belong in this country, so I had to fight."[69]

None of this is to downplay the evidence of women being forcibly recruited into armed forces or forced to participate in atrocities by commanders, nor is it to dispute that many women also join combat units to protect themselves from murder or rape.[70] But if researchers begin assessing mass atrocities with the assumption that women were forced into participation, they risk mischaracterising the experiences of women in conflict and overlooking valuable information that could be collected from these women about what motivated them, what drove them and how their experiences as women in conflict affected their behaviour.

As further research delves into the participation of women in atrocities during conflict, the theories explaining the intersections of gender and violence will develop and evolve. The theoretical framework deployed when evaluating women's participation in atrocities may shape policy recommendations and law reform, so it is important to adopt a framework that takes into account the varied experiences of women in conflict, the agency women possess, and the organisational, cultural and social pressures at play during times of conflict.

IV IMPLICATIONS OF THE ASSUMPTION THAT MEN ARE PERPETRATORS

The essentialisation of women simply as victims of atrocities leaves their categories of experience in conflict incomplete, risks leaving women out of DDR processes, risks creating pockets of impunity, and may inadvertently reinforce the tired stereotypes found in international humanitarian law treaties.

A Reinforcing gendered stereotypes in international humanitarian law treaties

The tendency to equate women with victimhood is an essentialisation seen in key instruments of international humanitarian law. There are 19 specific provisions in the Geneva Conventions granting protections to women as

69 Loken, above n 2, at 86.

70 According to the International Labour Organization, women in Liberia joined combat to protect themselves from murder or rape, or to prove their equality with males. This reiterates limited options: "for many … females, becoming a soldier was a matter of kill or be killed". See Tabak, above n 25, at 140.

expectant or nursing mothers and 24 provisions dealing with preserving the honour and dignity of women.[71] These specific provisions direct that parties to conflict protect women, but these same provisions do not prohibit inhumane conduct directed towards women.

The theme of equating womanhood with victimhood is therefore woven through some of the key instruments of international humanitarian law. More modern articulations of the laws of war, such as the Rome Statute, do not tend to equate women with victimhood to the same extent. Nevertheless, the tired gender stereotypes of women as "victims", "vulnerable", and needing protection, and men as chivalrous "protectors" evident in the Geneva Conventions risk resurfacing in the international community's treatment of women if women's participation in atrocities is not given adequate focus.

B Prevention and accountability

Assuming that women in conflicts are "victims" affects how the international community and international law respond to violence.[72] When it comes to preventing atrocities, the "victim" assumption has led some to suggest that the presence of more women in combat units would prevent the commission of international crimes. In terms of punishing atrocities, a gendered lens has been employed by female defendants in international tribunals in an attempt to diminish liability. In terms of rehabilitation, DDR processes have sometimes excluded women. Each of these responses by the international community will be addressed below.

Some have suggested that recruiting more women into armed units may prevent the commission of atrocities, drawing heavily from false notions that women are inherently less aggressive than men.[73] This "add women and stir" suggestion for preventing atrocities relies on the false assumption that women are less prone to participating in atrocities. Another particularly troubling theory is that male fighters in mixed gender armed groups are less likely to sexually abuse civilians because they will instead have sexual access to women in their own units.[74] This theory is extremely problematic because it assumes

71 See Judith Gardam and Michelle Jarvis *Women, Armed Conflict and International Law* (Kluwer Law International, The Hague, 2001).

72 Gilani, above n 1, at 1.

73 For instance, see Gerard J DeGroot "A Few Good Women: Gender Stereotypes, the Military and Peacekeeping" (2001) 8(2) International Peacekeeping 23; Loken, above n 2, at 67.

74 See Elisabeth Jean Wood "Armed Groups and Sexual Violence: When is Wartime Rape Rare?" (2009) 37 Pol & Soc 131.

firstly that sexual violence is grounded in sexual desire, and secondly that female combatants are willing sexual participants.[75]

Loken created a systematic measure of women's participation as fighters and measured this data set against conflict-related rape in civil wars from 1980 to 2009.[76] The results of this study suggested that women's participation in conflict as fighters does not significantly impact the likelihood that armed groups will commit rape during civil war, and that armed groups with higher proportions of women are not less likely to commit rape in civil wars.[77] Similar research into female perpetrators in Rwanda found:[78]

> … when women are provided with positive and negative incentives similar to those of men, their degree of participation in genocide, and the violence and cruelty they exhibit, will run closely parallel to their male counterparts.

In order to effectively prevent the commission of atrocities by armed groups, the problematic assumptions around women's experiences of conflict need to be challenged.

Women are frequently excluded from the benefits of DDR programs and women tend to be deprioritised in accountability for perpetrating violence in post-conflict criminal justice processes.[79] Many DDR plans implement "cash for weapons" programs that specifically exclude certain groups from the demobilisation process, so female soldiers without their own firearms are often overlooked and unable to benefit from training or rehabilitation.[80] Transitional justice mechanisms also sometimes fail to consider the multiple roles that both men and women play in conflict.[81]

The media, the courts, and female defendants themselves have utilised a gendered lens when talking about the crimes with which women have been charged. Research into the investigation of atrocities in Rwanda has found that

75 Loken, above n 2, at 68.

76 At 76.

77 At 76.

78 Adam Jones "Gender and genocide in Rwanda" in *Gender Inclusive: essays on violence, men and feminist international relations* (Routledge, London and New York, 2009) 196–229.

79 Cohen, above n 29, at 388.

80 For example, in the Congo, one of the four criteria for DDR eligibility includes "possession of a weapon": see Naomi Cahn "Women in Post-Conflict Reconstruction: Dilemmas and Directions" (2006) 12 Wm & Mary J Women & L 335 at 347–348.

81 For a comprehensive analysis of transitional justice mechanisms and their treatment of women in conflict, see Tabak, above n 25.

women have not been perceived as "criminals" and that male investigators, prosecutors and judges often exercise discretion in a female defendant's favour at each level of the criminal justice system.[82] In the United States, notable gender gaps in sentencing have been reported, with a dataset of sentences for terrorism showing that the average sentence of imprisonment for men amounting to 13.8 years and the average sentence for women being only 5.8 years.[83]

In proceedings against female defendants in international tribunals, gendered narratives play a significant role in shaping the discourse of their offending both in and out of court.[84] While a comprehensive analysis of these legal proceedings goes beyond the scope of this article, two proceedings are particularly illustrative of how gender may impact accountability in international tribunals; the ICTY Plavšić case and the ICTR Nyiramasuhuko case.

1 The Plavšić case

Before entering politics, Plavšić was a professor and the dean of the natural sciences faculty at the University of Sarajevo. In 1990, she co-founded the Serbian Democratic Party and then became one of the two acting Vice-Presidents of Republika Srpska. Known as the "Serbian Iron Lady", Plavšić delivered hate speeches and used her academic background in biology to justify crimes committed during the Yugoslavian conflict, sometimes describing ethnic cleansing as simply a form of natural selection.[85] On a television program, she

82 Hogg, above n 11, at 81. By contrast, though, in the case brought against Indira Kamerić, the Appellate Panel of the Court of Bosnia and Herzegovina concluded that it is very rare that a woman treats another woman as unscrupulously, without any compassion and consideration, as the accused treated her victim and that such behaviour constituted an aggravating circumstance because it implied a high level of criminal responsibility, see *Prosecutor v Indira Kamerić* Court of BiH Appellate Panel Si 1 K 010132 15Krz, 15 December 2015 at [103].

83 See the George Washington University's Extremism Tracker, cited in Audrey Alexander and Rebecca Turkington "Treatment of Terrorists: How Does Gender Affect Justice?" (2018) 11(8) Combating Terrorism Center Sentinel at 25–26. The author notes that this analysis is limited to the size of the dataset, which included 87 cases of men and nine of women. In some of these cases, men and women were convicted of the same crimes, for instance, for providing material support to a foreign terrorist organization, but received different sentences. Defence counsel for one female defendant, Keonna Thomas, focused sentencing submissions on aligning Thomas' sentence with other convicted women, rather than aligning her sentence with others convicted of the same crimes.

84 See Natalie Hodgson "Gender Justice or Gendered Justice? Female Defendants in International Criminal Tribunals" (2017) 25(3) Feminist Legal Studies 337 at 344–345; see also Doris Buss "Knowing Women: Translating Patriarchy in International Criminal Law" (2014) 23(1) Social & Legal Studies 73.

85 Smeulers, above n 3, at 235.

stepped over a dead body and kissed Željko Raznjatović, the infamous leader of the Arkan Tigers.[86]

In 2000, Plavšić was issued with an ICTY indictment for genocide, crimes against humanity and war crimes. After initially pleading not guilty, Plavšić pleaded guilty to the crime of persecution as a crime against humanity and in exchange for her guilty plea, the seven remaining charges, including genocide, were dropped. Plavšić was sentenced to 11 years imprisonment and during her sentencing hearing, the ICTY judges stated that she had participated in "a crime of utmost gravity" but that she was not as culpable as Radovan Karadžić and Momčilo Krajišnik, as she was "not in the very first rank of the leadership", despite the fact that she was Vice-President.[87] Krajišnik, a male political leader convicted of the crimes against humanity of persecution, deportation and forcible transfer was sentenced to 20 years' imprisonment. Plavšić's lenient sentence has been criticised because her guilty plea and "genuine remorse" had been taken into account as mitigating circumstances despite the fact that she refused to implicate any others involved in the conflict and refused to cooperate with the prosecution.[88]

While Plavšić was serving her sentence in Sweden, she wrote lengthy memoires which were published in 2005.[89] In the two volumes, she retracted her most significant admissions and made a series of claims that not only directly contradicted her confession in the ICTY, but reiterated a hard-line nationalist worldview that showed very little remorse or rehabilitation.[90] Interestingly, Plavšić wrote that traditionally, there was no role for a woman in leadership or war and that it was "unfair" of Krajišnik and Karadžić to "recommend me for a high function and later take over all my responsibilities and leave me only with accountability".[91] She served two-thirds of her 11-year sentence before release. Plavšić's plea deal, sentence and early release are aspects of her accountability that appeared more lenient than the treatment of male ICTY indictees, particularly Krajišnik, who committed similar crimes with similar levels of control.

86 At 235.
87 *Prosecutor v Plavšić (Sentencing Judgement)* IT-00-39&40/1-S, 27 February 2003 at [52] and [57].
88 Smeulers, above n 3, at 236.
89 Jelena Subotić "The Cruelty of False Remorse: Biljana Plavšić at The Hague" (2012) 36 Southeastern Eur 39 at 39.
90 At 40.
91 At 40.

2 *The Nyiramasuhuko case*

Nyiramasuhuko was born into a poor Hutu family and rose through political ranks to become the Minister of Family and Women's Affairs. In the ICTR, Prime Minister Kambanda entered a guilty plea and named Nyiramasuhuko "among the five members of [the] inner sanctum where the blueprint of the genocide was first drawn up".[92] Nyiramasuhuko was the main instigator of mass rapes and killings in the Butare region of Rwanda. According to witnesses, she gave direct orders to erect roadblocks and ordered her son, an Interahamwe leader, to rape.[93] At the end of one of the massacres, Nyiramasuhuko reportedly visited a camp where a group of Interahamwe were detaining around 70 Tutsi women and girls. According to witnesses, she gave an order to the Interahamwe to rape the women before sprinkling them with petrol and burning them to death. The ICTR issued Nyiramasuhuko with an indictment for 11 charges of genocide, crimes against humanity and war crimes, including rape, and her trial was joined with five other defendants in what became known as the "Butare group" trial.

Nyiramasuhuko and her defence counsel denied all the charges and, interestingly, attempted to rely on Nyiramasuhuko's gender as part of the defence case. She claimed that she was the victim of sexism and that she was targeted because she was an educated woman.[94] When she was asked in a 1995 interview with the BBC about what she did during the war, she replied "[w]e moved around the region to pacify … We wrote a pacification document saying people shouldn't kill each other".[95] When asked about the allegations of rape and murder, she responded in a way that emphasised her gender, attempting to play into the stereotype of women as innocent and non-violent, by saying "I cannot even kill a chicken. If there is a person who says that a woman, a mother, killed, then I'll confront that person".[96] She also stated that women "did not know how to massacre".[97] Nyiramasuhuko's husband and mother made similar public statements defending Nyiramasuhuko on the

92 Mark Drumbl "She Makes Me Ashamed to Be a Woman: The Genocide Conviction of Pauline Nyiramasuhuko" (2013) Mich J Int'l L 559.

