FROM "REAL RAPE" TO REAL JUSTICE? REFLECTIONS ON THE EFFICACY OF MORE THAN 35 YEARS OF FEMINISM, ACTIVISM AND LAW REFORM

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In this article, the author develops her observations made during the 2012 Suffrage Lecture at the University of Otago. Using the lecture as the starting point, the article considers what law reform over more than 35 years has actually achieved, with a specific focus on the admissibility of evidence about a complainant's previous sexual experience in a criminal case involving rape allegations. It concludes that although policy makers and legislators have been responsive to the concerns expressed by complainants about their treatment in the trial process, little real change to that experience has occurred. More fundamental work needs to be done by way of preventative education, challenging rape mythology and developing new processes to resolve allegations of sexual offending. These are the challenges for the next 35 years.

I INTRODUCTION

I was asked to speak at the University of Otago in 2012[1] following the publication of a jointly authored book: *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand*.[2] In this work we made a number of recommendations for reform of law and practice regarding the prosecution of sexual offending – some of which have been picked up and developed by the Law Commission, as I will discuss later in this article. In doing that work, however, I was reminded again that despite

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1 Elisabeth McDonald "From 'Real Rape' to Real Justice? A look at the efficacy of 35 years of feminism, activism and law reform" (Suffrage Lecture 2012, University of Otago, Dunedin, September 2012).

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

decades of law reform many issues remain, and remain the same. As historical commentary, it is fitting to build on my earlier observations as part of this Special Issue of the *Victoria University of Wellington Law Review*, published to commemorate the first woman law graduate from Victoria University. Although Harriette Vine was not a criminal lawyer, no doubt she would have been very aware of the particular struggles faced by female victims of crime. In this article, as I did in the Suffrage Lecture, I will explore the lack of real change and what remains to be done in order to effect real justice for victims of sexual offending.

Over the last 35 years there has been a significant amount of research aimed at identifying, and changing, aspects of the criminal justice processes which impact adversely, and unfairly, on victims of sexual offending – especially those who have not been victims of what is referred to as "real rape".[3] However, more recently there is a similar amount of research demonstrating that implementing law reform, whether substantive or procedural, is inadequate to bring about "real justice" unless accompanied by other long-term community-wide initiatives.[4]

To evaluate whether law reform has resulted in real justice, it is necessary to identify the goals of the relevant reforms. If the aim of the reforms was to decrease the incidence of sexual violence while also increasing the reporting and conviction rates, there has been mixed success.[5] While there appears to be a recent increase in the number of offences reported, there has been no significant change with regard to either the occurrence of sexual violence or conviction rates.[6] If the aim was to make a difference to victims' experiences of the criminal justice processes, such that the impact of participating in the prosecution of the alleged offender was not traumatic and distressing of itself, the report card equally reveals a picture of limited success.[7] In the words of Louise Nicholas, the

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3 For an early definition of "real rape", see Martha R Burt "Cultural Myths and Supports for Rape" (1980) 38 J of Personality & Social Psych 217; and Susan Estrich "Rape" (1986) 95 Yale LJ 1087 at 1088 and 1092. More recently see Joanne Conaghan and Yvette Russell "Rape Myths, Law and Feminist Research: 'Myths about Myths'" (2014) 22 Feminist Legal Studies 25.

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

5 Liz Kelly, Jo Lovett, Gordana Uzelac and Miranda Horvath *Rape in the 21st century: Old behaviours, new contexts and emerging patterns* (Economic and Social Research Council, End of Award Report RES-000-22-1679, Swindon, 2007); Temkin and Krahé, above n 4, at 9–23.

6 Elisabeth McDonald and Rachel Souness "From 'Real Rape' to Real Justice in New Zealand Aotearoa: the reform project" in McDonald and Tinsley, above n 2, at 31.

7 Temkin and Krahé, above n 4, at 127–142; Venezia Marlene Kingi and others *Responding to Sexual Violence: pathways to recovery* (Ministry of Women's Affairs, October 2009) [*Responding to Sexual Violence*]; Gender Bias and the Law Project *Heroines of Fortitude: The experience of women in court as victims of sexual assault* (Department for Women, NSW, 1996); Elisabeth McDonald "'Real Rape' in New Zealand: Women Complainants' Experience of the Court Process" (1997) 1 Yearbook of New Zealand Jurisprudence 59.

New Zealand rape complainant who rejected anonymity to disclose her allegations against police officers which were not initially acted on:[8]

> As someone who has been through the judicial system seven times in the last 15 years, I know the failings of our system but I am also hearing very loudly and very clearly from other victims/survivors that our court system does not give justice to victims of sexual violence. Survivors have told me that it is a system that unfairly supports the rights of offenders. Many survivors have complained to me that they experienced only intimidation, re-victimisation and re-traumatisation.

Although the goal of some reform proposals, and some law and policy makers, is to increase the conviction rate for sexual offending, this is not always the aim of victims.[9] Victim advocates and others working in the sector report, as they did to us, that for many victims the resolution *process* is more important than the outcome.[10] To be listened to, to have their experience validated and to be well treated by the professionals they come into contact with tends to have a greater effect on overall victim satisfaction with the criminal justice system, and most likely their long-term recovery.[11] Research to date indicates that specialisation of those involved in the prevention and prosecution of sexual offences and of those providing treatment and therapy is "best practice", and therefore likely to result in the best outcomes for both offenders and victims.[12]

In this article I continue the discussion of what might amount to "best practice", beginning with a specific focus on the admission of evidence about a complainant's sexual history. I see the admission of such evidence as demonstrating how rape myths, which support the schema of what is a "real rape", continue to be reinforced in the trial process. It is not just the substance of the questions relating to sexual history that is of concern to complainants however – the *process* of cross-examination is often reported as being unnecessarily unpleasant and disrespectful.[13] Although there has been much substantive and procedural reform, there has been no significant change to how

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8 Te Ohaakii a Hine – National Network Ending Sexual Violence Together *Report of the Task Force for Action on Sexual Violence* (Ministry of Justice, 2009) at 79.

9 Nor should it be, argues Wendy Larcombe in "Falling Rape Conviction Rate: (Some) Feminist Aims and Measures for Rape Law" (2011) 19 Feminist Legal Studies 27.

10 Ministry of Women's Affairs *Restoring Soul: effective interventions for adult victim/survivors of sexual violence* (Wellington, 2009) at 69. See also Sara C Benesh and Susan E Howell "Confidence in the Courts: A Comparison of Users and Non-users" (2001) 19 Behavioural Science and the Law 199 at 210.

