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**NEW ZEALAND'S RAPE SHIELD AND THE NEED FOR
LAW REFORM TO ADDRESS SUBSTANTIAL HARM:
WHEN POLITICS AND THE LAW MUST ADDRESS SOCIAL
INJURY**

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Table of Contents

I	INTRODUCTION	4
II	SECTION 44	6
III	THE PERTINENT NEED FOR CHANGE	8
	A PREVALENCE OF SEXUAL VIOLENCE IN NEW ZEALAND	8
	B THE DISTINCT NATURE OF SEXUAL VIOLENCE	10
IV	A WORK IN PROGRESS: NEW ZEALAND’S RAPE SHIELD	16
	A THE HISTORY OF THE RAPE SHIELD	16
	B THE WORK OF THE LAW COMMISSION	17
V	THE LIMITATIONS OF THE PROVISION	23
	A CONFLICT WITH DEFENDANTS’ RIGHT TO A FAIR TRIAL	23
	B THE FAILINGS OF THE RAPE SHIELD	25
	C A SOCIAL PROBLEM	32
	D A LOT OF RESEARCH BUT A LACK OF RESULTS – THE GOVERNMENT’S RESPONSE	36
VI	LAW REFORM AND ADDITIONAL IMPLEMENTATIONS	41
	A THE LIMITATIONS OF LAW REFORM	41
	B EXAMPLES OF EFFECTIVE CAMPAIGNS	43
	C OTHER POSSIBLE METHODS TO ENABLE AWARENESS	47
VII	WHAT THIS PAPER’S FINDINGS TELL US ABOUT LAW REFORM	49
VIII	CONCLUSION	54
IX	BIBLIOGRAPHY	56

Abstract

Section 44 of the Evidence Act 2006 is New Zealand's "rape shield" that restricts certain questions being posed to the complainant during cross-examination. This paper analyses this provision, focusing on its legislative reform history. Sexual violence is a criminal area in New Zealand in need of reform and consideration. The criminal justice process is stacked against complainants due to the adversarial system, societal misconceptions and limited protective mechanisms. This issue is a social issue as well as a legal one. In this paper I offer a critique of the current criminal justice process and outline how work in this area could directly address the most pressing concerns for complainants of sexual violence. I argue that more work in this area is necessary. I finish the paper with an analysis of what section 44, its history and its limitations, illustrates regarding law reform.

Key words

Law reform, sexual violence, fairness for complainants, section 44 of the Evidence Act 2006.

I Introduction

Sexual violence is an issue in New Zealand that requires addressing. Statistics illustrate the many failings of the current criminal justice system in regards to sexual violence.¹ Incidents of sexual violence are unlikely to be reported to police with less than seven percent of victims electing to recount their experiences.² Furthermore, it is estimated that only three in a hundred cases make it to court.³ There are feelings of shame and embarrassment associated with being a survivor of sexual violence. During the process of informing authorities, complainants frequently withdraw their original complaints.⁴ Significant elements of the criminal justice process directly conflict with appropriate means of achieving justice for complainants of sexual violence. Justice for survivors means much more than a conviction. It means their story being heard. It means being treated with respect. In stark contrast to what complainants need, the questioning process and biases in the system have been linked to the initial retraction of statements and a lack of trust in the system.⁵ The legal institution that exists to offer complainants a resolution to sexual violence too often results in feelings of intimidation and shame, as well as requiring them to re-live the experience.⁶

In 1977 the first enactment of the ‘rape shield’ provision in New Zealand acknowledged the need for legal protection regarding assumptions made concerning a complainant’s sexual history.⁷ A rape shield provision limits the ability of a party to admit evidence in a

¹ Arul Nadesu “Reconviction Rates of Sex Offenders” (16 August 2011) Department of Corrections <<http://www.corrections.govt.nz>>.

² Ministry of Justice *The New Zealand Crime & Safety Survey 2009: Main Findings Report* (2010) at 45.

³ Rod Vaughan “Sexual violence reform – change at last” (5 February 2016) Independent Voice of Law <<http://www.adls.org.nz>>.

⁴ Jan Jordan, Venezia Kingi, Elaine Mossman and Sue Triggs *Responding to Sexual Violence: Attrition in the New Zealand criminal justice system* (Ministry of Women’s Affairs, September 2009) at 54.

⁵ Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 41-42 and 120-126.

⁶ Elisabeth McDonald “From ‘Real Rape’ to Real Justice? Reflections on the Efficacy of more Than 35 years of Feminism, Activism and Law Reform” (2014) 45(3) VUWLR 487 at 505.

⁷ Evidence Act 1908, s 23A.

sexual case pertaining to the complainant's sexual experience. Provisions can offer protection in regards to the complainant's sexual experience with the defendant, and previous sexual experience with people other than the defendant. An increased relevance threshold of such evidence must be met.⁸ New Zealand's rape shield is contained under section 44 of the Evidence Act 2006. It is a protective instrument to ensure complainants are not exposed to unfair questioning. It is a measure to minimise placing fault, blame or answerability on the complainant because it puts the focus on the requirement for consent for each sexual act, and not on previous activity. The New Zealand rape shield is aimed at limiting the admission of evidence of the complainant's sexual history with any individual other than the defendant.⁹ Section 44 is an example of the form of protection that the law has attempted to offer thus far and is the subject of this paper. This paper will discuss the provision's success, limitations and reflect upon what the rape shield tells us about law reform in New Zealand.

Despite substantial changes in legislation to address concerns regarding sexual violence cases, low reporting rates remain. Law reform has failed complainants of sexual violation thus far. The harm of this offence is significant. A proportionate amount of effort into creating change must be invested in New Zealand's law reform process. This paper will outline the historical difficulties of law reform concerning sexual violence. This paper will outline the historical difficulties of law reform concerning sexual violence. It will analyse steps that have been taken thus far and critique where insufficient change has been initiated.

Before embarking, it is necessary to note that the focus in this paper is on female complainants and will involve a "gendered" approach. This focuses on sexual violence as a form of criminal offending that is predominately perpetrated by men against women, because the facts bear this out.¹⁰ This paper acknowledges at the outset that men are

⁸ Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers Ltd, Wellington, 2012) at 204.

⁹ Evidence Act 2006, s 44.

¹⁰ Law Commission *The Justice response to victims of sexual violence: Criminal trials and alternative processes* (NZLC R136, 2015) at 29.

survivors too.¹¹ However the needs of men requires separate study to the particular needs of male survivors. To do this subject justice and to cover the law appropriately, the paper will primarily focus on female survivors. This paper will use the term “survivor” rather than “victim”. This is a term that Louise Nicholas, a campaigner for women who have been sexually violated, applies.¹² Nicholas is a survivor advocate for Rape Prevention Education and understands the strength and courage talking about these issues requires. Complainant will be used where the offence has not been proven and there will be no use of the word victim. This recognises the strength in surviving such a profound infliction of harm.¹³

This paper consists of seven Parts. This part, Part I, introduces and defines the topic. Part II establishes section 44. Part III outlines the issue of sexual violence in New Zealand and the pertinent need for law reform. Part IV will complete an analysis of the rape shield and a historical evaluation of the development of section 44. Part V will discuss the limitations of the provision and offer recommendations. The law is not the best tool to answer all problems. Part VI will propose practical solutions regarding a campaign based on consent that should be implemented alongside law reform. Finally, Part VII attempts to answer the questions offered in the rest of the paper. It will analyse the difficulty of law reform concerning sexual violence and explain what that tells us about law reform holistically.

II Section 44

Section 44 provides:¹⁴

44 Evidence of sexual experience of complainants in sexual cases

¹¹ “Sexual Assault of Men and Boys” (1 June 2016) RAINN < <https://www.rainn.org> >.

¹² Sarah Robson “Louise Nicholas proud of work with survivors” (1 June 2015) Newshub <<http://www.newshub.co.nz/>>.

¹³ Jon Bird “People who have been raped are survivors not just victims” (22 December 2014) The Guardian <<https://www.theguardian.com>>.

¹⁴ Evidence Act 2006, s 44.

(1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.

(2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.

(3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.

There are two exceptions in section 44(1). First, the Judge may provide permission to admit evidence of sexual history under section 44(3) if satisfied that the evidence is of such direct relevance to the facts at issue that it would be “contrary to the interests of justice to exclude it”. The second exception, which will be a focus in this paper, concerns evidence of sexual experience with the defendant.¹⁵ Evidence of a complainant’s sexual experience with the defendant only faces the normal relevance threshold under section 7 of the Evidence Act.

In regards to reputation, no evidence or questions can be heard that relate either directly or indirectly to that issue.¹⁶ This is a protective measure upheld by the law.

In a legal proceeding, evidence is admissible if it is relevant. In determining relevance a fact must tend to prove or disprove a material issue in the case.¹⁷ It is the role of the presiding Judge to exclude evidence if the probative value of the evidence is outweighed by a risk that it might result in unfair prejudice on the proceedings or needlessly prolong it.¹⁸ Section 44 is the current governing law in the Evidence Act that addresses the

¹⁵ Evidence Act 2006, s 44(1).

¹⁶ Section 44(2).

¹⁷ Section 7.

¹⁸ Section 8.

admissibility of evidence in sexual cases.¹⁹ This paper will analyse section 44, its current effectiveness, limitations and what its history illustrates regarding law reform.

III The Pertinent need for change

A Prevalence of sexual violence in New Zealand

Sexual violence is hidden in nature. Therefore it is difficult to obtain an accurate depiction of its prevalence in New Zealand. Sexual violence is a crime that is very frequently unreported. Rape Prevention Education conducted research that confirmed high prevalence of sexual violence in our communities.²⁰ The research found the following: up to one in three girls will be subject to an unwanted sexual experience by the age of 16;²¹ up to one in five women experience sexual assault as an adult;²² one in seven boys will be subject to sexual violation; Māori women and girls are nearly twice as likely to experience sexual violation;²³ repeat sexual violence is a serious issue; young adults are most at risk and the highest age group at risk of sexual violence is 16-24;²⁴ 90 percent of sexual violence is committed by an individual known to the survivor;²⁵ reporting is extremely low, an estimated nine percent of incidents are reported to the police;²⁶ low

¹⁹ Evidence Act 2006, s 44.

²⁰ “Sexual Violence in Aotearoa New Zealand” (17 August 2015) Rape Prevention Education <<http://rpe.co.nz/information/statistics>>.

²¹ JL Fanslow, EM Robinson, S Crengle and L Perese *Prevalence of child sexual abuse reported by a cross-sectional sample of New Zealand women* (2007).

²² JL Fanslow and EM Robinson “Violence against Women in New Zealand: Prevalence and health consequences” (2004) 117 *New Zealand Medical Journal* 1206.

²³ *The New Zealand Crime & Safety Survey 2006* (Ministry of Justice, 2006).

²⁴ TC Clark, E Robinson, S Crengle, S Grant, R Galbreath and J Sykora *Youth’07: The health and wellbeing of secondary school students in New Zealand: Findings on young people and violence* (The University of Auckland, 2009).

²⁵ *The New Zealand National Survey of Crime Victims 2001* (Ministry of Justice, 2003).

²⁶ Ministry of Women’s Affairs (2009). *Restoring Soul: Effective Interventions for adult victims/survivors of sexual violence*. MWA: Wellington.

conviction rates include only 13 percent of cases resulting in a conviction²⁷ and in the United Nations Report on the Status of Women published in 2011, New Zealand was ranked as one of the worst OECD countries in regards to sexual violence.²⁸

One of the more concerning findings was in regards to media reporting. The media perpetuates rape myths and misconceptions. Thus citizens are under-informed and false narratives regarding rape-supportive attitudes are perpetuated.²⁹ The difficulty in combating sexual violence is twofold. First, instances of sexual violence are high while reporting is low. Second, social views are extremely problematic, especially in regards to victim blaming and the media does not assist in appropriately informing the public. Not only are survivors damaged by the violation committed against them but the court process and society repeats the harm through misunderstandings and a lack of justice.