93 Smeulers, above n 3, at 239.

94 Carrie Sperling "Mother of Atrocities: Pauline Nyiramasuhuko's Role in the Rwandan Genocide" (2006) 33 Fordham Urb L J 637 at 650.

95 At 650–651.

96 At 651.

97 At 651.

basis of her gender, with her mother saying "[i]t is unimaginable that she did these things … After all, Pauline is a mother".[98]

Nyiramasuhuko was found guilty of seven of the 11 charges, including conspiracy to commit genocide and genocide, crimes against humanity and war crimes, and sentenced to life imprisonment, later reduced to 47 years' imprisonment.[99] Peter Landesman wrote about Nyiramasuhuko in the New York Times Magazine, stating that her case "transcends jurisprudence" because she "presents to the world a new kind of criminal".[100] Her case also received a disproportionate level of attention compared with the dozens of men who bore similar levels of responsibility for promoting the systematic rape, torture and murder of thousands of victims.[101] This kind of reporting of the trial only perpetuated the idea that women are unusual if they are found responsible for mass atrocities, but the empirical evidence shows that Nyiramasuhuko was not a "new kind of criminal" at all. Other women in Rwanda, and in conflicts across the world, have participated in atrocities during conflict.

What is notable about both Plavšić and Nyiramasuhuko is that both women participated in atrocity crimes deliberately, willingly, and consciously. They made choices that were in keeping with their political ambitions and ideological convictions. Both Plavšić and Nyiramasuhuko then tried to rely on their gender, to an extent, to defend themselves. The gendered lens through which mass atrocity crimes are viewed has the distorting effect of littering criminal conduct with assumptions that are based solely on social, cultural and historical constructions of gender roles. Once the gendered lens is removed, evidence of women's involvement in conflict has shown women to be equally capable of committing atrocities as men. However, particularly in the lower ranks, women are often spared from being held to account for participation in atrocities and when higher ranked women have been tried in international tribunals, they have used their gender in efforts to alleviate their culpability.

C An incomplete picture of women's experiences

Because of the stereotyped roles in conflict drawn along gendered lines, there are rarely comprehensive evaluations of how and why women perpetrate

98 At 651.

99 *Prosecutor v Nyiramasuhuko (Appeal Judgement)* ICTR Appeals Chamber ICTR-98-42-A, 14 December 2015.

100 Sperling, above n 94, at 652.

101 Tabak, above n 25, at 126–127.

atrocities. By looking at how women have contributed to mass violence and atrocities, it is possible to assemble a more accurate and comprehensive picture of how women experience war.

One of the key gaps in the overall picture of women's experiences in war is the autonomy deprived from women whose participation in conflicts is ignored, under-researched or assessed from an essentialist viewpoint. There has been "woefully little research" published on why women join armed groups, and hardly any research into why women commit atrocities.[102]

In the research that has been produced, there are a range of complex and varied reasons for women participating in combat and in the commission of atrocities. Survivors of the Majdanek concentration camp interpreted the female guards' conduct as an attempt to distinguish themselves among their counterparts, to attract the attention of their counterparts, or to assert their equality to counterparts in the male-dominated environment.[103] Female concentration camp guards were also looking for a well-paid and secure job, an opportunity for social advancement, the thrill of adventure, recognition of service, personal enrichment and the opportunity to satisfy ambitions.[104] In post Second World War trials, however, female perpetrators were portrayed as women acting emotionally, for reasons of jealously, loneliness, greed and revenge.[105] Women's participation in atrocities in other conflicts has been motivated by racism,[106] personal convictions and belief.[107] It is clear that a multiplicity of reasons compel women to join armed units, and to commit atrocities. Employing a false dichotomy of women as victims and men as perpetrators therefore risks leaving women's experiences of war under-analysed and misunderstood.

V CONCLUSION

This article refutes the presumption that women are exclusively victims and men are exclusively perpetrators of atrocities. The one-dimensional portrayal

102 Tabak, above n 25, at 139.

103 Elissa Mailänder and Patricia Szobar *Female SS Guards and Workaday Violence: The Majdanek Concentration Camp, 1942–1944* (Michigan State University Press, Michigan, 2015) at 245–247.

104 At 270–279.

105 Wendy Lower *Hitler's Furies: German Women in the Nazi Killing Fields* (Houghton Mifflin Harcourt, New York, 2013) at 174.

106 See Hogg, above n 11, at 83–89.

107 Truth and Reconciliation Commission *Witness to Truth: Report of Sierra Leone Truth and Reconciliation Commission* volume IIIB (Graphic Packaging Limited, Ghana, 2004) at 186–189.

of women in conflict as vulnerable, unlikely actors in conflict renders them invisible in important aspects of the history books and homogenises their lived experiences. Atrocities perpetrated by women must be recognised and taken seriously if society seeks to explain what causes atrocities and what steps can be taken to prevent their occurrence.

This article has shown that the relationship between women and violence is complex. Some women act in a supporting capacity, but others directly participate in killings, rapes and other atrocities, and others act as leaders, planners or instigators. The empirical evidence shows that women are equally capable of participating in atrocities during conflict as men. A review of the literature seeking to explain women's violence paints a messy picture. Scientific and psychological theories have attempted to explain why men or women commit atrocities in ways that perpetuate problematic assumptions about women and their agency. Explanations that instead situate the commission of atrocities within an environment governed by social, organisational and institutional forces most cogently explain how ordinary individuals commit atrocities in a way that avoids making assumptions on the basis of sex.

It is important that gender-based violence has been put on the international agenda. Gender-based crimes were long overlooked and victims were often discouraged from coming forward or seeking redress. However, the intense spotlight on women as victims of gender-based atrocities during conflict, and atrocities committed by men, created an incomplete picture where women perpetrating atrocities were erased from popular discourse and historical memory. Where any spotlight was shone on women for their role in conflicts, they tended to be demonised and labelled "abnormal". In fact, women have the same capacity for violence as men when put under the kinds of social, cultural and organisational pressures seen in violent armed units. It is hoped that further research into topics such as women's experiences in conflict as combatants, the impact of gender on investigations and prosecutions of atrocities, and media coverage of female defendants' trials will shine more light on this hitherto under-researched area. When gendered stereotypes are interrupted, comprehensive responses to atrocities and sound theories explaining violence can be more accurately produced.

THE PASSING OF THE ABORTION LEGISLATION BILL

Meghan Laing*

This article takes a critical view of the Abortion Legislation Act 2020, supporting its liberalisation as a step in the right direction but questioning whether the Act goes far enough. The article briefly outlines the preceding law and the process allowing for reform. It then outlines the new regime, justifying the Act's liberalisation by drawing on rights-based and moral arguments. Finally, the article analyses potential issues with the Act, arguing that not enough has been done to ensure that pregnant people have proper access to abortion services by including a gestational limit, failing to introduce safe zones, and not properly addressing access issues for rural dwellers and Māori. Overall we in Aotearoa New Zealand should not consider the debate surrounding abortion and its liberalisation completely resolved.

I INTRODUCTION

The 24th of March 2020 marked a historic day for New Zealanders,[1] as the Abortion Legislation Bill passed through Parliament and was given royal assent, ending a fight for the liberalisation of abortion regulation. With 18 per cent of all pregnancies in Aotearoa being terminated and 25 per cent of people who can get pregnant having had an abortion in their lifetime, abortion is an unavoidable necessity.[2] Prior to 24 March 2020, in order to get an abortion, New Zealanders were required to meet very narrow criteria. If the individual could not meet said criteria, doctors would refuse to provide treatment as they would otherwise be committing a crime with a maximum sentence of 14 years' imprisonment. This was because the approach to abortions prior to the Abortion Legislation Bill treated the procurement of an abortion as a criminal

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1 I generally use "pregnant people" in this article because abortion can be of concern to women, trans men or non-binary individuals. There are however references to "women" in original quotations.

2 *Report of the Abortion Supervisory Committee* (Annual Report, 2018).

activity.[3] That approach was enshrined in legislation which was enacted during the 1970s:[4]

> It was a time when the law supported a man's right to sex with his wife regardless of whether she wanted it or not, a time when men were also legally sanctioned to administer moderate physical correction to their wives.

Now, following this long overdue change, there is free access to an abortion up to 20 weeks' gestation. This change represents a monumental shift in the way that we respect reproductive freedom and choice in Aotearoa. While the passing of the Bill is a welcome relief, an important question still remains: has it gone far enough and is the battle truly over? The reform is intended to improve access to abortion services, although it is yet to be shown if this will be the case. This article argues that discussions around abortion liberalisation are not over and that there are still issues with the reformed law. Not enough has been done to ensure that people have proper access to abortion services, and the gestational limit of 20 weeks may pose an unnecessary limitation.

II THE PRECEDING LAW

Prior to the 2020 reform, abortions were regulated by the Crimes Act 1961 (CA) and the Contraception, Sterilisation, and Abortion Act 1977 (CSAA). Under s 183 of the CA, it was an offence to unlawfully administer a drug, to use an instrument, or to use any other means "with intent to procure the miscarriage of any woman or girl". However, an exception to this offence was if two certifying consultants were of the opinion that the abortion came within one of the grounds listed in the CA. If the person's pregnancy was under 20 weeks, these grounds included:[5]

i) "if continuing the pregnancy would result in serious danger [...] to the life, physical health or mental health of the woman";

ii) any form of incest;

iii) mental sub-normality of the pregnant person; and

3 Crimes Act 1961, s 183 [CA].
4 (8 August 2019) 740 NZPD (Abortion Legislation Bill – First Reading, Jan Logie).
5 CA, s 187A(1).

iv) if there were a substantial risk that the child, if born, would be "so physically or mentally abnormal as to be seriously handicapped".

Other factors which were not grounds, but which could be accounted for were the extremes of age and sexual violation.[6] Then after 20 weeks, the grounds on which a pregnancy could be aborted were only if the abortion was required to:[7]

i) save the life of the mother or girl; or

ii) prevent serious permanent injury to their physical or mental health.

The process that was required to authorise the abortion, either before 20 weeks or afterwards, was then laid out in the CSAA. A person could request an abortion from their doctor and if the doctor believed a ground may apply, they could propose to perform the abortion themselves if authorised under the Act,[8] or refer the person "to another medical practitioner […] who may be willing to perform [the] abortion".[9] The abortion then had to be carried out at a licensed institution,[10] by an "operating surgeon" pursuant to a certificate issued by two "certifying consultants" who authorised the procedure.[11]

Once the decision of a certifying consultant was made to authorise or not authorise a procedure, it could not be reviewed by the Abortion Supervisory Committee (ASC), a supervisory committee established by the CSAA. This was because "to do this would be to engage in a process of attempting to review the clinical judgement of the consultant in an individual case".[12] No doctor was required to consent or assist with an abortion if they had a conscientious objection, even if one of the grounds for an abortion existed.[13] Such an objection also permitted a doctor to

6 Section 187A(2).
7 Section 187A(3).
8 Contraception, Sterilisation, and Abortion Act 1977, s 32(2)(b) [CSAA].
9 Section 32(2)(a).
10 There are "full" and "limited" licenses, the first of which allow abortions to be performed at any point during pregnancy, and the latter within the first 12 weeks only.
11 CSAA, s 29. Failure to follow this procedure is otherwise an offence under s 37(1) as well as the CA. There is an exception under s 37(2) if immediate action is necessary to save the life of the patient or prevent serious permanent injury to one's physical or mental health.
12 *Right To Life New Zealand Inc v The Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762 at [40] [*Right to Life New Zealand*].
13 CSAA, s 46.

refuse to organise for a case to be considered by certifying consultants, which was otherwise required by the CSAA.[14]

When considering how this law was applied in practice, the most striking statistics are those that detail which of the grounds were used to authorise abortions. In 2017, 97.3 per cent of all abortions were granted on the basis of danger to mental health, with 0.7 per cent on the basis of danger to both mental and physical health, 0.8 per cent on the basis of danger to mental health and having a child with a severe disability, and a negligible few on the basis of danger to both mental health and life.[15] This means that, overall, around 98.9 per cent of all abortions carried out in New Zealand employed danger to the mental health of the person seeking an abortion as a justifying ground. This high percentage demonstrates the disconnect that existed between the law and abortion practice: clinicians were enabling access to abortion on the basis of a general — and allegedly liberal — application of the mental health ground.

