Judging Juries:
Assessing a New Fact-Finder Model for Sexual Violence Trials

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Table of Contents

[The jury is] the lamp that shows that freedom lives.
Lord Devlin

[The jury is] the most ingenious and infallible agency for defeating justice that human wisdom could contrive.
Mark Twain

Introduction

Who should decide whether or not a defendant is guilty of committing a crime of sexual violence:[1] the jury, the judge, or an alternative model? This dissertation explores this question, which the Law Commission raised in a comprehensive 2015 report, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*.[2] This report considered the problems with the treatment of sexual violence in the mainstream criminal justice system and proposed a range of solutions. The Specialist Sexual Violence Pilot Court was established in response to the report. One of the issues examined, but left unresolved, was the presence and role of the jury in sexual violence trials. The Law Commission concluded that jury trials are not well suited to determining guilt in sexual violence cases, but did not have the resources to examine the alternatives in depth or make a recommendation.[3]

This dissertation takes up this issue and selects one of the potential alternative fact-finder models – two lay members alongside a judge – and considers the merits of this model against the jury system. Both lay members would have some form of experience or interest in the sexual violence or criminal justice sectors. This model appears at first look to be a desirable option as it incorporates educated community involvement.

Chapter I outlines the current role of juries in sexual violence trials. It discusses why juries have been regarded as so important, why the current jury model struggles to accommodate sexual violence cases, and argues that cases of sexual violence are sufficiently different to other crimes to require a non-jury decision-maker. Chapter II sets out the proposed alternative model in detail. Finally, Chapter III addresses the potential objections and limitations to the model, both practical and philosophical. It argues though that these objections are not necessarily fatal, despite how radical the model may appear.

Changing the fact-finder in sexual violence trials would not solve every issue faced by the court in adjudicating these types of offences effectively. The issues are multi-faceted. However, it would mark a significant step towards achieving justice for victims of sexual violence.

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[1] For the purposes of this dissertation, the term 'sexual violence' will follow the definition of 'sexual case' in section 4 of the Evidence Act 2006, namely an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961, or any other offence against the person of a sexual nature. These sections include rape, unlawful sexual connection and indecent assault.

[2] Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015).

[3] At 6.32.

Chapter I: The Current Role of Juries in Sexual Violence Trials

There is a growing consensus in academic and professional discussion that the traditional adversarial criminal trial has serious limitations in cases of sexual violence.[4] In particular, questions have been raised about the accuracy of a jury's fact-finding and potential harm to complainants. One solution that has been suggested is to change the fact-finder.[5] This chapter outlines the significant differences between crimes of sexual violence and other crimes that justify a different model of fact-finding. It then outlines the major issues that juries present as the fact-finder in these cases.

A The Role of Juries in the Common Law System

Juries have a long and hallowed history in Common Law jurisdictions.[6] In 1815, Scottish solicitors declared jury trials to be "the dearest birth right of the people of England".[7] The Law Commission describes trial by jury as a "fundamental feature of our adversarial criminal justice system",[8] an idea imported to New Zealand during colonial settlement. Their importance to New Zealand was recognised by the Supreme Court in 2010, with McGrath J stating they have "always been central in New Zealand criminal law".[9] The right to a jury trial for offences with a penalty of at least two years' imprisonment is protected by section 24(e) of the New Zealand Bill of Rights Act 1990. As such, limiting access to jury trials would be a significant reform of criminal procedure.

The Law Commission has identified the functions of the jury as: acting as the fact-finder and determining whether the defendant is guilty or not guilty; acting as the conscience of the community in criminal trials; protecting the public from arbitrary or oppressive government;

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[4] Notable recent New Zealand texts include Law Commission, above n 2; Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011); and Ministry of Women's Affairs *Restoring soul: Effective interventions for adult victim/survivors of sexual violence* (2009). Notable foreign texts include Jennifer Temkin and Barbara Krahé *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart, Oxford, 2008); and *The Stern Report: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* (Government Equalities Office, Home Office, United Kingdom, 2010).

[5] Law Commission, above n 2; McDonald and Tinsley, above n 4.

[6] For a history of the jury in New Zealand, see Michele Powles "A Legal History of the New Zealand Jury Service – Introduction, Evolution and Equality?" [1999] VUWLawRw 19.

[7] John W Cairns and Grant McLeod *"The Dearest Birth Right of the People of England": The Jury in the History of the Common Law* (Hart, Oxford, 2002), at 1.

[8] Law Commission, above n 2, at 6.2.

[9] *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 per McGrath J at [21].

encouraging the public's faith in the criminal justice system; and educating the public about how the criminal justice system functions.[10]

The protection of the individual at the hands of the state is crucial in the criminal context, when a person's liberty is at stake. A jury trial has the accused's peers stand between them and the exercise of the state's power "in a way that judges, who are sworn to apply the law, are not always able to do".[11] The courts have deemed community involvement in judgement of serious criminal offending to be desirable.[12] Laypeople bring diversity of views and life experience, helping juries make decisions that are more representative of the wider community than would a judge alone. The Law Commission has also stressed how the "democratic nature of the jury process ensures public validation of verdicts".[13]

There are arguments justifying the role of juries in sexual violence trials specifically. In 1995, the National Collective of Rape Crisis and Related Groups of Aotearoa Inc. submitted to the Law Commission expressing concern about juries in such cases,[14] but the Commission did not accept its criticisms. In a preliminary report in 1998, the Commission responded to Rape Crisis by noting three points: that sexual violence trials often come down to a question of the complainant's credibility, which a jury is as well placed to determine as any other party; that because sexual violence exists on a continuum of acceptable social activity, community involvement in the criminal trial is especially important; and that through participation in these trials, laypeople can begin to recognise and correct their stereotypical thinking about sexual violence.[15] In its final report in 2001, the Law Commission rejected the suggestion of removing juries from sexual violence trials. It concluded that precisely because of the seriousness of the crime, and how deeply it breaches community values, community input via the jury is especially important.[16] The Commission has nevertheless in recent years suggested that the possibility of changing the fact-finder should be looked at again.[17]

At first look, the jury trial plays a significant role in protecting the rights of the accused, engaging the community in the criminal justice process, and highlighting the seriousness of the crime.

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[10] Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [1].
[11] *Siemer v Solicitor-General,* above n 9, per McGrath J at [20].
[12] *Siemer v Solicitor-General,* above n 9, per McGrath J at [19]; *Iti v R* [2011] NZCA 114 at [59].
[13] Law Commission, above n 10, at [7].
[14] Law Commission *Juries in Criminal Trial Part One: A Discussion Paper* (NZLC PP32, 1998) at [194].
[15] Law Commission, above n 14, at [196].
[16] Law Commission, above n 10, at [127].
[17] Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012) at 24; Law Commission, above n 2, at 6.32.

B Why is Sexual Violence Different to Other Criminal Offences?

The Law Commission discusses six characteristics of sexual violence that distinguish it from other crimes. First, "it usually occurs in private", without witnesses except the victim.[18] Second, "it breaches intimate physical and psychological boundaries", so victims may be reticent to go into details about the incident, especially with strangers.[19] Third, there is often a close relationship between the perpetrator and the victim, and the offending sometimes occurs in the context of an ongoing personal or family relationship.[20] Fourth, "the psychological impact of sexual violence and the absence of a typical 'victim' response" can also make victims hesitant to submit to a trial process where their credibility may be challenged.[21] Fifth, sexual violence victims often have "distinct justice needs", mainly a more common desire for participation in the justice process as more than a mere witness.[22] Sixth, "cultural conceptions about sexual violence" often affect how jurors interpret the relevant evidence.[23]

The sixth factor is particularly important in considering the best fact-finder in a trial. There are numerous public stereotypes about sexual violence. One of the most powerful of these is the idea of the "real rape", a concept defined by Estrich: "A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse".[24] While incidents like this certainly exist, most acts of sexual violence do not take this form.[25] When incidents do not conform to this model, it is less likely that the complainant will be seen as a victim of sexual offending, and the defendant is less likely to be convicted.[26] Alternatively, the jury may accept that the sexual connection was involuntary, but may be wary of convicting the defendant of a crime as serious as rape. If it can convict the defendant of a lesser offence, it will likely do so, but the jury may prefer to acquit over finding the defendant guilty of rape.[27]

Other widely-held beliefs about sexual violence are rooted in social and moral expectations of how people, particularly women, should behave. This is reflected in notions such as that the victim was "asking for it" or that the victimisation was her fault because of what she

[18] Law Commission, above n 2, at 1.9.
[19] At 1.10-1.11.
[20] At 1.12.
[21] At 1.13-1.15.
[22] At 1.16-1.18.
[23] At 1.19-1.22.
[24] Susan Estrich "Rape" (1986) 95 Yale LJ 1087 at 1092.
[25] Ministry of Women's Affairs, above n 4, at 14; Temkin and Krahé, above n 4, at 11.
[26] Temkin and Krahé, above n 4, at 31; Natalie Taylor "Juror Attitudes and Biases in Sexual Assault Cases" (2007) 344 Trends and Issues in Crime and Criminal Justice 1 at 2; Elisabeth McDonald and Rachel Souness "From "real rape" to real justice in New Zealand Aotearoa: The reform project" in McDonald and Tinsley, above n 4, at 80.
[27] Harry Kalven Jr and Hans Zeisel *The American Jury* (Little, Brown and Company, Boston, 1966) at 250.

wore, consumed, or how she (or he) acted.[28] Beliefs like this are sometimes called "rape myths", which Kelly, Lovett and Regan describe as "powerful stereotypes that function to limit the definition of what counts as 'real rape', in terms of the contexts and relationships within which sex without consent takes place".[29] Such myths include beliefs that "victims are lying, victims are malicious, sex was consensual, and rape is not damaging… The underlying assumptions about rape suggest that women are essentially responsible for male sexual behavior".[30] There are also stereotypes about how a victim of sexual assault ought to behave, such as fighting back, yelling, and immediately reporting the incident.[31] For various psychological, social and personal reasons, many sexual assault victims do not behave in this way.[32] These widespread misconceptions about sexual violence "pervade rape trials",[33] and give rise to serious questions about the suitability of a jury, drawn from the general public, to determine the guilt of a defendant in a sexual violence case.[34]

The Law Commission argues that the criminal justice system is largely failing to recognise these distinguishing factors, which contributes to the low reporting and conviction rates for sexual violence.[35] The New Zealand Crime and Safety Survey put reporting rates for sexual violence at nine per cent in 2006,[36] making it the crime least likely to be reported.[37] A 2009 study found that 31 per cent of acts of sexual violence reported to the Police were prosecuted, and only 13 per cent of reported acts resulted in a conviction.[38]

The formal criminal justice process as it stands has been described as traumatic for complainants. Victims' concerns about how the trial process will affect them likely influence reporting rates.[39] The low conviction rates for cases that do proceed to trial could be seen as