Sexual violence is extremely harmful. It comes at a huge cost to individuals, communities and the nation as a whole. The cost of sexual violence is approximately \$72,000 per incident, a total of \$1.2 billion dollars per annum.³⁰ For a crime that creates so much harm, simply not enough is being done to combat its damage. The illegality of rape is redundant if the criminal justice system does little to prevent its occurrence, or to hold offenders to account.

Survivors of sexual violence experience psychological, emotional and physical trauma. Affects include: shock, anxiety, depression and post-traumatic stress. Survivors can experience a wide range of harm including disturbed sleep, loss of self-esteem, sexual

²⁷ Jan Jordan, Venezia Kingi, Elaine Mossman and Sue Triggs *Responding to Sexual Violence: Attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, Wellington, September 2009) at viii.

²⁸ United Nations Women (2011). *Progress of the World's Women: in pursuit of justice*. Geneva: United Nations.

²⁹ N Wood and S Dickson *Reporting Sexual Violence in Aotearoa New Zealand* (Tauwiwi Prevention Project, 2013).

³⁰ Veronica Marwitz "Community action: preventing sexual violence" (3 April 2009) Rape Prevention Education <<http://rpe.co.nz/>>.

dysfunction and a lack in trust in others.³¹ The World Health Organisation found a strong link between sexual violence survivors and resulting mental health disorders.³² This paper finds that the research evidence base that proves the prevalence of sexual violence, its harmful effects and complainant's dissatisfaction with the criminal justice system establish the case for law reform.

Reports have found that sexual violence affects vulnerable groups in society disproportionately: women, Māori, migrant communities, children, the elderly, the disabled and Pacific Peoples.³³ An estimated 186,000 incidents of sexual assault occurred towards adults in 2013.³⁴ UK medical journal *The Lancet* found in 2014 that New Zealand had the third highest rate of sexual assault in the world. Thus there are compounding factors of these vulnerable groups bearing a disproportionate burden of the prevalence, the harm, and the poor social and legal response. New Zealand is a nation that is performing poorly in comparison to its international counterparts while also lagging behind in the legislative reform to address this. Despite decades of concerted pressure to reform the law, achieving justice for survivors remains a pressing and unfinished task.³⁵

B The distinct nature of sexual violence

Sexual violence is distinct in its nature. It is deeply personal and frequently involves a perpetrator close to the survivor. The issue of consent is at the very heart of sexual violence trials.

1. Deeply personal in its nature

³¹ *Global Status Report on violence prevention 2014* (World Health Organisation, 2014) at 16.

³² At x.

³³ Office of the Minister for Social Development *Ministerial Group on Family Violence and Sexual Violence: Update on the progress of the work programme* (2016) at 1.

³⁴ New Zealand Crime and Safety Survey (2015) population estimates.

³⁵ Anastasia Powell, Nicola Henry and Asher Flynn *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, United Kingdom, 2015) at viii.

It could be argued that law reform is made more difficult by in the lived experience real of sexual violence because it is a delicate and deeply personal issue to discuss. As Louise Nicholas states,³⁶

Sexual assault is a subject so personal that people don't believe they can talk about it.
Because rape and sexual abuse are crimes of silence, it's about power and control.

Sexual violence has defining characteristics that distinguishes it from other forms of criminal offending. First, it usually occurs in private by someone known to the survivor. Research suggests the perpetrator is most likely to be a family member or domestic partner.³⁷ Due to the private nature of the crime there are very rarely witnesses to the offence. Contention frequently rests on the issue of consent. Thus the complainant is subjected to questioning and scrutiny absent in other crimes.³⁸

Crimes of sexual violence carry serious levels of penalty, frequently of seven years' imprisonment or more. Sexual violation carries a maximum penalty of 20 years' imprisonment.³⁹ The penalty level means that defendants can choose to elect trial by jury. Counsel for the defendant is likely to recommend this course of action: because rape myths are prevalent in society, jurors are likely to hold them, and they work in the defendant's favour. Thus there are high stakes for both defendants and complainants. The evidence of the complainants as the main witness will be critical and she will often not be in a good emotional state to give it.

³⁶ "Louise Nicholas: I turned my ordeal into an opportunity" (10 July 2014) New Zealand Women's Weekly <<http://www.womensweekly.co.nz>>.

³⁷ Law Commission *The Justice response to victims of sexual violence: Criminal trials and alternative processes* (NZLC R136, 2015) at 6.

³⁸ Louise McCudden "Anonymity for the accused: Rape is different to other crimes, and we need to talk about why" (21 February 2013) Independent <www.independent.co.uk>.

³⁹ Crimes Act 1961, s 128B.

Feelings of shame and guilt lead to a lack of reporting by sexual violence complainants.⁴⁰ Sexual violence breaches very personal physical and psychological boundaries.⁴¹ Evie South, a New Zealand survivor who described her dissatisfaction with the criminal justice system, stated that the testimony required of a survivor is extremely confronting. South stated, “These strangers – unqualified, unprepared strangers – are about to hear things I have only told a psychologist”.⁴² The information is deeply personal and difficult to disclose. As well as this, because many complainants are familiar with the perpetrator of sexual violence, there is often a reluctance to share their testimony, developed out of fear or loyalty. The potential for a lengthy jail sentence can weigh in to this reluctance. Ironically, the very protection of a high penalty offered by the law works against the survivors’ interests. What is even more concerning is that once a complainant has decided to report and undergo the criminal justice process, there is a very high attrition rate. On top of the circumstances and distinctive features of the crime, the criminal justice process itself is creating real harm for complainants. Survivors are not being heard. For what other crime does a complainant require bravery just to report an offence? In what other circumstances would such a power imbalance and sense of shame and humiliation exist? Sexual violence is distinctly harrowing to its victims and more relevantly, the criminal justice process does very little to assist their search for a fair outcome.

Evie South had an extremely difficult battle through the New Zealand court system. As a child South and her sisters were molested and violently abused by their father. South sought justice but primarily possessed the motivation of ensuring safety for other young women. As a survivor of sexual violence it seems you must undergo a grueling process in order to protect others from your “monster”.⁴³ While attempting to manage the trauma after a sexual violation, individuals also must address the public safety issues of seeing a

⁴⁰ Rod Vaughan “Sexual violence reform – change at last” (5 February 2016) Independent Voice of Law <<http://www.adls.org.nz>>.

⁴¹ Law Commission *The justice response to victims of sexual violence: Criminal trials and alternative processes* (NZLC R136, 2015) at 23.

⁴² Evie South “Facing down my monster” (24 September 2016) The Spinoff <<http://thespinoff.co.nz>>.

⁴³ Evie South, above n 42.

rapist held accountable.⁴⁴ The defence lawyer accused South of lying. The strategy of defence was to portray South as the “smart vendetta-driven daughter bent on revenge”. South noted the difficulty regarding the balancing of rights;⁴⁵

On one level I can barely imagine why a court system exists that is so adversarial toward people who have survived what we did. It defies all logic that such a trial system works in any way. And yet I believe profoundly in everyone’s right to get a decent defence.

It is a difficult tension that even a survivor, so damaged and defeated, can acknowledge. South finishes her description of her experience by apologising that she cannot offer a better ending for her readers, “I wish no one else had to go through anything like this but they do, all the time, and worse”. Evie South describes New Zealand’s court system as adversarial and nonsensical in regards to sexual violence crimes. As a survivor who was cheated of justice owed to her, South is calling for change.⁴⁶

The Law Commission’s investigation into alternative trial for sexual violence found that the current criminal justice process is unsuitable for most instances of sexual violence.⁴⁷ Survivors have distinct needs and justice comes in different forms. The criminal justice system does not always offer justice that suits the circumstances of sexual violence. A criminal trial, with the possibility of imprisonment of the perpetrator known to the survivor if the act is established beyond reasonable doubt, is not always suitable in the circumstances. That result will not necessarily address the harm caused, nor create appropriate outcomes for the survivor, their family, whānau and community. The trauma suffered by survivors is so dependant on the circumstances. Similarly, justice carries different meanings for different individuals. Sexual violence is deeply personal and involves an individual’s personhood. This offence can have profound affects on its

⁴⁴ “Effects of Sexual Violence” (1 October 2016) Rape Victim Advocates <<http://www.rapevictimadvocates.org>>.

⁴⁵ Evie South, above n 42.

⁴⁶ Evie South, above n 42.

⁴⁷ Law Commission *The Justice response to victims of sexual violence: Criminal trials and alternative processes* (NZLC R136, 2015) at 6.

survivors. It is impossible to generalise what justice means to survivors when it comes to the crime of sexual violence.

Commission President Sir Grant Hammond addressed concerns regarding hesitancy to report in his work within the Commission:⁴⁸

There may be many reasons why victims choose not to report to the police. However, it is clear that amongst those reasons is the fact that victims can find the criminal justice process traumatising, frightening and that victims risk being re-victimised by going through the criminal justice system.

The process of cross-examination is frequently recorded as unnecessarily disrespectful to and unpleasant for complainants and is therefore off putting.⁴⁹ The justice system is perceived as stacked against the complainant. Therefore survivors elect not to participate in the criminal justice system as they do not believe it meets their needs. The risk of further harm is simply too significant.

Sexual violence is distinct in that complainants can feel as if they are on trial themselves, rather than the perpetrator. Complainants are the main witness to the trial. They may be cross-examined on their evidence at length by defence counsel.⁵⁰ This requires the complainant to undergo an examination where the witness is “put to proof” on matters involving the whereabouts and details of the offence. Importantly, the focus is on the issue of consent, which involves challenging the complainant’s credibility and reliability as a witness.⁵¹ Consent often becomes a more central issue in cases where physical evidence is lacking, which is not uncommon. The experience of the trial has been

⁴⁸ Rod Vaughan “Sexual violence reform – change at last” (5 February 2016) Independent Voice of Law <<http://www.adls.org.nz>>.

⁴⁹ Elisabeth McDonald, above n 6 at 489.

⁵⁰ Law Commission *The Justice response to victims of sexual violence: Criminal trials and alternative processes* (NZLC R136, 2015) at 7.

⁵¹ Law Commission, above n 50 at 8.

described as being akin to a “second rape”.⁵² Complainants consider cross-examination regarding their sexual experience with the defendant to be unfair, distracting, embarrassing and irrelevant.⁵³ It is difficult to imagine a victim of repeat burglary being questioned in a way that the previous events might suggest they consented to the latest intrusion. The fact that questions of this nature are asked may be a factor in low reporting rates.⁵⁴ The discussion of previous sexual history, whether with the defendant or otherwise, can attribute blame to the complainant and that prejudice may not always be able to be countered by judicial direction. The cross-examination can be an unfairly punishing experience for the complainant.⁵⁵

2. The Issue of Consent

Sexual violence is a crime where witnesses are rarely involved in its commission thus consent is frequently the issue in dispute. Due to the fact that consent is the central issue regarding this offence, the key witness becomes the complainant herself.⁵⁶ The unfortunate consequence is that the defence may then attack her testimony and character in order to defend the accused. The issue of consent is therefore the element that creates such difficulty for complainants. It is a case of “he said, she said” and that can translate into a miscarriage of justice for survivors.⁵⁷

New Zealand law acknowledges that consent must be provided appropriately. This is illustrated by the creation of marital rape as a sexual offence.⁵⁸ If a husband can rape their wife, who presumably has consented to sexual activity in the past, then this affirms the

⁵² R Campbell “Preventing the “Second Rape”” (2001) 16 JIV 1239.

⁵³ Elisabeth McDonald and Yvette Tinsley “Evidence Issues” (2011) 17 Canterbury Law Review 123 at 139.

⁵⁴ At 139.

⁵⁵ At 140.

⁵⁶ Lauren McManamon “Rape complainants on trial: Defence questioning approaches and witness emotionality” (Masters in Psychology, Victoria University of Wellington, 2014) at 12.