While it is arguably logical for certifying consultants to conclude that forcing a person to have an unwanted pregnancy would be likely to seriously endanger their mental health, to the extent such an approach may have been employed, it did not go without scrutiny. In the High Court decision *Right To Life New Zealand Inc v The Abortion Supervisory Committee*, Miller J commented that the high percentage of people receiving abortions based on mental health grounds suggested certifying consultants were employing the ground in a much more "liberal fashion than the legislature intended".[16] Despite the Court of Appeal noting that this comment was outside the scope of the issues before the Court, as it is not for a court to examine the legality of individual instances or "address in any effective way the systemic issues that are properly the concern of the Committee",[17] it is important to note that such scrutiny has been applied. Furthermore, in 2005 the ASC noted that the "wording [of the Act came] to have a de facto liberal interpretation" and was not "working as originally intended".[18]

14 *Hallagan v Medical Council of New Zealand* HC Wellington CIV-2010-485-222, 2 December 2010 at [20].
15 *Report of the Abortion Supervisory Committee*, above n 2, at 21.
16 *Right To Life New Zealand*, above n 12, at [135].
17 *Right To Life New Zealand Inc v The Abortion Supervisory Committee* [2011] NZCA 246 at [213].
18 At [50]–[52].

Despite an allegedly liberal approach being taken to the CA and CSAA, pregnant people continued to face limited access to abortions. In 2013 to 2017, certifying consultants found 1309 requests for abortion were not justified under the CA grounds and were therefore rejected.[19] This statistic does not account for situations where a general practitioner failed to refer a person because of a conscientious objection or otherwise unlawfully refused, both of which impact access. In 2017, two women who discovered they were pregnant at 18 weeks were denied a referral to a certifying consultant on the basis their pregnancies were "too advanced", despite not yet being 20 weeks pregnant when services were sought.[20]

Furthermore, the ASC noted the provision of safe and legal abortions was inconsistent throughout the country, with some areas not having any service providers.[21] While the ASC recommended that people should not have to travel more than two hours to receive an abortion,[22] there is no evidence this recommendation was realised. As of 20 June 2018, there were only 168 certifying consultants across the country[23] and in 2010, the average time between first contact with the health system and the date of termination was estimated to be 24.9 days.[24]

III TIDES OF CHANGE

The legal framework established through the CA and CSAA has been readily criticised, and the fight for liberalisation was a long and tough one. There were a range of different factors which instigated reform. The first being that the law was outdated, and it no longer aligned with modern healthcare practices.[25] The liberal interpretation was at times uncertain,[26] which is contrary to the rule of law as valid and effective law should, where possible, be predictable,

19 "Abortions Denied and Grounds Official Information Act Request" (27 August 2017) at 2 (Obtained under Official Information Act 1982 Request to the Abortion Supervisory Committee).

20 Susan Strongman "No Choice: When a legal abortion is denied" *The New Zealand Herald* (online ed, 19 September 2017) and Sarah Harris "Denied abortion: Woman discovers pregnancy at 4 months, 2 weeks" *The New Zealand Herald* (online ed, 15 October 2017).

21 In Counties Manukau there are no providers and Tāmaki Makaurau Auckland only has one main public service: *Report of the Abortion Supervisory Committee* (Annual Report, 2017) at 5.

22 At 12.

23 *Report of the Abortion Supervisory Committee*, above n 2, at 29.

24 Silva Martha, Rob McNeill and Toni Ashton "Ladies in waiting: the timeliness of first trimester services in New Zealand" (2010) 7(1) Reproductive Health 19 at 5.

25 *Report of the Abortion Supervisory Committee*, above n 2, at 4.

26 *Right To Life New Zealand*, above n 12, at [51].

non-arbitrary and clear.[27] Furthermore, as the ASC has pointed out, even the language in the law was outdated. The statute referred to doctors as "he", used terms such as "woman's own doctor", ignored specialised services such as Family Planning, and referred to "severely subnormal" women which is derogatory and inappropriate.[28]

Another driver for reform was international influence. Aotearoa's abortion law was amongst the eight most restrictive abortion regulation frameworks in the developed world.[29] Many other countries were taking steps to liberalise abortion law. Since 2000, Switzerland, Australia and Ireland, amongst 25 other countries, have moved to broaden their criteria for what constitutes a legal abortion.[30] A report by the United Nations Department of Economic and Social Affairs noted that in 2013, more than one third of member states permitted abortions for economic or social reasons, while another 30 per cent allowed abortions upon request, an increase from 24 per cent in 1996.[31] Furthermore, in 2012, the United Nations Committee on the Convention on the Elimination of All Forms of Discrimination Against Women suggested New Zealand's approach made "women dependent on the benevolent interpretation of a rule which nullifies their autonomy" and noted criminalisation leads to pregnant people seeking "illegal abortions, which are often unsafe".[32] In 2019, a Universal Periodic Review by the United Nations Human Rights Council considered New Zealand's human rights record and compared this to international human rights treaties and standards. During the review, a number of member states recommended that New Zealand remove abortion from the CA and address abortion as a health issue.[33]

A final element supporting abortion reform was public opinion. At the time of the 2017 election, poll results showed a majority of New Zealanders

27 The Rt Hon Lord Thomas Bingham "The Rule of Law" (Sixth Sir David Williams Lecture, Centre for Public Law, 16 November 2006).

28 *Report of the Abortion Supervisory Committee* (Annual Report, 2016) at 4.

29 The Guttmacher Institute, a research organisation that investigates sexual and reproductive health, characterised international approaches to abortion law into six categories, one being the least restrictive and six the most. New Zealand fell into category four: Susheela Singh and others *Abortion Worldwide 2017: Uneven Progress and Unequal Access* (Guttmacher Institute, New York, 2018) at 14–21.

30 At 18.

31 United Nations Department of Economic and Social Affairs Population Division *Abortion Policies and Reproductive Health around the World* ST/ESA/SER.A/343 (2014) at 6.

32 Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women* CEDAW/C/NZL/CO/7 (27 July 2012) at 9.

33 *Human Rights Council Working Group on the Universal Periodic Review* 32nd Session UN Doc A/HRC/WG.6/32/NZL/3 (21 January 2019) at 8.

supported the right to access abortion on request.[34] This was also shown in a 2017 survey conducted by the New Zealand Election Study where 63.3 per cent of New Zealanders disagreed with the statement "abortion is always wrong", an increase from 55.4 per cent in 2008.[35] Then in 2019 a study published in the New Zealand Medical Journal involving 20,000 participants showed a majority of those surveyed either strongly agreed, or agreed, that abortion should be legal, regardless of the reason.[36] They concluded that legislative reform would be well received by the public.[37]

IV THE ABORTION LEGISLATION BILL

Following such reports and international recommendations, during the 2017 election campaign leader of the Labour party, Jacinda Ardern, declared her intention to decriminalise abortion should Labour be elected.[38] After the Labour coalition government was established, Andrew Little, Minister of Justice, requested that the Law Commission consider options for reform.[39] This led to a significant increase in debate surrounding the issue and, more importantly, to the eventual introduction of the Abortion Legislation Bill to Parliament in August 2019.

The Bill proposed removal of any statutory test for a person who is under 20 weeks pregnant.[40] Then, for a person over 20 weeks pregnant (referred to as the gestational limit), the Bill required the health practitioner to reasonably believe the abortion is "appropriate with regard to the pregnant woman's physical health, mental health, and well-being".[41] It also proposed other important changes such as: allowing any qualified health practitioner to provide the service;[42] requiring health practitioners to advise people of the availability of counselling services without making such services mandatory;[43]

34 Abortion Law Reform Association of New Zealand "Labour Party Supports Decriminalisation of Abortion" *Scoop* (online ed, 4 September 2017).

35 *New Zealand Election Study* (19 August 2019) <www.nzes.org>.

36 Yanshu Huang, Danny Osborne and Chris G Sibley "Sociodemographic factors associated with attitudes towards abortion in New Zealand" (2019) 1497 NZMJ 9 at 13.

37 At 18.

38 Eleanor Ainge Roy "New Zealand election: Jacinda Ardern pledges to decriminalise abortion" *The Guardian* (online ed, 5 September 2017).

39 Ken Orr "Abortion a justice issue, not a health issue" *The Gisborne Herald* (online ed, 11 April 2018).

40 Abortion Legislation Bill 2019 (164–3), cl 7 (s 10, CSAA) [Abortion Legislation Bill].

41 Clause 7 (s 11, CSAA).

42 Clause 7 (ss 2, 10 and 11, CSAA).

43 Clause 7 (s 13, CSAA). The Minister of Health is required to ensure the availability of counselling services for abortion when entering into Crown funding agreements, as per s 7 (s 20A, CSAA).

allowing people to self-refer to an abortion service provider rather than requiring referral from their primary healthcare provider;[44] no longer requiring services to be provided at a licensed institution;[45] and disbanding the ASC. [46]

There were also two controversial proposals which garnered much debate. These were first, that the Bill created a case-by-case regulation-making power for the Minister of Health to establish "safe areas" around abortion facilities[47] and second, that the Bill would require conscientious objectors to inform pregnant people about their objection at the earliest opportunity so that they could obtain services elsewhere.[48]

Despite these changes the Bill still retained important protective measures such as the criminal offence for persons other than health practitioners who attempt to procure an abortion for a pregnant person or supply the means, and the criminal offence of killing an unborn child for anyone who causes harm to a pregnant person and in doing so causes the death of a fetus.[49]

V THE NEW REGIME

The Bill was treated as a conscience issue in the House with members voting based on personal beliefs. On 18 March 2020, the Bill passed through the House of Representatives and abortion was decriminalised in Aotearoa through the Abortion Legislation Act 2020.

The Act was passed with several amendments. First, the safe zone provisions were removed. Secondly, the conscientious objection provision was amended to ensure providers inform a pregnant person how to access the contact details of another person who is their "closest provider" rather than the contact details of any service provider. Finally, an obligation was placed on the Minister of Health to ensure that access to emergency contraception is available throughout Aotearoa within 48 hours of it being requested by any person. All changes made to the Bill have been implemented through amendments to the

44 Clause 7 (s 14, CSAA).
45 Achieved by replacing ss 10 and 11 of the CSAA and repealing ss 24 and 25.
46 Abortion Legislation Bill, cl 17 (Sch 1, Pt 1, s 2 CSAA).
47 Abortion Legislation Bill 2019 (164–1), cl 7 (proposed s 17, CSAA). In such safe areas it would be prohibited to intimidate, interfere with or obstruct a person with the intention of preventing that person or being reckless as to whether they are prevented from accessing abortion services, seeking advice on such services or providing such services, as per cl 7 (proposed s 15, CSAA).
48 Abortion Legislation Bill 2019 (164–1), cl 7 (proposed s 19, CSAA).
49 Abortion Legislation Bill, cl 12 (s 183, CA).

CSAA, CA and the Health Practitioners Competence Assurance Act 2003. Overall, many saw these changes in the law as a welcome reform.

VI WHY THIS CHANGE IS A STEP IN THE RIGHT DIRECTION

Liberal approaches to abortion law are most commonly and often most convincingly argued for from a rights-based perspective. However, there are also strong moral arguments in support. In this section I consider all of these when assessing why the reform is a step in the right direction.

A A rights-based approach

Often, the most common discourse in the abortion debate focuses on the enforceable rights of the pregnant person and the unborn child. Such an approach has been used by overseas jurisdictions with entrenched rights instruments that liberalise abortion law. The United States Supreme Court in *Roe v Wade* determined that, at least in the early stages of pregnancy, there is a right to access abortion on the basis of a "right to privacy" arising from the constitution. Such a right to privacy protects a person's decision to terminate a pregnancy.[50] The same was determined in Canada in *R v Morgentaler* where it was held that the right to privacy, arising from the right to security of person provided for in the Canadian Charter of Rights and Freedoms, related to the ability to make important decisions about one's own life and to have bodily autonomy.[51]

In comparison, New Zealand lacks an entrenched rights framework. Courts are limited to issuing a declaration that legislation is inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA).[52] The courts have also held that there is no specific right to abortion under the NZBORA because, unlike the other jurisdictions discussed above, the NZBORA has no guarantee to liberty and security of person.[53] Despite this, abortion can be considered part of a suite of moral, if not legal, reproductive rights. For example, the Privacy Commissioner submitted to the Law Commission, when they were considering the options available for reform, that the existing law was

50 *Roe v Wade* 410 US 113 (1973) at 113 and 153.
51 *R v Morgentaler* [1998] 1 SCR 30 (SCC).
52 *Attorney-General v Taylor* [2018] NZSC 104.
53 *Right to Life New Zealand*, above n 12, at [98]. This issue was not addressed on appeal, but the Supreme Court at [64] did commend the High Court's comments.