[28] For example, a comment from a Toronto police officer that women should "avoid dressing like sluts" to avoid sexual assault launched the transnational protest movement Slutwalk.
[29] 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.
[30] Colleen A Ward *Attitudes Towards Rape: Feminist and Social Psychological Perspectives* (Sage, London, 1995) at 25.
[31] Law Commission, above n 2, at 1.20; Taylor, above n 26, at 5.
[32] Law Commission, above n 2, at 1.20.
[33] Kirsty Duncanson and Emma Henderson "Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials" (2014) 22 Fem Leg Stud 155 at 155.
[34] Acceptance of the idea of 'rape myths' is common but not universal: see, e.g. David Wolchover and Anthony Heaton-Armstrong "Debunking rape myths" (2008) 158(7305) NLJ 117.
[35] Law Commission, above n 2, at 1.8.
[36] Pat Mayhew and James Reilly *The New Zealand Crime & Safety Survey: 2006* (Ministry of Justice 2007) at 135; Ministry of Women's Affairs, above n 25, at [1.3]. A 2009 survey suggested a reporting rate of seven per cent, but said: "Owing to the low number of sexual offences reported in the 2009 NZCASS this figure has a high relative standard error and is not statistically reliable": Bronwyn Morrison, Melissa Smith and Lisa Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report* (Ministry of Justice 2010) at 45.
[37] Ministry of Women's Affairs, above n 25, at 2.
[38] Sue Triggs and others *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, September 2009) at 57.
[39] Elisabeth McDonald and Yvette Tinsley "Evidence issues" in McDonald and Tinsley, above n 4, at 279-280; Judy Shepherd "Reflections on a Rape Trial: The Role of Rape Myths and Jury Selection in the Outcome of a Trial" (2002) 17(1) Affilia 69 at 69.

evidence the courts are not doing their job in holding offenders accountable and serving justice. The Law Commission writes:[40]

> As a potential offence, it is badly under reported. In the view of some, as much as 80 per cent of offences go unreported. This latter characteristic is a matter of the greatest concern for the formal criminal justice system. Whatever the figure is – and no-one doubts it is a high percentage – a significant number of complainants are "opting out" of the very system that is supposed to recognise their rights and support their needs. They are doing so largely because they perceive the formal criminal justice system to be alienating, traumatising, and unresponsive to their legitimate concerns.

These factors distinguish sexual violence from other crimes, and it is therefore justifiable to consider how the criminal justice system can better respond to these types of offences. The legal system has begun to recognise these differences and over the past few decades changes have been made, such as the general prohibition on evidence of the complainant's sexual history.[41] However, low reporting rates are still a problem, and it is not clear that minor reforms have had much effect.[42] One potential larger-scale reform is replacing the jury as the fact-finder in sexual violence trials.[43]

C The Problems with Juries in Sexual Violence Trials

In most sexual offence trials, the defendant elects trial by jury, exercising their right to do so under the New Zealand Bill of Rights Act 1990.[44] The Law Commission identifies two major issues with juries in sexual violence trials: the decision-making problem and the harm problem.[45]

1 The decision-making problem

Jurors are meant to bring a wider community perspective to the criminal trial. As discussed above, however, wider community perspectives on sexual violence are often erroneous. Jurors, like all members of the community, can be affected by rape myths about the

[40] Law Commission*,* above n 2, at iv.
[41] Evidence Act 2006, s 44.
[42] See e.g. McDonald and Souness, above n 26, at 31; Jennifer Temkin ""And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom" (2010) 13(4) New Crim R 710 at 710; Ilene Seidman and Susan Vickers "The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform" (2005) 38 Suffolk U L Rev 467 at 467-468; Stephen J Schulhofer *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Harvard University Press, Cambridge, Mass., 1998) at 17-47.
[43] Law Commission*,* above n 2, at 6.48-6.49.
[44] Law Commission*,* above n 2, at 6.2.
[45] Law Commission*,* above n 2, at 6.11.

frequency of sexual violence, the identity of the victims, the circumstances in which it takes place, and typical victim reactions, both at the time of the alleged offence and in the witness box.[46] If the case before them does not reflect understandings of 'real rape', it can be difficult for jurors to be convinced beyond reasonable doubt that a criminal offence occurred.[47] Jurors can be confused about where the boundary lies between consensual sex and rape.[48] The myths jurors believe could affect the outcome of the case even more than the evidence before the court, as jurors appear to interpret the evidence before them in light of these myths.[49]

The benefit of a twelve-person jury is that individual biases can usually be overridden by the majority. The ideal image of a jury is twelve people bringing their own knowledge, experience and perspectives to the table, combining them with those of the other jurors, individual errors and biases being revealed and rejected by the jury as a whole body, and the final verdict representing a shared understanding of the case.[50] If one person holds particularly strong discriminatory views, for example, ideally the other jurors would be able to convince them not to vote on that basis. If not, there are provisions for the remaining eleven to outvote them in a majority verdict.[51] In the context of sexual violence, however, it may not be an outlying individual who has the biased views or holds misconceptions, but a majority of the jury, because these misconceptions are so widespread. The strength of juries as 'common sense' decision-makers is therefore their weakness in sexual violence cases where 'common sense' may involve unfounded stereotypes and myths.[52]

Research has been conducted into judicial use of heuristics, or mental short-cuts that guide people's judgements of the world around them.[53] While "reliance on heuristics facilitates good judgment most of the time… it can also produce systematic errors in judgment".[54] In the context of sexual violence trials, these mental short-cuts can prevent decision-makers from evaluating the evidence unaffected by societal rape myths.[55] For example, a decision-maker might be affected by the heuristic of hindsight bias in thinking that a complainant

[46] Law Commission, above n 2, at 6.12; Taylor, above n 26. For the findings of a study looking at jury deliberations in a mock jury rape trial, see Louise Ellison and Vanessa E Munro "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-sexual Scripts in (Mock) Jury Deliberation" (2009) 18(3) Social & Legal Studies 291 and Louise Ellison and Vanessa E Munro "A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13(4) New Crim R 781.
[47] Annie Cossins "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England" (2013) 14 E&P 74 at 77; Temkin and Krahé, above n 4, at 70.
[48] Seidman and Vickers, above n 42, at 468; Schulhofer, above n 42, at 95-98.
[49] Taylor, above n 26.
[50] Phoebe C Ellsworth "Are Twelve Heads Better Than One?" (1989) 52 LCP 205 at 206.
[51] Juries Act 1981, s 29C. See also Law Commission *Juries in Criminal Trials*, above n 10, at [122].
[52] Law Commission, above n 2, at 6.16; Duncanson and Henderson, above n 33, at 169.
[53] E.g. Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrick "Inside the Judicial Mind" (2001) 86 Cornell L Rev 777.
[54] Guthrie, Rachlinski and Wistrick, above n 53, at 780.
[55] Jeremy Finn, Elisabeth McDonald and Yvette Tinsley "Identifying and qualifying the decision-maker: The case for specialisation" in McDonald and Tinsley, above n 4, at 230-233; Temkin, above n 42, at 729.

could have noticed indicators of imminent unwanted sexual conduct, and could have taken steps to clearly indicate their lack of consent, or protect themselves if necessary, when those indicators would have been extremely difficult to notice at the time.[56] As a result, the decision-maker may consider it more likely that the complainant consented to sexual contact. Judges, being people, also use heuristics in making decisions, but it is more practical to address and correct these mental short-cuts in professional judges than in lay jurors only present for a single trial.

Jurors' reliance on heuristics and societal rape myths increases the chances of the jury coming to a verdict based on understandings of the evidence that do not align with research and are sometimes completely counter to it.[57]

2 The harm problem

The presence of a jury can also make it harder for complainants to give evidence fully and freely. Complainants have to detail what is likely to be one of the most traumatic experiences of their lives, in front of twelve strangers whose job it is to determine if they are telling the truth. This can be particularly difficult in small towns, where jurors may be people the complainant could come into contact with in the community – at schools, workplaces or even the supermarket.[58] The quality of the complainant's evidence is often a central part of the trial, especially in 'he said-she said' type cases that occur in private settings without other witnesses. If there is a risk that the evidence will be compromised because of their anxiety, it is to the detriment of all involved, including the defendant.[59] It is difficult to see how evidence obtained in this way could lead to a "just determination of proceedings",[60] which is the purpose of the Evidence Act 2006.[61]

Defence lawyers can also capitalise on juries' misunderstanding of the realities of sexual violence by engaging in courtroom theatrics.[62] This can include unnecessarily intrusive or distressing cross-examination of the complainant and the admission of evidence that is targeted to build a damaging narrative around them.[63] The conduct of defence lawyers in sexual violence trials has already been the focus of amendments to the rules of evidence, such as the general inadmissibility of the complainant's sexual history with people other than the defendant.[64] However, even with amendments like this, complainants can still feel attacked

[56] Finn, McDonald and Tinsley, above n 55, at 231; Temkin and Krahé, above n 4, at 49.
[57] Law Commission, above n 2, at 6.14; Temkin and Krahé, above n 4, at 178.
[58] Law Commission, above n 2, at 6.22.
[59] Temkin and Krahé, above n 4, at 178.
[60] Evidence Act 2006, s 6.
[61] McDonald and Tinsley, above n 39, at 279.
[62] Temkin and Krahé, above n 4, at 179.
[63] Temkin and Krahé, above n 4, at 129.
[64] Evidence Act 2006, s 44.

by the defence counsel, some describing it as like a second assault.[65] The presence of the jury can encourage defence lawyers to engage in aggressive tactics or appealing to the 'common sense' of the widely held misconceptions and rape myths as a defence.[66] This reduces the likelihood of conviction. It may also cause diminished reporting rates as other victims are discouraged by the potential trauma of being cross-examined in this way in front of a jury.[67]

D The Need to Consider Alternative Fact-Finding Models

Juries have a long and venerated history within Common Law systems. Attempts to limit the exercise of the right to a jury trial have generally been met with concern. However, in the context of sexual violence there are serious issues with the role and presence of the jury. First, using a jury as the fact-finder can lead to unreliable outcomes as a result of jurors' biases, known as the decision-making problem. Second, the presence of the jury can distress the complainant testifying, which can affect the quality of the evidence before the court, known as the harm problem. The issues are sufficiently serious that consideration needs to be given to replacing the jury as the fact-finder. The next chapter considers one alternative, a judge sitting with two lay members.

[65] Law Commission, above n 2, at 4.3.
[66] Jennifer Temkin "Prosecuting and Defending Rape: Perspectives from the Bar" (2000) 27 Journal of Law and Society 219 at 231-232; Duncanson and Henderson, above n 33, at 169.
[67] McDonald and Tinsley, above n 39, at 279-280; Shepherd, above n 39, at 69; Taskforce for Action on Sexual Violence *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network for Ending Sexual Violence Together* (Ministry of Justice, 2009) at 54.

Chapter II: An Alternative – Judge with Two Lay Members

If problems with a jury as the fact-finder in sexual violence trials justify consideration of an alternative fact-finder, which model should replace a jury? Suggestions have included judge-alone trials, or trials with either two lay judges (laypeople who are professional decision-makers, voting on both matters of law and fact), or lay members (laypeople with some form of relevant experience) alongside the judge.[68] In 2011, Finn, McDonald and Tinsley suggested judge-alone trials would be the best solution, with the judges being specially trained with regard to counterintuitive issues in the context of sexual violence.[69] The Law Commission in 2015 continued to float alternative models including non-jury lay participation.[70]

Finn, McDonald and Tinsley make a strong case for adopting judge-alone trials, however the lack of community participation in trials for such serious criminal offending is problematic. Many of the benefits of jury trials could equally be achieved by a fact-finder model with non-jury lay participation, such as acting as the conscience of the community, protecting the public (and, importantly, the defendant) from arbitrary government, and encouraging the public's faith in the criminal justice system.[71] The protective and representative features of the jury could be reproduced in an alternative model that still includes a form of community participation.[72]

Therefore, the model this dissertation will consider comprises two lay members sitting alongside a judge in trials for sexual offences with a sentence of at least two years' imprisonment. This model fleshes out one of the options floated by the Law Commission.[73] It is the model that appears to best ameliorate the problems with juries in sexual violence trials while retaining a key element of community participation. Non-jury lay participation is used in civil and criminal jurisdictions both in New Zealand and overseas, which is discussed further in Chapter III.