⁵⁷ Lauren McManamon, above n 56 at 71.

⁵⁸ Crimes Act 1961, s 128(1) inserted by the Crimes Amendment Act 1984.

fact that as under the law, consent must be provided freely and at each separate sexual encounter. Due to the fact that consent is at the heart of the issue of sexual violence cases it is vital that the law treats this issue appropriately. Arguably section 44 should be extended to include sexual history with complainants in order to remain consistent with the enactment of the marital rape clause. This paper will assess the validity of this argument and consider it against an accused's right to use all defences available to them.

IV A work in progress: New Zealand's rape shield

A The history of the rape shield

Despite the rape shield being reformed over time, it is a provision where change has not made any great improvement.

Historically the law of evidence considered sexual history of a complainant to be relevant to her credibility as a witness. This assumption existed even when the complainant's sexual history had no connection to the alleged offending.⁵⁹ Sexual history was used as propensity evidence to argue that the individual was more likely to have consented to the sexual contact with the defendant.⁶⁰ Sections 13 and 14 of the Evidence Act 1908 did not sufficiently protect complainants. The common law allowed for the defence to use significant discretion in their questioning of the complainant.

The lack of protection in regards to complainants of sexual violence created concern amongst the legislature. The "rape shield" first came into existence in 1977 in s 23A of the Evidence Act 1908. The provision only provided for complainants in cases involving rape. It was then reformed in 1985 to broadly apply to cases of a sexual nature. In 1997 the Law Commission considered this aspect of the Evidence Act, referring to s 23A. In doing so it was found:⁶¹

⁵⁹ Elisabeth McDonald "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's "Rape Shield" Provision" (1994) 18 Crim LJ 321 at 321.

⁶⁰ Law Commission *Evidence Law: Character and Credibility – A Discussion Paper* (NZLC PP27, 1997) at 101.

⁶¹ Law Commission, above n 60 at 104.

The provision does not exclude the evidence absolutely. Rather there is a limited ability for the judge to admit the evidence, if it is directly relevant and if “to exclude it would be contrary to the interests of justice”. But its proviso makes clear that “inferences [raised] as to the general disposition of propensity of the complainant in sexual matters” will not make such evidence directly relevant. The section would therefore exclude evidence of promiscuity and prostitution, although it does not control evidence of the sexual experience of the complainant with the defendant.

The rape shield acknowledged the need to safeguard complainants and respect their interests. The history of this provision illustrates movement towards understanding regarding complainants’ rights and the need to improve effectiveness of the justice system. At the same time however, it misses the point regarding the need for positive consent each time, by failing to protect the complainant from questions about her sexual history with the accused.

B The work of the Law Commission

1. The need for change acknowledged

The rationale of the rape shield provision is that complainants should not face unfair prejudice due to irrelevant factors. Inferences must not be drawn due to previous sexual experiences. This was deemed necessary as early 1980s research illustrated that authorities and fact-finders would distrust complainants who were sexually active out of marriage and deem such individuals untrustworthy or of bad character.⁶² The original provision, section 23A of the Evidence Act 1908 aimed to combat this misconception. This provision was later replaced by s 44 of the Evidence Act 2006 that came into force on 1 August 2007.⁶³

The Court of Appeal in *R v Clode* stated:⁶⁴

⁶² Elisabeth McDonald, above n 6 at 492.

⁶³ Evidence Act 2006, s 44.

⁶⁴ *R v Clode* [2007] NZCA 447 at [24].

Section 44 of the Evidence Act (and its predecessors) were enacted to prevent the entirely reprehensible and inappropriate blackening of the characters of particularly women complainants by directly or indirectly “tarring” them in the eyes of the jury.

Other necessary factors regarding this provision include: protecting the complainant from having to disclose unnecessary content that may be traumatic, for instance having to “re-live” earlier events of sexual violation; protection from disrespectful and damaging cross-examination and addressing findings that the court process was found to be humiliating and harrowing for complainants.⁶⁵ The judge can allow information to be admitted in evidence but it must meet the heightened relevance test.⁶⁶ Elisabeth McDonald⁶⁷ argues that judicial discretion indicates that misconceptions still exist and are present in criminal justice trials. Complainants frequently report that they believed their behaviour and character was on trial, rather than the defendant’s.⁶⁸ It is not just the content of questions in trial that are problematic. It is the process itself, the types of questions, the inferences, the demeaning and disrespectful implications.

It is disappointing that an individual’s sexual activity has any bearing on the truth of their allegation in regards to sexual violence allegedly committed against them. Fortunately law reform has somewhat combated this misconception and the prevalence of previous sexual history being provided as evidence in trials has subsided.⁶⁹ The creation of a rape shield was important for the following reasons. First, it sent a clear message to society that an individual’s sexual history is irrelevant in a rape trial. A complainant’s sexual behaviour possesses little bearing on consent in circumstances of sexual violence.

⁶⁵ Cabinet Paper “Amendments to the Evidence Act 2006” (12 November 2013) CAB 100/2002/1 at [18].

⁶⁶ Evidence Act 2006, s 44(3).

⁶⁷ Elisabeth McDonald has conducted extensive research on this issue and is an expert in the field of both evidence law and the crime of sexual violence. This paper references her work and applies many of McDonald’s findings.

⁶⁸ Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

⁶⁹ Sam Bookman “Taking Victims’ Rights seriously” (6 November 2013) New Zealand Human Rights blog <nzhumanrightsblog.com>.

Second, this practice had the potential to damage complainants' reputation and was therefore unjust. Third, these kinds of questioning tactics used by the defence deterred complainants from coming forward with their experience. The rape shield therefore provided the function of sending a social message and indicating to complainants that their testimonies will be heard with respect.

“Victim-blaming” is an instinctive reaction for decision makers in cases. For instance, assuming that complainants who have had many sexual partners previously are dishonest or that sex workers are partially to blame for offences committed against them. Law reform such as the rape shield provides protection to combat prejudicial or ignorant attitudes.

The enactment of the first rape shield was indicative of the legislature accepting the need to back survivors. A need for change was acknowledged by the legislature and the rape shield goes some way to address the failings of the system.

2. The importance of law reform

Law reform affects citizens' lives more than ever acknowledged or understood. Law reform is the essence of change and reflection. It is the opportunity to improve. Law reform is the process of analysing laws already in existence and implementing changes in a legal system, primarily with the aim of enhancing efficiency or justice. In New Zealand the Law Commission exists to promote the review, reform and development of legislation.⁷⁰

The Law Commission is an independent Crown Entity that aims to promote accessible and understandable law. The Law Commission works with the evidence as well as experience to work towards improvements in the law.⁷¹ The Commission has spent a lot of time on the issue of sexual violence and is constantly persisting in the pursuit to improve justice for complainants. The lack of effective reform in regards to sexual

⁷⁰ “Legislation and its Interpretation” (2016) Law Commission <<http://www.lawcom.govt.nz>>.

⁷¹ “What We Do” (2016) Law Commission <<http://www.lawcom.govt.nz>>.

violence is not due to inadequacies on behalf of the Law Commission, but rather the legislature's reluctance to address this contentious issue and follow the advice provided by the Commission.

The Law Commission acknowledged that sexual violence is a concerning problem that requires addressing: "it has serious effects on victims and for society at large".⁷² The underreporting of this crime was acknowledged as an issue as was the process itself if complainants had reported. Professionals advocating for sexual violence complainants are clear in their view that law reform processes in the past have not achieved sufficient change. During a Criminal Pre-Trial Processes Law Commission Investigation a complainant of sexual violence provided their experience of the current process;⁷³

Going through a trial is like running the gauntlet to find justice. I was slammed around the courtroom like a tennis ball. Dealing with the abuse is bad enough but then to go through this process slowly kills any hope of finding peace and normality.

The Law Commission understood the gravity of this offence and the significant need for change. However this paper will analyse whether sufficient action was taken to properly address the crime of sexual violence. Law reform cannot provide all the answers however it is important to acknowledge law reform's ability to create substantial change and to signpost social change.⁷⁴

3. *Law Commission Reports*

In the Law Commission's 1997 discussion paper titled *Evidence Law – Character and Credibility* the Commission reflected upon the "defendant exception". The "defendant exception" describes the exception to the rape shield where evidence regarding sexual history with the defendant is able to be admitted without permission by the Judge. The

⁷² Law Commission *The justice response to victims of sexual violence: Criminal trials and alternative processes* (NZLC R136, 2015) at iv.

⁷³ "Survivor Advocate" (2011) Rape Prevention Education <<http://rape.co.nz>>.

⁷⁴ Nina Russell *What works in Sexual Violence Prevention and Education* (Ministry of Justice, July 2008) at 11.

discussion clearly distinguished between stranger rape and acquaintance rape, deeming stranger rape as much more concerning and damaging. The report included the statement that there is “usually less trauma associated with admitting [evidence of sexual experience with the defendant] as compared with evidence of the complainant’s sexual experience with other parties”.⁷⁵ The Law Commission had not cited this presumption nor had it explained its justification. Misconceptions regarding sexual violence are pervasive and even informed the Law Commission’s decision process. Despite the fact that this statement was made over 16 years ago it is extremely indicative of attitudes towards the difference between sexual violence committed by individuals known to the survivor, and those that are not. This preliminary paper informed the recommendations made by the Law Commission to the Government that contributed to the creation of the Evidence Act 2006. Thus there is a link between this statement, influenced significantly by incorrect rape myths, and section 44. This is concerning. Particularly because this statement was not corrected in the Law Commission’s 1999 report on the Evidence Act.⁷⁶

In December 2015 the Law Commission underwent an investigation into alternative trial processes for sexual violence.⁷⁷ The Law Commission considered whether the process should be modified or fundamentally changed. The objective was to improve the justice system’s “fairness, effectiveness, and efficiency and, in particular, the court experience of complainants”.⁷⁸ The difficulty with reform in regards to sexual violence is that it must work within the framework of the process that already exists. The Law Commission focused on the difference that training and education would achieve. Consequently, substantive issues regarding altering the laws around evidence and cross-examination were neglected.⁷⁹

⁷⁵ New Zealand Law Commission *Evidence Law Character and Credibility* (NZLC PP27, Wellington, 1997) at 349.

⁷⁶ New Zealand Law Commission *Evidence: Reform of the Law* (NZLC R55, Wellington, 1999).

⁷⁷ New Zealand Law Commission *The Justice response to victims of sexual violence: Criminal trials and alternative processes* (NZLC R136, Wellington 2015) at 6.

⁷⁸ Law Commission, above n 77 at 6.

⁷⁹ Interview with Elisabeth McDonald, Associate law Professor at Victoria University of Wellington (Radio New Zealand, 15 December 2015) titled “Radical alternative proposal for sexual abuse cases” at 05:50.

This report achieved very little in regards to unpacking and rethinking how the trial process can be improved for survivors. The notion of a specialised court carries with it its own difficulties that perhaps were not properly analysed. There is difficulty regarding deciding which alleged offenders would be dealt with under an alternative trial. The objective is to create empowerment for survivors'. However there are issues regarding public safety. An alternative trial process may not be appropriate in some cases due to the danger posed by offender.⁸⁰ Another issue is that by separating the court system from a specialised process, there is a risk of reinforcing the demarcation of “real rape” committed violently by a stranger and rape by someone known to the survivor. This is particularly concerning due to the worrying comment made in the 1997 discussion paper where this distinction between “validity” of different rapes was made. The report also failed in that it did not address the rules of evidence and little effort was expended to challenge the nature of cross examination.