"inadequate to protect women seeking to exercise a choice relating to their own reproductive rights".[54]

Despite the CSAA stating in its long title that full regard should be had to the "rights of the unborn child", it is judicially established a fetus has no enforceable legal rights as it is not a legal person[55] and New Zealand generally adheres to the "born alive" rule.[56] This is consistent with the approaches taken in Canada[57] and the United States.[58] English and Canadian courts have even gone so far as to claim the fetus has no rights which prevail over the pregnant person's because the fetus and its mother cannot be considered separate legal people.[59] Furthermore, Crown Law considered the Bill and concluded decriminalising abortion does not engage the right not to be deprived of life under s 8 of the NZBORA as a fetus has no enforceable rights.[60]

Having said this, it is challenging to argue a fetus has no interests whatsoever. This sentiment is currently alluded to in legislation. In *Wall v Livingston*, Woodhouse P noted the CSAA prescribed specific precautionary requirements to balance the "deep philosophical, moral and social attitudes" which existed when the original legislation was drafted.[61] Furthermore, in *Right to Life New Zealand Inc v Rothwell,* Wild J concluded that it was not untenable for the plaintiff to argue that the unborn child had some rights enforceable at law. Primarily, a fetus has the right to be born unless the mother's pregnancy is terminated in accordance with the provisions of the CSAA.[62] Fetal life is not entirely inconsequential and therefore, when making a rights-based assessment,

54 Law Commission *Alternative Approaches to Abortion Law* (NZLC MB4, 2018) at 54.

55 *Wall v Livingston* [1982] 1 NZLR 734 (CA) at 737, *Harrild v Director of Proceedings* [2003] 3 NZLR 289 (CA) and *Right to Life New Zealand*, above n 12, at [1].

56 *Right to Life New Zealand*, above n 12, at [81]. The born alive rule is a well-established common law principle which provides that a fetus is not a legal person. In other words, a fetus has no status to bring a claim and thus has no enforceable rights before birth.

57 Canadian Charter of Rights and Freedoms, art 7, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK). Discussed in *Tremblay v Daigle* [1989] 2 SCR 530 (SCC).

58 Concerning the United States Constitution, amend XIV, § 1. Discussed in *Roe v Wade*, above n 50, at 158.

59 This is in the context of the right to decline treatment, see *St George's Healthcare NHS Trust v S* [1999] Fam 26 (EWCA) and *Winnipeg Child & Family Services (Northwest Area) v G* [1997] 3 SCR 925 (SCC).

60 Matt McKillop *Abortion Legislation Bill — consistency with New Zealand Bill of Rights Act 1990* (Crown Law, ATT395/294, 1 August 2019) at 14.

61 *Wall v Livingston,* above n 55, at 737.

62 *Right to Life New Zealand Inc v Rothwell* HC Wellington CIV 2005-485-999, 11 October 2005 at [46].

moral arguments impact the discussion and fetal interests must be considered to some extent.[63]

International obligations also suggest permissive reform is more rights consistent. The Beijing Declaration and Platform for Action, to which New Zealand is a signatory, noted that women's ability to control their own fertility is an important basis for the enjoyment of other rights and includes the "right to make decisions concerning reproduction free of discrimination, coercion and violence".[64] Furthermore, the United Nations Special Rapporteur on the Right to Health notes criminal laws which penalise and restrict abortions are "paradigmatic examples of impermissible barriers to the realisation of women's right to health and must be eliminated".[65]

Alternative rights can also be advanced in the New Zealand context to justify a pro-choice stance. For example, last year six women and the Abortion Law Reform Association of New Zealand (ALRANZ) complained to the Human Rights Commission alleging abortion law was inconsistent with s 19 of the NZBORA, freedom from discrimination. The Human Rights Act 1993 includes sex and pregnancy as grounds for discrimination.[66] ALRANZ alleged the law was discriminatory as pregnant people seeking healthcare received demonstrably worse treatment than others seeking healthcare: no other individual was required to seek approval from certifying consultants; could be denied healthcare because their reasons were not those listed in the CA; was forced to lie to doctors about their mental health status; was subject to arbitrary and unpredictable withholding of healthcare; or was subject to possible refusal of services because of the provider's conscience with no warning or recourse.[67]

Leaving the choice of whether to terminate a pregnancy with the pregnant person better upholds personhood, reproductive justice and bodily autonomy, even if such rights do not explicitly exist in the NZBORA. The new regime's

63 The issue of fetal rights is worth discussing for moral reasons but is beyond the scope of this article. This article is predicated on the assumption that the fetus has interests which should be taken into account to some extent, but not enforceable rights at law.

64 United Nation's Fourth World Conference on Women *The Beijing Declaration and Platform for Action* A/CONF.177/20 (1995) at [94]–[95].

65 Special Rapporteur of the Human Rights Council *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health* A/66/254 (2011) at [21].

66 Human Rights Act 1993, s 21(a).

67 Abortion Law Reform Association of New Zealand "ALRANZ's Complaint to the Human Rights Commission" (26 August 2019) ALRANZ Abortion Rights Aotearoa <www.alranz.org>.

permissive approach better maintains this right to choose and upholds international obligations.

B Critiques of a rights-based approach

While a rights-based approach effectively justifies liberalisation, there are valid critiques of such an approach. Many suggest that rights talk should be rejected in favour of other forms of discourse. Rights theory is criticised as there can be bias in the individualistic rights which tend to be protected.[68] Moreover, rights-based discussions can be excessively adversarial when protagonists take binary and absolute positions.[69] As can be seen by the cases already cited, this prevents nuanced debate as to what good policy should look like and results in litigation which demands only one winner. Beiner discusses this specifically in the context of abortion. He suggests abortion debate cannot focus on the competing rights of the pregnant person and fetus as the decision of who should succeed is left to be determined by the interaction of opposing lawyers and the courts who are not equipped to do so.[70] To credit one right is to automatically impugn the other and if a right can be discredited then it may not be a right at all, giving such discourse an "absolutist and sometimes even fanatical character".[71] A rights-based argument is unavoidably based on moral conceptions of good, and Beiner argues that using the label of rights merely gives a valid and definite gloss to moral arguments.[72] The alternative is to approach discourse from a moral and political angle to allow transparent debate which accounts for the welfare of all. Mackenzie articulates a similar point of view. She suggests rights-based debate misrepresents the nature of abortion decisions, ignoring the connection between the pregnant person and fetus and the reasons why the right to choose is vital for bodily autonomy.[73] In agreement with these critics, my view is that New Zealand's process is a preferable approach: where the courts do not determine the law through an exclusively rights-based approach, but rather where reform is a matter of policy

68 Morton Horwitz "Rights" (1988) 23 Harv Civ R/Civ Lib L Rev 393 at 399–400.

69 Tom Campbell *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (Routledge & Kegan Paul, Boston, 1983).

70 Ronald Beiner *What's the matter with Liberalism* (University of California Press, Berkeley, 1992) at 84 and 96.

71 At 84 and 86.

72 At 82–83.

73 Catriona Mackenzie "Abortion and embodiment" (1992) 70(2) Australasian Journal of Philosophy 136 at 137.

for Parliament to debate. It allows for clinical input and public contribution where the moral nuances impacting the rights involved can be considered.

C Philosophical and moral perspectives

For more nuanced discussion, moral and deontological arguments should be considered. While these are not entirely disconnected from rights-based discussions, they combat some of the issues with purely rights-based approaches. There are several formulations of these arguments which focus on: the fetus; the pregnant person; the connection between the pregnant person and the fetus; or the importance of choice. I address these in turn.

The main argument of the pro-life movement centres on three core propositions: that it is wrong to kill innocent humans, that the fetus is an innocent human being, and therefore abortions are unjust, and the law should prohibit the killing of a fetus.[74]

This view is criticised by those who do not accept that a fetus has personhood. An early formulation of this criticism came from philosopher Mary Anne Warren. She argued that in order to be a person, one must have consciousness, reasoning, be able to undergo self-motivated activity, communicate and have self-awareness. Although all are not required, if only one exists that being cannot be considered a person.[75] A fetus has, at most, one of these requirements: consciousness. Moreover, this is only gained once the fetus becomes sentient, the time of which is subject to debate.[76] Warren also clarifies that while infants also only have consciousness, this theory does not condone infanticide. She outlines that infanticide is not generally permissible as after birth there is no conflict between the infant's and pregnant person's rights because the fetus is no longer physically reliant on the pregnant person and people would be willing to adopt the child.[77]

A common pro-life response to this is the natural capacities view. This states there is no need to have the capacities Warren identifies, instead one

74 Mary Anne Warren "On the Moral and Legal Status of Abortion" (1973) 57(1) Monist 43 at 44.

75 At 55.

76 Royal College of Obstetricians and Gynaecologists Working Group *Fetal Awareness Review of Research and Recommendations for Practice* (RCOG Press, March 2010); Stuart WG Derbyshire "Can fetuses feel pain?" (2006) 332(7546) BMJ 909; and Susan Lee and others "Fetal pain: a systematic multidisciplinary review of the evidence" (2005) 294 JAMA 947.

77 Mary Anne Warren "Postscript on Infanticide" (1982) in Joel Feinberg (ed) *The Problem of Abortion* (Wadsworth, Belmont, 1984). I do not necessarily agree with this position regarding adoption. This is discussed further in Part VII(C).

just requires a natural capacity to develop these qualities in order to be considered a person. Consequently, an embryo is a person from conception.[78] This is similar to the argument that abortion is wrong because it deprives the fetus of a valuable future.[79] However, this too liberally grants human status.[80] Without consciousness of personal identity, a fetus does not have an interest in its future.[81] In my view, conscious personal identity is not developed at least until viability. This is the position adopted in the regulatory framework with the 20-week gestational limit.[82] Moreover, such pro-life arguments are also undermined when pro-lifers agree that abortion is appropriate when the mother's life is at risk and in cases of rape and incest. [83]

The moral approach to the fetus ingrained in the common law through the born alive rule is that new-born infants are distinguished from fetuses as fetuses are presumed dead until born.[84] "Personhood" only crystalises at birth. This is largely justified by the fact that "legal complexities and difficult moral judgments would arise if the courts were to […] treat the foetus as a legal person"[85] and the fetus can, in any case, be protected through statute.[86] However, it is helpful in identifying the distinction that exists between a fetus and new-born infant.

Moral arguments justifying abortion become much stronger once the focus moves from merely considering the fetus. The moral approach contends that even if the embryo can be considered to have interests, an abortion can still be morally justified when considering the mother's interests. The mother's interests cannot be ignored as a fetus is unavoidably linked to its mother. Thompson argues, for example, that the right to life and the moral importance of life is not to never be killed, but rather, not to be killed unjustly.[87] Thompson makes this point through the use of a thought experiment comparing pregnancy

78 Germain Grisez *Abortion: The Myths, the Realities, and the Arguments* (Corpus Books, New York, 1970); Stephen Schwarz *The Moral Question of Abortion* (Loyola University Press, Chicago, 1990); and Patrick Lee and Robert George "The Wrong of Abortion" in Andrew Cohen and Christopher Wellman (ed) *Contemporary Debates in Applied Ethics* (Blackwell, Oxford, 2005) 13.

79 Don Marquis "Why Abortion Is Immoral" 86(4) Journal of Philosophy (1989) 183.

80 Jeff McMahan *The Ethics of Killing* (Oxford University Press, New York, 2002) at 257–256; Peter Singer *Practical Ethics* (2nd ed, Cambridge University, Cambridge, 1993) at 149–150.

81 McMahan, above n 80, at 271.

82 My position with regards to this gestational limit is discussed in more detail in Part VII.

83 Ronald Dworkin *Life's Dominion* (Harper Collins, London, 1993) at 32.

84 *Harrild v Director of Proceedings*, above n 55; and CA, s 159.