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[68] For a more detailed analysis of the difference between lay jurors, lay judges and lay members, see Finn, McDonald and Tinsley, above n 55, at 253-254.
[69] Finn, McDonald and Tinsley, above n 55, at 258.
[70] Law Commission, above n 2, at 6.40-6.46. Note that the Law Commission uses the term 'assessor', rather than distinguishing between lay judges and lay members.
[71] The functions of the jury as set out in Law Commission, above n 14, at [1]. Another factor is educating the community about the criminal justice system, which would not be replicated with a non-jury model.
[72] Sanja Kutnjak Ivković "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals" (2003) 25 Law & Policy 93 at 95 shows the international focus on the benefits of lay participation generally, rather than the specific example of a jury.
[73] Law Commission, above n 2, at 6.40-6.46.

Under the proposed model of a judge sitting alongside two lay members, the defendant could elect either a judge-alone trial or a trial with lay members, in the same way defendants can currently elect trial by jury.[74] These lay members would be involved, like juries, in the decision of whether to convict the defendant, and not involved in sentencing decisions. They would have interest or experience in the sexual violence or criminal justice sectors. They could be appointed for a specific, renewable term, perhaps two years. The appointment of these lay members could be in the vein of the Parole Board, whose members include laypeople who are not "experts" but have knowledge or understanding of the criminal justice system. As the fact-finding includes a judge, the court could provide written reasons for its decision, written by the judge.

Per McDonald and Tinsley, a change in the fact-finder in this way would likely not involve a simple substitution of the fact-finder, but may require shifts in the role of the judge and administration of the trial, as well as changes to the rules of evidence.[75] These would represent fundamental shifts in the adversarial criminal trial model. While these changes may be worthy of consideration in the future, the proposal here is only to change the fact-finder, which does appear possible without a full suite of reforms.

The training that the judges sitting in the Specialist Sexual Violence Court Pilot received at the beginning of 2017 should be extended to all judges sitting on sexual violence trials. This training was directed at dispelling rape myths[76] and explaining how the courtroom could be made less traumatic for complainants.[77] If judges sitting with lay members have this training, all three people on the panel would have a more comprehensive understanding of sexual violence. They can fulfil their role as a fact-finder while limiting the effect of rape myths on the proceeding.

Defendants can be charged with multiple offences that are generally tried together. This poses some problems when trying to separate out the judicial treatment of certain crimes such as sexual violence. There are three scenarios to address. The first scenario is where the defendant is charged with a sexual offence and a Category 1 or 2 offence that would usually be heard by a judge alone in the District Court,[78] such as male assaults female.[79] In this case,

[74] All the specific offences defined as "sexual violence" above fall under Category 3, which allows defendants a choice between trial by judge-alone and trial by jury.
[75] Elisabeth McDonald and Yvette Tinsley "Rejecting "one size fits all": Recommending a range of responses" in McDonald and Tinsley, above n 4, at 385.
[76] E.g. Jan Jordan "Barriers for adult sexual violence complainants" (paper presented to Best Practice in Sexual Violence Courts: An education programme for Sexual Violence Court Pilot Judges, Auckland, January 2017).
[77] E.g. Emily Henderson "Innovations in Other Jurisdictions: The Art of the Possible" (paper presented to Best Practice in Sexual Violence Courts: An education programme for Sexual Violence Court Pilot Judges, Auckland, January 2017).
[78] "Category 1 offence" as defined in section 6 of the Criminal Procedure Act 2011 includes offences that are not punishable by a term of imprisonment. "Category 2 offence" includes offences that are punishable by a term of imprisonment of less than 2 years.
[79] Crimes Act 1961, s 194(b).

the proceeding would be conducted under the higher category of offence, the sexual offence, and the proposed lay member procedure would be available. This is consistent with the current procedure that if any charge is to be heard by a jury, then all charges are heard in that trial.[80] The second scenario is where the defendant is charged with one of those most serious offences specified as Category 4 that are usually heard by a jury in the High Court,[81] such as murder,[82] along with a sexual offence. In that case, the trial would be conducted under the Category 4 offence and the lay member procedure would not be used. The third scenario is where, along with the sexual offence, the defendant is charged with another Category 3 offence that would usually allow them to elect a jury trial in the District Court,[83] such as aggravated assault.[84] In this case, the defendant should be able to choose between a judge-alone trial and the lay member procedure, not a jury trial. This is how the Specialist Sexual Violence Court Pilot currently operates.[85]

This model provides benefits unavailable under either the current jury trial model or a judge-alone model. The community participation element from jury trials is retained, while removing the issues around laypeople unfamiliar with the dynamics of sexual violence. A significant amount of the stress felt by complainants in giving evidence in front of strangers is lifted, with fewer people involved and the knowledge that the assessors before them understand the complexities of the subject matter. While lay judge models would have similar features, having lay judges who would specialise in determining purely sexual violence cases has many practical difficulties. These include questions around their selection and accommodating their other employment.[86] The lay member model retains community participation in sexual violence trials while avoiding the full force of these practical issues.

Due to their lack of legal training, lay members may rely less heavily than judges on formal rules and focus more on encouraging just and equitable outcomes.[87] Their non-legal skills help to "mitigate the precision of legal thought and judgement",[88] allowing for a broader, less strict understanding of the issue at hand. This is an important part of incorporating community input into the adjudication of serious criminal offences, and it helps to ensure public faith in the verdict.

[80] Criminal Procedure Act 2011, s 139.
[81] Category 4 offences are listed in Schedule 1 of the Criminal Procedure Act 2011.
[82] Crimes Act 1961, s 172.
[83] "Category 3 offence" as defined in section 6 of the Criminal Procedure Act 2011 includes offences punishable by imprisonment for more than 2 years.
[84] Crimes Act 1961, s 192.
[85] The District Court of New Zealand "Sexual Violence Court Pilot – Frequently Asked Questions" <www.districtcourts.govt.nz>.
[86] Finn, McDonald and Tinsley, above n 55, at 257; Law Commission, above n 2, at 6.44.
[87] Kutnjak Ivković, above n 72, at 96-97.
[88] Michele Powles "The New Zealand Community Magistrates Scheme: Whose Community and What Involvement?" (2000) 19 NZULR 29 at 33.

A The Appointment of Lay Members

The first issue to consider is who the lay members would be, what would qualify them for the position, and how they would be selected. Finn, McDonald and Tinsley, in their analysis of the options for changing the fact-finder, suggest lay members would be selected because they: [89]

> possess knowledge or experience which supplements the material presented to the court by the parties – either to make sense of information presented, or by having expert knowledge which can be used instead of requiring the parties to call specific evidence.

In this context, lay members would be selected based on their experience or interest in the sexual violence or criminal justice sectors. They could come from many professions and many walks of life, but between them they would have a more nuanced understanding of sexual violence than the general population.

1 What experience would lay members have?

The calls for a change in fact-finder in sexual violence trials often mention or suggest sexual violence experts.[90] By 'experts', those commenters presumably mean people who have worked in the sexual violence sector and have experience with the treatment of sexual violence victims or offenders. While the proposed model would leave it open for such experts to become lay members, they should not exclusively make up the panel because they would likely take belief in the complainant's evidence as their starting point. There is a long history of victims not being believed when they accuse their assailants.[91] To counter this history, the sexual violence sector has cultivated an ingrained sense of belief when people claim they have been assaulted.[92] This can be seen in Rape Crisis Dunedin's philosophy: "Listen – Believe – Support".[93]

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[89] Finn, McDonald and Tinsley, above n 55, at 254.
[90] See, for example, comments made by the National Collective of Rape Crisis and Related Groups of Aotearoa Inc in Law Commission, above n 14, at [194]; Law Commission, above n 2, at 6.13.
[91] Leigh Gilmore *Tainted Witness: Why We Doubt What Women Say About Their Lives* (Columbia University Press, New York, 2017); Jocelynne A Scutt "The Incredible Woman: A recurring character in criminal law" in *The Incredible Woman: Power and Sexual Politics Volume 1* (Artemis Publishing, Melbourne, 1997). This disbelief can also be seen in the historically mandatory use of corroboration warnings in the courts, which warned juries not to convict based only on a complainant's accusation, as sexual violence complainants were typically unreliable: Australian Law Reform Commission *Family Violence – A National Legal Response* (ALRC Report 114, October 2010) at 28.11.
[92] See, for example, Annie E Clark and Andrea L Pino *We Believe You: Survivors of Campus Sexual Assault Speak Out* (Holt Paperbacks, New York, 2016).
[93] Rape Crisis Dunedin "Aims/How we work" <www.rapecrisisdunedin.org.nz>.

While this is valuable in the counselling and support of victims, it is contrary to the accused's right to be presumed innocent until proven guilty. The expertise of those who have worked in the sexual violence sector would be beneficial in the courtroom, but to have two Rape Crisis counsellors sitting with the judge would likely be, or at least appear to be, too prejudicial to the defendant to be justifiable. The criteria to be appointed to the panel needs to be wider than just "experience in the sexual violence sector". Thus, this dissertation proposes a panel of lay members with interest or experience in the sexual violence or wider criminal justice sectors.

The pool of lay members would therefore be drawn from those with specific qualifications, but not only expertise in sexual violence. For example, lay members could be appointed in a similar way to those appointed to the Parole Board. Decisions made by the Parole Board, while not relating to formal convictions, are similar in their basis of determining credibility in a criminal context. Members of the Parole Board are selected on the basis that they have:[94]

> (a) knowledge or understanding of the criminal justice system; and
> (b) the ability to make a balanced and reasonable assessment of the risk an offender may present to the community when released from detention; and
> (c) the ability to operate effectively with people from a range of cultures; and
> (d) sensitivity to, and understanding of, the impact of crime on victims …

Membership of the current Parole Board includes judges, lawyers, police officers, probation officers, psychiatrists, psychologists, paediatricians, public servants, social workers, and journalists. While there does not seem to be any formal published policy in place to ensure diversity of appointments, such diversity in different forms seems to be a priority, including a proportion of Māori members.[95]

Lay members for sexual violence trials could be selected from a panel of people appointed in a similar way to the Parole Board. The panel could include people who have worked in the sexual violence sector, psychologists, social workers, police officers and so on. The panel as a whole should have appropriate representation of Māori. This would allow Māori members to be empanelled for cases involving Māori complainants or defendants, to better reflect the particular needs and experiences of Māori with sexual violence.[96] In a similar vein, there could also be efforts to include members from underrepresented groups such as the LGBTQIA* community. The size of the panel should be large enough to allow for diversity considerations in each case.