11 Sara Payne in *Rape: The Victim Experience Review* (Home Office, November 2009) lists victim needs at 14. Jennifer Temkin notes prosecutor treatment has a far greater impact on victim satisfaction than the outcome of the case: Jennifer Temkin *Rape and the Legal Process* (2nd ed, Oxford University Press, Oxford, 2002) at 271–272.

12 See Ministry of Women's Affairs, above n 10, at 70.

13 Ivana Bacik, Catherine Maunsell and Susan Gogan *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre, September 1998); and the research cited in n 7 above.

complainants report their experience of the trial process. Despite the public outcry regarding the acquittals of those charged with raping Louise Nicholas,[14] and more recently in relation to the "Roast Busters" sex scandal,[15] the changes that may really be required – changes to attitudes regarding intimate communication and interaction – seem far away. My critique of the New Zealand rape shield provision also demonstrates the ongoing and pressing need, not just for law change, but for societal change – through preventative education and challenges to rape mythology, within and outside the criminal justice system.

II HISTORY AND CRITIQUE OF NEW ZEALAND'S "RAPE SHIELD" PROVISION

The reference to "more than 35 years" in the title of this article recognises the introduction of an important rule dealing with the admissibility of evidence of a complainant's sexual experience with a person other than the defendant, during a trial dealing with allegations of sexual violence. The rule is sometimes referred to as a "rape shield" provision.[16] Section 23A of the Evidence Act 1908 came into force on 29 July 1977, and, as the author of a number of articles discussing the application of this section, I was always aware that it was introduced some eight years before the raft of other significant reforms came into effect in 1986 regarding the prosecution of sexual offending, including changes to the definition of sexual violation and the criminalisation of rape within marriage.[17]

I had often wondered what had given rise to this earlier legislative reform but it was not until preparing for the Suffrage Lecture, I am embarrassed to admit, that I actually spent time trying to find out who were those (I presumed) successful feminists. They were able to effectively lobby for this amendment, which was introduced on 18 August 1976 under a National Government consisting of 53 men and two women, (with 30 men and two women on the Opposition benches).

The answer is that the amendment formed part of a Private Member's Bill, which had been foreshadowed in the Member of Parliament (MP) for Birkenhead's maiden speech earlier that year – and was later drawn from the ballot (like the Marriage (Definition of Marriage) Amendment Bill was on 26 July 2012).[18] The Private Member's Bill was championed by the maker of that maiden speech – a Mr Jim McLay (a National MP). Again, I am embarrassed to admit my money was firmly on the National MP for Raglan at the time, a person significantly more well known as a

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14 Louise Nicholas with Philip Kitchin *Louise Nicholas: My Story* (Random House, Auckland, 2014).

15 "Expert appointed to head Roast Busters probe" (11 November 2013) Stuff.co.nz <www.stuff.co.nz>.

16 T Brettel Dawson "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1988) 2 Canadian Journal of Women & the Law 310.

17 Gerry Orchard "Sexual Violation: The Rape Law Reform Legislation" (1986) 12 NZULR 97.

18 Marriage (Definition of Marriage) Amendment Bill 2012 (39-1).

women's rights activist, Marilyn Waring. Notwithstanding its surprising beginnings, the Bill was widely supported during the Select Committee process by many groups including the New Zealand Law Society, the New Zealand University Students Association, the National Council of Women, the Women's Electoral Lobby and a group that no longer seems to be active under their name at this time: the Te Awamutu Feminists.

Mr McLay said in introducing the Bill:[19]

> In my opinion the previous sexual history of the alleged victim with third parties – persons other than the accused – is unlikely to be of any significance when determining whether [the victim] might have consented to have sexual intercourse with the accused. Whether one thinks it is right or wrong, *sexual experience with a third party is no longer – in this society of ours – necessarily indicative of a willingness to consent to sexual intercourse with the accused*.

I agree with this unexpectedly radical statement made on 18 August 1976. The relevant part of section that was enacted provided:[20]

> In any case of a sexual nature, no evidence shall be given, and no question shall be put to a witness, relating directly or indirectly to –
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> (a) The sexual experience of the complainant with any person other than the accused; or
> (b) The reputation of the complainant in sexual matters, –
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> except by leave of the Judge.

Section 23A(3) of the Evidence Act 1908 further provided that leave should not be granted unless:

> [T]he Judge is satisfied that the evidence [of the complainant's sexual experience with a person other than the accused] … is of such direct relevance … that to exclude it would be contrary to the interests of justice.

This admissibility rule was importantly subject to a proviso:[21]

> Provided that any such evidence or question shall not be regarded as being of such direct relevance *by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.*

The purpose of the specific admissibility rule (which introduced a heightened relevance test) was to prevent any illegitimate or irrelevant inferences being drawn about the credibility of the complainant or the likelihood that the offending occurred based solely on whether the complainant

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19 (18 August 1976) 405 NZPD 1753 (emphasis added).

20 Section 23A(2) (as amended by s 2 of the Evidence Amendment Act 1997).

21 Evidence Act 1908, s 23A(3) (emphasis added).

had previous sexual experience. Although less likely now, it is hoped, there was research at that time and in the early 1980s that suggested that fact-finders (as well as police officers) would treat unmarried women who were sexually active as being of bad character and consequently untrustworthy.[22]

Section 23A was replaced by s 44 when the Evidence Act 2006 came into force on 1 August 2007. With one important exception, regarding the bar on reputation evidence introduced in s 44(2), the admissibility rule is essentially identical to that introduced in 1977. Considering the scope and rationale of s 44 the Court of Appeal in *R v Clode* stated:[23]

> [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.

To this rationale of the rape shield provision should be added the further rationale discussed in other cases – the desirability of protecting the complainant from having to "re-live" earlier events of sexual abuse,[24] or from cross-examination that may "re-traumatise the victim".[25] In the words of William Young J in 2013:[26]

> The policies primarily underlying s 44 are that those who allege sexual offending should not be subject to humiliating cross-examination and that trials for sexual offences should not be derailed by collateral inquiries of little or no actual relevance into the complainant's sexual experiences.

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22 Warren Young *Rape Study Volume 1: A discussion of law and practice* (Department of Justice, Wellington, 1983) at 130.

23 *R v Clode* [2007] NZCA 447 at [24]. See also the Court's reference to s 8(2) at [22]. These passages were quoted with approval in *R v Sutherland* [2010] NZCA 154 at [19] and [23]. In *W (CA537/12) v R* [2012] NZCA 567 at [11] the Court of Appeal cited *Clode* and stated that the jury should not be invited to "draw the inference that [the complainant] is promiscuous and so unworthy of belief, which is the very risk that s 44 is intended to control".

