THE TRIAL BEFORE THE TRIAL:

the effects of the Evidential Test on the prosecution of sexual violation

Holly J Moffett

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I. Introduction

Effectively responding to sexual violation has proven to be notoriously difficult for states.[1] New Zealand has long struggled with our persistently low rates of reporting, prosecution and conviction. 9 per cent of all instances of sexual violation are reported, 38 per cent of reported cases are prosecuted[2] and 13 per cent of reported cases convicted;[3] meaning only 3.4 per cent of sexual violations overall are prosecuted and 1.1 per cent convicted. This is a huge contributor to the high attrition rate of reported sexual violation cases.[4] The United Nations has recently criticised New Zealand for both the frequency of and justice response to sexual violation.[5]

In the broader context, rape is four times less likely to go to court than any other physical assault,[6] and less likely to be prosecuted than types of sexual violence with lower maximum sentences.[7] Victims with intellectual disabilities or who have previously complained about sexual violation experience an even lower prosecution rate.[8]

The real world result of this low prosecution rate is that: "From women's point of view, rape is not prohibited, it is regulated".[9] This means that New Zealand's justice system has such significant difficulty with responding to the vast majority of sexual violation that, so long as there is not significant corroboration, sexual violation's illegality is practically redundant. The effects of the trauma on victims[10] and the state's inability to recognise and act on such a serious

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[1]The term sexual violation here is used to correspond to the definition used in section 128 of the Crimes Act 1961. This is because the legal definition of rape only corresponds to the penetration of the vagina using the penis. Sexual violation is more expansive and covers all types of non-consensual sexual connection. However, as 'sexual violation' is only used in New Zealand, 'rape' will be used when referring to evidence from other jurisdictions. 'Sexual violence' will be used as a more general term that also encompasses sexual assault.

[2]Stats NZ Tatauranga Aotearoa "NZ.Stat" NZ. Stat <www.nzdotstat.stats.govt.nz>.

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

[4]Sue Triggs and others *Responding to Sexual Violence: Attrition in the New Zealand criminal justice system* (Ministry of Women's Affairs, September 2009) at 4.3.

[5]Committee on the Elimination of Discrimination against Women *Concluding observations on the eight periodic report of New Zealand* CEDAW/C/NZL/CO/8 (2018) at 25.

[6]Kirsty Johnston and Chris Knox "Sex cases vanish: Why thousands of rapists walk free" (3 May 2018) NZ Herald <www.nzherald.co.nz>.

[7]Triggs and others, above n 4, at 4.4.

[8]At 5.5.

[9]Catharine MacKinnon *Women's Lives, Men's Laws* (Harvard University Press, United States of America, 2005) at 179.

[10]There is some discussion over whether the term "victim" or "survivor" is most appropriate to the people who have been subject to sexual violation. The term "victim" is used here as it is the most common term used in legal academia, and as an attempt to place the onus on the state to protect these people rather than place the onus on them to 'survive' the violation.

crime causes serious concerns about our criminal justice system's ability to protect people and respond to crimes. Total systemic change is needed to resolve all of these issues.[11]

The subject of this dissertation will be on one aspect of this system: the decision to prosecute in instances of sexual violation. Currently, only 38 per cent of reported sexual violation cases are prosecuted,[12] meaning that changes to the trial process to avoid traumatising the victim and improve jury understanding of the reality of sexual violation are not helpful until the prosecution rate is also improved. Although there has been significant attention within New Zealand on how to improve the reporting rates and convictions rates of sexual violation, there has been very little attention paid to why 62 per cent of reported sexual violation is not prosecuted. This dissertation seeks to draw attention to this gap in the discussion around the justice response to sexual violation, as the decision to prosecute operates as a 'bottle neck' for these cases even once they are reported. The decision to prosecute tends to be an area of the criminal justice system that goes unquestioned and ignored, but this dissertation seeks to highlight the key roles that the Prosecution Guideline's Evidential Test and prosecutors themselves play in inhibiting sexual violation cases from progressing through the justice system.