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[94] Parole Act 2002, s 111(3).
[95] New Zealand Parole Board "Board Membership" <www.paroleboard.govt.nz>.
[96] Leonie Pihama and Huriana McRoberts *Te Puāwaitanga o te Kākano: A Background Paper Report* (Te Puni Kōkiri, 2009); McDonald and Souness, above n 26, at 46-47; Ministry of Women's Affairs, above n 4, at 39.

It is important that all lay members understand the potential power of rape myths in sexual violence trials. While people who have worked in the sexual violence sector would understand this, people from other areas of the criminal justice sector may not be so familiar. Police officers in particular have attracted criticism for their treatment of sexual violence complainants.[97] In the criteria for selection, there should be some requirement for the proposed member to show recognition of how rape myths can inform beliefs about sexual violence.

2 Practical considerations

There are a number of practical considerations to take into account if the proposed model is to be introduced, including remuneration, time commitment, and the pool of available candidates.

Jurors are currently paid a small fee to thank them for their service, and travel and childcare expenses can be claimed back.[98] However, as the lay member role is based on a person's knowledge and expertise, their remuneration would need to reflect that. Lay members' remuneration could be fixed at a daily rate, governed by the Remuneration Authority under the Remuneration Authority Act 1977.[99] If lay members need to travel to regional courts, travel and accommodation costs would also need to be met. The cost of a trial with lay members may therefore be greater than a jury trial, even though only the expenses of two people need to be covered rather than twelve.

It is also important to consider how often a lay member would need to be available to perform their role. In 2014/2015 there were 293 sexual violence cases heard in the District Court, and in 222 of them (76 per cent) the defendant elected trial by jury.[100] This is an average of 20 jury trials per month (averaged over 11 months). If lay members replaced the jury, and 20 lay members were appointed to the wider panel, this would mean each lay member could expect to sit twice a month.

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[97] See, e.g. Margaret Bazely *Report of the Commission of Inquiry into Police Conduct* (March 2007). The Police has made many improvements in its practices since this report, but issues still remain: Independent Police Conduct Authority *Report on Police's handling of the alleged offending by 'Roastbusters'* (March 2015); Yvette Tinsely "Investigation and the decision to prosecute in sexual violence cases" in McDonald and Tinsley, above n 4, at 120.

[98] Ministry of Justice "Jury Service: What you get paid" <www.justice.govt.nz>.

[99] Cabinet Office Circular "Role of the Remuneration Authority in Setting Remuneration for Individuals Appointed to Statutory Bodies and Other Positions" (21 October 2011) CO (11) 7 at [15].

[100] Law Commission, above n 2, at 3.24.

The number of 20 lay members to be appointed to the panel is based on the number of people appointed to the Human Rights Review Tribunal panel,[101] but it is likely a conservative estimate of the number of lay members needed around the country. Over 20 members would allow for the diversity discussed above. It will also allow for some flexibility if there are a number of sexual violence trials scheduled at once. However, the number of people appointed will impact the amount of time each lay member would be required, and consequently how viable the position would be.

Because of the variability of criminal trials, it is difficult to state exactly how often lay members would be required. Figures from the Ministry of Justice indicate that the average length of a trial involving rape or sexual violation in 2014/2015 was three to four days.[102] The lay members would need to attend the full trial. This means that, if each lay member is to sit, on average, twice a month, it would be an average commitment of eight working days a month. As such, they would need to have fairly considerable flexibility with any other employment or responsibilities. This would limit the pool of people who could be appointed to the role. Most likely, a potential lay member would not have other paid employment, or perhaps would be self-employed with more control over their own workload.

The model could be altered to decrease the number of trials a lay member would sit on to limit interference with other employment, but the total number of members would then need to increase. It is unclear if there are enough people suitable and available to fill the roles, and this needs to be established if the model is to be viable. Likewise, the number of trials to sit on could be increased, to make it closer to a full-time job. It would however depend on the locations, lengths and scheduling of the trials. No matter how the job description is developed, the member would need some employment flexibility. An increased work load may also attract concerns about the risk of members burning out, given the high stress environment. Few people would thrive in full-time work that focuses solely on the adjudication of sexual violence.

B The Role of Lay Members

Finn, McDonald and Tinsley describe their conception of the role of a lay member as follows:[103]

> Lay members on a panel do not determine what evidence the tribunal will hear, nor do they have any input into issues of law relating to the offence, defences or

[101] Human Rights Act 1993, s 101(1).
[102] Law Commission, above n 2, at 3.38.
[103] Finn, McDonald and Tinsley, above n 55, at 254.

> procedural matters. However, the lay member may take part in decisions on whether or not guilt is established.

This definition aligns with the general role of the jury as a body to deal with issues of fact, leaving issues of law to the judge. The lay members in the proposed model would perform this role, replacing the jury as a fact-finder.

Two of the more significant aspects of the role in the context of criminal trials are whether majority verdicts would be permissible, and whether the panel would provide reasons.

1 Voting

To ensure the full participation of the lay members on whether guilt has or has not been established, the lay members and judge would deliberate together on the conviction decision. This gives rise to the question of whether the verdict should be unanimous or by a majority. If majority verdicts are allowed, then it needs to be determined whether the lay members could outvote the judge. In the lay member model set out by sections 77 and 78 of the Commerce Act 1986,[104] majority decisions are allowed but the lay members cannot outvote the judge.[105] In effect, the judge makes the decision of the court, and the lay members act as the judge's advisors.[106] However, the Commerce Act process operates in a civil jurisdiction. Majority jury verdicts in criminal trials, meaning one of the 12 jurors could disagree and the verdict could still stand, only became possible in 2009,[107] and this was not without controversy.[108] In a criminal context, the fact-finder must be convinced beyond reasonable doubt that the defendant is guilty, and when a person's liberty is at risk there should be little room for disagreement. This is especially true in a panel as small as three, as otherwise there would be a greater chance of a miscarriage of justice. Verdicts from the panel should therefore be unanimous. This model is consistent with a suggestion made by the Law Commission in 2012.[109]

One of the risks of the lay members sitting alongside a judge is that the judge would dominate the deliberations.[110] The lay members ensure community participation but they might defer to the judge, with legal training and experience, as better placed to come to a decision. It is important for this not to be the case, as then "citizen participation would be mere window-dressing, unjustly enhancing the legitimacy of the legal system without

[104] See Chapter III for more detail about this model.
[105] Commerce Act 1989, s 77(10).
[106] Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at [CA78.02].
[107] Juries Amendment Act 2008, s 19, responding to a recommendation in Law Commission, above n 10.
[108] See, for example, a prominent barrister disagreeing with the proposal, Marie Dyhrberg "Majority verdicts: Are we all for it?" *New Zealand Lawyer* (New Zealand, 4 October 2001) at 16.
[109] Law Commission, above n 17, at 26.
[110] For a detailed analysis of this issue, see Finn, McDonald and Tinsley, above n 55, at 256.

assuring meaningful input".[111] A model with lay members is rare but in jurisdictions that use the similar role of lay assessor (who consider both fact and law), there is evidence of general satisfaction of their contribution.[112] In Germany, for example, most parties agree that lay assessors play an important role independent of the professional judges, particularly in coming to factual decisions requiring assessing credibility.[113]

2 Giving reasons

Currently, the court in a judge-alone trial is required to provide reasons for its decision,[114] but not when the decision is made by a jury as a jury's deliberations are confidential. However, this contributes to a lack of transparency and "a corresponding inability to scrutinise the nature and quality of the reasoning process employed in the case".[115] This leaves room for juries to make decisions based on inaccurate understandings, such as rape myths, unchallenged. Even when juries make decisions that are conceptually sound, without explanatory written reasons there is room for speculation about the validity of their decisions. The Law Commission has suggested that this "can lead to a lack of confidence in jury decisions and a belief that they have been driven by prejudice, a lack of understanding of the evidence or an inappropriate assessment of it".[116] A requirement to give reasons makes decision-makers refer their decisions back to the evidence and justify their choices, which should limit irrational decision-making and the power of unconscious biases.[117] This would be an advantage of the lay member model as the judge could be required to provide a written statement of the panel's reasons for its decision.

C Summary of the Proposed Model

The proposed model involves a judge sitting alongside two lay members to act as the fact-finder in sexual violence trials. These lay members would be appointed in a process similar to that of appointments to the Parole Board. There are some practical difficulties in considering who would fill this role, considering the flexibility required with other employment. How viable the model is in this respect depends on the size of the pool of possible lay members. In terms of the actual work of the panel of the judge and lay members, majority verdicts would not be permissible, for fear of miscarriages of justice.

[111] Valerie P Hans "Introduction: Citizens as Legal Decision Makers: An International Perspective" (2007) 40 Cornell Int'l LJ 303 at 309.
[112] See, e.g., Law Commission, above n 17, at 63 and 88. See also Sanja Kutnjak Ivković "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals" (2007) 40 Cornell Intl LJ 429 at 445.
[113] Law Commission, above n 2, at 6.41; Christoph Rennig "Influence of Lay Assessors and Giving Reasons for the Judgement in German Mixed Courts" (2001) 72 International Review of Penal Law 481.
[114] Criminal Procedure Act 2011, s 106(2).
[115] Law Commission, above n 17, at 26.
[116] Law Commission, above n 17, at 26.
[117] Finn, McDonald and Tinsley, above n 55, at 243.

The judge would be responsible for writing reasons for the decision, which opens up the panel's reasoning to scrutiny. Unlike any other alternative fact-finding model, this model would enable informed, realistic lay participation in trials for sexual offending.

As well as the practical issues that may arise in implementing the proposed model, there are some broader concerns about how a model like this would affect the integrity of the criminal justice system. The next chapter addresses these concerns.

Chapter III: Addressing Concerns with the Proposed Model

The proposed model may appear radical.[118] It is certainly a departure from traditional criminal procedure in New Zealand and in other Common Law systems. This chapter will address four particular concerns about removing the jury from a serious criminal trial and replacing it with an alternative form of lay participation. First, while removing the jury is a prima facie breach of the New Zealand Bill of Rights Act 1990, it can be seen as a justifiable limit. Second, there are concerns that the model is merely taking the role of expert evidence, or that its goals could be more effectively achieved through the use of expert evidence. However, the proposed model can withstand these concerns on its particular merits. Third, there are examples of non-jury lay participation in the existing New Zealand legal system, both in criminal and civil jurisdictions, as well as overseas, demonstrating that the model is not as radical as it first appears. Finally, this dissertation will consider whether it is justifiable to isolate and make substantial changes to one particular part of the criminal justice system, given the practical and wider constitutional consequences.

A New Zealand Bill of Rights Act 1990

Section 24(e) of the New Zealand Bill of Rights Act 1990 (NZBORA) states that:

> Every person who is charged with an offence … shall have the right … to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more …

The proposed model of a judge sitting alongside two lay members in sexual violence trials would breach this right as all of the offences considered "sexual violence" under the proposed model have a penalty of over two years' imprisonment.[119] However, under section 5, the rights contained within the NZBORA may be subject to reasonable limits. There is an arguable case that the substitution of lay members and a judge for the jury is a justified limit.

[118] As noted by a senior practitioner, recorded in Finn, McDonald and Tinsley, above n 55, at 253.
[119] See the definition of "sexual case" in the Evidence Act 2006, s 4.