4. The Law Commission’s recommendation regarding the “defendant exception”

The Law Commission reviewed section 44 “which requires an application to be made before evidence can be put before the court of a complainant’s sexual history with any person other than the defendant”.⁸¹ In 2011 the Commission concluded that this provision creates a problematic effect in sexual violence cases.⁸² The Evidence Amendment Bill 2015 amended section 44 to regulate applications. They will only be made if legislative requirements are complied with and are done so prior to trial.⁸³ This alteration means that a party who proposes to offer evidence regarding a complainant’s sexual history must provide the other party with written notice concerning their intention to offer the evidence. The purpose of such an amendment is to provide reasonable notification to

⁸⁰ At 7:00.

⁸¹ At 121.

⁸² Jeremy Finn, Elisabeth McDonald and Yvette Tinsley “Identifying and qualifying the decision-maker: The case for specialization” 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 279.

⁸³ Evidence Amendment Bill 2015 (27-1), cl 16.

complainants to ensure they are at all times prepared for difficult questioning. The sexual history of complainants may not only be admitted with a pre-trial sign-off from the Judge.⁸⁴ This law came into effect in New Zealand on the 20th of September, 2016. This demonstrates that change, however incremental, can occur. While the change is well-intentioned, and should prevent complainants from being blind-sided at trial, having notice of the intention to offer this evidence is also likely to be stressful for complainants. The Government should have extended the rape shield to include sexual experience with the defendant instead of implementing a notice requirement. This would have achieved greater protection for complainants.

The Law Commission is in a position to report back fully and encourage debate regarding these issues. Arguably there have been missed opportunities in these reports. The Law Commission report did not focus on section 44. Changes that had been recommended by the sector were not made.

V The limitations of the provision

A Conflict with defendants' right to a fair trial

It has been argued that rape shield laws conflict with a defendant's right to a fair trial, including their right to confront the complainant and challenge the veracity of the allegation.⁸⁵ Defendants' liberty and freedom is at stake. New Zealand's justice system places great emphasis on the rights of defendants and fair trial processes.

The exception to the shield involves evidence of prior sexual behaviour between the complainant and defendant. This exception illustrates the difficulty with this law and the balancing of complainants' interests against the rights of defendants. Ninety percent of sexual violence is estimated to be perpetrated by individuals known to the survivor. The

⁸⁴ Nicholas Jones "Sexual violence evidence changes to pass into law" (19 September 2016) New Zealand Herald < <http://www.nzherald.co.nz/>>.

⁸⁵ Brett Applegate "Prior (False?) Accusations: Reforming Rape Shields to reflect the Dynamics of Sexual Assault" (2013) 17(3) Lewis & Clark Law Review 899 at 913.

As mentioned previously, the Law Commission provided a recommendation concerning this area: that pre-trial notification should be presented in cases where a defendant intends to introduce evidence concerning prior sexual activity between the parties.⁸⁶ The reasoning for this is twofold. First, it would ensure a thorough examination of the necessity to include this evidence. Second, it would ensure greater certainty for complainants. It is in the complainant's best interests to be aware of what issues will be discussed or disputed in Court. However a strength the defence has is that they do not have to notify the material they will argue in Court. This advantage exists to acknowledge the power imbalance between the defendant and the State. The arguments regarding whether or not to alter this aspect of the provision highlights the difficulty of determining whether to place complainants' rights as so necessary that defendants' rights are eroded slightly.

Changes to the rape shield would affect the rights of the accused - the right to a reasonable defence and a fair trial. This tension is an illustration of the difficulty in reforming legislation concerning sexual violence. Despite the acute need for improvement in complainant's experience in the criminal justice process, defendants' rights remain of paramount consideration. A defendant must have access to all possible defences. By disallowing evidence the accused would experience difficulty attempting to prove that they believed on reasonable grounds that the complainant had consented. The tension between complainants need for greater protection and defendants' rights was recognised by McDonald and Tinsley,⁸⁷

One current challenge is subjecting evidence of the sexual experience of the complainant with the particular defendant to appropriate scrutiny – in a way that reduces the prejudice to the complainant but does not prevent fairness to an accused.

⁸⁶ Law Commission *The 2013 Review of the Evidence Act* (NZLC R127, 2013) at 7.29-7.34.

⁸⁷ Elisabeth McDonald and Yvette Tinsley "Evidence Issues" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 279 at 336.

Different rights must be balanced. The House of Lords in the United Kingdom narrowed the approach of the rape shield for this very reason. They perceived the shield as contrary to defendants' rights. Lord Steyn stated;⁸⁸

Good sense suggests that it may be relevant to an issue of consent whether the complainant and the accused were ongoing lovers or strangers. To exclude such material creates the risk of disembodiment of the case before the jury. It also increases the danger of miscarriages of justice.

This provides an example of the perspective that may have contributed to the extension of the rape shield being a politically unpalatable reform option. Lord Steyn was emphasising the need for the jury to understand the context of the relationship between the complainant and defendant. Arguably the jury does not require understanding of the entirety of the relationship's history. Only information relevant to the facts or issue of consent should be admitted. This may not always include the sexual history between the complainant and defendant.

The "golden thread" of New Zealand's law assumes that an individual is innocent unless proven guilty.⁸⁹ This is a fundamental right. When threatened or perceived to be under threat there is a significant amount of public outcry.

When providing additional rights for complainants it must always be asked: what is being taken from defendants as a consequence? Rights to fair trial should always be at the forefront of law reform consideration. Although defendants' rights require consideration in these circumstances, with this particular crime, it is so important that complainants are protected. The tension of rights is more acute in the reform of sexual violence law.

B The failings of the rape shield

1. The already identified problem of the limited shield

⁸⁸ *R v A* [2001] UKHL 25 at 46.

⁸⁹ As established in *Woolmington v DPP* [1935] AC 462.

This paper has already identified the most obvious limitation of the rape shield - it does not extend to sexual history relating to the defendant.⁹⁰ A strong argument is that prior sexual relationship between the complainant and accused is never relevant. Whether a complainant possesses a sexual history with the accused is prejudicial. Jurors may perceive the accused to have reasonably believed in consent because it had been provided in the past. This is problematic for the following reasons. First, consent is offered at the beginning of each new sexual encounter. Consent to sexual activity on one occasion does not imply assumed consent on another occasion. New Zealand law, through the recognition of marital rape, upholds this principle.⁹¹ Second, including such evidence can distract the jury to focus on the relationship rather than the alleged offence. The focus is being inappropriately misdirected. Even if a jury is directed to discount the evidence, the jury will hear the evidence regardless and may be persuaded to find that the complainant consented based on the defence's testimony.⁹² The advantage of extending section 44 to include the defendant, and removing the ability to raise sexual history as evidence, is complainants will receive further and fuller protection. Third, individuals are particularly at risk of sexual violence during the dissolution of a relationship. Thus whether consent has been offered in the past does not negate the validity of a rape allegation. The idea that it might is misinformed. A restriction on section 44 could ensure that complainants are safeguarded against a "second rape" at trial.⁹³ This is the most fundamental limitation of the shield at present.

Comparable jurisdictions have enacted rape shields that extend to sexual history with the defendant. Some American states have included complainants' sexual history with defendants within the shield. However judges have misinterpreted the statute and allowed

⁹⁰ Keegan Browne, Rachel Hale, Diana Ivanov, Dylan Jackson, Tessa King, Jasper Lau, Rob Mcstay, Max Smith and Sarah Thompson, *Sexual Crime Law Symposium* (Equal Justice Project, Occasional Paper, August 2014) at 3.

⁹¹ Crimes Act 1961, s 128.

⁹² Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 134.

⁹³ R Campbell "Preventing the "Second Rape"" (2001) 16 JIV 1239 at 1242.

for inclusion of this type of evidence.⁹⁴ Similar circumstances occurred in the United Kingdom. This paper later discusses the House of Lord's decision to narrowly interpret the rape shield. Vera Baird, a Queen's Counsel that advised women's groups, stated "we are back to the discretion of a lot of male judges. We will try to draft an amendment to go into the next criminal justice bill."⁹⁵ This illustrates the fact that other countries are progressing at a faster rate than New Zealand's legislature. Despite the fact that the judiciary undermined the shield, these examples at least illustrate the legislature's attempt to provide improved protection for complainants. It also exemplifies the fact that legislation must be unequivocal and clear otherwise judges can apply discretion to the detriment of complainants.

In Canada, history with the defendant is protected in the rape shield, adding greater protection for complainants than what is provided for in New Zealand. Only evidence that is logically probative may be admitted.⁹⁶ The focus is ensuring that evidence does not have a prejudicial effect on the complainant. The rape shield in Canada is governed by section 276(1) and 276(2) of the Criminal Code.⁹⁷ This section governs the admissibility of evidence of all sexual activity, including that between complainant and defendant. The onus is placed on the defence to satisfy the heightened relevance test. The Judge, when deciding whether the evidence has sufficient probative value, must take into account the need to remove discriminatory biases from the trial process and the need to protect the complainant's dignity and privacy.⁹⁸ Canadian legislation endeavours to protect society's interests in supporting the reporting of sexual violations.

⁹⁴ Michelle Anderson *Understanding Rape Shield Laws* (National Alliance to End Sexual Violence, 2002) at 6.

⁹⁵ Clare Dyer "Lords rule rape shield law unfair" (18 May 2001) *The Guardian* <<https://www.theguardian.com>>.

⁹⁶ *Character Evidence in Rape Trials: A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases* (Bangladesh Legal Aid and Services Trust, January 2015) at 11.

⁹⁷ Criminal Code RSC 1985, c C-46, s 276.

⁹⁸ *Character Evidence in Rape Trials*, above n 96 at 9.

Evidence in regards to sexual history with the defendant may be put forward in open court without prior question or consideration in New Zealand.⁹⁹ Other jurisdictions have adapted an approach of generally prohibiting this form of evidence and allowing it only once the judge has deemed it suitably relevant.¹⁰⁰ New Zealand once considered itself an innovator regarding law reform. New Zealand was the first nation to grant suffrage for women.¹⁰¹ It seems unfortunate that this nation has slowed down in its progress towards innovation and advancement. New Zealand, where once leading the progress of gender equality, is now receding behind comparable nations.

When the Law Commission considered the “defendant exception” it was asserted that sexual history with the defendant would almost always be deemed relevant by the judge.¹⁰² Thus it would be a waste of time and resources to reverse the presumption. This decision in itself demonstrates the pervasive attitude that consent can be assumed based on previous experiences. It is the position of this paper that it may not always be relevant evidence. This should be considered when determining admissibility in order to avoid the allowance of irrelevant, and therefore prejudicial, evidence.¹⁰³

The reason section 44 applies is not just to advantage complainants. It is also an issue of relevance. Previous sexual history is irrelevant information and in some circumstances has no bearing on consent to the activity that is the basis of the charge. A rape shield is simply the rational conclusion required by evidence law. Arguably previous sexual

⁹⁹ Keegan Browne, Rachel Hale, Diana Ivanov, Dylan Jackson, Tessa King, Jasper Lau, Rob Mcstay, Max Smith and Sarah Thompson, *Sexual Crime Law Symposium* (Equal Justice Project, Occasional Paper, August 2014) at 2.

¹⁰⁰ Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand: Public Discussion Document* (August 2008).

¹⁰¹ “New Zealand Women and the Vote” (12 July 2016) New Zealand History <<http://www.nzhistory.net.nz/>>.

¹⁰² New Zealand Law Commission *Evidence Volume 1: Reform of the Law* (NZLC R55, 1999) at [178].

¹⁰³ Elisabeth McDonald and Yvette Tinsley “Evidence Issues (2011) 17 Canterbury Law Review 123 at 145.

history is irrelevant information and has no bearing on consent.¹⁰⁴ Therefore it could be argued that a limitation of this provision is the fact that it does not achieve extra protection for complainants, it merely follows an appropriate relevance test. It fails to provide the increased protection necessary for complainants in a system that is stacked against them.

The most fundamental issue with the “defendant exception” in the rape shield is that it perpetuates rape myths. It is problematic to imply that consent can be consumed based on previous sexual experience. Although in some cases the previous relationship with the defendant may be relevant, this should not be a fixed assumption. This is the most significant limitation of the rape shield. If this was reformed it would signal correctly that complainants require protection regarding cross-examination and a mere relevance test is insufficient.