The decision whether or not to prosecute is based on The Test for Prosecution within the Solicitor-General's Prosecution Guidelines. Section 185 of the Criminal Procedure Act 2011 gives the Solicitor-General the responsibility to oversee all prosecutions, and these guidelines form part of this oversight.[13] This test is provided in full at Appendix 1. The test has two 'sub-tests' within it, both of which must be passed before a case will be prosecuted. These are the Evidential Test and the Public Interest Test.[14] The focus here is the Evidential Test, as sexual violation cases fail this test significantly more often than the Public Interest Test.[15] The Prosecution Guidelines were first formulated in 1992, and the Evidential Test has not materially changed since.[16] It requires that the evidence in a case be sufficient, which is described at section 5.3 as follows:[17]

[11]Yvette Tinsley "Investigation and the decision to prosecute in sexual violence cases" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 120 at 121.
[12]Stats NZ Tatauranga Aotearoa, above n 2.
[13]Criminal Procedure Act 2011, s 185.
[14]Crown Law *Solicitor General's Prosecution Guidelines* (1 July 2013) at 5.1.
[15]Elish Angiolini *Report of the Independent Review into The Investigation and Prosecution of Rape in London* (30 April 2015) at 107.
[16]Compare Crown Law *Prosecution Guidelines* (9 March 1992) at 3.
[17]Crown Law, above n 14, at 5.3.

> A reasonable prospect of conviction exists if, in relation to an identifiable person whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

There are multiple elements to this test that are problematic when applied to sexual violation. The first is that New Zealand prosecutors interpret the Evidential Test using a predictive approach.[18] This means that prosecutors look at the evidence collected during the investigation of a crime through the lens of how juries would view and react to it, and predict whether there is a reasonable prospect that such a jury would convict.

The predictive approach is justified by the supreme importance that our legal system places on lay adjudication.[19] This is the belief that courts operate as a reflection of social values, so a jury of citizens is best placed to make judgements on whether cases are worthy of censure.[20] The importance placed on lay adjudication is reflected in the predictive approach because it utilises the jury perspective in prosecutorial decision making.

The other problematic element is how much discretion the test leaves for prosecutors. This discretion is important because the Evidential Test is applied to the prosecution of all crimes. Flexibility is necessary to ensure the Test can be used for a wide and unpredictable range of scenarios, but is reliant on having unbiased, well-informed prosecutors to exercise this discretion.

Neither of these elements alone are necessarily harmful to the criminal justice system. However, this dissertation argues that, when applied to instances of sexual violation, the impartiality of the decision to prosecute quickly disappears due to the prevalence of rape myth within both juries and prosecutors.

This dissertation will first set out the relevant criminal justice values that are being breached by our current prosecution rate, including the traditional core purpose of the criminal justice

[18]Fiona Cownie, Anthony Bradney and Mandy Burton *English Legal System in Context* (6th ed, Oxford University Press, New York, 2013) at 296.
[19]Andrew Ashworth and Mike Redmayne *The Criminal Process* (4th ed, Oxford University Press, New York, 2010) at 201.
[20]Valerie Hans "Introduction: Citizens as Legal Decision Makers: An International Perspective" (2007) 40 Cornell Int L J 303 at 306.

system, before arguing that the criminal justice system should also recognise a victim's right to procedural fairness.

The misinformation and bias around sexual violence that is still widely believed in New Zealand will then be identified as a significant contributor to the low prosecution rate for sexual violation. The Evidential Test and the discretion allowed to prosecutors who are subject to rape myths will be identified as particular aspects within the decision to prosecute where this misinformation is particularly prevalent. Measures of the victim's credibility will be highlighted as an issue at the core of how these biases can affect the decision to prosecute.

Arguments against increasing the prosecution rate will then be addressed, including the notion that it may pointlessly traumatise the victim to put them through the trial process because such cases will be unlikely to be convicted, and that it will be inefficient to bring cases to trial that will not result in a conviction. Additional reasons to increase the prosecution rate will also be provided.

Finally, a series of solutions to our current issues with prosecuting sexual violation will be suggested. These include a different approach to the Evidential Test, strong leadership for prosecutors with an understanding of the role prosecutors have in sexual violation cases, greater external scrutiny on the prosecutorial process, and education for prosecutors about the realities of sexual violence and the trauma response. Opportunities within the prosecutorial process for victims to have a level of autonomy over the decision made, and a right to review will also be discussed.