1 The legislative history of section 24(e)

The NZBORA has only been amended twice since its enactment in 1990; once to align the grounds of prohibited discrimination in section 19 with the new Human Rights Act 1993,[120] and once to restrict the right to trial by jury in section 24(e). The Criminal Procedure Act 2011 streamlined and modernised criminal procedure. One of the changes made was changing the minimum possible term of imprisonment that triggered the option of a jury trial from "more than 3 months" to "2 years or more".[121] This amendment changed the substance of the right to a jury trial, reducing the number of defendants able to exercise the right.

As required, the Attorney-General wrote a report under section 7 of the NZBORA when this Bill was before Parliament.[122] At this point, the proposal was to increase the threshold to three years, but this was revised down to two years at the Committee of the Whole House stage of the legislative process. Attorney-General Hon Christopher Finlayson stated that the original choice to set the threshold at three months in the NZBORA affirmed existing legislation dating back to 1900,[123] but there was no real consideration at the time of the implications of that choice.[124] Mr Finlayson noted that the three-month threshold had had marked negative effects on the administration of criminal litigation, particularly by causing serious delays.[125] In deciding that the three-year threshold proposal was a justified limit on the right to trial by jury, the Attorney-General considered that it would not breach New Zealand's obligations under international law,[126] and was not out of step with comparable jurisdictions such as Canada.[127]

Submissions on the proposed law change to a three-year threshold were divided. Some submitters, such as the Human Rights Commission[128] and the Criminal Bar Association of New Zealand,[129] opposed any change to the threshold at all. Others, such as the Auckland

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[120] Human Rights Act 1993, s 145 (and Schedule 2).
[121] New Zealand Bill of Rights Amendment Act 2011, s 4.
[122] Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the proposed amendment to s 24(e) of the New Zealand Bill of Rights Act 1990 in the* Criminal Procedure (Reform and Modernisation) *Bill* (15 November 2010).
[123] Summary Proceedings Act 1957, s 66, re-enacting Indictable Offences Summary Jurisdiction Act 1900 (repealed), s 6.
[124] Finlayson, above n 122, at [18].
[125] At [20].
[126] At [12].
[127] At [15].
[128] Human Rights Commission "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".
[129] Criminal Bar Association of New Zealand "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

District Law Society,[130] the New Zealand Bar Association,[131] and the New Zealand Law Society,[132] expressed concern about the jump from three months to three years, and suggested that if there was to be a change at all, a smaller increase would be more appropriate. The New Zealand Police Association supported the three-year threshold proposal,[133] and the submission from the District Court Judges went even further, suggesting consideration of an increase to five years.[134] The District Court Judges commented: "The current jury trial system is a Rolls Royce system of unnecessary complexity."[135]

In response to these submissions, the threshold was modified down from "over three years imprisonment" to "2 years or more". The amendment to the NZBORA passed in 2011 and came into force on 1 July 2013.[136]

2 Is the proposed model a justified limit on the defendant's rights?

Replacing the jury with lay members and a judge would require demonstration that this model was a justified limitation on the defendant's right to trial by jury. Section 5 of the NZBORA provides that any limits on rights must be reasonable and "demonstrably justified in a free and democratic society". This section demonstrates the "obvious reality" that the rights contained within the NZBORA are not absolute.[137] There must be an ability for the state to limit the rights of individuals for the benefit of the wider community. However, these limits must be reasonable. Section 5 encourages a "culture of justification" when it comes to limits on rights.[138] This means that when the state intends to limit a right, it should be standard practice for the burden to be on the state to defend its position. Citizens should be able to expect that any interference into their rights is "deliberate, measured and (one would hope) closely scrutinised before the interference occurs".[139] This culture of justification encourages and supports transparent, accountable, good government.[140]

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[130] Auckland District Law Society "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".
[131] New Zealand Bar Association "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".
[132] New Zealand Law Society "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".
[133] New Zealand Police Association "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".
[134] District Court Judges "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".
[135] At [2.8].
[136] New Zealand Bill of Rights Amendment Act 2011, s 2.
[137] *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260 (CA) at 286 per Hardie Boys J.
[138] To use the phrasing of Etienne Mureinik "Emerging from Emergency: Human Rights in South Africa" (1994) 92 Mich L Rev 1977.
[139] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, 2015) at 6.8.2.
[140] Butler and Butler, above n 139, at 6.8.1.

If the proposed model came before Parliament, the Attorney-General would write a report under section 7 of the NZBORA expressing any concerns about the proposed model's consistency with the right to trial by jury in section 24(e). However, as in the section 7 report regarding the change to the right to trial by jury in 2010,[141] it is possible for the Attorney-General to come to the conclusion that the breach is justified.

The right to a fair hearing expressed in section 25(a) of the NZBORA is paramount, but a hearing does not require a jury to be fair.[142] A jury trial may be more favourable to the defendant than a judge-alone trial, or another model, but a fair hearing does not necessarily require procedures that are the most favourable imaginable.[143] Thus, the proposed model would not necessarily affect fair trial rights.

As there has already been amendment to the right to trial by jury,[144] this indicates that the right can be justifiably limited. Finn, McDonald and Tinsley state that the then proposed amendment "indicates that, outside the importance of the defendant's right of election, there is no inherent importance attached to the role of the jury as decision-maker".[145] Finn, McDonald and Tinsley go on to suggest that "the importance of the jury as fact-finder is contestable".[146] However, considering the range of submissions on the Bill, it is clear there is no consensus on this point in the legal community.

It is worth noting though that the amendment was mostly to facilitate more efficient and effective administration of criminal justice. The problem to be solved was the impracticality of having expensive, time-consuming jury trials so regularly and for more minor issues. On the other hand, the proposed model has a more substantive justification of improving the courtroom experiences for complainants, in order to increase faith in the criminal justice system's response to sexual violence. Because of this, the legal community may be more receptive to this proposal than the 2011 amendment. More likely, however, it may be seen as a more significant intrusion into the right because it concerns more serious offending.

Parliament would not be breaching any international human rights obligations by enacting this proposal. The International Covenant on Civil and Political Rights does not contain a right to trial by jury, given that it is generally only Common Law countries that use trial by jury.[147] Many countries around the world achieve similar criminal justice and constitutional goals in other manners.

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[141] Finlayson, above n 122.
[142] E.g. *Iti v R*, above n 12, at [37]; Finn, McDonald and Tinsley, above n 55, at 244.
[143] Butler and Butler, above n 139, at 23.14.2.
[144] New Zealand Bill of Rights Amendment Act 2011, s 4.
[145] Finn, McDonald and Tinsley, above n 55, at 246.
[146] Finn, McDonald and Tinsley, above n 55, at 247.
[147] Finlayson, above n 122, at [12].

One of the other possible solutions to the problems of sexual violence trials is changing all such trials to judge-alone. This is the model endorsed by Finn, McDonald and Tinsley.[148] Judge-alone trials for sexual violence would also breach the right to trial by jury, but it could be seen as an even more serious breach given the elimination of lay participation altogether. Introducing a lay member model achieves a better balance between addressing the problems of complainants giving evidence and the important role of lay participation in the criminal law.

In this way, the proposed model is a less significant limitation on the defendant's rights than it may first appear. The proposed model would not necessarily breach fair trial rights, nor would it breach international obligations. Unlike a total shift to judge-alone trials, it would retain an element of lay participation while addressing the issues that discourage victims from reporting. The proposed model can therefore be seen as a justified limit of section 24(e) of the NZBORA.

As the proposed model is a prima facie breach of section 24(e), there is a risk that its implementation would be challenged in the courts. The particular details of how a challenge would be constituted would depend on the drafting of the relevant legislation. If a challenge did reach the courts however, the judge would apply the *Hansen* test. Tipping J in *Hansen v R*[149] sets out a methodology for assessing the reasonableness of a limit under section 5 of the NZBORA. Summarising the approach taken in the leading Canadian case of *R v Oakes*,[150] Tipping J's two-step test is as follows:[151]

> (a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
> (b) (i) Is the limiting measure rationally connected with its purpose?
> (ii) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
> (iii) Is the limit in due proportion to the importance of the objective?

There is necessary uncertainty in how the proposed model would fare under this test, as it depends on the drafting of the legislation and how the challenge would be structured. However, a few predictions can be made.

Under (a), the problems outlined in Chapter I of this dissertation are sufficiently important to justify the curtailment of the right to trial by jury. The decision-making and harm problems caused and exacerbated by juries in sexual violence trials lead to a criminal justice

[148] Finn, McDonald and Tinsley, above n 55, at 258.
[149] *Hansen v R* [2007] NZSC 7.
[150] *R v Oakes* [1986] 1 SCR 103.
[151] *Hansen v R*, above n 149, at [104].

system that is inaccessible, ineffective and unfair. Per (b)(i), the proposed model improves on these problems by reducing the stress for complainants giving evidence. Under (b)(ii), the proposed model impairs the right less than a judge-alone trial would, as suggested by Finn, McDonald and Tinsley,[152] as it retains lay participation. It is possible that the some of the problems outlined in Chapter I could be addressed without any interference with the right to trial by jury, such as through more focus on counterintuitive evidence and changes to the rules of evidence. This possibility is explored below. In terms of (b)(iii), the objective of ensuring the courts do the job they are designed to do is of peak importance. The replacement of the jury with a two-lay member model is proportionate to this objective as it retains both judicial and lay participation, while addressing a significant issue in the administration of sexual violence trials.

B Expert Evidence

Another concern with the proposed model is its interactions with expert evidence. There are two specific issues. First, it can be argued that lay members selected based on knowledge and experience are merely providing expert evidence to the judge under another guise, without the opportunity of cross-examination. Second, counterintuitive expert evidence, intended to educate the jury, is increasing in regularity in cases of sexual violence against children. The court's focus could merely be on extending that practice to adult sexual violence cases, rather than changing the fact-finder entirely. This section will address these concerns.

1 Is the proposed model just expert evidence without cross-examination?

A major criticism of a lay member model is that "in effect it will lead to the judge receiving expert evidence in private and without the parties having the opportunity of cross-examination".[153] The Law Commission considered that this was "not acceptable in the criminal context, when the liberty of the accused is at risk".[154]

Finn, McDonald and Tinsley quote this position approvingly and argue that the possible benefits of a lay member model would be outweighed by the evidence law issues.[155] However, this criticism is based on the idea that the lay members are experts, as opposed to informed community participants. The lay members of the proposed model are not necessarily experts in sexual violence, but rather people with a more sophisticated

[152] Finn, McDonald and Tinsley, above n 55, at 258.
[153] Law Commission, above n 10, at [111].
[154] Law Commission, above n 10, at [111].
[155] Finn, McDonald and Tinsley, above n 55, at 254.

understanding of the dynamics of such offences. They would not be providing the judge with expert evidence.

Judges could participate in a training course about rape myths before sitting on trials with lay members, as have the judges going into the Specialist Sexual Violence Court Pilot. This would mean that the lay members would not be bringing any specific knowledge to the table over and above the judge's knowledge. The lay members are just allowing the fact-finding to go ahead in an environment that minimises the chance of rape myths interfering in the fact-finding process.