24 See *R v C (CA228/10)* [2010] NZCA 147 at [14]; *R v Scott* DC Dunedin CRI-2009-005-344, 12 May 2011 at [6]. In *TPN v R* [2010] NZCA 291 the Court of Appeal allowed the defence to question a complainant in relation to her being also raped when she was around 12 years old by two uncles on two separate occasions. The impact on the complainant of having to answer such questions was not expressly factored into the Court's decision. In the case the Court noted the absence of any evidence to suggest that there had been "transferred attribution from actual offender to present accused" (at [14] and [17]) – although the Court also acknowledged the need to protect complainants "from unnecessary or inappropriate questioning about other sexual activity" (at [15]).

25 *Lindsay v R* [2011] NZCA 500, [2012] 1 NZLR 62 at [11] and [17]; Cabinet Paper "Amendments to the Evidence Act 2006" (12 November 2013) CAB 100/2002/1 at [18].

26 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [112].

Along with the other evidential rules, which apply specifically to sexual cases, rape shield provisions have attracted much academic analysis.[27] Complainants have also been asked to report the extent to which they have been questioned about their sexual history at trial.[28]

A number of replicated findings and commonly held perspectives may be distilled from the significant literature on this topic:

(a) Complainants consider it distressing, irrelevant, embarrassing, unfair and distracting to be asked about their previous sexual experience. Complainant distress impacts on the quality of evidence they are able to give. The fact that victims of sexual offences know they may well be asked about their sexual experience may well be a factor in low reporting rates.[29]

(b) Admission of evidence concerning a complainant's sexual history makes it more likely the fact-finder will attribute blame to the complainant and less likely they will consider the defendant's conduct criminal. (This is more likely to occur when the evidence concerns the complainant's sexual history with the defendant – evidence not currently subject to s 44.) The prejudice arising from such evidence cannot be meaningfully countered by a direction from the judge, nor does it appear that "limited use" directions are an effective way of ensuring that the evidence is used by the jury only for specific purposes (for example, to assist the decision about the defendant's belief about the complainant's consent and not for the impermissible purpose of informing jury opinion about the credibility of the complainant).

(c) The admission of sexual history evidence has traditionally not been appropriately controlled in the absence of a specific rule. That is, subjecting the evidence to a relevance requirement has not been sufficient to prevent the admission of irrelevant and highly prejudicial sexual history evidence.

(d) Rape shield provisions that allow for the exercise of judicial discretion (as in New Zealand) may be a less effective way of preventing the introduction of irrelevant and prejudicial sexual history evidence. Category-based exclusion provisions are arguably

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27 Jennifer Temkin "Sexual History Evidence: the Ravishment of Section 2" [1993] Crim LR 3; Aileen McGolgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16 Oxford Journal of Legal Studies 275; Elisabeth McDonald "Syllogistic Reasoning and Rape Law" (1994) 10 Women's Studies Journal 41; Sue Lees *Carnal Knowledge: rape on trial* (2nd ed, Women's Press Ltd, London, 2002); Regina A Schuller and Marc A Klippenstine "The Impact of Complainant Sexual History Evidence on Jurors' Decisions: Considerations From a Psychological Perspective" (2004) 10 Psychology, Public Policy and Law 321; Jennifer Temkin "Sexual History Evidence: Beware the Backlash" [2003] Crim LR 217.

28 Gender Bias and the Law Project, above n 7; Bacik, Maunsell and Gogan, above n 13.

29 See Liz Kelly, Jennifer Temkin and Sue Griffiths *Section 41: An Evaluation of New Legislation Limiting Sexual History as Evidence in Rape Trials* (Home Office Online Report 20/06, 2006) at 70.

> more effective yet are more open to challenge on the basis of potential or actual unfairness to an accused.[30]

A critique of the historical approach to questioning complainants about their sexual past has been succinctly stated by Paul Roberts and Adrian Zuckerman:[31]

> Over the years some strange notions of relevance became embedded in the common law. For example, it was assumed that evidence of prostitution diminishes the credibility of a rape complainant and increases the probability that intercourse was consensual, when, on a dispassionate appraisal, one might expect prostitutes to be the last people to make false allegations of rape, since sending customers to gaol can hardly be good for business. Equally, a promiscuous person is not the most likely to concoct a false accusation of rape in order to protect her reputation, nor would one particularly expect a sexually experienced person (as opposed to a shrinking violet with no previous sexual history to exploit) to be overcome by shame or remorse into falsely accusing her partners of rape. All-too-frequently, it would appear, the real purpose of such cross-examination was to suggest that the complainant was herself too morally flawed to deserve the court's sympathy or to justify punishing the accused.

Legislation in most common law jurisdictions does severely limit evidence of sexual experience with a person other than the defendant, if only offered to prove that the complainant consented, or that the defendant believed that she was consenting. It is likewise difficult to see how evidence of the complainant's reputation in sexual matters provides, of itself, grounds for the defendant believing she consented to sexual relations. Consent is, after all, given to a person, not a set of circumstances.[32]

To explore the extent to which there have been, and remain, legitimate concerns about the application of New Zealand's rape shield provision, as elsewhere,[33] I have in the past critiqued admissibility decisions by applying syllogistic reasoning. As the test in s 44 is one of heightened

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30 There is debate on this issue. See Carol Withey "Female Rape – an Ongoing Concern: Strategies for Improving Reporting and Conviction Levels" (2007) 71 JCL 54 at 82; Temkin, above n 11, at 224; Neil Kibble "Judicial Discretion and the Admissibility of Prior Sexual History Evidence under Section 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to your Guns Means Shooting Yourself in the Foot" [2005] Crim L Rev 263 at 267 and 273.

31 Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 443–444. See also Dawson, above n 16, at 328: "Information made available to a jury concerning the primary witness's past sexual activity or non-conformity to a sex-role norms increases the responsibility for the assault that is attributed to her at the same time that it decreases perceptions of the accused's guilt."

32 However this argument is not always reflected in decisions about the admissibility of sexual history evidence. See for example *R v Bourke* CA207/06, 15 August 2006; commentary on the case in Elisabeth McDonald "Complainant's Reputation in Sexual Matters" [2007] NZLJ 251; and the later Court of Appeal case *Keegan v R* [2010] NZCA 247 at [63].