II. Theoretical Framework

The low prosecution rate, resulting in a low conviction rate, breaches core functions of New Zealand's criminal justice system. The first to be discussed in censuring wrongdoing, a commonly accepted purpose. Additionally, a victim's right to procedural fairness will be advanced as a core purpose of the criminal justice system that requires recognition.

A. The Orthodox Theory of Criminal Justice

The low prosecution rate for sexual violation may seem instinctively wrong to many people. However, it is important to articulate why the criminal justice system seeks to deal with these crimes, and whether a low prosecution rate runs counter to the purpose of the criminal justice system.

Although there will always be debate surrounding the role of the criminal justice system, it is generally accepted that one role is censuring wrongdoing. Specifically, this means public powers will censure public wrongs through formal criminal legal processes. To establish which wrongdoing requires censure, a 'public wrong' must be defined.

Public wrong are acts that infringe upon the shared values and concerns within a society.[21] From Wall:[22]

> A group can share a wrong that has been committed against an individual where the members of the group define and identify themselves as a community united by mutual concern, by genuinely shared (as distinct from contingently coincidental) values and interests.

In pluralistic societies it can be hard to define what values and concerns are actually shared, and there may not be universal agreement about whether certain wrongs within society actually require official involvement or punishment.[23] However, there seems to be strong social consensus that sexual violation is a common concern in our society. Once conduct is established to infringe community values, censure is warranted.[24] Because this infringes upon shared social values, it becomes our public officials' responsibility to deal with these wrongs on the community's behalf.[25]

The wrongdoer also damages their relationship with the whole of society, because it is society's values that are wronged. Since protection is the state's responsibility, it must also remedy this damaged relationship.[26] So the state is not only bound to censure the wrong, but also to rectify

[21]Jesse Wall "Public Wrongs and Private Wrongs" (2018) 31 CJLJ 177 at 177.
[22]At 181.
[23]At 183.
[24]At 185.
[25]At 191.
[26]At 182.

the inequality caused in society by the wrong.[27] This damage to society as a whole justifies the state pursuing cases even when the primary victim does not want involvement.[28] The orthodox purpose of the criminal justice system is ultimately that the "response to harmful conduct with which the criminal law centrally deals with should convey censure", and this is conveyed through the criminal justice system's various punitive and rehabilitative processes.[29]

This censure is served by bringing suspected offenders to trial.[30] The state is not only responsible for censuring these types of wrongs, but also has the procedural advantage of being best placed to deal with these wrongs.[31] As Packer describes:[32]

> If the legislature has decided that certain conduct is to be treated as criminal, the decision-makers at every level of the criminal process are expected to accept that basic decision as a premise for action.

This means that all parts of the process must be geared towards censuring proven wrongdoing.

In order to execute the core purpose of censuring wrongdoing, the procedure of the criminal justice system "should serve the rule of law, by making decisions more consistent, more predictable, and less arbitrary",[33] whilst still respecting the wrongdoer's procedural rights.[34] This is relevant to another core purpose of the criminal justice system: protecting the accused's rights to justice and fair process.[35] This tempers the core value of censuring wrongdoing, requiring that the censure be done in the context of a fair investigative and trial process to prevent false convictions by the comparatively more powerful state.

Prosecutorial discretion, in particular the requirement that there be sufficient evidence to support a finding of guilt, is important because it reflects the "cardinal value" of the prosecutorial process: preference for acquitting the guilty over convicting the innocent.[36] This is why a range of filtering processes are adopted throughout criminal procedure, such as the emphasis on non-coercive police processes and the discretion to prosecute or not, to avoid mistaken convictions and innocent people progressing through the onerous criminal justice

[27] Andrew von Hirsch "Censure and Proportionality" in Antony Duff and David Garland (eds) *A Reader on Punishment* (Oxford University Press, New York, 1994) 112 at 115.
[28] Wall, above n 21, at 181.
[29] von Hirsch, above n 27, 125.
[30] Ashworth and Redmayne, above n 19, at 51.
[31] Wall, above n 21, at 191.
[32] Herbert Packer *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968) at 156.
[33] Ashworth and Redmayne, above n 19, at 22.
[34] At 32-35.
[35] At 51.
[36] At 25.

system.[37] This is also done to maximise efficiency within the criminal justice system, by removing cases without meritorious evidence out of the system early.[38] Whilst this procedure and emphasis on filters is usually justified, there is strong evidence that the standard criminal justice procedure, when applied to instances of sexual violation, is preventing the censure of most wrongdoing.