2. The Law Commission reasoning for rejecting a “halfway-house”

In a recent review of the Evidence Act the Law Commission rejected the concept of a “halfway-house” which would extend the rape shield and require any question regarding the complainant and defendant’s sexual history to be of direct relevance to the facts at issue in the proceeding. The Law Commission asserted;¹⁰⁵

With respect to the proposal put forward in the Ministry’s 2008 Discussion Document, we do not support the extension of the “rape shield” to relationships between the defendant and the complainant. Cases involving such a prior relationship will almost always turn on the question of consent or belief in consent. Almost inevitably, the existence of prior sexual relationship will be relevant to this question.

For this reason, an application for leave to cross-examine the complainant on the prior relationship could reasonably be expected to be made in the vast majority of cases involving a prior relationship between the complainant and the defendant, thereby inevitably increasing the number of pre-trial applications and

¹⁰⁴ *B v R* [2013] NZSC 151.

¹⁰⁵ Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at 135.

appeals. This would add to delays, which in our view, compounds rather than alleviates problems for complainants.

The Law Commission acknowledged a need for improvement for justice for complainants. However, in the Commission's estimation, a "halfway-house" was not the way to achieve necessary justice. Complainants' rights have been at the forefront of consideration in regards to law reform for some time. Anecdotal evidence and rates of attrition illustrate that cross-examination and evidence-in-chief can be an extremely harrowing experience for complainants.¹⁰⁶ It seems from the Law Commission's perspective that it is clear action must occur in order to improve the process for complainants. However, restrictions on questioning and the extension of the rape shield have been deemed unfavourable. The Law Commission stated that these options would either lead to undue delays or, if prevented altogether, an obstruction of justice on behalf of the accused. Interestingly, the delay caused by the recent changes in the application process for evidence about the complainant's sexual experience with people other than the accused did not stop that reform. In addition, while acknowledging the negative impact of delay on complainants, measures to address this can be operational. These were also not fully explored.

3. The difficulties of its enactment

The difficulty is not necessarily the legislation itself, but rather, how judges run trials. Although the Evidence Act prohibits the questioning of any witness regarding their previous sexual experience, defence lawyers can still use biases towards complainants to their advantage. Defence lawyers can create insinuations, knowing the judge will intervene but also successfully casting doubt in the minds of the jury. Raising questions in regards to the complainant's reputation can damage their credibility as much as if she was expected to answer those questions.¹⁰⁷ It is important to note that the judge has an

¹⁰⁶ Keegan Browne, Rachel Hale, Diana Ivanov, Dylan Jackson, Tessa King, Jasper Lau, Rob Mcstay, Max Smith and Sarah Thompson, *Sexual Crime Law Symposium* (Equal Justice Project, Occasional Paper, August 2014) at 10.

¹⁰⁷ Equal Justice Project, above n 106 at 50.

inherent jurisdiction to set the tone of the trial. Therefore judges aware of prejudices against complainants can combat these issues with direction.

Historically a significant way to discredit a woman's testimony was to critique her previous sexual history. Defence lawyers took advantage of the misconception that an unmarried woman who had consented to sexual activity in the past, whether with the complainant or with another individual, could not be perceived as a genuine rape victim. This was particularly apparent where the woman was a sex worker.¹⁰⁸ Directing a jury to ignore a question posed by defence can draw attention to the stereotype or assumption attempted. This can unintentionally reinforce prejudicial attitudes that preexist in jury members' minds.¹⁰⁹ Louise Nicholas asserts that regardless of law reform, including section 44, defence lawyers can still manipulate the minds of the jury as rape myths are already so embedded in cultural views.

Defence lawyers can exploit rape myths and misconceptions held by jurors and provide implications to blame the complainant. Exploiting prejudice is a part of advocacy.¹¹⁰ Defence lawyers can manipulate societal biases to advantage their client. For instance, the fact that the complainant may have been suggestive or flirtatious; the existence of consensual activity prior to the offence or in the past; the fact that the individual invited the alleged offender into her home or willingly entered his home or what the individual was wearing.¹¹¹ A defence lawyer's role is to defend their client with devotion and passion. Unfortunately that representation can harm the complainant. Alice Sebold, a survivor of a rape in her first year of University, stated that the prejudicial experience for complainants is both in what is said and what is not said, conveyed in the lawyer's every move, insinuation and disbelieving tone.¹¹² Sebold accounted "I was exhausted, felt as if I

¹⁰⁸ At 51.

¹⁰⁹ At 52.

¹¹⁰ Abbe Smith "Representing rapists: the cruelty of cross-examination and other challenges for a feminist criminal defense lawyer" (2016) 53 *American Criminal Law Review* 255 at 283.

¹¹¹ At 284.

¹¹² At 287.

was being dragged here and there. The course of this man's logic was beyond me, and it was meant to be".¹¹³ A defence lawyer's motivation can be to unsettle the complainant and instil feelings of uncertainty and inadequacy. Even with the enactment of the rape shield and despite a restriction of questioning, complainants still suffer under the justice system and experience difficulties in the cross-examination process.

Sexual violence is extremely distinct in nature and how that affects process. Interests of the defendant are fundamental. But there could be more rigorousness around what questions are asked to the complainant.¹¹⁴ Sometimes there is a concern that there needs to be an avoidance of the possibility of a retrial thus more evidence is being admitted that has little relevance, can have a huge impact on the complainant, in the interests of not miscarrying the trial. This brings a difficult dynamic.¹¹⁵ Questioning may be inappropriate but it is difficult in sexual violence cases due to prosecution lawyer's fear of a mistrial. Therefore there are difficulties in the enactment of the rape shield.

A compelling argument is therefore that the rape shield has been used as far as it may be applicable. The law can only do so much. It is now up to the social climate and judicial understanding to catch up to the legislation. The question thus remains: should the law reform continue to alter the shield, or should resources and thought be put towards new and innovative reform, both within the legal system and outside of it? The difficulties of enactment is the reason why law reform in this area must be implemented alongside other initiatives.

C A social problem

1. The difficulty of regulating rape myths

¹¹³ At 287.

¹¹⁴ Interview with Elisabeth McDonald, Associate law Professor at Victoria University of Wellington (Radio New Zealand, 15 December 2015) titled "Radical alternative proposal for sexual abuse cases" at 06:39.

¹¹⁵ At 07:00.

A rape myth is a misconception that blames survivors for harm committed against them rather than perpetrators. ‘Rape myths’ are defined as “attitudes and generally false beliefs about rape that are widely and persistently held, and that serve to deny and justify male sexual aggression against women”.¹¹⁶

The first of the rape myths engaged by the defendant exception in the rape shield is that ‘stranger rape’ is of greater seriousness and more traumatic than ‘acquaintance rape’.¹¹⁷ The second is that consent can be ‘implied’ from previous similar sexual experiences with the defendant.¹¹⁸ Other misunderstandings that may lead to prejudicial beliefs from the jury include the following. First, if an individual dresses provocatively they are more likely to be raped as they are “asking for it”.¹¹⁹ Second, women should police their own behaviour and restrict alcohol intake, only walk alone in the daytime and regulate their actions through decisions such as sitting in the back seat of a taxi.¹²⁰ Third, rape is about fulfilling a sexual desire. This is untrue. Rape is about control and for that reason it is irrelevant how a woman is presented or how she behaves.¹²¹ Finally, a “real rape” can only be committed by a stranger and that unless the survivor attempted to force the perpetrator off her and voiced her objection loudly and clearly then the offence cannot be interpreted as rape.¹²² Rape myths undermine the harm of sexual violence. They manipulate blame and cause women to minimise the harm inflicted on them. This is a

¹¹⁶ Kimberly Lonsway and Louise Fitzgerald “Rape Myths in Review” (1994) 18(2) *Psychology of Women Quarterly* at 133.

¹¹⁷ Michelle Anderson “From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law” (Public Law and Legal Theory Research Paper, Villanova University School of Law, 2002) at 90 - 91.

¹¹⁸ At 94.

¹¹⁹ Eliana Suarez and Tahany M. Gadalla “Stop blaming the Victim: A Meta-Analysis on Rape Myths” (2010) 25(11) *Journal of Interpersonal Violence* at 2.

¹²⁰ Genevieve Gannon “Taxi sexual assault victim could have avoided attack, says driver’s lawyer” (12 May 2016) *Herald Sun* <www.heraldsun.com.au>.

¹²¹ Suarez and Gadalla, above n 119 at 3.

¹²² Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

primary cause of underreporting of sexual violence in New Zealand. Rape myths teach women not to be raped rather than men not to rape.

The difficulty is that if citizens believe rape myths then jury members will too. While juries exist, the position of the law becomes extremely important as it must regulate misconceptions and ensure that uneducated beliefs do not lead to injustice for survivors. However judges must possess discretion in order to fulfill their role appropriately, especially in their overarching duty to ensure fairness. Legislation should not inflict unreasonable boundaries on judges. Otherwise it can be difficult for judges to conduct their role as arbitrator effectively. There is a tension between the need to legislate and the need to allow judicial discretion.

The concern regarding juries and their lack of education on rape misunderstandings means that the law should be even stronger in its assertion against rape myths. In family violence judges undergo training so the issues can be focused. In rape trials, defendants are frequently legally aided so arguably they should be trained in regards to appropriate etiquette when questioning a complainant. Fact-finding is benefited by the respectful treatment of complainants. Louise Nicholas stated that in her trial experience she was the most cooperative with the defence counsel who treated her situation with respect and decency.¹²³ Legal aid lawyers should be educated regarding the fulfilment of their professional duty without causing more damage. However exploiting biases and rattling the complainant is obviously an effective technique for defence lawyers or else it would not be applied. Unless legislative reform requires defence lawyers to use fairer tactics, it is likely they will continue to add to the complainant's distress in the criminal process. Due to the fact that the criminal justice system is stacked against complainants, the law needs to counterbalance this prejudice and bring the complainant back to equilibrium. The law should be a means to tilt the balance to impartiality.

2. A cultural issue

¹²³ Louise Nicholas *My Story* (Random House, New Zealand, 2014).

Sexual violence is distinct in nature compared with other crimes. This is not only in the offence itself but also in how it is perceived by others. This is true particularly in regards to the “appropriate” reaction or response to being sexually violated. Expectations and misconceptions are extremely pervasive in New Zealand culture. For instance there is a standard of “real” rape in New Zealand.¹²⁴ Consequently sexual violence is only perceived as an offence if the perpetrator was a stranger to the complainant, if they had protected themselves, for instance: dressed appropriately, remained sober and behaved conservatively. There is a culture of blaming the victim that is absent in other crimes. Kelly, Lovett and Regan studied the attrition rate of sexual violence and its connection with cultural misconceptions. It was found that stereotypes result in a limitation of what can be classified as “real” rape.¹²⁵ Due to these myths and misconceptions, complainants believe that their trauma will not be appreciated as valid. It is therefore important that the legislature sends an unequivocal message that complainants of sexual violence are understood.

The legislature possesses an obligation to combat social issues and reform the law where necessary. The issue of sexual violence in New Zealand has gone beyond a social issue. It is extremely prevalent and damaging. There has been a history of a distinct lack of creative thinking and flexibility exhibited by the legislature in regards to sexual violence. A conversation must be started. This paper acknowledges that a conversation is required beyond just the means of legal change. Sexual violence is a cultural issue that is perpetuated by victim-blaming attitudes and misconceptions in regards to who is a risk and its prevalence. Sexual violence requires a response from everyone.¹²⁶ Consent is a central issue that requires addressing. Consent is a social issue that should be as prominent in discussions and advertisement as seatbelts and eating five plus vegetables

¹²⁴ Elisabeth McDonald and Yvette Tinsley (eds) *From “Real Rape” to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

¹²⁵ Liz Kelly, Jo Lovett and Linda Regan *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study, United Kingdom, 2005) at 2.