33 See Mary Heath "The law and sexual offences against adults in Australia" (2005) 4 ACSSA 1 at 10; and Victoria Law Reform Commission *Sexual Offences: Final Report* (July 2004) at 201.

relevance, it is important to note that relevance is not an inherent characteristic of any item of evidence but exists only as a relation between the evidence and a matter in issue.[34] Whether the relationship exists may depend on either experience or science.[35] As relevance has historically been viewed as largely a matter of "logic and common sense",[36] it is the judge's own knowledge of human conduct and motivation that is relied on to resolve relevance determinations in order to decide on admissibility – based on premises that may not always be articulated.[37]

Decisions about relevance in the context of judicial admissibility rulings are sometimes thought to be helpfully guided by the use of (deductive) syllogistic reasoning. Where the piece of evidence is the minor premise, the conclusion helps solve an issue in the case, and the major premise is, or should be, a "proposition the truth of which is likely to be accepted by the person who has to draw the conclusion – in the case of a lawsuit, a reasonable person".[38]

The classic example of such syllogistic reasoning is:[39]

All men are mortal (major premise).
Socrates is a man (minor premise).
Socrates is mortal (conclusion or deduction).

This technique illustrates the need for careful articulation of a background generalisation (or premise) where the relevance of the evidence is disputed. It also demonstrates the extent to which decisions about relevance (and degrees of relevance) depend on the knowledge, experience and worldview of the decision maker. Delisle, Stuart and Tanovich make the argument for the use of syllogistic reasoning in this way:[40]

> We know that evidence is relevant if it has a tendency to make the proposition for which it is tendered more probable than that proposition would be without the evidence. For evidence to have any value

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34 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 36.

35 Jenny McEwan "Reasoning, Relevance and Law Reform: the influence of Empirical Research on Criminal Adjudication" in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 187 at 191.

36 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [25] citing *R v A* [2001] 1 WLR 789 (HL); Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (New Zealand Law Society, Wellington, 2010) at 27.

37 Christine Boyle "A Principled Approach to Relevance: the Cheshire Cat in Canada" in Paul Roberts and Mike Redmayne (eds) *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Hart Publishing, Oxford, 2007) 87 at 111.

38 DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at 25.

39 See Mathieson, above n 38, at 25; and Roberts and Zuckerman, above n 31, at 143.

40 Ron Delisle, Don Stuart and David Tanovich *Evidence: Principles and Problems* (8th ed, Thomson Carswell, Ontario, 2007) at 148.

> there must be a premise, a generalization one makes, allowing the inference to be made. Borrowing from Professors Binder and Bergman, evidence that roses were in bloom, when tendered to prove that it was then springtime, has meaning only if we adopt the premise or generalization that roses usually bloom in the spring. The tendency of evidence to prove a proposition, and hence its relevance, depends on the validity of the premise which links the evidence to the proposition. The probative worth of the relevant evidence depends on the accuracy of the premise which supports the inference. Sometimes the premise will be indisputable, sometimes always true, sometimes often true and sometimes only rarely true. But a premise there must be. The next time someone says to you that the evidence is *clearly* relevant ask the proponent of the evidence to articulate for you what premise she is relying on. If she has no premise the evidence is irrelevant. If she has a premise you can debate with her the validity of the premise. What experience does she base it on? Is there contrary experience? Is the premise based on myth? Is the premise always true, sometimes or only rarely? These latter parameters do not affect relevance since relevance has a very low threshold but may affect the probative worth which may cause rejection of the evidence if the probative value is outweighed by competing considerations. Approaching discussions of relevance in this way may yield a more intelligent discussion than the often times typical exchange of conclusory opinions.

Syllogistic reasoning was applied by the New Zealand Court of Appeal in *R v Alletson*.[41] The Court was asked to consider the admissibility of what would have previously been considered "good character" evidence about the appellant, James Alletson. To be admissible under the Act, the evidence to be given by an Anglican vicar needed to be substantially helpful to the assessment of the veracity of Alletson, or relevant as propensity (character) evidence. The Court discussed the evidence in terms of whether it could help establish the likelihood that Alletson did not commit the offence:[42]

> [43] Accepting for the purpose of argument that the proposed evidence of Reverend Woodman was propensity evidence, the issue for determination would be whether it would have tended to prove anything of consequence at the trial: s 7(3) of the 2006 Act. We do not believe that it would. The jury would have been asked to adopt the following chain of reasoning: the appellant was a religious person in

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41 *R v Alletson* [2009] NZCA 205 [*Alletson*]. Compare, however, the finding in *Alletson* to the view of the minority in *Gharbal v R* [2010] NZCA 45 at [30]:

> In this case, the proposed evidence that Mr Gharbal is polite and honest appears to have no relevance to his propensity for committing rape. That he is not the sort of person to commit rape is pure opinion evidence rather than showing negative propensity in the sense set out by the Supreme Court in *Wi*. I accept, however, that it is arguable that a person who is old fashioned and religious may be seen by some in the community as having a tendency to act in a morally correct manner (and therefore not rape someone). This evidence may thus have some slight relevance on the test in *Wi*. Likewise, that Mr Gharbal never acted inappropriately to another woman he encountered could have some relevance (although totally lacking in particularity, given that it is unknown if he was even ever alone with the witness). This means that some portion of the proposed character evidence may have been relevant and could have been led.

42 *Alletson*, above n 41, at [43] and [44] (emphasis added).

> his younger days and considered by a reputable figure in religious circles to be a decent person; a boy who is religious and is considered by a reputable person to be of good character is unlikely to commit sexual offences against young girls; therefore, it is less likely that the appellant did so in this case.
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> [44] While we accept that the evidence proves that the appellant was religious in his younger days (possibly at the time the offending occurred) and at that stage appeared to have a strong religious faith, we do not see this as tending to prove anything in issue in the present case. *We do not see any logical connection between evidence of religiosity and general good character and the likelihood of a person having those characteristics committing sexual offences.* In our view the chain of reasoning which the jury would be asked to follow is no more logical than the obviously impermissible chain of reasoning that someone who has no religious beliefs and is not highly thought of by an authority figure is more likely to commit sexual offences against young girls. In those circumstances we see no error on the part of the Judge and no miscarriage arising from the Judge's decision not to admit the evidence.

Phrased as syllogistic reasoning the relevance of Alletson being religious as a young man could be examined as follows:

> The evidence at issue: Alletson was a religious person in his younger days (minor premise).
>
> An issue in the case (which the evidence helps resolve): Alletson is unlikely to have committed sexual offending against young girls (conclusion).

Therefore, in order for the evidence to be relevant a reasonable person must accept the following statement as either being the truth or having sufficient validity:

> People who were religious in their younger days are less likely to commit sexual offending against young girls (major premise).