85 At [117] per McGrath J.

86 At [118]. The exception to the born alive rule is found in the CA, s 182.

87 Judith Jarvis Thompson "A Defense of Abortion" (1971) 1(1) Philosophy and Public Affairs 47 at 57.

to waking up plugged into a violinist with failing kidneys who will die if you unplug yourself from them at a point sooner than nine months. She argues that when you wake up next to a violinist who you are connected to and who you are keeping alive, it is morally permissible to unplug yourself from the violinist even if it will kill them and even if after nine months of being connected, they would live. This is because the right to life does not entail the right to use another person's body. Therefore, in disconnecting from the violinist you do not violate their right to life, you merely deprive them of the use of your body, something they had no right to. This makes the point that the fetus, while it may have a right to life, does not have a right to the pregnant person's body against their will.[88] While there are morally relevant disanalogies between the violinist scenario and typical cases of abortion, such as the fact that most pregnant people are causally responsible for their circumstance unlike in the violinist example, Thompson's theory was important in changing the way the morality of abortion was considered. It shifted the focus from considering the rights of the fetus, to the connection between the fetus and the pregnant person.

MacKinnon built on this, but produced an alternative articulation of the connection between the mother and fetus, suggesting they are more unavoidably connected. She argued the experience of many pregnant people is that the fetus is more than a body part, but still much less than a human: [89]

> It "is" the pregnant woman in the sense that it is in her and of her and is hers more than anyone's. It "is not" her in the sense that she is not all that is there.

MacKinnon is convincing in outlining that this intricate and intimate connection means the interests of the fetus can never be considered without considering the interests of the pregnant person.

In a similar vein, and reformulating Thompson's analogy, Ross argues that the issue with the violinist analogy is that the violinist is a complete stranger whereas the fetus, if left to develop, will not be.[90] The continuing burden of raising the child is therefore not accounted for in Thompson's analogy, and should be. Mackenzie mirrors this sentiment in arguing that assuming

88 At 56–57.

89 Catharine MacKinnon "Reflections on Sex Equality Under Law" (1991) 100 Yale LJ 1281 at 1316.

90 Steven Ross "Abortion and the Death of the Foetus" (1982) 11 Philosophy and Public Affairs 232 at 235–238.

responsibility for falling pregnant is not the same as accepting parental responsibility.[91] Overall, these arguments suggest a pregnant person should be able to choose whether to terminate their pregnancy as they are most affected, and pregnancy does not equate to accepting parental responsibility.

A pro-life view which considers the embodied experience of pregnancy is that the development of the fetus is a natural process and to disrupt it would be immoral.[92] However, this conservative criticism ignores the important role the pregnant person plays in pregnancy. As Coleman outlines, the natural process approach grants unwarranted moral significance to the development of the fetus. He claims many medical procedures are interruptions of some kind of natural disease process and sometimes it is appropriate to interrupt such processes even if they are morally significant.[93]

The final moral approach justifying abortion focuses on pregnant people's interests and is premised on a feminist approach. For example, MacKinnon argues that if women were truly equal to men, then the current political status of the fetus would be different. She claims that because women are sexually subordinate, the fetus is not seen as the woman's own creation. Rather, it is something imposed on a pregnant person that they have a duty to care for. If seen differently, it would be for the pregnant person to decide whether to terminate, as the pregnancy is something they have created.[94] A paternalistic and restrictive approach, however, maintains this subordination and ensures male control over women's reproductive lives. While this may ignore the function of the father to some extent and is ambivalent about the complex character of pregnant people's attitudes towards their fetus,[95] it adds a useful dimension to the debate.

The pro-life position can also be framed by the argument that restricting abortions protects women. However, this argument contends that abortions involve significant trauma and regret, whereas motherhood involves joy and fulfilment. This does not accord with reality and the psychological risks of abortion are commonly overstated.[96] Studies do not support the claim that

91 Mackenzie, above n 73, at 142.
92 Dave Wendler "Understanding the 'Conservative' View on Abortion" (1999) 13 Bioethics 32 at 38–39.
93 Stephen Coleman *The Ethics of Artificial Uteruses: Implications for Reproduction and Abortion* (Ashgate, England, 2004) at 98.
94 MacKinnon, above n 89, at 1326.
95 Dworkin, above n 83, at 56.
96 Emily Jackson *Regulating Reproduction: Law, Technology and Autonomy* (Hart, Portland Oregon, 2001) at 75.

abortions have a devastating impact on mental health. It is even suggested that permitting abortions allows for better mental health outcomes than denial.[97] Furthermore, arguably this misconstrues what it means to be pregnant by suggesting the choice to terminate a pregnancy is disturbing and painful, whereas the choice not to terminate is straightforward and faultless. Foster and Jivan argue that in reality, pregnancy can be invasive, onerous, challenging and painful, and is associated with enduring responsibilities.[98]

Overall, a feminist approach to justifying abortion rests on the importance of choice. West discusses how pregnant people view their responsibilities regarding this choice. She argues pregnant people will make their decision based on what they see as responsible.[99] So while allowing pregnant people to choose rejects the view that the fetus is a person, it still accounts for fetal interests as these interests will be considered when a pregnant person makes a responsible decision. West's perspective is supported by research showing that many pregnant people characteristically consider moral issues differently from men, focussing less on abstract moral principles and more on their responsibility to care for others, and to prevent hurt and pain.[100] Such a focus on responsibility can justify both the decision to terminate a pregnancy and the decision not to. One pregnant person may choose to terminate because to have a child which they could not properly care for would be irresponsible, whereas another may find abortion to be irresponsible despite this.[101] This shows the decision is not a unique problem separated from other considerations, but rather a paramount example of a decision inextricably linked to personal views on the value of life and meaning of death. MacKinnon reiterates this point by explaining "reproduction in the lives of women is a far larger and more diverse experience than the focus on abortion has permitted".[102]

The above provides a summary of the key moral arguments relating to abortion. The common thread to all arguments justifying a person's entitlement

97 M Antonia Biggs and others "Women's Mental Health and Well-being 5 years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study" (2017) 74(2) JAMA Psychiatry 169.

98 Christine Foster and Vedna Jivan "Abortion Law in New South Wales: Shifting from Criminalisation to the Recognition of Reproductive Rights of Women and Girls" (2017) 24 Journal of Law and Medicine 850 at 856.

99 Robin West "Taking Freedom Seriously" (1990) 104 Harv L Rev 43 at 84–85.

100 Carol Gilligan *In a Different Voice: psychological theory and women's development* (Harvard University Press, Massachusetts, 1993) at 105.

101 At 73–103.

102 MacKinnon, above n 89, at 1318.

to receive an abortion is that an individual's choice cannot be ignored. It is my opinion that the most convincing argument is made by Furedi. She outlines that in today's society, where fertile people are having sex without wanting a child, abortions are inevitable.[103] Since moral disagreement is also inevitable, the most moral regime would be to prioritise the choice of the pregnant person as they are the only individual equipped with the proper understanding of their circumstances to reach a personally appropriate decision. Many of the arguments discussed are predicated on the fact that our ability to make decisions for ourselves is a precondition of being human. Furedi argues, and I agree, that to deny a pregnant person reproductive choice denies their moral agency and therefore their humanity.[104] To ignore the wishes of pregnant people and to make decisions for them by limiting their reproductive choices ignores the fact that pregnant people are human beings capable of making complex decisions, that hugely impact their own lives, for themselves. The newly developed line of argument is not about being pro-abortion, but pro-choice.

D A liberal approach can be justified

Overall, the decision to terminate a pregnancy will be a considered choice for many pregnant people and a choice which is morally justified no matter their conclusion. For example, one person may be making the decision in order to attend school or work, or another because they are in a bad relationship. Some may consider this to be selfish and morally wrong, whereas other pregnant people may consider any other decision to be a serious moral mistake. Both are personal positions which are individually justified, and universal moral agreement on this topic is unlikely. Therefore, pregnant people's personhood is best recognised through their empowerment to make decisions for themselves, giving effect to their personal moral positions. This position also better upholds rights to health, reproductive independence, autonomy and freedom from discrimination. Rights which ought to be respected in Aotearoa, as they are internationally. New Zealand's reform is effective as it does not rely solely on rights-based arguments and has allowed for nuanced debate that has included moral considerations.

103 Ann Furedi *The Moral Case for Abortion* (Palgrave Macmillan, London, 2016) at 9–10.
104 At 77.

VII DOES THE REFORM GO FAR ENOUGH?

Despite the welcome reform, the question still remains: does decriminalisation of abortion in Aotearoa go far enough?

The approach taken by the reform is not complete legalisation, but medicalisation: after the 20-week gestational limit the decision-making power is held by health practitioners. Specifically, after 20 weeks, a medical practitioner can only terminate a pregnancy if the "practitioner reasonably believes that the abortion is clinically appropriate in the circumstances".[105] In order to determine what is "appropriate" the "practitioner must have regard to the pregnant woman's physical health, mental health and overall well-being".[106] Overall, it removes the person's ability to choose and shifts the decision-making authority to the medical practitioner, effectively medicalising abortions after 20 weeks. While a medical model is an improvement on New Zealand's earlier criminal model, there are several outstanding issues, as follows.

A Issues with a medical model

Medicalisation is a paternalistic regime where pregnant people are deemed incapable of making the "correct" choice, requiring the intervention of a medical practitioner.[107] A medical model entrenches the perspective that pregnant people are unable to make decisions by deferring to a medical authority (for abortions after 20 weeks).[108] This is problematic for two reasons. First, a medical model assumes that doctors are capable of making better decisions than the pregnant person about what is "appropriate". While it is inevitable medical considerations will be relevant to a pregnant person's decision, it does not mean they should control the outcome. Whether to undergo an abortion is unavoidably associated with a range of social issues, and treating it as a medical decision marginalises important non-medical considerations.[109] It is these considerations that are most significant in practice when considering whether to terminate a pregnancy, as shown by the fact that the most common justification for an abortion is mental health.[110] Medical practitioners are

105 Abortion Legislation Bill, cl 7 (s 11(1), CSAA).
106 Clause 7 (s 11(2), CSAA).
107 Foster and Jivan, above n 98, at 856.
108 Sally Sheldon *Beyond Control: Medical Power and Abortion Law* (Pluto Press, London, 1997) at 157.
109 At 153.
110 In 2017 98.9 per cent of all abortions carried out in New Zealand employed danger to the mental health of the pregnant person as a ground justifying the procedure. See *Report of the Abortion Supervisory Committee*, above n 2, at 21.

not directly trained in making decisions on social or psychological factors. To expect a practitioner to adequately understand what is appropriate in the individual pregnant person's circumstances is unrealistic. This is a sentiment which medical practitioners themselves have concurred with.[111] It will also continue to force a pregnant person to present their circumstances in the worst possible light in an attempt to convince the practitioner that the decision to terminate is appropriate. While discussion with a practitioner regarding the reasons for seeking an abortion assists pregnant people and provides them with an opportunity to disclose concerns regarding violence or coercion, this discussion can still occur, and it does not justify leaving the final decision to the practitioner.

The second issue associated with a medical model is that the decision will be subject to a practitioner's individual attitudes and values. Sheldon outlines that the approach of medical practitioners can legitimately vary under a medicalised regime. Practitioners can employ:[112]

i) a decisional approach where they essentially defer to the pregnant person;

ii) paternalistic decision-making where they decide what is appropriate for the pregnant person; or

iii) normalised decision-making where they access all the details of the pregnant person's life, consider these factors, and produce an authorised account of the person's reality to which they apply their own opinion.

While some doctors may attempt to minimise their control in determining what is appropriate by applying a decisional approach, this is not guaranteed. Even the Royal Commission, when recommending the parameters for New Zealand's previous legal framework in 1977, noted there was a risk practitioners would give effect to their personal views in making decisions.[113] This is problematic as it legitimises a third-party decision, on a matter which is inextricably linked to complex moral debate, as being medical. Furthermore, medicalisation can create the false appearance that healthcare is somehow

111 Law Commission, above n 54, at 86.

112 Sheldon, above n 108, at 149.

113 Royal Commission of Inquiry "Contraception, Sterilisation, and Abortion in New Zealand" [1977] II AJHR E26 at 293–294.

immune from political power and discourse, when in reality it is intertwined with political considerations.[114] Practitioners are not impervious to the debate surrounding abortion and such issues unavoidably become involved when discretion is granted.