With the particularly low sexual violation rate of prosecuting only 38 per cent of reported cases, the criminal justice system is failing to censure sexual violation. This crime is one of the most inherently wrong; it fundamentally infringes on bodily autonomy and sexual integrity, often causes long term psychological trauma to the victim, and "assaults the very 'core' of the self and causes great moral injury."[39] Despite the clear wrongfulness of sexual violation, the New Zealand criminal justice system censures almost none of these crimes. Current procedure is failing to adequately respond to sexual violation, and must be improved if our criminal justice system is to function correctly.

Not only is the criminal justice system failing to censure the wrongdoing in the cases that are reported, but there is evidence that a failure to respond to reported cases results in lower reporting.[40] The system is known to treat victims poorly, and the prosecution and conviction rates are so low that going through the trauma of the system may not be worthwhile.[41] Additionally, studies have found that at least half of people when asked why they did not report did so because they were afraid of not being believed or treated poorly within the criminal justice system.[42]

Because our procedure is failing to react to the sexual violation that is reported, especially by prosecuting so few cases, "people are voting with their feet" by not reporting.[43] This leads to even less censure by the system. As a result, the criminal justice system risks total failure to fulfil its purpose of censuring wrongdoing when faced with sexual violation.

[37]At 23.
[38]At 38.
[39]David Archard "The Wrong of Rape" (2007) 57 Philos Q 374 at 390.
[40]Alexandra Topping and Caelainn Barr "Rape prosecutions plummet despite rise in police reports" (26 September 2018) The Guardian <www.theguardian.com>.
[41]*Government Response to the Report of the Taskforce for Action on Sexual Violence* (Ministry of Justice, September 2010) at 10.
[42]Holly Johnson "Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth Sheehy (ed) *Sexual Assault in Canada* (University of Ottawa Press, Ottawa, 2012) 613 at 617.
[43]Johnston and Knox, above n 6.

B. Victims' Rights within the Theory of Criminal Justice

Upholding the rights of victims to procedural fairness may also be a function of the criminal justice system. Whether victims have rights has become a source of debate.[44] Some supporters of the traditional conception of criminal justice (which is focused on the relationship between the accused and the state) disagree with the notion that victims have specific rights, arguing that recognising victims' rights will jeopardise the impartiality of prosecutorial and judicial decision making.[45] However, an argument is emerging that victims' rights can be introduced to acknowledge the victim's role within the system, while maintaining impartiality.

Part of the reason victims' rights are not traditionally recognised in the theory of criminal law is the belief that the state is the 'injured' party, rather than the victim.[46] Traditional theory focuses on the power imbalance between the state and the offender, seeking to protect the offender from unjust treatment by the state. Yet we do not acknowledge the imbalance between the offender and the victim as separate parties, an imbalance caused by both the crime itself, and the state's focus on the accused's rights within the process without acknowledging the victim.[47]

Additionally, there is no acknowledgement of the state's relationship with the victim within the system. This is an expansive discussion, but the focus here will be on the need for the criminal justice system to recognise that the state also owes the victim a right to procedural fairness. The sexual violation context provides a particularly helpful example of this right, because of the many ways that the criminal justice system allows bias and misinformation into its procedure for such crimes.

Although there are areas of the criminal law that acknowledge the victim, such as sentencing and bail decisions,[48] most of the conventional criminal law was not made to address the victim's sense of justice.[49] The system largely only requires evidence from the victim, with no

[44]Judith Lewis Herman "Justice From the Victim's Perspective" (2005) 11 VAW 571 at 572.
[45]Andrew Ashworth "Restorative Justice and Victims' Rights" (2000) NZLJ 84 at 87.
[46]Lewis Herman, above n 44, at 575.
[47]At 573.
[48]Sentencing Act 2002, s10; Bail Act 2000, s 8.
[49]Lewis Herman, above n 44, at 573.

regard for their opinion, experience, or status,[50] reducing them to a dehumanised "cog" in the criminal justice process.[51]