When the Court stated there was not "any logical connection between evidence of religiosity … and the likelihood of a person having those characteristics committing sexual offences" they were rejecting the validity of the major premise and therefore the evidence was irrelevant for the purpose it was being offered.[43] By conducting a similar analysis the Court held that evidence of the home life of one of the complainants was also irrelevant:[44]

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43 See also *R v Evans* [2010] NZCA 340, (2010) 25 CRNZ 155 at [18] where the prosecution identified "a significant logical flaw" in the evidence of the expert:

> The premise was characterised as an unsophisticated and dated view of sexuality and sexual offending; the more so in a case which concerns alleged offending consisting of low level touching by someone who was in their mid to late teens at the relevant time. The proposed evidence is based on an assumption that sexuality, even in a teenager, is fixed and constant so that it can be safely assumed that someone who is of a heterosexual orientation is unlikely to commit offences of the present kind. Motivation borne of curiosity or experimentation, to name but two possibilities, can be safely ignored.

44 *Alletson*, above n 41, at [30].

> [30] We do not accept that the evidence of the complainants' home environment was substantially helpful in assessing their veracity. The idea that a child who is subject to strict discipline and violence is more likely to seek attention by making a false allegation of sexual misconduct against a neighbour than a child from a better family environment does not appear to us to be valid. We do not see how the jury would have been assisted by this evidence.

In order for syllogistic reasoning to be a helpful tool in assessing relevance it need not be a requirement that the major premise is true – just that it has sufficient validity in order for there to be a logical connection between the evidence and what it is being offered to help establish. To use the words of Delisle, Stuart and Tanovich again:[45]

> The probative worth of the relevant evidence depends on the accuracy of the premise which supports the inference. Sometimes the premise will be indisputable, sometimes always true, sometimes often true and sometimes only rarely true.

In this way, syllogistic reasoning may be of assistance not just in relation to the decision about relevance (where the evidence would be inadmissible if the premise had no or very little validity) but also in relation to assessing the probative value and weight of the evidence.

Drawing factual inferences, as illustrated by the discussion of the case of *Alletson*, can be informed by common sense generalisations that allow conclusions about admissibility (in the case of judges) or sufficiency of proof (in the case of fact-finders). For example, the absence of particular conduct (such as writing about sexual abuse in a diary) "is rendered meaningful by comparison with what we think we, or other people, or reasonable people, would do in the same situation".[46] However, common sense "is highly acculturated and differentially distributed".[47] Judges and fact-finders bring to their relative tasks their own beliefs and assumptions about the world, which include prejudices as well as knowledge:[48]

> Personal experience, and the beliefs which go with it, are moulded by all of the major psycho-sociological variables: class, sex/gender, age, ethnicity, nationality, and religion. There is consequently much variation between differently-situated groups and individuals, and this has important implications for some of the generalizations available to fact-finders in legal proceedings.

In *Cross on Evidence* it was acknowledged, in relation to syllogistic reasoning, that "the most appropriate way of stating the major premise may be controversial: this depends on one's experience

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45 Delisle, Stuart and Tanovich, above n 40, at 148. Compare Jenny McEwan in *Evidence and the Adversarial Process* (2nd ed, Hart Publishing, Oxford, 1998) at 10, who argues that the weakness of inductive reasoning is that "syllogistic reasoning depends on the *correctness* of those initial premises which logically proceed to the conclusion" (emphasis added).

46 Boyle, above n 37, at 106.

47 Roberts and Zuckerman, above n 31, at 146.

48 At 147.

of human nature and the world".[49] Feminists, examining the gendered operation of the rules of evidence, observe that decisions, especially ones about relevance and probative value "are inextricably intertwined with [the] identity and standpoint" of the decision maker.[50] William Twining also notes that:[51]

> In respect of any … generalization one should not assume too readily that there is in fact a "cognitive consensus" on the matter. The stock of knowledge in any society varies from group to group, from individual to individual and from time to time. Even when there is a widespread consensus, what passes as "conventional knowledge" may be untrue, speculative or otherwise defective; moreover "common-sense generalizations" tend not to be "purely factual" – they often contain a strong mixture of evaluation and prejudice, as is illustrated by various kinds of social, national and racial stereotypes.

To the extent that these observations are accepted, decisions about admissibility may well be inconsistent and indeterminate as it is by no means the case that all judges have the same life experience and cultural background – in fact, there have been recent efforts across many jurisdictions to ensure that there is a far less homogenous judiciary than was historically the case.[52] One way to avoid inconsistent decision making may well be to follow a more self-reflective approach to drawing inferences and therefore determining relevance. Such an approach has been suggested by Christine Boyle,[53] who focuses on the need for a mindful evaluation of any assumptions being made with respect to decisions about relevance:[54]

> No matter how logical the structure of analysis, assumptions about raped women, homosexual men and criminal suspects may distort analysis of both relevance and weight, and thus call particular inferences (or their absence) into question … Is there any way in which this inevitable common-sense component, which feeds into assessments of relevance whatever the legal test, can be disciplined by law or even by good habits of advocacy and judging? In other words, is it possible to develop any criteria for assessing the legitimacy of hypothetical probabilities?

Boyle suggests that although the basic test of relevance is logical relevance, "it should be tempered by precedent … critical self-consciousness and the rejection of discriminatory or overly speculative common sense".[55] Explicit attention to possible counter-assumptions may take the form

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49 Mathieson, above n 38, at 26.

50 Mary Childs and Louise Ellison "Evidence Law and Feminism" in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence* (Cavendish, London, 2000) 1 at 6.

51 William Twining *Theories of Evidence: Bentham & Wigmore* (Weidenfeld and Nicolson, London, 1985) at 146.

52 Bertha Wilson "Will Women Judges Really Make a Difference?: The Fourth Annual Barbara Betcherman Memorial Lecture" (1992) 30 Family Court Review 13.

53 Boyle, above n 37, at 95 and from 111.

54 At 111–112.

55 At 117.

of expert evidence[56] or judicial directions[57] in some cases, although this of course requires judicial recognition that assumptions are contestable.[58]

One of Boyle's other criteria for assessing relevance also has merit and may be easier to implement: her observation that common-sense assumptions should reflect insights drawn from the law of evidence as a whole,[59] that is, there should be more reference to appropriate precedents.[60] In Boyle's view there should be "reasonable consistency in the overall common sense of the law of evidence".[61] I will now explore this call for consistency with reference to some admissibility decisions about a complainant's sexual experience.

III SYLLOGISTIC REASONING AND CONSISTENCY OF ADMISSIBILITY DECISIONS

Elsewhere, as mentioned, I have examined admissibility decisions about a complainant's previous sexual history by applying syllogistic reasoning to these decisions.[62] This exercise, which "forces into prominence the assumptions or generalisations relied upon",[63] exposed, in particular, over-reliance on contestable assumptions about male beliefs of women's sexual availability. These

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56 Louise Ellison "Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases" (2005) 9 E&P 239.