Furthermore, having a test such as "appropriateness" for when an abortion will be allowed leaves the door open to statutory challenge from groups opposing abortion. For years anti-abortion groups have tried to challenge the law through the courts. While in *Right To Life* the majority determined that once a certified consultant makes a decision it cannot be reconsidered by the ASC,[115] this was not a unanimous decision. Significantly, the minority took the view that decisions made by certifying consultants could be reviewed for compliance with the law.[116] Under a medicalised approach, decisions will remain open to challenge.

B Concerns with late-term abortions

There is an argument that the medical concerns surrounding late-term abortions justify the use of a medical model at this later stage.

In 2017, only 0.54 per cent of abortions occurred after 20 weeks of gestation. This could be because the law only allowed for an abortion at this point when it was to save a pregnant person's life or to prevent them from suffering serious permanent physical or mental injury. However, 6.1 per cent of abortions occurred later than 13 weeks into pregnancy so, even without exceptionally stringent requirements, generally fewer abortions occur at later stages.[117] The abortion procedure becomes more invasive and involved with more developed pregnancies. For an abortion after 16 weeks, the dilation and evacuation method, which involves inducing labour, is required.[118] After 22 weeks, unless there are exceptional circumstances, a drug must be used to stop the fetus' heart.[119] This is coupled with more severe side effects including

114 Rachael Johnstone "Between a Woman and Her Doctor? The Medicalization of Abortion Politics in Canada" in *Abortion: History, Politics and Reproductive Justice after Morgentaler* (UBC Press, Vancouver, 2017) 217 at 222.

115 *Right To Life New Zealand*, above n 12, at [40].

116 At [56].

117 *Report of the Abortion Supervisory Committee*, above n 2, at 19.

118 *Standards of Care for Women Requesting Abortion in Aotearoa New Zealand: Report of a Standards Committee to the Abortion Supervisory Committee* (Abortion Supervisory Committee, 2018) at 41.

119 Standard 9.9.6.

pain[120] and higher rates of complications such as incomplete abortion and hemorrhaging.[121] The fact the procedure becomes riskier and more invasive at later stages is only one of the concerns justifying gestational limits.

Many of those who argue for abortion do not argue for unrestricted access, contending it is only morally justified up to a certain point. For example, Warren notes late-stage abortions require more in the way of moral justification,[122] giving several reasons for this. The first is that when a fetus is capable of surviving outside of the pregnant person's uterus with artificial medical aid,[123] it is no longer clear the pregnant person has a moral right to opt for an abortion.[124] The fetus could therefore be adopted by individuals willing and able to care for it.[125] The second reason is that the fetus is sentient at later stages. Warren argues sentient beings should benefit from continued life as they have higher moral status and are more characteristic of persons because they can feel pain and have thought and other conscious mental states.[126] The point at which sentience accrues is debatable, with some research suggesting it is before 24 weeks, and other research suggesting this is impossible. Despite this, it is accepted that consciousness and the ability to feel pain are obtained late in the second trimester and that they should be the general test for sentience. Therefore, it is Warren's view that the only justification for a late-term abortion is to save the pregnant person's life or because of significant fetal abnormalities.

Both are medical reasons, which suggests it should be for the doctor to consider it medically necessary. This is a sentiment mirrored by Steinbock. It is her view that consciousness should be a pre-requisite for the possession of interests.[127] The argument is that the interest in preserving the life of the fetus increases as the fetus develops, based on capacity for sentience or viability which is gained at around 24 weeks. This is the most convincing of the justifications

120 T Kelly and others "Comparing medical versus surgical termination of pregnancy at 13–20 weeks of gestation: a randomised controlled trial" (2010) 117(12) BJOG: An International Journal of Obstetrics & Gynaecology 1512.

121 Daniel Grossman, Kelly Blanchard and Paul Blumenthal "Complications after Second Trimester Surgical and Medical Abortion" (2008) 16(31) Reproductive Health Matters 173.

122 Mary Anne Warren "The Moral Difference Between Infanticide and Abortion: A Response to Robert Card" (2000) 14(4) Bioethics 352 at 352.

123 *Roe v Wade*, above n 50, at 732.

124 Warren, above n 122, at 353.

125 At 357.

126 At 353–354.

127 Bonnie Steinbock "Fetal Sentience and Women's Rights" (2011) 41(6) Hastings Center Report 49. See also L W Sumner "A Third Way" in Susan Dwyer and Joel Feinberg *The Problem of Abortion* (Wadsworth, Belmont, 1984) 72.

against late-stage abortions and leads to most of the anxiety around the ethical problem of late-term abortions.

A further justification for gestational limits concerns the issue of infanticide. As discussed, Warren distinguishes between infants and fetuses, despite both only having consciousness and no other indicia of personhood, as after birth the infant is no longer physically reliant on the pregnant person. She outlines that infanticide is not generally permissible as after birth there is no conflict between the infant's and pregnant person's rights because the fetus is no longer physically reliant on the pregnant person and others would be willing to adopt the child. However, at late stages, once the fetus gains viability, the fetus is also not necessarily reliant on the mother. Therefore, the argument is that late-stage terminations cannot be allowed on the basis that they effectively condone infanticide.

This attitude is also reflected in case law from New Zealand and other jurisdictions. In *R v Woolnough,* Richmond P stated that the "further a pregnancy progresses, the more stringent the requirements should be which will justify its termination".[128] Similarly, *Roe v Wade* held the right to privacy diminishes as the pregnancy progresses, only allowing third trimester abortions to save a pregnant person's life.[129] At that point, the interests of the fetus can no longer be as clearly overcome by the rights of the pregnant person.

In making their recommendations on reform, the Law Commission consulted with medical practitioners, some of whom supported gestational limits. It noted that medical practitioners are more willing to perform terminations at earlier stages and there are limited numbers of clinicians who are qualified and experienced to perform late-term abortions. Its concern was that these limited numbers may decline if there was no limitation on access because there would be no basis to decline the abortion if the clinician was uncomfortable performing it.[130]

C Issues with gestational limits

Despite these justifications for gestational limits, such limits are associated with significant issues beyond those which merely come from the introduction of a medical model, and so there is merit in considering removing gestational limits.

128 *R v Woolnough* [1977] 2 NZLR 508 (CA) at 516–517.
129 *Roe v Wade*, above n 50, at 732.
130 Law Commission, above n 54, at 87.

The removal of gestational limits suggests fetal interests are only attained at birth, as prior to this the state would not intervene to protect the fetus. This can be justified by arguing that viability or sentience should not be the moral benchmark for fetal personhood. This approach takes sentience and viability to be more social than physiological, in that it is not about the ability to live a life separate from the pregnant person, but the need to actually be living that life.[131] Such an argument contends that the fetus is merely developing potential and not actual personhood, justifying treating that fetal life as subordinate to human will. As Singer argues, a potential X does not have the same value as X, or all the rights of X.[132] When potential has not yet been realised, a developmental change in this potential, like becoming sentient, may not make a significant difference to moral status as this change is still not the realisation of that potential. This is demonstrated in an analogy employed by Singer. While Prince Charles is a potential King of England, he is not yet King and these two positions do not have the same value.[133] Even if someone who was more distantly in line from the throne was to move closer to the throne, this would be a negligible change to their potential.[134] While this analogy suffers from limitations it does help to illustrate that arguably a developing human does not acquire significant intrinsic moral status, despite continual development, until birth. In my view this also responds to the issue of infanticide as it seeks to draw a distinction still between infants and late-stage fetuses.[135] That is, despite the latter having the potential to survive outside the womb as infants do, it is still only the potential, and that is a significant difference.

Furthermore, Warren's point on adoption also faces criticism. Furedi notes that adoption is an alternative to raising a child, not an alternative to abortion as a pregnant person must continue to be pregnant against their wishes.[136] Paske also counters Warren's point by introducing the concept of the right not to be a biological parent. Paske recognises the value given to biological descendancy, as it is commonly held that wherever possible children should be raised by their genetic parents, and argues individuals should have

131 Michael L Gross "After Feticide: Coping with Late-Term Abortion in Israel, Western Europe, and the United States" (1999) 8(4) Cambridge Quarterly of Healthcare Ethics 449 at 456–459.

132 Singer, above n 80, at 153.

133 At 153.

134 Coleman, above n 93, at 114.

135 But it should be noted that Singer unacceptably advocates for the infanticide of disabled children and assisted suicide for disabled adults.

136 Furedi, above n 103, at 13.

a right not to be one.[137] Ross also discusses this and notes pregnant people do not just want to no longer be pregnant, but to not be a parent in any sense of the word.[138] While this right not to be a biological parent is not unlimited in considering the rights of the other genetic parent and the interests of the fetus,[139] it does explain that adoption is not a straightforward solution to the issues with late-stage abortions.

Such arguments could be rejected because they treat the fetus with disrespect, are not the best construction of the meaning of life, and ignore the significance of viability. However, these claims assume no concern will be given to fetal life or fetal viability in the decision-making process. Abortions are available earlier in the pregnancy and usually if pregnancies reach late-term, there originally was a desire for the child to survive. Instead, there are complex considerations which have developed leading to the decision, and one of these considerations will unavoidably be fetal interests. The complex range of reasons for late-term abortions was considered by a study which suggested that people who sought abortions after 20 weeks fit into one of five categories, other than to save the life of the pregnant person or because of fetal abnormality.[140] These categories were:[141]

i) they would suddenly be raising the child alone;

ii) they were depressed or using illicit substances;

iii) they were in a situation of domestic violence;

iv) they had trouble accessing services earlier; or

v) they were young and nulliparous.[142]

While there are limitations to this study[143] it does provide a good indication of the complex range of factors considered. It also shows that gestational limits

137 Gerald H Paske "Sperm-napping and the right not to have a child" (1987) 65(1) Australasian Journal of Philosophy 98 at 91.

138 Ross, above n 90, at 232–245.

139 Coleman, above n 93, at 141.

140 Diana Greene Foster and Katrina Kimport "Who Seeks Abortions at or After 20 Weeks?" (2013) 45(4) Perspectives on Sexual and Reproductive Health 210 at 210.

141 At 215–216.

142 A person who has never given birth.

143 This study only considered 30 facilities over a three-year period (at 211). Furthermore, the authors note that the study should be considered in the cultural context of the United States where the study was completed (at 217).

tend to disproportionately disadvantage vulnerable people who are facing limited support, difficult situations and who have poor access to abortion services. The study supports the position that the only individual who is able to properly understand these considerations is the pregnant person.

Viability is also problematic in terms of finding an accurate or logical limit. Determining the exact point of viability is unclear and debated. Moreover, the stage of viability is subject to change as medical practices develop and improve. In 1981 it was a significant medical development to have a fetus survive from 28 weeks,[144] whereas now a fetus is commonly considered viable around 24 weeks. Even then, a fetus born at 24 weeks has only a 35 per cent chance of survival.[145] Viability will become an even more problematic measure in the future as artificial uteruses may soon make it possible to develop a fetus outside of the womb.[146]

When the Law Commission made its suggestions it noted that most health practitioners and professional bodies consulted did not support a gestational limit.[147] Some reasons provided for opposing a gestational limit were that a person's mental or physical health can deteriorate even at late stages in pregnancy and a limit may mean pregnant people feel rushed in decision-making, particularly in the case of fetal abnormality.[148] For example, the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG) guidelines indicate delaying decision-making when a condition affecting the pregnancy is uncertain at earlier stages in the pregnancy can reduce uncertainty and regret.[149] Other reasons practitioners gave was that the decision is a personal one which others should not judge.[150]

144 Peter Singer and Deane Wells *The Reproductive Revolution: New Ways of Making Babies* (Oxford University Press, Oxford, 1984) at 131.

145 Jon Tyson and others "Intensive Care for Extreme Prematurity — Moving Beyond Gestational Age" (2008) 358(16) New England Journal of Medicine 1672.

146 Carlo Bulletti (an Associate Professor at Yale University) believes a functioning artificial womb could be created within the next decade, referenced in Natasha Preskey "In The Future, You Could Be Pregnant Outside Your Body" *Vice* (online ed, 15 Jun 2018).

147 Law Commission, above n 54, at 88.

148 At 89.

149 Royal Australian and New Zealand College of Obstetricians and Gynaecologists *Late Termination of Pregnancy* (RANZCOG, C-Gyn-17A, 2016) at 2.