¹²⁶ Sam Bookman “Taking Victims’ Rights seriously” (6 November 2013) New Zealand Human Rights blog < nzhumanrightsblog.com >.

and fruit a day. Children from an early age should be taught the essential nature of consent. For instance, in sexual education it would be extremely valuable to include consent as a discussion topic. The discussion should be shifted away from teaching young girls not to walk in the dark and to prevent extreme intoxication and should be directed towards young men being taught to only proceed with sexual activity if there is an affirmative yes, rather than simply the absence of no. Advertisements should convey the importance of consent as an issue such as drink driving. A problematic and pervasive harm exists. Action is essential. Education is severely lacking in this area and family members and friends of survivors must be educated in regards to how to respond to the sexual violation of their loved ones. This paper will discuss how important education is alongside law reform. Law reform must address this issue, however it must do so alongside comprehensive education.

D A lot of research but a lack of results – The Government’s Response

Eleanor Butterworth, the agency manager for Wellington Rape Crisis, stated that despite the substantial amount of reports and research conducted regarding sexual violence, necessary action has not occurred. Butterworth stated that the sector and the government possess the same goal “to reduce and ultimately end our country’s shameful rates of sexual violence”¹²⁷ but in order to do so action is required. The disconnect between high-level policy and the day to day provision of services of the sector such as Wellington Rape crisis and HELP Wellington is problematic.¹²⁸ Priorities for ministers and political climates change. Unfortunately the need for these services does not. Butterworth found that regardless of years of research and work towards improvement with this offence, a lack of action has been the unfortunate result.

This paper acknowledges that significant amount of time and resources have been expended to research the prevalence and harm of sexual violence. However practical results have been limited. The Ministry of Pacific Island Affairs reported on sexual

¹²⁷ “Enough reports on sexual violence, let’s do something about it” (1 April 2016) Stuff New Zealand <www.stuff.co.nz>.

¹²⁸ Stuff New Zealand, above n 127.

violence in the Pasifika community.¹²⁹ There have been discussion papers prepared by the Ministry of Justice regarding necessary improvements in the criminal justice process in 2008; an analysis of kaupapa and tikanga Maori services by Te Puni Kokiri in 2010;¹³⁰ the Ministry of Justice report from the Taskforce for Action on Sexual Violence with comprehensive recommendations in 2010; Ministry of Women’s Affairs report on sexual victimisation in 2012¹³¹ and a review of the specialist sexual violence sector by the Treasury in 2013. This paper has found the research and work conducted in these papers essential to its findings. However action is also incredibly necessary. There needs to be practical results to all this written work. At present, survivors are not seeing the product of these papers.

Law reform requires prioritisation by the legislature. Despite Government acknowledgment of the harm of sexual violence, there is a distinct lack of action and thus practical protections for complainants. A sexual violence Taskforce was established in July 2007 for two years. Their objective was to “provide leadership, coordinate efforts and advise government on future actions to prevent and respond to sexual violence”.¹³² The Taskforce consisted of experts who possessed invaluable knowledge and experience. Contributors included: senior officials from the Ministries of Justice, Women’s Affairs, Social Development, Education, Health, Pacific Island Affairs, New Zealand Police, Te Puni Kokiri, Accident Compensation Corporation and the Department of Corrections.¹³³ This intersection of government officials work alongside representatives of community organisations – Te Ohaakii a Hine – National Network Ending Sexual Violence Together.

¹²⁹ Teuila Percival, Robert Robati-Mani, Elizabeth Powell, Pefi Kingi, Maiava Carmel Peteru, Linda-Teleo Hope, ‘Eseta Finau, Elisala Selu and Jenny Rankine *Pacific pathways to the prevention of sexual violence: Full report* (Ministry of Pacific Island Affairs, October 2010).

¹³⁰ Chloe Hoeata, Linda Waimarie Nikora, Wendy Li, Amanda Young-Hauser and Neville Robertson “Maori women and intimate partner violence: Some sociocultural influences” (2011) 3 MAI Review 1 at 2.

¹³¹ Jan Jordan, Venezia Kingi, Elaine Mossman and Sue Triggs *Responding to Sexual Violence: Attrition in the New Zealand criminal justice system* (Ministry of Women’s Affairs, Wellington, September 2009)

¹³² *Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network Ending Sexual Violence Together* (Taskforce for Action on Sexual Violence, 2009).

¹³³ At 2.

This was a Treaty-based network that partners Maori Caucus and the Tauwiwi Caucus, including Pasifika representatives.¹³⁴ The Taskforce's report contained sector recommendations alongside those of government.

The Taskforce for Action on Sexual Violence proposed that criminal justice action was necessary. Legislative amendments were provided and it was suggested that legislative change, if accompanied by appropriate awareness and public education, could be very successful.¹³⁵ The overarching recommendation was that the Evidence Act 2006 should better protect complainants and witnesses when providing evidence in court. In regards to section 44, it was recommended that the rape shield be extended to include previous experience between the complainant and the accused so that the history between those individuals would be inadmissible without prior agreement of the judge. Other recommendations worth noting were the inclusion of a positive definition of consent to sexual activity as well as the requirement that the court have regard to all relevant circumstances including the defendant's steps taken to ensure consent was freely and properly provided.¹³⁶

The Taskforce provided substantial insight into the needs of survivors. The overarching objective of reform work was to create sustainable solutions to better provide justice for survivors.¹³⁷ Recommendations related to prevention,¹³⁸ front-line services,¹³⁹ criminal justice reform¹⁴⁰ and future directions and approaches.¹⁴¹ The government response was underwhelming. The Taskforce provided the following recommendations;¹⁴²

¹³⁴ At 2.

¹³⁵ At 13.

¹³⁶ *Government Response to the Report of the Taskforce for Action on Sexual Violence* (Ministry of Justice, September 2010).

¹³⁷ At 2.

¹³⁸ At 4.

¹³⁹ At 7.

¹⁴⁰ At 10.

¹⁴¹ At 13.

¹⁴² At 10.

progressing the three legislative amendments relating to consent, reasonable belief and the rape shield;
referring a project to considering options for fundamental change to the current criminal justice system to the Law Commission; and
work on alternative pathways alongside and outside of the current criminal justice system be explored.

These are aligned with this paper's recommendations and recognise the necessity of both preventative action as well as reactive reform. This is consistent with this paper's proposition that law reform must occur in conjunction with action outside of the current criminal justice system.

First, the Government's response acknowledged that survivors experience trauma during their participation of the criminal justice system.¹⁴³ Even more relevant is the reluctance to report offences of sexual violence due to the damaging treatment of complainants.¹⁴⁴ Reform was therefore recognised as important and required. Second, the Minister of Justice, Amy Adams, requested that the Law Commission undertake an inquiry regarding pre-trial and trial processes, with an emphasis on sexual violence. Third, need for resources such as court support services, discretionary grants, information resources and assistance related to travel, accommodation and childcare needs was acknowledged. The response included a discussion of implementation of these new measures. However, the government's response ignored the issue of legislative amendments and instead provided distractions with an acknowledgment of the need for change, funding initiatives and a Law Commission report. It was a dismissive response that represents the stubborn resistance to meaningful change. The response to the Taskforce buried the rape shield extension.¹⁴⁵ Applying soft language and distracting the reader with other measures does not address the recommendation. Substantive legislative change was ignored by the government response.

¹⁴³ At 10.

¹⁴⁴ Government Response to the Report of the Taskforce for Action on Sexual Violence, above n 135 at 10.

¹⁴⁵ At 10.

This paper has identified the problem that the amount of research conducted has not resulted in a proportionate response in action. Despite the need for research arguably sexual violence and its harm is now understood and properly acknowledged. It is now time to move towards creating practical results.

Another problem is that a lot of the research and government discussion regarding law reform conflates the issue of sexual violence and domestic violence. This is unhelpful. Defendants in the two offences are recommended to respond in a distinct way. Sexual violence results in denial while often in family violence defendants plead guilty in order to lower their sentence. Due to the high stake in sexual violence cases a defendant would never be advised to do the same by their defence lawyer. Complainants in sexual violence cases are the main witness and their intimate testimony is the evidence on trial. Trauma can be compounded in sexual violence cases due to time delay and it can lead to extreme difficulty in recovery. Delay in family violence increases ability of coercion and can lead to the recanting of previous statements. Family violence will always occur within the family by definition. Sexual violence may, and frequently does, however the complainant and defendant are not bound in an ongoing relationship in the same way. Arguably the Law Commission disadvantaged the reform work by conflating these issues. Similar arguments have been made by the sector in regard to funding. The two should be analysed separately as despite the similarities on the face of it, sexual and family violence remain distinct.

Despite similarities there are also key differences between these crimes. There is the overlap due to sexual violence often involving an intimate partnership and that both are a gendered harm. However consent is the key issue at play that differentiates the crimes, because a person cannot consent to family violence.. The Law Commission failed to unpack the differences of these offences. Thus the conflation of sexual violence and family violence is another problematic aspect of research conducted and the work of the Law Commission.

This paper is not attempting to diminish the need for reform outside of substantive legislative change. However complete dismissal by the government is inappropriate. Substantive legislative reform is symbolic. It provides solid protection for complainants and signposts societal developments. Section 44, in its current form, merely conducts a relevance test. It provides no additional protection for complainants nor an acknowledgment of prejudices suffered. The extension of the rape shield to include defendants would provide a symbolic message regarding the laws disapproval and rejection of rape myths, as well as providing better protection in individual cases. This paper is also not undermining the importance of research but is instead stressing the vitality of practical results in a time where the need for change has been readily acknowledged.

VI Law Reform and additional implementations

A The limitations of law reform

Recent research suggests that both substantial and procedural law reform has proven inadequate in the pursuit of justice for survivors of sexual violence.¹⁴⁶ A perspective that this paper affirms is that the law in itself cannot alter attitudes and societal perceptions. Sexual violence is a societal issue and one the legislature has already partially sought to address. “Rape culture” and the myths it perpetuates will remain regardless of a change in the law. Arguably law reform is a method that has been practiced in the past in regards to this crime but has proven unsuccessful. It could be stated that sexual violence is an issue that requires community-level engagement. This is due to the fact that it is such a widespread crime and is rarely committed by a stranger to the survivor. Sexual violence is instead a crime that occurs within families, friends, schools, workplaces and partners.¹⁴⁷ Arguably this crime requires engagement by all citizens rather than a selected few politicians. However the Law Commission can address this critique by ensuring public consultation is followed. Whether this is achieved effectively is of greater concern.

¹⁴⁶ Elisabeth McDonald, above n 6 at 488.

¹⁴⁷ Jessie Hume, “Shocking IPCA Report Confirms Criminality of Roastbusters Actions and Police Failure” (19 March, 2015) The Daily Blog <<http://thedailyblog.co.nz>>.

Despite citizens being provided the opportunity of involvement this does not mean it translates into actual participation. This issue is so much just about starting the conversation. Is law reform the appropriate mechanism for this? It is the position of this paper that law reform is adequate, so long as used in conjunction with other mechanisms.

Despite a change in legislation, if problematic stereotypes and misconceptions regarding sexual violence pervade throughout New Zealand culture then this will inherently disadvantage complainants. If unconscious biases affect citizens then they affect potential jurors.¹⁴⁸ Therefore social educational programmes are necessary along with changes in legislation.

Almost 90 percent of government spending on sexual violence is expended after the violence occurs.¹⁴⁹ It is this paper's recommendation that resources are applied before the harm results through the mechanism of creating awareness, prevention and education. This paper has discussed the viability of this strategy. It is important that the legislature places proportionate time and thought into action before harm is caused. Preventative and reactive legal response is necessary.