The most prominent concern raised about giving the victim a higher status within the process is that by allowing the victim rights then they can utilise these rights to influence the criminal justice process. This will endanger the impartiality of the state's treatment of the accused.[52] Ashworth argues this, in the belief that victims are in favour of high compensation and state punishment, and that any rights for them would produce biased effects.[53]

However, there is evidence to the contrary. The assumption that victims are disruptive to the impartiality of the process is a reflection of the general socialisation within criminal justice processes to distrust victims' emotions.[54] It has been found that victims of sexual violation are actually very measured in what they want from the justice system and are more concerned with being supported and acknowledged within their communities.[55] Not only is this assumption about what victims want incorrect, but ignoring and devaluing the victim's indignation only vindicates the perpetrator by adding to the victim's shame.[56]

This evidence supports more acknowledgment for victims within the process, especially in the context of sexual violation. However, the concept of victims' rights is still a new conversation and there are few solid frameworks identifying them, let alone implementing them. We do not yet have a "robust method of determining what is or is not an effective justice mechanism from a victim's perspective."[57] Therefore, there is no fully thought out and researched notion of victims' rights that is ready to be embedded into the core of the criminal justice system.

For the purpose of this dissertation, it is advanced that the victim should at least have a right to procedural fairness, much like the accused. The accused has such a right as an acknowledgement of the imbalance between the state and the individual, and to prevent the state from using the criminal justice system to abuse the individual's civil and political rights.[58] A right to procedural fairness for a victim would acknowledge an aspect of the fundamental

[50]Ashworth, above n 45, at 87.
[51]Lewis Herman, above n 44, at 582.
[52]Ashworth, above n 45, at 86.
[53]At 87.
[54]Lewis Herman, above n 44, at 576.
[55]At 597.
[56]At 577.
[57]Kathleen Daly "Reconceptualising sexual victimisation and justice" in Inge Vanfraechem, Antony Pemberton and Felix Mukuiza Ndahinda (eds) *Justice for Victims: Perspectives on rights, transition and reconciliation* (Routledge, Oxfordshire, 2014) 378 at 386.
[58]Ashworth and Redmayne, above n 19, at 193.

social contract between the state and citizens: that citizens get protection from the state in exchange for losing their autonomy to retaliate when wronged.[59] This contract is only honoured by the state when it identifies wrongs; otherwise the state is not providing the agreed protection. Allowing the victim a right to procedural fairness acknowledges them as a citizen who deserves protection, and now needs the state to act fairly to right a wrong. Just as the accused needs procedural fairness to be protected from the state's power, the victim is owed procedural fairness to be fairly protected by the state when a wrong is committed.

Additionally, allowing the victim this right acknowledges them as a person with an interest in seeing the wrongdoing censured. This elevates them from their dehumanised status as a "cog" in the justice system, which is particularly damaging for victims of sexual violation because the crime itself is already dehumanising.[60]

Procedural fairness as a right for victims also mitigates Ashworth's concerns about rights for the victim introducing a biased viewpoint into criminal justice. Procedural fairness inherently means that the victim has a right to see the crime treated fairly and without bias within the system. Any situation with a conflict in what is 'fair' for each party would still validly fall in the accused's favour, as they are most vulnerable to the state's powers.

Finally, a victim's right to procedural fairness would balance the accused's procedural rights. Currently, the accused's rights protect them from unfair treatment within the process, such as the inadmissibility of certain evidence and allowing them to not give evidence. However, the criminal justice system's standard for procedural fairness is so focussed on protecting the offender that it is slow to question processes and decisions that provide additional benefit to the offender, rather than simple fairness. Sexual violation cases provide helpful examples of this, illustrating how every part of the criminal justice process allows disproven misconceptions about sexual violation to make the laying of charges of sexual violation less likely (discussed in full at Part III). This benefits the accused by making it less likely for them to face charges, but does not enhance the fairness of the trial because it utilises myths and misunderstandings.

[59]"The reason why men enter into society is the preservation of their property; and the end while they choose and authorise a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the society, to limit the power and moderate the dominion of every part and member of the society." Per John Locke *Two Treatises of Government* (1690, Cambridge, Cambridge University Press, Student Edition, 1988 (Introduction by P Laslett)) at 222.

[60]Cortney A Franklin and others "Police Perceptions of Crime Victim Behaviors: A Trend Analysis Exploring Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors' Trauma Responses" (2019) Crime and Delinquency (Early Online Release) at 2.