150 Law Commission, above n 54, at 89.

D International perspectives

Abortion law in most other comparable jurisdictions includes a gestational limit.[151] The main jurisdictions without such limits are Australian Capital Territory[152] and Canada.[153] In Canada, while the legalisation of abortion has meant reporting is voluntary so comprehensive abortion statistics are limited,[154] it is noted that despite abortion being effectively available on demand, the reality is the lack of a gestational limit has not appeared to result in a drastic increase in late-term abortions.[155] Furthermore, terminations are almost always provided for maternal health reasons or serious fetal abnormalities.[156] Access remains variable for later gestations as shown by the fact multiple provinces have effective gestational limits at 12 weeks (New Brunswick) and 24 weeks (Ontario) which are not implemented by law, but by the discretion of medical practitioners, funding and availability of facilities.[157] In Australian Capital Territory the main provider for late-stage abortions is a private abortion provider. Public provision is minimal, with one of only two hospitals in the territory refusing to perform abortions at any gestation and the other only performing late-stage abortions in cases of emergency or fetal abnormality.[158]

Alternatively, New Zealand's approach reflects that taken in Victoria and the Northern Territory in requiring an abortion to be considered appropriate by a medical practitioner.[159] One study done in Victoria since their law reform indicated that one particular concern of abortion experts was the lack of availability of abortions for people over 20 weeks pregnant, as access had actually decreased since the reform. While the law in Victoria does not require people to meet specific criteria for receiving an abortion until 24 weeks, other barriers continue to limit provision even where the legal criteria are met, such

151 Such as the United States of America, the United Kingdom, Ireland, Victoria, Tasmania and Queensland.

152 Crimes (Abolition of Offence of Abortion) Act 2002 (ACT).

153 *R v Morgentaler*, above n 51.

154 Jeanelle Sabourin and Margaret Burnett "A Review of Therapeutic Abortions and Related Areas of Concern in Canada" (2012) 34(6) Journal of Obstetrics and Gynaecology Canada 532 at 537.

155 Rachael Johnstone and Emmett Macfarlane "Public Policy, Rights, and Abortion Access in Canada" (2015) 51 International Journal of Canadian Studies 97.

156 Sabourin and Burnett, above n 154, at 534.

157 Johnstone and Macfarlane, above n 155, at 107.

158 Barbara Baird "Decriminalization and Women's Access to Abortion in Australia" (2017) 19(1) Health and Human Rights 197.

159 Abortion Law Reform Act 2008 (Vic), s 5; and Termination of Pregnancy Law Reform Act 2017 (NT), s 7.

as a lack of clinics willing to provide services.[160] The only clinic which will deem non-medical reasons to be sufficient is private and it will not provide services after 24 weeks. The public hospitals in the region only provide services for non-medical reasons before 18 weeks.[161] This is occurring despite the legislation calling for the "woman's current and future physical, psychological and social circumstances" to be considered in determining whether an abortion is "appropriate".[162]

Overall, international approaches show limited differences in practical access to late-term abortions regardless of gestational limits, partly due to professional and institutional policies. Access is determined by which hospitals and clinics are willing to provide services. To remedy this is an access issue, however further restriction does nothing to improve the circumstances. The notion that gestational limits are required to prevent unfettered late-term abortions is not a legitimate one.

E The "appropriateness" test

Another possible issue with New Zealand's gestational limit is the "appropriateness" test itself. In recommending the test, the Law Commission outlined that the test directs the health practitioner to consider what is "appropriate" to allow the assessment to be made on an individualised basis, rather than on a legal one.[163] This test has a number of practical strengths. First, it is broad compared to the previous test and allows a pregnant person to justify their request on the basis of social issues regarding their wellbeing rather than purely medical issues. Secondly, the fact the practitioner must consider the pregnant person's physical health, mental health and well-being[164] means the objective morality of the individual doctor and what would offend the public should not legitimately be brought into consideration. Therefore, it cannot be used to legitimise a conscientious objection.

However, because the test is very broad it could be that what one practitioner considers to be appropriate would not be considered as such by the next. One may make an assessment purely on their personal views as to what

160 LA Keogh and others "Intended and unintended consequences of abortion law reform: perspectives of abortion experts in Victoria, Australia" (2017) 43(1) J Fam Plann Reprod Health Care 18 at 22.
161 Baird, above n 158.
162 Abortion Law Reform Act 2008 (Vic), s 5.
163 Law Commission, above n 54, at 84.
164 Abortion Legislation Bill, cl 7 (s 11(2), CSAA).

is medically or socially appropriate, whereas the other may best attempt to give effect to the choice made by the pregnant person, seeing this as appropriate. It seems unpredictable which approach will become common practice, and even more importantly, there is no certainty as to what approach the courts would take if required to determine the meaning of "appropriate". Furthermore, the reality is that the test may be ignored altogether, as can be seen in Victoria where late-stage abortions are only provided to save the life of the pregnant person rather than when "appropriate".

F Options moving forward

While it is understood that in order to pass the Bill through Parliament, a gestational limit was required because of the concerns that late-stage abortions raise, my view is that removing such limits should be revisited in the future. Pregnant people are unlikely to subject themselves to the trauma, pain and risk of a late-stage abortion without reason, and without respect being given to the fetus they are carrying. A medical model ignores this by assuming doctors are capable of making better decisions for a pregnant person than they are capable of making for themselves. It also legitimises the decisions made by practitioners who may, without good reason, fail to give effect to the legitimate wishes of the person seeking the abortion. The practical impacts of gestational limits are insufficient to justify their requirement. It is not just that providers are uncomfortable with providing abortions at a late stage, but that pregnant people will not seek abortions at these stages without good reason. Moreover, while there is no evidence gestational limits reduce late-term abortions, there is evidence cut-offs cause harm, particularly to disadvantaged and vulnerable people.

The only justification for a gestational limit which I have not already responded to is the possibility of reduced access at late stages without a limit, as practitioners may be disincentivised from providing services without any avenue to deny the abortion if they are uncomfortable providing it. However, as discussed below, access issues are more likely than not to improve with more liberal approaches. Furthermore, practitioners will have the ability to conscientiously object to late-term abortions, and abortion service providers will be able to determine up until which gestation stage and in what circumstances they wish to offer abortions. As the Law Commission noted, when recommending a model with no gestational limit, it remains open to

health professional bodies to develop guidance on when an abortion may be medically appropriate.[165] There are several ways fetal interests can be and are protected without gestational limits. First, practitioners must gain informed consent before offering a service, which is not unique to abortion. This is described by the Medical Council of New Zealand as:[166]

> … an interactive process between a doctor and patient where the patient gains an understanding of his or her condition […] including an assessment of the expected risks, side effects, benefits and costs […] and thus is able to make an informed choice and give their informed consent.

This means that even without medical control over the decision, the decision is not made solely by the pregnant person. The practitioner will play a role in ensuring they understand the decision they are making. This includes a discussion of fetal interests. Already, the ASC require providers to discuss short- and long-term complications including psychological issues,[167] the anatomy and physiology relevant to the length of gestation, the process of the abortion, and the possible complications.[168] This could continue under new standards of care. Second, counselling, which tends to have an increased uptake at later gestational states, must also be made available.[169] While counselling should be neutral and non-judgemental, it provides pregnant people with a place to discuss all factors relevant to the decision they are making, including the moral complexities associated with late-stage abortions. Finally, it is arguable that fetal interests are better considered without restrictions as pregnant people are not required to make early or rushed decisions.

This position is not in favour of on-demand late-stage abortions, but is in favour of acknowledging that pregnant people are the best people to make decisions for themselves and should be empowered to make the final decision. Practitioners should aid the pregnant person in reaching their decision, not make the decision on their behalf. This approach would have the same practical

165 Law Commission, above n 54, at 79–80.

166 Medical Council of New Zealand *Information, choice of treatment and informed consent* (Medical Council of New Zealand, Wellington, 2011) at [2].

167 *Standards of Care*, above n 118, standard 7.4. See also standard 8.3.4 which states "women should be informed of the range of emotional responses they may experience before, during and after an abortion".

168 Standard 8.1.1.

169 Law Commission, above n 54, at 151.

effect as having a gestational limit, but with a better realisation of the rights of pregnant people and in a more flexible manner. Whether the change to remove gestational limits will truly be required will remain to be seen depending on the practical impact of the new regime. However, the key point is that the discussion regarding liberalising abortion is not over and gestational limits will need to be revisited.

For now, an important step moving forward will be to clarify the legal test to ensure doctors are not overstepping their roles or making decisions they are not qualified to make. This clarification will have to come from the medical community as it is not included in the law. Such guidelines should ensure decisions give effect to the wishes of the pregnant person and that the doctor's role is only to look out for red flags, such as coercion. These guidelines could be created by bodies such as the Ministry of Health or by professional bodies such as RANZCOG. Current medical practices require practitioners to provide services consistent with that of a reasonably competent doctor who is skilled in that area.[170] Such a standard of care could require giving effect to the decision of the pregnant person. Furthermore, this standard of care, as well as the standards issued by professional bodies, are legally enforceable through the Code of Health and Disability Services Consumers' Rights.[171] Currently the Ministry of Health is operating on interim standards which are based on previous standards from the ASC. It has been said that the Ministry will create its own standards in due course. It will be interesting to see if and how the issue of late-term abortions is dealt with and whether any guidance is given on what should be deemed "appropriate".

VIII WILL ACCESS TO ABORTIONS BE SUFFICIENTLY IMPROVED?

Mere legalisation of abortion fails to ensure pregnant people have access to abortion services. For example, in Canada where there are no legal requirements for access, there is substantial variation in services, policies and general access, with some areas having no providers and others only having private providers.[172] Furthermore, in 2016 the United Nations Human Rights Commissioner's report recognised the limited access to abortion in Canada

170 Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 [Code of Health], right 4.

171 Right 4.

172 Sabourin and Burnett, above n 154, at 534.

and called on the government to remedy the inequities.[173] This has been mirrored in several states in Australia post-liberalisation.[174] Access to abortions is vital. The average gestational age at which abortions are performed decreases as access to services increase. The earlier an abortion is performed, the safer, less intrusive and less emotionally challenging it is. This is a problem in Aotearoa as pregnant people consistently access terminations later in the first trimester than in other developed countries.[175] While legalisation is a step in the right direction in terms of improving access, direct policies to improve access and change attitudes are essential.

Prior to the change in law, New Zealand suffered from varied and limited access with very few doctors being willing to, and capable of, performing abortions. As of June 2018, there were only 168 certifying consultants across the country.[176] Abortions had to occur in specially licensed facilities with adequate surgical and overnight facilities meaning that services were generally limited to larger centres.[177] Furthermore, some licences were limited to only performing abortions within the first 12 weeks, or nine weeks of pregnancy. This means some pregnant people were required to travel large distances in order to receive care.

The new regime includes some specific policies aimed at improving this, including empowering pregnant people to self-refer,[178] allowing any medical practitioner to perform an abortion,[179] repealing the requirement for abortions to occur in an institution licensed by the ASC (the safety of facilities will be governed by general health law under the Health and Disability Services (Safety) Act 2001) and altering the requirements for those who wish to conscientiously object.[180] The Ministry of Health is also directed to produce and maintain a list of abortion service providers and the types of services they provide, in order to give pregnant people the ability to self-refer. Practically these changes should increase the number of professionals who are willing to perform the service and allow smaller providers such as medical centres and

173 *United Nations Committee on the Elimination of Discrimination against Women: concluding observations on the combined eighth and ninth periodic reports of Canada* CEDAW/C/CAN/CO/8-9 (18 November 2016) at 2.
174 Keogh and others, above n 160.
175 Martha, McNeill and Ashton, above n 24, at 1.
176 *Report of the Abortion Supervisory Committee*, above n 2, at 29.
177 Law Commission, above n 54, at 127.
178 Abortion Legislation Bill, cl 7 (s 14, CSAA).
179 Clause 7 (ss 10 and 11, CSAA).
180 Clause 7 (s 19, CSAA).