Although law reform possesses limitations it cannot be readily dismissed. It is a mechanism that can send a social message regarding what is acceptable and what is not. New Zealand is a young nation that prides itself on its innovation. If sexual violence is not combatted appropriately then victims of this crime are being actively dismissed. There is no justice in a society where rape can be committed so easily. Law reform is appropriate and necessary as sexual violence survivors are currently failed by New Zealand's criminal justice system. There is a real need. A need for not just legal change, but social change too.¹⁵⁰

¹⁴⁸ Oliver Wright "Police need to take rapes more seriously, admits director of public prosecutions" *The Independent* (online ed, 23 August 2014).

¹⁴⁹ Office of the Minister for Social Development *Ministerial Group on Family Violence and Sexual Violence: Update on the progress of the work programme* (2016) at 6.

¹⁵⁰ Elisabeth McDonald, above n 6 at 490.

Despite the limitations of law reform, sexual violence still warrants legislative change. Law reform cannot solve all issues pertaining to sexual offences. It can, however, send a societal message regarding intolerance towards this crime. It can create marginally improved treatment of complainants in the justice process. It can communicate to survivors that their voice can be heard. Despite its limited ability to solve the entire problem, law reform is still certainly worth consideration.

B Examples of effective campaigns

Law reform is difficult and often frustrating. This paper will discuss the distinct and difficult nature of law reform in regards to sexual violence. Attempting to change the law where the foundations are conservative and patriarchal holds many barriers.¹⁵¹ Change is best achieved when law reform is applied in conjunction with other practical steps. To inform an analysis on law reform in regards to sexual violence, this paper now introduces a discussion regarding a social campaign on the issue of consent. The objective of a campaign would be to ensure that the issue of sexual consent enters citizens' consciousness.

The Crown Prosecution Service in the United Kingdom initiated an awareness campaign that used the analogy of making an individual a cup of tea to illustrate a simple message in regards to consent.¹⁵² The campaign compared sexual contact with making a cup of tea. It illustrated that an individual is not entitled to a person drinking their tea. An individual can agree to the cup of tea and then change their mind. They are under no obligation to drink tea. Unconscious people do not want a cup of tea and they cannot answer the question "do you want tea?" If a person says they don't want tea then don't make them one. Don't get annoyed at them. Don't try to convince them. "Whether it's tea or sex, consent is everything."¹⁵³ The absurdity of that kind of behaviour in regards to a

¹⁵¹ J Jordan *The Word of a Woman? Police, Rape and Belief* (1st ed, Palgrave Macmillan, United Kingdom, 2004) at 49.

¹⁵² "Sexual consent is simple. We should all be clear what constitutes rape" (23 September 2015) The Guardian <www.theguardian.com>.

¹⁵³ The Guardian, above n 152.

cup of tea and the clarity of the message is effective. The tea “consent is everything” campaign aimed to educate citizens regarding the necessity of given consent, rather than assuming it exists.¹⁵⁴ The advertisement effectively addresses the “grey area” concept where consent is seen as questionable. This is where the majority of sexual violence occurs, in this grey area. In this campaign the viewers are advised to not give tea to someone who refuses it and not to get annoyed if they reject an offer, “they just don’t want tea, OK?” The voiceover discusses the importance of affirmative consent. If an individual is unconscious, they don’t want tea.¹⁵⁵ This form of advertising is thought provoking, educational and explicitly clear. It denies the right to a “grey area”. This is the kind of clever advertising that New Zealand would benefit from in regards to consent.

Law reform works most effectively when implemented with other initiatives. With the issue of sexual violence, law reform can only achieve a limited amount. It is a social issue that requires addressing at the ground level. This paper recommends advertising. The issue of consent should be emphasised. Focus on consent addresses all forms of sexual violence, harassment and any form of unsolicited behaviour. It is important to focus on the actor. Advice provided to women to wear comfortable shoes,¹⁵⁶ to carry a whistle, to police their own behaviour and even to sit in the back seat of a taxi¹⁵⁷ has not only proven unsuccessful but it also contributes to a culture of victim blaming. A campaign to discourage drink driving does not target other drivers on the road, but rather the perpetrators. There is very little sense in teaching women not to get raped. This nation needs to teach men not to rape.

1. Death tolls on the road

¹⁵⁴ “Tea is analogy for sex in police consent YouTube video” (28 October 2015) BBC News <<http://www.bbc.com/news/uk-england-beds-bucks-herts>>.

¹⁵⁵ BBC news, above n 154.

¹⁵⁶ Talia Shadwell “Uni’s rape advice: wear runners, carry whistle” (13 August 2014) Stuff news <<http://www.stuff.co.nz>>.

¹⁵⁷ Genevieve Gannon “Taxi sexual assault victim could have avoided attack, says driver’s lawyer” (12 May 2016) Herald sun <<http://www.heraldsun.com.au/>>.

Advertisements can have significant impact regarding public perception on an issue. In 1995 the National Road Safety Plan held that their objective was to reduce the annual road toll.¹⁵⁸ New initiatives and efforts consisted largely of a concentration on advertisement. Between 1995 and 1997 changes to the road toll were significant. Improvements were noticeable. Substantial reductions in serious road crashes resulted in 111 fewer crashes. Police reported injuries decreased by 19 percent while hospitalisations decreased by 12 percent. Advertising works. If an issue enters the public consciousness, changes occur.

2. Domestic violence

In 2007 the Taskforce for Action on Violence Within Families initiated the “It’s not OK” campaign. The campaign was led by the Ministry of Social Development, Community Investment, through the Social Action Team in partnership with communities. Family violence is a useful comparison. It is a similar issue to sexual violence in its prevalence, interference in community safety and its cost to society. If advertising has worked for this issue, it can have the same effect for sexual violence. The family violence campaign successfully increased visibility of the issue and enabled empowerment and encouraged action and change.¹⁵⁹

Social issues can be targeted through social marketing including, as this paper has stated, alcohol use, drunk driving, smoking and the necessity of physical activity. Social marketing is defined as:¹⁶⁰

The use of marketing principles and techniques to improve the welfare of people and the physical, social and economic environment in which they live. It is a carefully planned, long-term approach to changing human behaviour.

¹⁵⁸ “History of road safety advertising” (1 July 2016) New Zealand Transport Agency <<https://www.nzta.govt.nz>>.

¹⁵⁹ F McLaren. (August 2009) *The Campaign for Action on Family Violence. Effective social marketing: complex issues and innovative practice*. Ministry of Social Development, Wellington.

¹⁶⁰ “Social Marketing Down under” (August 2009) Social marketing <www.socialmarketing.co.nz>.

Evidence suggests that to achieve long-term change, media advertising must be supported with other forms of intervention and activity, for instance, as this paper argues, law reform. The family violence campaign created visibility and was successful in highlighting the issues of family violence and the need for discussion and change. Surveys conducted after the campaign found that 95 percent of individuals interviewed had witnessed the campaign.¹⁶¹ The campaign had extended the definition of family violence and 68 percent of people who viewed the campaign then discussed the issue with family or friends, including their own experiences of violence. 37 percent of viewers reported that the campaign had personal relevance to them and the advertisements had personally impacted their perception.¹⁶² The campaign increased relevance and understanding of family violence. Family violence is similar to sexual violence in that it is important to acknowledge the following and increase understanding that sexual violence, like family violence, can happen in any household. It can happen in households where the individuals are perceived as wealthy or successful. It transcends classes and cultures and nationalities. They are both issues of control. Advertising increased understanding regarding the issue of family violence. Due to the similarity in the issues it could be argued that this approach, along with law reform, could increase awareness and create necessary change.

This paper perceives sexual violence as a harmful and pervasive crime. It is as important of an issue as death tolls on the road and domestic violence. It requires similar attention. Advertising reaches the rooms, conversations and minds of all New Zealand. It initiates necessary discussions. Advertisements regarding the issue of consent would be a useful step towards increasing awareness of the prevalence of sexual violence. Advertisements have been successfully used in other countries. This paper suggests that a campaign concerning consent should be a government-funded initiative. The backing of the government provides necessary resources and coverage as demonstrated by the successful campaigns that this paper has detailed.

¹⁶¹ McLaren, above n 159.

¹⁶² McLaren, above n 159.

C Other possible methods to enable awareness

Although this paper has acknowledged the importance of law reform it has also critiqued its ability to be completely effective. It is therefore necessary to provide other suggestions. It is the recommendation of this paper that law reform should be implemented alongside other initiatives.

1. The importance of education

This paper recommends education from a young age regarding the issue of consent. Schools have been advised by the Ministry of Education to address issues of consent and coercion during the sexuality education programme. A 2013 Health Select Committee report found that New Zealand sexuality education programmes are inadequate and fragmented at times. The committee included a recommendation that consent, coercion and cultural differences feature and as a result students will learn the importance of treating others with respect, navigating relationships and remaining safe.¹⁶³

There must be a fundamental shift in thinking.¹⁶⁴ To do so, society must engage actively with the issue of sexual violence. This requires acknowledgment and understanding – factors associated with the necessity of education. It is necessary to accommodate the needs of individuals who have never possessed the opportunity to know other. Rape and the belief of rape misconceptions are learned behaviours.¹⁶⁵ Martial rape was outlawed in 1985.¹⁶⁶ Not enough time has passed for rape myths and prejudices to fully be removed from society. Thus there remains a belief that individuals are entitled to the provision of consent by their partners or that if it has been provided once it can therefore be assumed

¹⁶³ “Sexuality education: a guide for principals, boards of trustees, and teachers” (5 February 2016) Ministry of Education <<http://health.tki.org.nz/>>.

¹⁶⁴ “Young people want to learn about sexual consent” (2 October 2015) Schools Consent Project <<http://www.schoolsconsentproject.com/>>.

¹⁶⁵ Kimberly Lonsway “Preventing acquaintance rape through education: What do we know” (1996) 20(2) *Psychology of Women Quarterly* 229 at 234.

¹⁶⁶ Anne Else “Story: Gender inequalities” (5 May 2011) Te Ara – the Encyclopedia of New Zealand <<http://www.teara.govt.nz/>>.

in future.¹⁶⁷ Education is therefore about teaching the next generations to view consent appropriately and with full understanding.¹⁶⁸ Education is allowing individuals the chance to unlearn problematic prejudices that their parents may have subconsciously instilled in them. Education is an effective avenue to explore as it is not punitive but it is far-reaching and successful.¹⁶⁹

2. Regulation in the media

The media can have influence over how citizens view social issues.¹⁷⁰ Regulation in the media could be a useful mechanism to work alongside a campaign in order increase awareness of the importance of consent. The media influences the minds and expectations of New Zealand citizens. Subtle messages of victim-blaming and rape culture permeate through the media in all its forms – newspaper articles, television and through social media. The tension exists between the benefit of censorship and the importance of freedom of speech. This paper holds that the harm rape culture creates may warrant the restriction of ideas that are damaging. The media only covers sensationalist rape cases.¹⁷¹ This perpetuates the myth that rape is only traumatic or “real” if it is vicious, violent and committed by a stranger. The survivor is often put on trial by the press, rather than the alleged offender. New Zealand media perpetrates gender stereotypes, victim blaming ideologies and rape myths. The portrayal of rape by news outlets downplays the extensiveness of the crime of rape.¹⁷²

There have been several problematic reports regarding the issue of sexual violence in the year of 2016. For instance, an issue involving the rugby team Chiefs and a stripper lead to

¹⁶⁷ “Rape is not a crime about sex: It is about male entitlement and power” (12 December 2014) Everyday Victim Blaming < <http://everydayvictimblaming.com> >.

¹⁶⁸ Elizabeth Schroeder *Teaching young people about consent* (Cornell University, October 2015) at 1.

¹⁶⁹ At 3.

¹⁷⁰ “How does the media influence people?” (12 August 2016) Reference <<https://www.reference.com>>.

¹⁷¹ Joanne Ardovini-Brooker and Susan Caringella-Macdonald “Media attributions of blame and sympathy in ten rape cases” (2002) 15 *The Justice Professional* 3 at 4.