57 See for example *R v D* [2008] EWCA Crim 2557, [2009] Crim LR 591 in which Latham LJ at [11] stated that a judge is "entitled to make comments as to the way evidence is to be approached particularly in areas where there is a danger of a jury coming to an unjustified conclusion without an appropriate warning". See the discussion of the case in Rosemary Pattenden "Case Commentaries" (2009) 13 E&P 141 at 154. In the New Zealand context see judicial directions about children's evidence in s 125 of the Evidence Act 2006; *Taylor v R* [2010] NZCA 69 at [74]–[85].

58 Elisabeth McDonald and Yvette Tinsley "Evidence issues" in McDonald and Tinsely, above n 2, at 371.

59 Boyle, above n 37, at 112.

60 Although the same piece of evidence, offered for the same purpose, may be relevant in some cases and not in others, so that there must always be a case-by-case analysis of relevance, as Zuckerman notes "past decisions can help to identify goals or policies which need to be pursued in the reception of evidence": AAS Zuckerman *The Principles of Criminal Evidence* (Oxford University Press, Oxford, 1989) at 52. I would go further and argue that past decisions should assist with what Boyle calls "self-consciously critical open-mindedness about fact-finding in context": Boyle, above n 37, at 117.

61 Boyle, above n 37, at 113.

62 Elisabeth McDonald "The Relevance of Her Prior Sexual (Mis) Conduct to His Belief in Consent: Syllogistic Reasoning and Section 23A of the Evidence Act 1908" (1994) 10 Women's Studies Journal 41; and Elisabeth McDonald "An(other) Explanation: The Exclusion of Women's Stories in Sexual Offence Trials" in *Challenging Law and Legal Processes: the Development of a Feminist Legal Analysis* (New Zealand Law Society, Wellington, 1993) 43.

63 Donald Nicolson "Facing facts: the teaching of fact construction in university law schools" (1997) 1 E&P 132 at 145. See also Terrence Anderson and William Twining *Analysis of Evidence: How to do things with facts* (Weidenfeld and Nicolson, London, 1991) at 67.

admissibility decisions operated, for example, to validate a defendant's claims that he believed the complainant consented as he had been told she had consented to have sex with other men in the past.[64] Although the heightened relevance test in s 44 of the Act has been relatively effective in *limiting* the extent to which evidence has been admitted under this provision, there are still cases in which evidence of the complainant's consensual sexual behaviour with people other than the defendant has been admitted as having "direct relevance" to the fact of consent or the defendant's belief in consent.[65]

For example, in *Keegan v R*, the Court of Appeal stated that:[66]

> [T]here was a wealth of material before the Court which could have formed the basis of an application under s 44 of the Evidence Act 2006 to cross-examine the complainant about her past sexual experience. The material available to [counsel] clearly demonstrated a dysfunctional relationship between the complainant, her sister and their mother; it highlighted the complainant's very disturbed behaviour; and, *most importantly, it showed that she was highly promiscuous and had been engaging in sexual activity for some time, including with older men.* We formed the view that, in these circumstances, there were good prospects that an application under s 44 would have succeeded and that the material which emerged would likely be damaging to the complainant's account that the sexual activity with [the defendant] was non-consensual.

Here is syllogistic reasoning applied to the admissibility issue in *Keegan*:

> The evidence at issue: C (the complainant aged 15) had been having consensual sex with older men (minor premise)
>
> An issue in the case (which the evidence helps resolve): It is likely that C consented to having sex with D (aged 30 and her mother's partner) (conclusion)

Therefore, in order for the evidence to be relevant a reasonable person must accept the following statement (the major premise) as either being the truth or having sufficient validity (remembering here that as s 44 contains a heightened relevance test the premise should be either "undisputable" or "always true"):[67]

> A 15 year-old girl who has been having consensual sex with older men is likely to consent to sex with other older men.

Despite the relevance of this evidence being somewhat controversial, this statement from *Keegan* is cited – without further explanation – as being of helpful "general guidance" to the

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

65 See for example *R v Bourke*, above n 32.

66 *Keegan v R*, above n 32, at [63].

67 Delisle, Stuart and Tanovich, above n 40, at 148.

appropriate application of s 44.[68] However, in my view the Court of Appeal's approach is actually support for the proposition that s 44 is not always operating to effectively exclude irrelevant and unfairly prejudicial material.[69] The point here is that the rules contained in the Evidence Act 2006 will often be applied in a way that results in different outcomes, even where the facts are very similar. As in other areas of the law, admissibility decisions are to an extent subjective and therefore "political" and will turn on the perspectives brought to the process by counsel and the members of the judiciary involved. These perspectives will include different views of individual responsibility and competing interpretations of inter-personal and intimate communication.

Other major premises I have extracted from admissibility decisions about a complainant's sexual experience include:

(a) Men believe that women they know have had consensual sex with another man are likely to consent to having sex with them too.[70]

(b) Women who claim to have been similarly sexually assaulted more than once in similar circumstances are likely to have fabricated the second incident.[71]

(c) Girls who are given love bites by their boyfriend and show them to their girlfriends are likely to consent to having sex with older men.[72]

Although it is not the case that a logical connection between previous sexual experience and consent is discovered in every case,[73] the fact that there are cases in which a logical connection is found raises a consistency concern. However, my focus here is not consistency of admission *among* such cases, but the refusal to admit evidence of an *absence* of sexual experience on the grounds that such evidence is irrelevant to the issue of consent. This issue has arisen in two decisions. In *Grace v R*[74] and *Leef v R*,[75] the Court of Appeal held that evidence of the complainant's virginity prior to the alleged offending was irrelevant and inadmissible:[76]

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68 *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at [EA44.01].

69 See Elisabeth McDonald and Yvette Tinsley "Evidence issues" in McDonald and Tinsley, above n 2, at 371.

70 *R v Bourke*, above n 32; and *R v Phillips* (1989) 5 CRNZ 405 (HC).

71 *R v Accused (CA 92/92)* [1993] 1 NZLR 553 (CA).

72 *R v Taria* (1993) 10 CRNZ 14 (HC).

73 See for example *W (CA247/10) v R* [2010] NZCA 561.

74 *Grace v R* [2011] NZCA 590.

75 *Leef v R* [2011] NZCA 567.

76 *Grace v R*, above n 74, at [10] (emphasis added). In *Leef v R*, above n 75, the Court stated at [16]: "C's prior sexual experience, or the lack of it, is not generally probative of whether she consented".

> [10] We are satisfied that the [trial] Judge was right to direct the jury to ignore the evidence of virginity. The evidence went to prior sexual experience, so was prima facie inadmissible under s 44 of the Evidence Act 2006. *The premise of that section is that prior sexual experience, or the lack of it, says nothing about whether a complainant engaged in consensual sexual activity with a particular person in a particular setting*.