Family Planning clinics to provide services, at least for medical abortions.[181] It also means pregnant people can take mifepristone at home, limiting a medical abortion to one visit rather than two.[182] This is consistent with professional guidelines and international approaches.[183]

A Conscientious objection

Conscientious objection can have a large impact on pregnant people's access. Prior to the change in law, a practitioner with a conscientious objection was not required to perform an abortion nor to refer to another service provider or another doctor who would refer to service providers. A practitioner was only required to inform the pregnant person that they had the option to be treated elsewhere.[184] This had a significant impact on the ability of pregnant people to access services, creating barriers and delays. Not only this, but it increased stigma, costs (by requiring more doctor visits) and confusion, as in some cases pregnant people believed this meant they did not qualify for an abortion, especially people in vulnerable situations.[185] This contributed to the average 24.9 day wait between a pregnant person's first hospital visit and when they received an abortion, as studies show most of the delay came at the referral stage.[186] Now, under the new law, practitioners are required to disclose the fact of their objection at the earliest opportunity and tell the pregnant person how they can access the contact information of another person who is the closest provider of the service, taking into account the physical distance between providers, the date and time of the request and the operating hours of the provider.[187]

While it is true that the ability of a practitioner to object is important as part of their moral integrity, which forms part of their personal identity,[188]

181 Law Commission, above n 54, at 127. A medical abortion involves taking drugs (mifepristone and misoprostol) to induce a miscarriage. Typically, in the first nine weeks of pregnancy a medical abortion is always preferred. Between nine to 14 weeks of pregnancy a larger dose of mifepristone is required.

182 At 127–128. Some clinics administer both misoprostol and mifepristone at the same time.

183 Royal College of Obstetricians and Gynaecologists *The Care of Women Requesting Induced Abortion: Evidence-based clinical Guideline Number 7* (RCOG Press, November 2011) at [4.28] and World Health Organization *Technical and Policy Guidance* (2nd ed, World Health Organisation, 2012) at 44.

184 *Hallagan*, above n 14.

185 Foster and Jivan, above n 98, at 860.

186 Angela Ballantyne, Colin Gavaghan and Jeanne Snelling "Doctors' rights to conscientiously object to refer patients to abortion service providers" (2019) 132 NZMJ 64 at 69.

187 Abortion Legislation Bill, cl 7 (s 19, CSAA).

188 Mark R Wicclair "Conscientious objection in medicine" (2000) 14(3) Bioethics 205 as discussed in Ballantyne, Gavaghan and Snelling, above n 186, at 67.

and that there is a right to freedom of conscience,[189] this must be balanced against the importance of providing adequate medical care as part of a medical practitioner's vocational role. The legislative reform in Aotearoa minimally impairs the right to freedom of conscience as it does not require individuals to provide the services themselves, merely to inform, as practitioners should already do.[190] The change does not go as far as the frameworks in Victoria, Northern Territory and New South Wales where it is an offence not to ensure the woman is referred to an alternative health provider.[191] However, it should make a vast improvement as people are able to leave with all the information required to access services.

It is also specified in the Act that those who have a conscientious objection must be accommodated for employment purposes, as long as it does not unreasonably disrupt the employer's ability to provide abortion services.[192] This is done to protect the rights of employees under the Human Rights Act 1993, replicating s 28(3) of that Act in requiring the accommodation of ethical beliefs unless it would unreasonably disrupt the employer's activities. This change will hopefully help improve access as it can, and should, be utilised in remote areas where there are limited practitioners, to ensure that there are sufficient practitioners without an objection.

B Safe zones

Another significant issue limiting access is the harassment of people attempting to seek services. Harassing demonstrations outside facilities can include holding vigils, carrying signs with pictures of fetuses and babies, approaching women with the intention to dissuade them, and shaming them. There have been calls to implement safe zones around facilities for several years and anti-abortion activists themselves claim to engage in "side-walk counselling".[193] Such demonstrations have the potential to become more prolific with the more permissive approach to abortions that the law now takes. While the

189 New Zealand Bill of Rights Act 1990 [NZBORA], s 13.

190 Code of Health, above n 170, right 6.

191 Victoria (Abortion Law Reform Act 2008 (Vic), s 8), New South Wales (Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW), s 1.3) and Northern Territory (Termination of Pregnancy Law Reform Act 2017 (NT), ss 11–12).

192 Abortion Legislation Bill, cl 7 (s 20, CSAA).

193 Law Commission, above n 54, at 126 and 176. A spokesperson from Voice for Life New Zealand has said she was a "sidewalk counsellor" who was part of a group in Hastings who "helped 32 women choose to continue their pregnancies".

original drafting of the Abortion Legislation Bill included a provision on safe zones, this was removed before the final version of the Bill was passed. Then, in July 2020 the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill was introduced to Parliament (Safe Areas Bill). The Safe Areas Bill allows the Ministry of Health to recommend regulations prescribing a safe area around abortion facilities.[194] In these safe areas certain behaviour will be prohibited. Prohibited behaviour would be behaviour that intimidates and obstructs a person from accessing abortion services or is a communication (or visual recording) that would be known to an ordinary reasonable person to cause emotional distress.[195] While it is argued that such provisions would limit the right to freedom of expression as protected by the NZBORA (including by the Attorney-General and the New Zealand Law Society),[196] I believe any potential limitation is justified.

The first type of prohibited expression is intimidation, interference with and obstruction of people seeking services. Comparable behaviour is already limited by the criminal law[197] and instead of the *Hansen* test being applied, the Supreme Court in *Brooker v Police* held infringements of the NZBORA should be accounted for by a narrower interpretation of whether public order is disrupted.[198] As outlined by Crown Law when considering the draft version of the Bill, in this instance the mental element is different from that considered in *Brooker v Police* as it is "less focussed on disruption of public order and more on disruption of access to a public service" which engages the right of freedom of expression less directly.[199] Even if the right is incidentally engaged, since this behaviour is about intentionally preventing access to a lawful service, the provision prohibiting interference is likely to be readily justifiable.

Secondly, the prohibition of communication which could reasonably cause emotional distress directly engages s 14 of the NZBORA as communication of controversial views is central to the purpose of this right. The Attorney-

194 Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill, (310–1), cl 5 (s 13C, CSAA).
195 Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill, (310–1), cl 5 (s 13A, CSAA).
196 NZBORA, s 14. See *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Contraception, Sterilisation, and Abortion (Safe Areas) Amendment Bill* and New Zealand Law Society "Submission on the Contraception, Sterilisation and Abortion (Safe Areas) Amendment Bill".
197 Summary Offences Act 1981, ss 3, 4, 21 and 22.
198 See *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; and *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1.
199 McKillop, above n 60, at 7.

General's report on the Safe Areas Bill[200] takes the view that this limitation cannot be demonstrably justified as any communication which may cause emotional distress is not rationally connected to the objective of ensuring access to abortion services and does not impair freedom of expression as little as possible in order to achieve its objective.[201] The report notes that if prohibited communication required an intention to cause harm this would likely be consistent as it would limit the right impairment in a justified way.[202] I disagree with this assessment. The fact that the behaviour is only prohibited in limited safe zones around abortion facilities rationally connects the limitation to the objective. Further, any communication which may cause emotional distress could prevent people from accessing or providing abortion services, therefore it is necessary to limit all such communications. While fostering freedom of expression may be important, it should not be interpreted as an obligation on anyone else to receive such messages. Ensuring dignified access to healthcare is a vital pursuit.

The Safe Areas Bill leaves the decision to implement safe zones to ministerial discretion. Instead, the Bill should simply prescribe that safe zones should be created around all service providers. Such zones have been introduced in some Australian states and in Canada. For example, in Tasmania, Victoria, New South Wales and Northern Territory, safe zones are considered to be 150 metres from any facility providing abortions.[203] In these states the High Court of Australia determined a limit to the right to freedom of political communication is justified.[204] In Canada, the British Columbian Court of Appeal held that absolute prohibition on protest within a safe zone was a justifiable limitation to freedom of expression.[205]

Overall, the introduction of safe zones is necessary and the Safe Areas Bill is a welcome revision on the initial decision to remove such provisions from the Abortion Legislation Bill.

200 Above n 196.

201 As is required by the *R v Oakes* [1986] 1 SCR 103 test, adopted in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [64].

202 At 23.

203 Victoria (The Public Health and Wellbeing Act 2008 (Vic), ss 185A–185H), Tasmania (Reproductive Health (Access to Terminations) Act 2013 (Tas), s 9), New South Wales (Public Health Act 2010 (NSW), ss 98A–98F) and Northern Territory (Termination of Pregnancy Law Reform Act 2017 (NT), ss 14–16).

204 For example, in Victoria in *Clubb v Edwards; Preston v Avery* [2019] HCA 11.

205 *R v Spratt* (2008) 235 CCC (3d) 521 (BCCA) at [91].

C Other possible methods of improving access

A straightforward method for improving access is to train nurses to provide medical abortions. There is already legal scope for nurses to provide abortions as they are considered to be a qualified health practitioner.[206] The current limitation is that the interim standards refer to "doctors" performing abortions. In the updated standards, the Ministry should consider how nurses can play a role in increasing access to medical abortions.

Another method to improve access is to introduce medical abortion services through telemedicine. This has been implemented effectively in Australia and tested in the United States, with staff citing many benefits to access. Telemedicine has been found to decrease the overall rate of abortion, but increase the number of abortions received before 13 weeks.[207] When compared to face-to-face methods, it was found both were comparable in satisfaction and outcomes, and telemedicine did not reduce the quality of aftercare.[208] Since the Act changes the requirements for where an abortion can occur, in that it is no longer required to occur on licensed premises, telemedicine is possible and its introduction should be considered in Aotearoa.

The stigma associated with abortion also acts as a significant barrier to access. Legalising abortion will go some way towards diminishing stigma, but will be insufficient without the deployment of methods outside of the realm of abortion regulation to reframe perspectives on abortion. Furthermore, better training of medical students in and around abortion services could improve access as evidence suggests experience with services improves the attitudes of practitioners towards abortion, increases the likelihood of them becoming a future abortion provider and makes them more likely to discuss abortion with their patients.[209] Moreover, improved sexual education in secondary schools has been shown to reduce general stigma about abortion, improving people's

206 Under s 2 of the Contraception, Sterilisation, and Abortion Act 1977 a qualified health practitioner is defined to be a health practitioner who is acting in accordance with the Health Practitioners Competence Assurance Act 2003. This includes a nurse.

207 Kate Grindlay, Kathleen Lane and Daniel Grossman "Changes in Service Delivery Patterns After Introduction of Telemedicine Provision of Medical Abortion in Iowa" (2012) 103(1) American Journal of Public Health 73 at 73.

208 Daniel Grossman and others "Effectiveness and Acceptability of Medical Abortion Provided Through Telemedicine" (2011) 118(2) Obstetrics & Gynecology 296 at 302.

209 Sarp Aksel and others "Unintended Consequences: Abortion Training in the Years After *Roe v Wade*" (2013) 103(3) AJPH 404 at 405.

ability to access services and reducing the incidence of unwanted pregnancy.[210] The Ministries of Health and Education need to continue to pursue these measures and others.

IX CONCLUSION

Aotearoa has historically been a vanguard of women's rights, being the first country to give women the vote and having a strong statutory framework protecting their equal rights. The decision to reform our previously restrictive, out-of-date and dysfunctional abortion regime has been a vital step in properly effecting reproductive justice and improving gender equality.

However, there is room for further reform. The inadequacies of the reform are evident for late-stage abortions, for which medical professionals retain the right to decide whether an abortion may proceed. There are significant and more complex elements which feed into the decision to seek a late-stage abortion. It is people who are seeking the abortion who are best suited to make that decision. A late-stage abortion is generally not sought without good reason and a medicalised approach runs the risk of neglecting those reasons. Therefore, the decision to include a gestational limit, which shifts the decision-making power from the pregnant person to a medical professional once a pregnancy reaches 20 weeks, should be reconsidered in the future.

Furthermore, legalisation of abortion is insufficient and must be paired with improved and protected access. While the Abortion Legislation Act 2020 is effective in its introduction of self-referral, in the removal of any provisions requiring procedures to be carried out by a certifying consultant or in a licensed institution, and in the improvement of provisions relating to conscientious objection, more can be done. Overall, time will tell how the Act operates in practice, but Aotearoa should not consider the debate surrounding abortion and its liberalisation completely resolved.

210 Mónica Frederico and others "Factors Influencing Abortion Decision-Making Processes among Young Women" (2018) 15(2) International Journal of Environmental Research and Public Health 329 at 337.