¹⁷² Anastasia Powell, Nicola Henry and Asher Flynn *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, United Kingdom, 2015) at 4.

prejudiced reporting that blamed her involvement.¹⁷³ The reporting of the cricketer Scott Kuggeleijn's rape trial was problematic and perpetrated victim blaming attitudes. A Stuff article titled "Cricketer rape trial: Did no mean no?" stated "She was drunk and she told him no. Whether she meant it is the central point in cricketer Scott Kuggeleijn's rape trial". The assertion that no may not have meant no ignores the fact that consent is an active element to be provided not assumed.¹⁷⁴ This form of reporting is problematic and could harm the public by perpetuating rape culture misconceptions. A possible mechanism could involve media censorship. This could involve a regulation on media reporting that perpetuates damaging rape myths. Although this paper considers worth in this kind of drastic action, it must be acknowledged that freedom of the press can reasonably result in problematic articles such as the Stuff article mentioned above. This article was eventually removed. Therefore active participation by consumers and complaints can lead to regulation in the media. The media may begin to self-regulate as citizens become more understanding. Education could assist in this regard. Thus options such as government censorship seem inappropriate and a step too far at this point. However media and its affect on social attitudes is an important element to consider in the discussion of myths and misconceptions regarding sexual violence. Regulation may be a step too far but education would certainly be of assistance.

VII What this paper's findings tell us about law reform

There is much more work to do in regards to the standard trial in New Zealand. The Law Commission failed to provide a thorough discussion regarding evidence issues and cross examination, a codified definition of consent is still missing and the potential erasure of juries in sexual violence cases requires full, public debate. At present there is a very fixed approach to dealing with sexual violence. In contrast, there is such a variation of

¹⁷³ Nicola Middlemiss "Lawyer weighs in on Chiefs stripper scandal" (9 September 2016) HRM New Zealand <<http://www.hrmonline.co.nz>>.

¹⁷⁴ Natalie Akoorie "Scott Kuggeleijn rape trial: Defence claim any man would do it angers women's advocates" (4 August 2016) New Zealand Herald <<http://www.nzherald.co.nz>>.

offending and responses. This “blunt approach”¹⁷⁵ does not acknowledge the complexities of the law regarding sexual violence. This issue needs to be unpacked more.

The main concern is that we have reports from complainants that the trial process is very harrowing and distressing and akin to the sexual offending itself.¹⁷⁶ The complainant participation in the system is unfair. When complainants in sexual cases go through the process they should come out feeling that the process was just and they have been heard, regardless of the outcome. It is the position of this paper that not enough has been achieved through law reform in order to allow that objective to be realised. In the case of sexual violence reform, perfect can be the enemy of the good. As law reformers search for perfection, sometimes action and necessary change is delayed. The rape shield will not be able to solve all issues pertaining to sexual violence. However not acting at all, initiating no change because options are imperfect, is the most problematic response possible.

The issue of sexual violence and legislative reform will always be incredibly imperfect. Sexual violence is extremely incompatible with New Zealand’s current criminal justice system. Confronting this issue is so difficult because it is institutional and attitudinal. As this paper has addressed, the search for justice and its process in relation to sexual crimes can be contradictory to what a complainant really needs. Therefore unless the process completely changes and alternative trials are arranged for sexual violence, the law must work within its current frameworks.

The position of this paper is that the rape shield should extend to defendants if for no other reason than to send a symbolic message. With this aspect of the law it is extremely difficult to create a practical reality of making a real difference. The House of Lords comment, particularly that of Lord Steyn, illustrated where a majority of judges will sit

¹⁷⁵ Interview with Elisabeth McDonald, Associate law Professor at Victoria University of Wellington (Radio New Zealand, 23 September 2012) titled “Real Justice” at 09:50.

¹⁷⁶ At 01:17.

on this issue. Judges will perceive all sexual history with the defendant to be relevant in order to provide context to the relationship. Judges are employed to be definitive and opinionated. These are important aspects that allows necessary decisiveness within New Zealand's judiciary. Therefore if judges perceive sexual history to always be relevant then regardless of legislative reform, the rape shield may be entirely futile. It could be necessary to structure judicial decision making. The law cannot remove judicial discretion entirely. Arguably there could be some form of "checklist" before judges decide whether sexual history is relevant. Different factors would be stated as necessary to consider. For instance, in South Africa section 227 of the Criminal Procedure Act provides factors that a court must consider in an application regarding the complainant's sexual history with the accused.¹⁷⁷ However judicial discretion remains in order to allow the court to balance the defendant's right to a fair trial. In New Zealand this could combat the issue of judges overriding the purpose of the rape shield extension and deeming all sexual history relevant.

An appropriate question is the purpose of legislative reform. If law reform exists to send societal signals regarding expectations of behaviour then sexual violence reform is useful. If law reform is only implemented when justice and conviction rates will result then some important symbolic change would be sacrificed. There may be significant benefit in signaling to judges as they possess influence in regards to rape convictions.

Law reform in regards to sexual violence is extremely complex and difficult. New Zealand's legislature has initiated incremental changes, slightly altering the Evidence Act and slowly creating progress for complainants of sexual violence. However significant law reform has proven difficult to navigate. For instance due to the fact that sexual violence is mostly committed by individuals known to the survivor there is often a hesitancy to report. The law must send a signal regarding the seriousness of this kind of offence. Sexual violence has been rendered disgusting and incomprehensible by society. It is perceived as the worst of crimes and "an assault on the soul" or "the ultimate

¹⁷⁷ *Character Evidence in Rape Trials: A Comparative Study of Rape Shield Laws and the Admissibility of Character Evidence in Rape Cases* (Bangladesh Legal Aid and Services Trust, January 2015) at 18.

violation”.¹⁷⁸ Sexual violence must not be trivialised therefore the maximum sentence of 20 years is appropriate.¹⁷⁹ However this places survivors who were raped by a family member or partner in a difficult position. In regards to sexual violence convictions, the stakes are very high. The law has actually disincentivised reporting by treating the crime so seriously. Law reform is very complex in regards to the crime of sexual violence. Many individuals do not want to subject people they know, even those they are now not associated with, to the potential of that length of imprisonment.¹⁸⁰ Defence lawyers mostly advise clients to plead not guilty due to the risks being so high and the convictions rates being so low.¹⁸¹ Due to the seriousness of the sanction this is sometimes a disincentive of seeking treatment, justice or acknowledgment of what was committed against survivors. It is not a politically palatable view however that the sanction is too high. However judges, individuals working in the sector, defence counsel and prosecutors state that it seems to be a barrier to survivors pursuing resolution through the criminal justice system.¹⁸² It puts defendants in a very entrenched position. This illustrates the complexity of sexual violence law reform. There are public signals that need to be sent regarding its seriousness but there is real difficulty for complainants regarding the harshness of the sentence that leads to a reluctance to come forward. Sexual violence requires distinct reform consideration. As this paper has addressed, it has proven very difficult to address both internationally and in New Zealand.

Another paradox in regards to sexual violence is the societal perception that it is a heinous crime. Despite the acknowledgment of the harm this offence creates, victim-blaming cultural attitudes, stereotypes and myths continue to normalise sexual violence in our society while trivialising damage inflicted upon survivors. Therefore there is a

¹⁷⁸ Anastasia Powell, Nicola Henry and Asher Flynn *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, United Kingdom, 2015) at 1.

¹⁷⁹ Crimes Act 1961, s 128B.

¹⁸⁰ Interview with Elisabeth McDonald, Associate law Professor at Victoria University of Wellington (Radio New Zealand, 13 November 2013) at 06:30.

¹⁸¹ At 07:08.

¹⁸² Interview with Elisabeth McDonald, above n 180 at 07:40.

tension between how the law and society approaches the crime of sexual violence.¹⁸³ Sexual violence is an area of offending filled with paradoxes and difficulties. This paper has unpacked the distinct nature of sexual violence that makes law reform incredibly challenging.

Survivors of sexual violence require acknowledgment. Due to the way society invalidates and victim blames, it is essential that the justice system handles harm with care and understanding. Arguably these survivors need more from the justice system than the average victim. Recognition of the harm is desired.¹⁸⁴ The criminal justice system provides minimal space for the impact of sexual violence to be considered. The offence is instead decontextualised, misconstrued, discarded and instead replaced with legal analysis – evidence, facts and truths.¹⁸⁵ It is really important that law reform acknowledges this need and receives the message that survivors are not feeling validated by the justice system.¹⁸⁶ Sexual violence reform requires constant checking in regarding the needs of survivors. This paper believes that greater thought is required in this area of law. It is of greater sensitivity than most other crimes and that needs acknowledgment during the process of law reform.

This paper has shown that law reform is dependent on politics. Influences include the election year, other issues at play and what is politically palatable.¹⁸⁷ Despite the importance of this issue, the acknowledged need for change and the widespread agreement that sexual violence is damaging New Zealanders and our culture, ultimately law reform is political. It is usually only politically palatable to initiate small, incremental changes. Reform changes initiated thus far have resulted in marginally better treatment

¹⁸³ Anastasia Powell, Nicola Henry and Asher Flynn *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan, United Kingdom, 2015) at 1.

¹⁸⁴ At 24.

¹⁸⁵ At 25.

¹⁸⁶ Interview with Elisabeth McDonald, above n 179 at 05:05.

¹⁸⁷ Interview with Wendy Parker, Principal Advisor at Ministry of Justice (Bridget Sinclair, at Victoria University of Law, 15 September 2016).

for some complainants by the justice system. This paper believes that is still worthwhile. It is still a symbolic gesture and the more progress for survivors, whether big or small, the better.

A lot of individuals and groups are invested in this issue. New Zealanders want change. The difficulty is in deciding the best approach. Sexual violence is a distinct issue that is difficult to redress with law reform. This paper has shown that law reform is not always the only solution and in this case must be implemented alongside education and a “consent campaign”. It has shown the difficulty in reforming law where the process itself is incompatible with what complainants require. It has demonstrated the disappointing reality that ultimately law reform is extremely political and regardless of the importance of an issue, such as better justice for complainants, if it is not politically palatable, it is likely change will not occur. This paper has shown that legislative reform requires political prioritisation. Sexual violence law reform is complex. There is no simple fix to an issue that is embedded in social misconceptions. It is a crime wrapped up in entrenched sexism and gender inequality. Sexual violence is a multifaceted concern that requires community wide engagement. This paper asserts that we can be hopeful that change will eventuate.¹⁸⁸ This issue has been acknowledged. A lot of stakeholders are interested in sexual violence reform. We can be hopeful that change will come.

VIII Conclusion

Sexual violence is a crime that is pervasive, harmful and prevalent in New Zealand society. This paper has described the harm this crime causes and the pertinent need to address necessary change through law reform. It then detailed a historical analysis of the rape shield from its creation, section 23A to section 44. The limitations of the provision were discussed as well as recommendations. This paper concluded with an explanation of methods that would effectively work alongside reform. These included: campaigns to

¹⁸⁸ Interview with Wendy Parker, Principal Advisor at Ministry of Justice (Bridget Sinclair, at Victoria University of Law, 15 September 2016).

allow the issue of consent to enter the public consciousness; education programmes and censorship. This paper has undergone an analysis of section 44 and all relevant factors that have affected its success or lack thereof. Finally this paper applied its findings to reflect upon the law reform process as a whole.

Sexual violence is an issue where harm is contributed by many social and cultural factors. Social attitudes and problematic sexist beliefs are embedded in New Zealand culture. It is a complex issue that cannot be addressed simply through one solution. Consequently law reform must work in conjunction with other initiatives.

Insufficient progress has been made for survivors of sexual violence. More must be done to create a provision that correctly addresses the way in which the criminal justice system fails to work well for complainants. There must be progress made to allow resolution, to enable survivors to appreciate their voice, to know they are heard. Law reform has enabled progress but greater work is necessary.

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