Introducing a right to procedural fairness for the victim would give the criminal justice system a mandate to question the introduction of myths and biases that skew procedure. By creating a responsibility to keep procedure fair for the victim, this right introduces some limits to how much the criminal justice system can allow benefits to the accused that do not enhance the fairness of the trial but endanger the valid censure of the wrong. It may not be as strong as the accused's right, but it would still prevent the most egregious bias within the system.

The victim's right to procedural fairness would be relevant to the prosecutorial process. This process was not developed with victims in mind, and its sole purpose is to establish whether an offence was committed that it is in the public interest to prosecute.[61] Prosecutors work with victims, but they do not represent them, they represent the crown and can provide limited support to the victim without risking a conflict of interest.[62] Allowing the victim a right to procedural fairness would place a responsibility on prosecutors to ensure that their decision making was entirely fair.

The need for the victim to have a right to procedural fairness is particularly apparent when applied to sexual violation. The prejudice in sexual violation cases is a key reason that the prosecution rate is so low, as discussed in Part III. Currently the victim does not have a fundamental right to protection from this prejudice, or from misinformation that may colour the process. A right to procedural fairness would force the state to act to prevent the prosecution of sexual violation falling victim to misinformation, enabling them to better censure the crime.

Sexual violation, in any form, is a huge intrusion on the victim's interests, such as bodily integrity, dignity, sense of safety, and capacity for intimacy.[63] The criminal justice system's lack of acknowledgement of this power imbalance only further ignores the reality of sexual violation. The system as it stands alienates victims from reporting and disempowers victims within the process, causing them to avoid the system. This lack of victim acknowledgement holds back the system's ability to fulfil its orthodox purpose of censuring wrongdoing. For these reasons, we must acknowledge the victim's right to procedural fairness and turn our focus to the state's responsibility to the victim as well as the accused.

[61]Philip C Stenning *The Modern Prosecution Process in New Zealand* (Victoria University Press, Wellington, 2008) at 205.
[62]At 206.
[63]Danica McGovern "Assessing Offence Seriousness at Seriousness: New Zealand's Guideline Judgement for Sexual Violation" (2014) 26 NZULR 243 at 250.

III. Rape Myth's Role in the Low Rate of Sexual Violation Prosecutions

A key limitation on the justice system's ability is the strong influence of rape myths on the decision to prosecute. The predictive approach embeds jury-held rape myths within the decision to prosecute and prosecutor-held rape myths influence prosecutor's exercises of discretion. Both need to be explored to gain a full understanding of the inherent bias within the prosecution of sexual violation.

A. What is Rape Myth?

'Rape myth' is the term used in reference to the widely held misconceptions about sexual violence. These myths tend to centre on a core misunderstanding of what 'real rape' is, with people thinking of only the narrow definition that rape is an unknown man using violence to force intercourse upon a woman.[64] Although these 'real rapes' occur, they are far from the most common forms of sexual violation that the Crimes Act 1961 covers, [65] which are overwhelmingly committed by people known to the victim in a wide range of circumstances.[66] As *From 'Real Rape' to Real Justice* (which a 2015 Law Commission report relied upon significantly)[67] explains:[68]

> …decisions made by investigators, prosecutors, juries and judges are influenced by such unrealistic expectations or erroneous assumptions about rape, or by the extent to which they display 'rape myth acceptance'.

The "reasonable belief in consent" requirement in the section 128 provision for sexual violation[69] is core to the harm caused by these myths.[70] It puts the onus on the victim to show they are not consenting or that they did not lead the accused to reasonably believe they consented. This is instead of the onus being on the accused to take steps to ensure consent has been freely given.

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[64]Johnson, above n 42, at 622.
[65]Crimes Act 1961, s 128.
[66]Triggs and other, above n 4, at 4.2.2.
[67]Law Commission, above n 3, at 1.59.
[68]Elisabeth McDonald and Rachel Souness "From "real rape" to real justice in New Zealand Aotearoa: The reform project" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) 31 at 42.
[69]Crimes Act 1961, s 128.
[70]Johnston and Knox, above n 6.