I agree with the italicised words. However, given that consent is to a person and not a set of circumstances, previous sexual experience should *always* be considered irrelevant to the issue of whether there was consent given on another occasion to a different person. In this context there should be consistency of approach with regard to the drawing of logical inferences. The decisions in *Grace* and *Leef* cannot sit comfortably alongside the statement in *Keegan*.

In *B (SC12/2013) v R*,[77] dealing in part with the meaning of reputation evidence for the purposes of s 44(2), William Young J, delivering a minority verdict for the Supreme Court, was of the view that *lack* of sexual experience is outside the ambit of s 44 – and the admissibility such evidence should be governed by ss 7 and 8.[78] Even if this is correct,[79] it does not alter the requirement for the evidence to be sufficiently relevant to be admitted, which again turns on the content of the major premises applied.

This discussion illustrates how the application of admissibility rules can operate to reinforce questionable beliefs about women's sexuality and behaviour (rape myths), which can add to complainant distress and discomfort at trial. But it is not only the admission of evidence which is of concern, and impacts on the negative experience of complainants in a rape trial, but also *how* complainants are expected to participate in the trial process. Both aspects of rape trials (admissibility rules and process rules) need to be reformed in order to appropriately improve the experience of rape complainants, in particular their sense that there has been a fair trial and a just outcome, even in the absence of a conviction.

IV EVIDENTIAL RULES AND FAIR PROCESS

Given that admissibility decisions under s 44 have exposed questionable logical links between the evidence and the issue at trial, it is unsurprising that lack of protection from questioning about their sexual experience *with people other than the defendant* contributes to the feeling expressed by complainants that they are the ones on trial. Unfortunately their experiences have not changed significantly, despite decades of reform of substantive and procedural law. These statements made by rape complainants, 25 years apart, provide a powerful example of the lack of real change:

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77 *B (SC12/2013) v R*, above n 26.

78 At [119].

79 This approach overlooks the cases in which fantasies or fabrication about sexual offending has been admitted under s 23A. See further Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at [EV44.03].

> Just having to get up there and tell a room full of people in detail about what happened. … It's not a nice thing to have to talk about – being forced to have sex in front of a whole lot of people. I thought I was going to be killed when I was raped. If I had, I would have been spared this – it was worse than the rape itself. If that's justice, I'd never report another rape (1983).[80]

> It was horrible. I was exhausted; like every part of my body that night was so sore. And it was embarrassing and kind of degrading and disgusting and I felt kind of like I was the one on trial because you know the things they ask you and the things they imply and you're in a room full of people, 90 percent of whom I don't know talking about intimate sexual stuff (2009).[81]

Despite these views consistently expressed about how difficult it has been historically to participate in the criminal justice system as a victim of sexual offending, a pronouncement made by Sir Matthew Hale in 1680 still is validated in contemporary cases – he opined that rape "is an accusation easily to be made" "but harder to be defended".[82] In 2010 defence counsel in *O'Donnell v R* included the following statement in his closing address to the jury:[83]

> I point out that, in fact, a rape is a very serious allegation and it's so easy [for] someone to say, "I was raped". Very easy to say, and unfortunately in most cases, as in this, it can be difficult to disprove.

In 2011 in *Payne v R* the Court acknowledged that it is a "common defence submission" that an allegation of sexual abuse is easy to make but hard to refute.[84]

In reality it remains very hard to complain. As observed in the Ministry of Women's Affairs funded research in 2009,[85] the community has become aware of the trauma of being involved in a rape trial through media reporting, and this knowledge, along with other deterrents such as family pressure, can contribute to under-reporting and attrition. Survivors' fear of disbelief and of having their character and credibility destroyed in court can be powerful disincentives to reporting to police or continuing through the criminal justice process. Very few rape/sexual assault cases proceed to court, and research in this area already cited has typically found the experience of the trial to be arduous and traumatic for all complainants. One of the hardest aspects to manage, not surprisingly,

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80 Joan Stone, Rosemary Barrington and Colin Bevan "The Victim Survey" in Institute of Criminology *Rape Study Volume 2: Research Reports* (Department of Justice, Wellington, 1983) at 52 and 55.

81 Kingi and others, above n 7, at [7.3.2].

82 Matthew Hale, George Wilson and Thomas Dogherty *The History of the Pleas of the Crown* (Payne, London, 1800) at 635.

83 *O'Donnell v R* [2010] NZCA 352 at [28].

84 *Payne v R* [2011] NZCA 127 at [10].

85 Ministry of Women's Affairs, above n 10, at 40.

has been defence counsel's cross-examination, with this experienced as akin to the initial rape experience.[86]

The results from the 2009 study indicate this is still the case. Going to court was described as a fearful and humiliating experience, and one that most victim/survivors felt they needed high levels of support to manage.

Defence lawyers themselves publically state that they would actually counsel a family member against reporting sexual offending:

> As a practicing lawyer, I was always of the view, and so was my family, that it would only be in the most extreme circumstances that you would ever advise a woman to participate in the criminal process if she was alleging that she had been raped.[87]

> Alas, I would never advise members of my family to report a rape. And that is the fundamental question which should be addressed because that is the 90% we are talking about (the women who don't report).[88]

Despite decades of law reform the issues remain the same and are unresolved. Elizabeth Sheehy has observed that:[89]

> [E]very law reform in evidence law that has been generated to overcome sex discrimination in the adjudication of rape has been met with counter-moves by the defence bar and the re-emergence of myths and stereotypes about women, men and rape in the guise of new legal practices and judicial discourses.

So change may not be effected just by law reform – it is not just a question of tinkering with rules but reconsidering the whole process, as was concluded by the President of the New Zealand Law Commission in 2008:[90]

> [T]he [Law] Commission … has arrived at the view that all is not well with the traditional trial process in New Zealand in relation to sexual offending. The issues that have come to our notice during the

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86 Joan Stone, Rosemary Barrington and Colin Bevan "The Victim Survey" in Institute of Criminology *Rape Study Volume 2: Research Reports* (Department of Justice, Wellington, 1983) at 55; *Responding to Sexual Violence*, above n 7, at [7.3.2].

87 Antony Ellis "The Rape Trial: Are the Scales of Justice Evenly Balanced?" in Juliet Broadmore, Carol Shand and Tania Warburton (eds) *The Proceedings of Rape: Ten years' progress?* (Doctors for Sexual Abuse Care (NZ), Wellington, 1996) 82 at 83.

88 Paul Dacre "Defence Counsel's Perspective" in Juliet Broadmore, Carol Shand and Tania Warburton (eds) *The Proceedings of Rape: Ten years' progress?* (Doctors for Sexual Abuse Care (NZ), Wellington, 1996) 99 at 102.