2 Why not counterintuitive evidence?

Taking away the jury in sexual violence trials, as the lay member model proposes, could be seen as too significant a step to address the issues with sexual violence trials. One avenue currently being explored to try to address the jury's misconceptions about sexual violence is counterintuitive evidence.[156] This involves a psychological expert providing evidence refuting societal myths about certain crimes; for example, explaining that a sexual assault complainant reacting by freezing is a normal psychological response, so an adverse judgement should not be taken from it. The purpose of counterintuitive evidence is educative, designed "to impart specialised knowledge the jury may not otherwise have, in order to help the jury to … be better able to evaluate [the evidence]".[157] It also helps to "restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance".[158]

The Supreme Court has accepted the use of counterintuitive evidence in cases of sexual offending against a child in three cases.[159] Any counterintuitive evidence must not be directed at determining the credibility of a witness, as that is the role of the fact-finder.[160] Counterintuitive evidence that referred specifically to a witness' behaviour and gave specific indications of the expert's beliefs on the case facts would challenge the defendant's right to a fair trial.

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[156] For early discussions of the possibility of expert evidence on rape myths, see Patricia A Tetreault "Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials" (1989) 7(2) Behav Sci & L 243 and Susan Murphy "Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome" (1991) 25 Colum J L & Soc Probs 277.
[157] Law Commission *Evidence, Volume 2: Evidence Code and Commentary* (NZLC R55, 1999) at [C110].
[158] Law Commission, above n 157, at [C111], as cited by the Supreme Court in *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [2].
[159] *M v R* [2011] NZSC 134; *DH v R*, above n 158; *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833.
[160] Cossins, above n 47, at 96.

Instead of changing the fact-finder, the courts could invest more resources into expanding the use of counterintuitive evidence into more or all sexual violence trials. However, there are resourcing issues with this idea. There are only five people currently giving this sort of counterintuitive expert evidence.[161] They must be practising psychological experts who are willing to take part in court processes. The number of psychologists required across the country to expand the use of counterintuitive evidence effectively may make this unviable.[162]

Most of the research done on the use of counterintuitive evidence in New Zealand focuses on sexual offending against children.[163] There are certain examples of such evidence being admitted in cases of sexual offending against adults,[164] but they are limited. Counterintuitive evidence may be easier to accept in the context of children, as it is easier to accept that children can behave irrationally. It is not clear that the justifications for using counterintuitive evidence in cases of child sexual abuse would easily transfer to justifying its use in cases with adult complainants.[165]

A lay member model for sexual violence has some benefits over widening the use of counterintuitive evidence. It allows for people with familiarity with the complexities of sexual violence to use that experience in assessing each piece of evidence as it arises. This is likely to be more effective than jurors without that experience attempting to readjust their understandings of sexual violence based on one of the many statements of evidence given at the hearing. The evidence would have to "adequately disrupt the traditional narratives" to be effective, which even judicial directions on consent have struggled to do.[166] It also does more than merely tinker around the edges without making meaningful changes, which counterintuitive evidence may be seen as doing. Having lay members would also mean that counterintuitive evidence would not be necessary, which would remove the cost and difficulty of bringing in experts to give evidence.

The presence of statements of counterintuitive evidence is unlikely to improve the perception of the criminal justice process for victims, and is thus unlikely to increase reporting rates. While solely focusing on counterintuitive evidence may improve the

[161] Suzanne Blackwell "Counterintuitive Psychological Expert Evidence in Child Sexual Assault Trials" (paper presented to Best Practice in Sexual Violence Courts: An education programme for Sexual Violence Court Pilot Judges, Auckland, January 2017) at [1].
[162] See Blackwell, above n 161, for a closer look at the options for the format of counterintuitive evidence.
[163] E.g. Ian Freckelton "Child Sexual Abuse Accommodation Evidence: The Travails of Counterintuitive Evidence in Australia and New Zealand" (1997) 15 Behav Sci & L 247; Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21(4) Psychiatry, Psychology and Law 511; Blackwell, above n 161.
[164] E.g. *R v Alden* HC Palmerston North CRI-2010-054-1873, 1 October 2010 at [69]-[70].
[165] Holly Hill "Rape Myths and the Use of Expert Psychological Evidence" (2014) 45 VUWLR 471 does not distinguish between child and adult complainants.
[166] Duncanson and Henderson, above n 33, at 156; Temkin, above n 42, at 730-732.

decision-making problem of the jury, it does not solve the harm problem. The complainant is still expected to give distressing evidence in front of twelve strangers. Encouraging the use of counterintuitive evidence would have to be done alongside changes to how witnesses can give evidence.

Counterintuitive evidence may be one option to improve how courts make decisions in sexual violence trials, but it is unlikely to solve the ultimate issue. The proposed model gets to the heart of the issue, in that the fact-finding body comes to the courtroom understanding the power of rape myths, rather than trying to neutralise them during the trial.

C Other Examples of Non-Jury Lay Participation in the Legal System

A third concern that can be expressed about the proposed model is that the step towards non-jury lay participation is too radical. The proposed model, with two lay members alongside a judge in sexual violence trials, would introduce a new form of lay participation into the criminal justice system. This model would be unprecedented in its particular form, but there are already many other examples of non-jury lay participation throughout the legal systems of New Zealand and overseas. They may not be high-profile, but it is important to understand that juries are not the only way legal systems work in community participation.

1 New Zealand examples in civil proceedings

Historically, Māori "of the greatest authority and best repute in their respective tribes" could be appointed to the court as assessors to assist in proceedings involving disputes between Māori.[167] This practice of the court recognising areas in which its expertise is limited has continued.

Lay members with commercial knowledge or experience may be appointed to sit alongside the judge in particular High Court cases under the Commerce Act 1986.[168] They ensure that complex expert evidence in competition law cases is properly understood and assessed by the court.[169] The court does not profess expertise in the commercial consequences of its decisions. It makes sense for the court to take the opinion of those with expertise in competition issues to ensure its rulings do not have unintended economic consequences. While majority decisions are permitted, the judge must be included in the majority.[170] Thus,

[167] Resident Magistrates' Act 1867 (repealed), s 107.
[168] Commerce Act 1986, ss 77-78.
[169] Courts of New Zealand "How cases come to the High Court" <www.courtsofnz.govt.nz>.
[170] Commerce Act 1986, s 77(10). If the Court is evenly divided, then the decision of the judge, or the majority of judges, becomes the decision of the Court: s 77(11).

"the role of the lay members is really an advisory role. That may be a powerful role, but ultimately the decision-making role is left with the Judge or Judges".[171]

In a similar way, land valuation experts can be appointed to the High Court as lay members under the Land Valuation Proceedings Act 1948.[172] This allows the lay members to contribute an expert valuation perspective to the assessing of evidence and reaching of a decision.[173]

The Human Rights Act 1993 provides for a slightly different lay member procedure. Where there is an appeal from the Human Rights Review Tribunal to the High Court on a question of fact, or where the Tribunal refers the determination of a remedy to the High Court, lay members are to be appointed to sit with the judge.[174] These lay members are drawn from the panel of people who sit on the Tribunal.[175] These people have been appointed because of their knowledge or experience in issues likely to come before the Tribunal.[176] The justification for this process is a little less clear than under the Commerce Act or the Land Valuation Proceedings Act. In *Hosking v Runting*, discussing this process, Keith J commented that "Parliament recognises in these provisions, as in legislation for the classification of publications and broadcasting… that specialist bodies and not the regular judiciary are to make the judgments about the release of certain sensitive information".[177] But privacy issues are not generally what this procedure is used for; rather, issues with discrimination and sexual harassment in the workplace[178] and remedies granted at first instance[179] are more common. It is not particularly clear why Parliament would consider that the court does not have the necessary skill to make determinations in those areas without expert input. However, perhaps it demonstrates a desire to maintain a connection with community values regarding rights issues.

2 New Zealand examples in criminal proceedings

At the lower levels of criminal offending, the District Court employs Justices of the Peace, Community Magistrates and sometimes Registrars to exercise limited judicial functions.

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[171] Gault, above n 106, at [CA78.02].
[172] Land Valuation Proceedings Act 1948, s 3.
[173] Courts of New Zealand, above n 169.
[174] Human Rights Act 1993, s 126.
[175] Human Rights Act 1993, s 126(1).
[176] Human Rights Act 1993, s 110.
[177] *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [194].
[178] *W v Proceedings Commissioner* [2000] NZAR 36 (HC); *Hatem v Proceedings Commissioner* [1998] NZAR 9 (HC); *Ellis v Proceedings Commissioner* [1997] ERNZ 325 (HC); *BHP New Zealand Steel Ltd v O'Dea* [1997] ERNZ 667 (HC); *Wheen v Real Estate Agents Licensing Board* (1997) 4 HRNZ 15 (HC).
[179] *Chief Executive of the Ministry of Social Development v Holmes* [2013] NZHC 672, [2013] NZAR 760; *Director of Proceedings v Nealie* [1999] 3 NZLR 603 (HC).

Justices of the Peace, alongside their various community functions, can preside over minor traffic offences and impose fines, as well as other lower-level District Court proceedings.[180] Justices of the Peace are required to take a training course and be sworn in to office by a District Court judge before they can exercise judicial functions.

Community Magistrates are part-time judicial officers. They have jurisdiction over some minor offences, including those punishable by a fine of $40,000 or under.[181] They can impose sentences in certain situations, although they cannot order imprisonment or home detention.[182] The Community Magistrate scheme was enacted to increase community involvement in the criminal justice system, as well as to ease pressure on District Court judges.[183] It is evident that community participation is seen as an important part of the exercise of state power in its criminal jurisdiction.

3 Overseas examples in criminal proceedings

Civil Law jurisdictions by and large do not use trial by jury in the same way as Common Law systems do, and thus have developed alternative lay participation systems in criminal trials. The Law Commission conducted research into criminal trials in a number of European jurisdictions including Germany, Denmark and France.[184] This research included visits to the relevant countries in 2010. Of interest to this dissertation are the jurisdictions that involve a lay assessor model, with non-expert laypeople sitting alongside the judge. Importantly, none of these processes are specifically in relation to sexual violence; they all are exercised as part of a wider criminal jurisdiction.

In Germany, less serious sexual offences are heard in the Amstgericht trial court, with a judge and two lay assessors. More serious offences are heard in the Landgericht, with two judges and two lay assessors.[185] While the appointment process differs between states, the term is commonly five years and they sit approximately ten times a year.[186] The trial is not divided between conviction and sentence, and thus the lay assessors have input into the sentence ordered as well.[187] In the trial itself, the lay assessors play a limited role. They do not have access to the case dossier before the trial as the judges and counsel do, and they rarely ask questions of witnesses. Lay assessors are however considered particularly useful in terms of assessing the credibility of witnesses and coming to associated findings of

[180] The District Court of New Zealand "Other Judicial Officers" <www.districtcourts.govt.nz>.
[181] Criminal Procedure Act 2011, s 356.
[182] Criminal Procedure Act 2011, s 357.
[183] Community Magistrates Bill (57-2) (select committee report) at i. For a discussion on the role of Community Magistrates, see Powles, above n 88.
[184] Law Commission, above n 17.
[185] At 63.
[186] At 63.
[187] At 64.

fact.[188] Reasons are provided for decisions, written by the judge.[189] The Austrian lay assessor procedure seems largely similar to that in Germany.[190]

Denmark used to have a jury system in a similar vein to New Zealand's, but in 2007 changed to a lay assessor process like most of the rest of Europe.[191] A trial for a sexual offence would likely be before a judge and two lay assessors. Lay assessors are selected from a list of citizens who have expressed interest in the role.[192] There have been concerns about the representativeness of those selected, especially in the underrepresentation of minority groups and overrepresentation of public servants.[193] The term of appointment is four years, with lay assessors usually sitting on four trials a year.[194] There is no compulsory training for citizens to fill the role, and no particular expertise needed for selection. They help to determine the sentence as well as the conviction. The judge writes the reasons for the decision.[195] According to the Law Commission's research, the legal community appears to be in favour of the new system, preferring it to the previous jury system.[196]

If New Zealand was to adopt a type of lay member system as proposed, it would be helpful to look more closely at the practicalities of how similar models work overseas. Without using a jury, some European countries are able to incorporate community participation successfully in more serious criminal trials.