Additionally, past court decisions considered whether a person can withdraw consent arguable, because the confusion it could cause for the sexual partner.[71] Although the law now recognises the ability to withdraw at any point, this indicates that the law has historically been more concerned with protecting people who want sex than protecting sexual and bodily autonomy. It prioritises the ability to make assumptions around consent over respecting other people's ability to give or refuse consent as they wish.

Another prevalent and especially damaging rape myth is the belief that false allegations are common and very difficult for the accused to deny. There is a long history of legislators and members of the criminal justice sector falling for this myth, based on the notion that women (as the majority of victims)[72] are:[73]

> …multifarious, distorted by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions [leading to] contriving false charges of sexual offenses by men.

While this statement may seem extreme, it is less than 100 years old and the shadows of these opinions continue to be reflected in the public understanding of rape today.

These assumptions and misunderstandings mean that cases with certain characteristics are more likely to be prosecuted; these are the cases that best match what an average person expects of sexual violation. The cases that most closely resemble 'real rape' tend to have more alternative evidence (such as physical injuries and post-rape medical examinations).[74] This makes it even less likely for juries to believe that other sexual violation occurs, because they expect 'real rapes' to have more evidence.

However, the most common forms of sexual violation do not involve injury and tend to be done by someone known to the victims, increasing the likelihood that there will be a delay in reporting.[75] Forensic evidence is helpful, but it is inexact and can only go so far in proving the mind-set of the victim or accused during the crime.[76] These cases tend to come down to the

[71]R v Kaitamaki [1980] 1 NZLR 59 (CA) at 61.
[72]Law Commission, above n 3, at 1.1.
[73]John Henry Wigmore *Evidence in Trials at Common Law* (revised ed, Little, Brown & Company, United States of America) vol 3a at 924a.
[74]Law Commission, above n 3, at 1.21.
[75]Tania Boyer, Sue Allison and Helen Creagh *Improving the justice response to victims of sexual violence: victims' experiences* (Ministry of Justice, August 2018) at 5.1.
[76]Philip Bulman "Increasing Sexual Assault Prosecution Rates" (November 2009) National Institute of Justice-United States of America <www.nij.gov>.

issue of consent, for which the only evidence is the victim's word (which, as will be discussed in Part III, Section D, is thoroughly devalued).The result is that society correlates how much evidence there is with the rape's validity.

This leads to a cycle of the cases with physical or independent evidence getting convicted more frequently, so those types of sexual violation are seen as even more legitimate because the state has taken definitive action against them. Meanwhile, the more common cases that do not have such evidence are derogated as "he said, she said" lost causes that are less likely to motivate a jury into perceiving these cases as valid and worthy of censure.[77]

There are many statistics that exemplify the manifestation of rape myths in the criminal justice process. For example, in the United Kingdom accused offenders between the ages of 18 and 24 are far less likely to be convicted of rape.[78] This is likely because of the social understanding that consent is an amorphous and unclear concept that is easily confused between partners, especially when young and enthusiastic. In reality, a person genuinely looking to obtain free and voluntary consent need only ask in non-coercive circumstances and be prepared to be declined. However, people argue that it is not worth convicting a young, inexperienced person over a misunderstanding of consent, ignoring the fact that the accused could have avoided any confusion and subsequent harm to the victim by using respectful communication.

Additionally, other factors such as the victim having a psychiatric condition, victim intoxication and delayed reporting are all factors that result in significantly lower prosecution rates.[79] There are very limited circumstances in which a person experiences psychosis and makes a verifiably false complaint.[80] However, these are exceptional cases that do not justify allowing stereotypes to alter how all victims with psychiatric conditions are treated during sexual violation investigations.

Another a key point of difficulty when prosecuting sexual violation is victim intoxication. A victim may be intoxicated to the point that their recollection is impaired but the law still considers them capable of consenting.[81] This creates questions about the reliability of their evidence, which must be examined. However, there is evidence that victim intoxication significantly discredits the victim's evidence immediately, leading to a lower prosecution

[77]Allison Leotta "I Was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth" (3 October 2018) Time <www.time.com>.
[78]Topping and Barr, above n 40.
[79]Triggs and others, above n 4, at 3.3.5-3.3.6.
[80]At 4.5.
[81]At 3.3.5.

rate.[82] The justice system tends to immediately treat victim intoxication as fatal to a case, without engaging sufficiently with arguments that the victim's evidence may be well remembered and valid. This is especially concerning considering the prevalence of alcohol in instances of sexual violation.[83] Given this higher proportion of victimisation whilst intoxicated, it is highly concerning that intoxication is so clearly correlated with a lower prosecution rate.