89 Elizabeth Sheehy "Evidence Law and 'Credibility Testing' of Women: A Comment on the *E* Case" (2002) 2 QUT Law JJ 157 at 173.

90 Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at v (emphasis added).

> course of this project cannot simply be cured by changes to the law of evidence. Problems in the system flow from the features of the adversarial system of trial that is, as presently constituted, an essential feature of our system of justice in New Zealand … *For these reasons the Commission has concluded that there could be value in investigating whether the adversarial system should be modified or replaced with some alternative model, either for sex offences or for some wider class of offences.*

It is sobering to compare this statement to that made by Richard Prebble, Labour MP for Auckland Central, on 18 August 1976:[91]

> I suggest, therefore, that if most women are afraid today to make a complaint to the police in cases of rape – and I believe they are – they will continue to be afraid to do so even if this [evidence law] amendment … is passed… We should look at the whole law and see if we need *a fundamental alteration in the way we deal with rape cases*.

The argument for bigger and bolder change has been made for some time and resulted in our work which was published in 2011 and also the Law Commission's project in 2012 looking at alternative trial processes – currently not on the Minister of Justice's reform agenda. The Law Commission's first review of the Evidence Act 2006 recommended no changes to s 44 (except a pre-trial notice requirement) and stated that the review was not a place for a review of policy regarding specific issues for complainants in rape cases or other vulnerable witnesses.[92] However, on 16 June 2014 the first report of the Glenn Inquiry concluded that "the courts system was seen by the majority of people as being broken and dysfunctional" and there should be a system that instead "promotes the wellbeing of victims".[93] But will more law reform make a difference to complainant's experiences given the failure of previous reforms?

On this point Victoria Nourse has argued that "legal reform is a work in progress. Statutory reform rarely ends anything. It may transform the debate, yet it would be naïve to believe that it could end a matter as ancient as sexism."[94] This too has been acknowledged over time:[95]

> [T]he process has revealed the limitations of legal change. By themselves, the changes to the law are not likely to affect the reportage of rape, and opinion is divided as to whether the trauma of the Courtroom trial for the victim will be lessened. … Those working in victim support services believe that unless there is some commitment made to these wider aspects of public education and moves towards the prevention of rape, then the changes in the law reform process are mere tinkering (1984).

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91 (18 August 1976) 405 NZPD 1757 (emphasis added).

92 Law Commission *Review of the Evidence Act* (NZLC R127, 2013) at [1.41].

93 Denise Wilson and Melinda Webber *The People's Report* (The Glenn Inquiry, 2013) at 118.

94 Victoria Nourse "The 'Normal' Successes and Failures of Feminism and the Criminal Law" (2000) 75 Chi Kent L Rev 951 at 978.

95 Rosemary Barrington "The Rape Law Reform Process in New Zealand" (1984) 8 Crim LJ 307 at 322 and 324.

It seems to me that what is needed, together with reform of law and practice, is a change of attitude, a change in understanding, a change to mindsets and beliefs, not just of lawyers, judges and police officers, but of potential jurors. Jennifer Temkin makes this point very well:[96]

> Despite all the efforts and undoubted improvements over the past thirty years, the rape trial as it is configured in the common law world is frequently not up to the task of delivering justice for rape victims … It is often said that the problem in rape cases is simply lack of evidence, or that it is just one person's word against another. Our analysis shows that it is not necessarily the *lack* of evidence but the *attitude* towards the evidence which matters … The view taken here is that changing attitudes, preventing stereotypical notions from infiltrating decision-making and replacing these notions with a realistic understanding of the problem of rape is one of the keys to achieving justice for its victims.

For example, to go back to the discussion of syllogistic reasoning, the required attitudinal change should result in reinforcing the following beliefs as "major premises" when making *all* admissibility decisions:[97]

> Women do not usually lie about being raped.
> Women may choose to have sex with many men and still retain the right to say no.
> Women may choose to have a drink with a man at his house and also choose not to have sex with him.

Such attitudinal changes would, I believe, have a flow-on effect into the trial process, even if no alternatives to the adversarial trial model are adopted. To again use the words of Louise Nicholas:[98]

> The courtroom should be about balance, fairness and seeking the truth. Not about trying to discredit a person because of the amount of alcohol consumed, the type of clothing worn or because s/he walked home alone.

V CONCLUSION

Over (at least) the last 35 years, policy makers and law reformers have been concerned about the rules of evidence and procedure as applied in cases involving allegations of sexual offending. In 1977 such concern led to the introduction of s 23A. The 1983 *Rape Study* gave rise to a significant number of reforms in 1986, and most recently the Evidence Act 2006 introduced significant changes – especially the introduction of a total bar on a complainant's "reputation in sexual matters" in s 44(2). Despite decades worth of well-intentioned reforms of law and practice, the operation of the rules of evidence still disclose reinforcement of the types of beliefs that the reforms were aimed at challenging. Focussing on New Zealand's rape shield provision, now found in s 44(1) of the

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96 Temkin and Krahé, above n 4, at 209 and 211.

97 A number of current cases do in fact draw on or allude to supportable major premises when considering admission of sexual history evidence. See for example *Brown v R* [2014] NZCA 110 at [27]; *B (SC12/2013) v R*, above n 26, at [62]; and *Demetriades v R* [2013] NZCA 31 at [21].

98 Te Ohaakii a Hine – National Network Ending Sexual Violence Together, above n 8, at 79.

Evidence Act 2006, I have critiqued a number of admissibility decisions. In my view, the exercise of judicial discretion in such cases indicates that questionable rape mythology is still present at trial.

It is not only the content of questions that are problematic and cause complainants to feel that they are on trial. The types of questions and the nature of the cross-examination process is still reported as being harrowing, demeaning and disrespectful – to the point that judges and lawyers are critical of the trial process in rape cases. Further work needs to be done to explore alternative ways of testing evidence without re-traumatising witnesses, including those in cases of sexual offending.

More reform alone is not the answer. Any legislative change must be accompanied by education aimed at challenging and changing the beliefs of those working in the criminal justice system – as well as the members of the public who will make up the jury. It is challenging societal attitudes and debunking rape mythology that is most likely to result in real change:[99]

> [T]he attitudes and behaviour of the legal professionals who apply the rules are often as important in practice as the content of the rules themselves. Such attitudes and behaviour might be a more promising target for reformers keen to improve the lot of sexual assault complainants, rather than tinkering with technical evidentiary rules of admissibility which often appear unresponsive to reformer's best endeavours.

Such are the challenges for the next 35 years.

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99 Roberts and Zuckerman, above n 31, at 450.