4 How radical is non-jury lay participation?

Non-jury lay participation in the legal system is not as rare as it might seem. It is true though that the proposed model would be a radical shift from the status quo. The most similar model considered here is probably the lay member procedure under the Human Rights Act 1993. The lay members are useful in fact-finding and determining credibility in the context of their particular knowledge and experience. However, transferring a model from a civil jurisdiction to a criminal one cannot be done lightly when a person's liberty is at stake. Experimentation with criminal processes is dangerous because the consequences of poor process are so significant, and it can risk public faith in the system as a whole,[197] an issue this dissertation will explore further in the following section.

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[188] At 63.
[189] At 66.
[190] At 71.
[191] At 87.
[192] At 88.
[193] At 88.
[194] At 88.
[195] At 88.
[196] At 88.
[197] See Sian Elias "Managing Criminal Justice" (address given at the Criminal Bar Association Conference, Auckland, 5 August 2017).

Some Civil Law jurisdictions use lay assessor models, which have many similarities with the proposed lay member model. However, these European models are used for a wide range of criminal offences, not just sexual violence. This could be a crucial point of distinction in the viability of the proposed model. The next section will consider if limiting the proposed model to sexual violence makes theoretical sense.

D Limiting the Model to Sexual Violence

There are genuine concerns at the idea of introducing a specialist model including laypeople but limiting it to only sexual violence.[198] Experimenting with the criminal justice system can have much more significant consequences than experimenting with other areas of the law. The stakes are higher than making amendments to civil procedure because the coercive power of the state is being exercised to limit individuals' liberty. Where there are changes to criminal procedure, it is particularly important to consider how those changes interact with the underlying principles of the justice system. Chapter I discussed the reasons for treating sexual violence separately to other criminal offences. There is a risk, however, that fragmenting the treatment of different crimes by removing the jury from one type of crime may cause bigger issues, particularly in affecting public faith in the system.[199]

In a dissenting judgment in 1983, McMullin J stated "[i]t is not important that the criminal law should be innovative; it is important that it be certain and seen as fair in its application by citizens whose lives it affects".[200] Since then there has been a stronger trend towards innovation in the criminal law, such as through the popularisation of specialist and therapeutic courts like the Rangatahi Courts and Alcohol and Other Drug Treatment Courts. These changes have been made with positive goals in mind, including a desire for the courts to play more than a merely punitive role in peoples' lives. If this specialisation trend continues, however, it is important to be mindful of whether the law is still being applied in a way that is "uniform, equal, and predictable"[201] – and, crucially, whether the public sees it that way.

The justice system only works because the public has faith in it. It symbolically encourages a sense of social order, "with a society's sense of itself as a cohesive, viable and ethical

[198] Finn, McDonald and Tinsley, above n 55, at 257; Law Commission, above n 17, at 24-25.
[199] Some argue that the adversarial system will never be able to provide the support necessary for complainants of sexual violence: Louise Elaine Ellison "A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems" (PhD thesis, University of Leeds, 1997).
[200] *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA) at 97 per McMullin J dissenting.
[201] Roscoe Pound *The Development of Constitutional Guarantees of Liberty* (Yale University Press, New Haven, 1957) at 1.

entity".[202] In general, victims of sexual violence do not have faith in the criminal justice system, evidenced by the very low reporting rates. This is a real problem if the courts are serious about addressing crime, and it is right for the system to be considering its own shortcomings in the area of sexual violence. However, making changes to specific areas of criminal justice risks undermining the entire system. Chief Justice Elias recently compared the criminal justice system to a cat's cradle: "You cannot pull on one thread without causing movement in the whole structure".[203] Changing the adjudication of sexual violence trials, such as through the implementation of the proposed model, may increase the confidence of victims of sexual violence in the system, but it must be done cautiously, without putting the legitimacy of the entire criminal justice system at risk in the eyes of the public.

The Chief Justice also noted with uneasiness the shift in rules of criminal procedure in the United Kingdom from the burden being on proving guilt to "acquitting the innocent and convicting the guilty".[204] The adversarial system does not traditionally have an interest in what actually happened regarding an alleged crime. Rather, the burden is on the state to convince the fact-finder beyond reasonable doubt of the defendant's guilt. It is thus perhaps uncomfortable for the criminal courts to prioritise "convicting the guilty". Elias CJ quoted the traditional position as laid out by Baroness Hale:[205]

> Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt. This is, as Viscount Sankey LC so famously put it in *Woolmington v Director of Public Prosecutions*[206]… the "golden thread" which is always to be seen "throughout the web of the English criminal law". Only then is the state entitled to punish him. Otherwise he is not guilty irrespective of whether he is in fact innocent.

This shift from proving guilt to convicting the guilty can be seen in a fundamental premise of this dissertation – that people who commit sexual offences should be held responsible for their actions, rather than a premise that even if people are not innocent, they must be proven to be guilty beyond reasonable doubt before they can be convicted. This is not an unproblematic assumption. However, in the context of sexual violence, which has been so grievously underreported, it may be a necessary position to take if these crimes are to be addressed by the criminal justice system.

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[202] Nicola Lacey "Criminalization, rationale of" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008).
[203] Elias, above n 197.
[204] Criminal Procedure Rules 2005 (UK), r 1.1(2).
[205] *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [116].
[206] *Woolmington v Director of Public Prosecutions* [1935] 1 AC 462, (1936) 25 Cr App R 72 (HL).

In a related way, the proposed model aligns with the increased concern for the role of the victim that has arisen in recent years. Traditionally the court has only viewed victims of crime as witnesses. A criminal act is an offence against the state, against social order, and a prosecution is taken on behalf of the Queen. The victim's role in the trial is merely to offer evidence to assist in that prosecution. Public calls for victims to be included more in the criminal justice process have become louder over the last few decades.[207] This was recognised legislatively first in the Victims of Offences Act 1987 and later in the Victims' Rights Act 2002. The use of restorative justice practices also demonstrates this shift in conception of the role of the victim. The Chief Justice notes that this "empowerment" of the victim in the criminal trial is creating a "'triangulation' of the parties to whom fairness in procedure is owed".[208] Putting excessive weight on the views of the victim risks "unequal application of the criminal law in cases of serious offending, according to the attitude of the victim".[209]

It can be argued however that in cases of sexual violence, the complainant is particularly important. In many cases, particularly the 'he said-she said' cases, the complainant's evidence is the only evidence available. If the complainant chooses not to give evidence, it is highly unlikely that a prosecution would go ahead at all. It is therefore justifiable to be concerned about the courtroom experiences for complainants of sexual violence in particular, to ensure that all the evidence is before the court. Sexual violence has been so overlooked by the criminal justice system compared to other crimes that a specific approach may be necessary.[210] Cossins writes that in "relation to no other offence would the public and Parliaments be satisfied with the poor outcomes that characterise sexual assault cases".[211]

The cornerstone of the criminal justice system is the public's faith in its administration. Victims of sexual violence, in general, do not have faith in it.[212] The question then becomes whether amendments to criminal procedure relating to sexual violence specifically are justified, and whether those amendments go so far as to threaten the general public's faith in the wider criminal justice system as a whole. To limit the seriousness of that risk, any changes to how sexual violence cases are treated in the courts should be incremental and should "accord with the skeleton of principle that underpins law".[213] The proposed model, with a judge sitting with two lay members, can be seen as incremental in that it is a way of

[207] From groups such as the Sensible Sentencing Trust, established in 2001.
[208] Elias, above n 197.
[209] Elias, above n 197.
[210] For support for innovative thinking in sexual violence trial process from a former Court of Appeal judge, see Bruce Robertson "Sexual Offending: Pre-Trial and Trial Reform" (2011) 17 Canterbury L Rev 8.
[211] Cossins, above n 47, at 111.
[212] Taskforce for Action on Sexual Violence, above n 67, at 51 and 55.
[213] Elias, above n 197.

retaining a desirable part of a standard criminal trial for a serious offence (community participation), while removing an undesirable part (a jury likely affected by rape myths).

E Are These Concerns Fatal to the Proposed Model?

All models have justifiable concerns and the proposed model is no exception. It is likely to be seen as a radical suggestion, and clear arguments can be made against its introduction. However, many concerns are overstated. The courts are not dealing with sexual violence effectively, which leads to victims not believing the formal criminal justice system to be a viable path to achieve justice and thus not reporting their victimisation.

While the proposed model would be a breach of the right to trial by jury in the New Zealand Bill of Rights Act 1990, it can be justified under section 5 given the urgency of the problem. The proposed model is a less intrusive breach than a simple judge-alone model would be. The criticism that a lay member model would effectively be expert evidence without the ability to cross-examine it can be overcome on the specific points of the proposal. While expanding the use of counterintuitive evidence shows potential, it does not have many of the benefits of a full lay member model. Introducing a lay member model into criminal trials is an unprecedented step, but New Zealand has found creative ways to incorporate lay participation in many different areas of the legal system. Extending these innovations to an area of the criminal law that currently has serious flaws may not be as radical as it first seems. The concerns about isolating out sexual violence offences are perhaps the most convincing. Innovation in the criminal justice system in any form could risk public faith in the institution as a whole. However, seeing how poorly the courts have historically dealt with sexual violence, and the destructive wider impact that can have on victims, a new approach is justifiable.

Conclusion

Sexual violence has characteristics that differentiate it from the majority of other crimes, from the relationship between offender and victim to the stereotypes around the offences themselves. The courts, however, have traditionally treated sexual violence as just another criminal offence. Not recognising these differences has meant the formal criminal justice system has not been seen as a viable path for victims looking for justice to be served. Reporting rates are low, and cases that do make it to trial rarely result in convictions. This is a complicated and multi-faceted issue, and there is no easy solution. It is encouraging to see these concerns being taken seriously by the Law Commission, and to see the willingness of the courts, with the support of the Ministry of Justice, to tackle the issues through setting up the Specialist Sexual Violence Pilot Court.

The Law Commission considered but ultimately left open the possibility of changing the fact-finder in sexual violence trials. While it recognised the ways in which juries are not best placed to deal with sexual violence, it was unclear how realistic the other possible models would be. This dissertation has taken up the challenge of looking more deeply at how an alternative fact-finding model would work in sexual violence trials.

The model this dissertation has considered is a judge sitting alongside two lay members who have experience or interest in the sexual violence or criminal justice sectors. While this model would mark a clear change in the adjudication of criminal law in New Zealand, it may not be as radical a suggestion as it seems. Many of the challenges posed can be overcome. There are some practical difficulties to its implementation, which would require more attention. While the proposed model is not perfect, it mitigates the decision-making and harm problems exacerbated by the presence of the jury, while maintaining community participation in trials for serious crime.

Improving the court experience for complainants and addressing the power rape myths can have over courtroom verdicts is crucial if the justice system is serious about addressing sexual violence. How serious the problems of low reporting and high attrition rates for sexual violence are seen to be will determine how large-scale the solutions proposed are. A change in fact-finder to the proposed model is large-scale suggestion. It reflects how pressing these problems are.

Bibliography

A Cases

1 New Zealand

BHP New Zealand Steel Ltd v O'Dea [1997] ERNZ 667 (HC).

Chief Executive of the Ministry of Social Development v Holmes [2013] NZHC 672, [2013] NZAR 760.

Civil Aviation Department v MacKenzie [1983] NZLR 78 (CA).

DH v R [2015] NZSC 35, [2015] 1 NZLR 625.

Director of Proceedings v Nealie [1999] 3 NZLR 603 (HC).

Ellis v Proceedings Commissioner [1997] ERNZ 325 (HC).

Hansen v R [2007] NZSC 7.

Hatem v Proceedings Commissioner [1998] NZAR 9 (HC).

Hosking v Runting [2005] 1 NZLR 1 (CA).

Iti v R [2011] NZCA 114.

Kohai v R [2015] NZSC 36, [2015] 1 NZLR 833.

Ministry of Transport v Noort; Police v Curran [1992] 3 NZLR 260 (CA).

M v R [2011] NZSC 134.

R v Alden HC Palmerston North CRI-2010-054-1873, 1 October 2010.

Siemer v Solicitor-General [2010] NZSC 54, [2010] 3 NZLR 767.

W v Proceedings Commissioner [2000] NZAR 36 (HC).

Wheen v Real Estate Agents Licensing Board (1997) 4 HRNZ 15 (HC).

2 Canada

R v Oakes [1986] 1 SCR 103.

3 United Kingdom

R (Adams) v Secretary of State for Justice [2011] UKSC 18, [2012] 1 AC 48.

Woolmington v Director of Public Prosecutions [1935] AC 462, (1936) 25 Cr App R 72 (HL).

B Legislation

1 New Zealand

Commerce Act 1986.

Crimes Act 1961.

Criminal Procedure Act 2011.

Evidence Act 2006.

Human Rights Act 1993.

Indictable Offences Summary Jurisdiction Act 1900 (repealed).

Juries Act 1981.

Juries Amendment Act 2008.

Land Valuation Proceedings Act 1948.

New Zealand Bill of Rights Act 1990.

New Zealand Bill of Rights Amendment Act 2011.

Parole Act 2002.

Resident Magistrates' Act 1867 (repealed).

Summary Proceedings Act 1957.

Victims of Offences Act 1987 (repealed).

Victims' Rights Act 2002.

Community Magistrates Bill (57-2).

2 United Kingdom

Criminal Procedure Rules 2005.

C Treaties

International Covenant on Civil and Political Rights.

D Books and Chapters in Books

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, 2015).

John W Cairns and Grant McLeod *"The Dearest Birth Right of the People of England": The Jury in the History of the Common Law* (Hart, Oxford, 2002).

Leigh Gilmore *Tainted Witness: Why We Doubt What Women Say About Their Lives* (Columbia University Press, New York, 2017).

Harry Kalven Jr and Hans Zeisel *The American Jury* (Little, Brown and Company, Boston, 1966).

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

Roscoe Pound *The Development of Constitutional Guarantees of Liberty* (Yale University Press, New Haven, 1957).

Stephen J Schulhofer *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Harvard University Press, Cambridge, Mass., 1998).

Jocelynne A Scutt "The Incredible Woman: A recurring character in criminal law" in *The Incredible Woman: Power and Sexual Politics Volume 1* (Artemis Publishing, Melbourne, 1997).

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

Colleen A Ward *Attitudes Towards Rape: Feminist and Social Psychological Perspectives* (Sage, London, 1995).

E Journal Articles

Annie Cossins "Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England" (2013) 14 E&P 74.

Kirsty Duncanson and Emma Henderson "Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials" (2014) 22 Fem Leg Stud 155.

Phoebe C Ellsworth "Are Twelve Heads Better Than One?" (1989) 52 LCP 205.

Louise Ellison and Vanessa E Munro "A Stranger in the Bushes or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study" (2010) 13(4) New Crim R 781.

Louise Ellison and Vanessa E Munro "Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-sexual Scripts in (Mock) Jury Deliberation" (2009) 18(3) Social & Legal Studies 291.

Susan Estrich "Rape" (1986) 95 Yale LJ 1087.

Ian Freckelton "Child Sexual Abuse Accommodation Evidence: The Travails of Counterintuitive Evidence in Australia and New Zealand" (1997) 15 Behav Sci & L 247.

Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrick "Inside the Judicial Mind" (2001) 86 Cornell L Rev 777.

Valerie P Hans "Introduction: Citizens as Legal Decision Makers: An International Perspective" (2007) 40 Cornell Int'l LJ 303.

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

Sanja Kutnjak Ivković "An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals" (2003) 25 Law & Policy 93.

Sanja Kutnjak Ivković "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals" (2007) 40 Cornell Intl LJ 429.

Etienne Mureinik "Emerging from Emergency: Human Rights in South Africa" (1994) 92 Mich L Rev 1977.

Susan Murphy "Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome" (1991) 25 Colum J L & Soc Probs 277.

Michele Powles "A Legal History of the New Zealand Jury Service – Introduction, Evolution and Equality?" [1999] VUWLawRw 19.

Michele Powles "The New Zealand Community Magistrates Scheme: Whose Community and What Involvement?" (2000) 19 NZULR 29.

Christoph Rennig "Influence of Lay Assessors and Giving Reasons for the Judgement in German Mixed Courts" (2001) 72 International Review of Penal Law 481.

Bruce Robertson "Sexual Offending: Pre-Trial and Trial Reform" (2011) 17 Canterbury L Rev 8.

Ilene Seidman and Susan Vickers "The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform" (2005) 38 Suffolk U L Rev 467.

Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21(4) Psychiatry, Psychology and Law 511.

Judy Shepherd "Reflections on a Rape Trial: The Role of Rape Myths and Jury Selection in the Outcome of a Trial" (2002) 17(1) Affilia 69.

Natalie Taylor "Juror Attitudes and Biases in Sexual Assault Cases" (2007) 344 Trends and Issues in Crime and Criminal Justice 1.

Jennifer Temkin ""And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom" (2010) 13(4) New Crim R 710.

Jennifer Temkin "Prosecuting and Defending Rape: Perspectives from the Bar" (2000) 27 Journal of Law and Society 219.

Patricia A Tetreault "Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials" (1989) 7(2) Behav Sci & L 243.

David Wolchover and Anthony Heaton-Armstrong "Debunking rape myths" (2008) 158(7305) NLJ 117.

F Parliamentary and Government Materials

1 New Zealand

Auckland District Law Society "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

Margaret Bazely *Report of the Commission of Inquiry into Police Conduct* (March 2007).

Cabinet Office Circular "Role of the Remuneration Authority in Setting Remuneration for Individuals Appointed to Statutory Bodies and Other Positions" (21 October 2011) CO (11) 7.

Criminal Bar Association of New Zealand "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the proposed amendment to s 24(e) of the New Zealand Bill of Rights Act 1990 in the* Criminal Procedure (Reform and Modernisation) *Bill* (15 November 2010).

District Court Judges "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

Human Rights Commission "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

Independent Police Conduct Authority *Report on Police's handling of the alleged offending by 'Roastbusters'* (March 2015).

Law Commission *Alternative Pre-Trial and Trial Processes: Possible Reforms* (NZLC IP30, 2012).

Law Commission *Evidence, Volume 2: Evidence Code and Commentary* (NZLC R55, 1999).

Law Commission *Juries in Criminal Trials* (NZLC R69, 2001).

Law Commission *Juries in Criminal Trial Part One: A Discussion Paper* (NZLC PP32, 1998).

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

Pat Mayhew and James Reilly *The New Zealand Crime & Safety Survey: 2006* (Ministry of Justice, 2007).

Ministry of Women's Affairs *Restoring soul: Effective interventions for adult victim/survivors of sexual violence* (2009).

Bronwyn Morrison, Melissa Smith and Lisa Gregg *The New Zealand Crime and Safety Survey: 2009 – Main Findings Report* (Ministry of Justice, 2010).

New Zealand Bar Association "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

New Zealand Law Society "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

New Zealand Police Association "Submission to the Justice and Electoral Select Committee on the Criminal Procedure (Reform and Modernisation) Bill".

Leonie Pihama and Huriana McRoberts *Te Puāwaitanga o te Kākano: A Background Paper Report* (Te Puni Kōkiri, 2009).

Taskforce for Action on Sexual Violence *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence, Incorporating Views of Te Ohaakii a Hine – National Network for Ending Sexual Violence Together* (Ministry of Justice, 2009).

Sue Triggs and others *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, September 2009).

2 Australia

Australian Law Reform Commission *Family Violence – A National Legal Response* (ALRC Report 114, October 2010).

3 United Kingdom

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

The Stern Report: A Report by Baroness Vivien Stern CBE of an Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales (Government Equalities Office, Home Office, 2010).

G Presentations to Conferences

Suzanne Blackwell "Counterintuitive Psychological Expert Evidence in Child Sexual Assault Trials" (paper presented to Best Practice in Sexual Violence Courts: An education programme for Sexual Violence Court Pilot Judges, Auckland, January 2017).

Sian Elias "Managing Criminal Justice" (address given at the Criminal Bar Association Conference, Auckland, 5 August 2017).

Emily Henderson "Innovations in Other Jurisdictions: The Art of the Possible" (paper presented to Best Practice in Sexual Violence Courts: An education programme for Sexual Violence Court Pilot Judges, Auckland, January 2017).

Jan Jordan "Barriers for adult sexual violence complainants" (paper presented to Best Practice in Sexual Violence Courts: An education programme for Sexual Violence Court Pilot Judges, Auckland, January 2017).

H Theses

Louise Elaine Ellison "A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems" (PhD thesis, University of Leeds, 1997).

I Magazine Articles

Marie Dyhrberg "Majority verdicts: Are we all for it?" *New Zealand Lawyer* (New Zealand, 4 October 2001).

J Internet Resources

Courts of New Zealand "How cases come to the High Court" <www.courtsofnz.govt.nz>.

The District Court of New Zealand "Other Judicial Officers" <www.districtcourts.govt.nz>.

The District Court of New Zealand "Sexual Violence Court Pilot – Frequently Asked Questions" <www.districtcourts.govt.nz>.

Ministry of Justice "Human Rights Review Tribunal: About the Tribunal" <www.justice.govt.nz>.

Ministry of Justice "Jury Service: What you get paid" <www.justice.govt.nz>.

New Zealand Parole Board "Board Membership" <www.paroleboard.govt.nz>.

Rape Crisis Dunedin "Aims/How we work" <www.rapecrisisdunedin.org.nz>.

K Other Resources

Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers).

Nicola Lacey "Criminalization, rationale of" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008).