None of these factors are based in true correlation with false accusations. People with psychiatric conditions are actually victim to higher than average rates of sexual abuse,[84] as are intoxicated people,[85] and the trauma of an assault can put the victim into a self-protective state, in which they do not acknowledge the assault; it is only after this initial trauma response wears off that the victim begins to seek formal criminal justice.[86] Notably, although wāhine Māori are twice as likely to experience sexual violence,[87] there is no difference caused by the victim's ethnicity within the prosecution rate of sexual violation.[88] This indicates that there are wider sociological factors influencing the higher rate of victimisation of wāhine Māori, but prosecutor do not tend to use race as a basis when deciding to prosecute.

B. The Effect of Jury-Held Rape Myths

Citizens on juries are subject to rape myths as much as the rest of society. This has huge influence on juries' decision making when they are faced with evidence in a sexual violation trial, making them biased against cases that do not match up with their core conception of 'real rape'. Additionally, expert information at the time of trial may be ineffective at combatting rape myths,[89] as jury members live in a society that repeats and reinforces these misconceptions.

There is strong evidence that jury decisions reflect rape myths, with eight out of nine recent studies finding a great influence of traditional rape myth on jury decisions.[90] This is hardly

[82] Angiolini, above n 15, at 138.
[83] Triggs and others, above n 4, at 3.3.5.
[84] At 3.1.3.
[85] At 3.3.5.
[86] Lewis Herman, above n 44, at 585.
[87] *The New Zealand Crime & Safety Survey 2006* (Ministry of Justice, 2006).
[88] Triggs and others, above n 4, at 4.5.
[89] Jennifer Temkin, Jacqueline M Gray and Justine Barrett "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2016) Feminist Criminology (Early Online Release) at 3.
[90] At 163.

surprising considering one in three people believe that false allegations are very common[91] and there is continued debate about what belief in consent even is.[92] Outside of purely sexual violence-based misconceptions, other biases also influence juries in rape trials. Convictions are disproportionally high for Māori[93] or low-income defendants.[94] These studies on jury bias overwhelmingly find that juries are unreliable and make judgements that are based on incorrect assumptions about sexual violation and bias against certain demographics.

Prosecutors using the predictive approach to the Evidential Test for evidence sufficiency are forced to look at the evidence from the jury's misinformed perspective. With their proven bias in mind, any rape myth believed by the jury will be incorporated into the prosecutorial decision.[95] Low convictions rates also result in a "trickle-down" impact for prosecutors, who respond by prosecuting less in general.[96] Considering jury opinion naturally embeds rape myth into the prosecution test, limiting the equality and fair judgement of the justice system. As Retter describes: [97]

> Even where officials do not themselves believe the stereotypes that may lead a jury to acquit, they allow likely jury reactions to influence their exercise of discretion on whether to proceed with a case.

The predictive test arbitrarily imposes serious obstacles to censuring instances of sexual violation.[98] It does serve the legitimate end in most criminal proceedings of protecting the accused from an onerous trial when there is insufficient evidence, as well as the decreased court spending on trials that a theoretical jury will clearly not receive well. However a 38 per cent prosecution rate and the prevalence of jury-held rape myths indicate that the predictive test operates within sexual violation so that people who have committed the offence will go arbitrarily uncensored, rather than protecting innocent people from state power.

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[91] Natalie Taylor and Jenny Mouzos *Community Attitudes to Violence Against Women Survey: A Full Technical Report* (Australian Institute of Criminology, 2006) at 67.
[92] Nixon v R [2016] NZCA 589 at [28] to [30] per Asher J.
[93] Action Station "They're our whānau: Māori perspectives of NZ's justice system" (7 October 2018) E-Tangata <www.e-tangata.co.nz>.
[94] Jonathan Rogers "A human rights perspective on the evidential test for bringing prosecutions" (2017) 9 Crim L R 678 at 690.
[95] Tinsley, above n 11, at 125-126.
[96] Johnston and Knox, above n 6.
[97] Amelia Retter "Thinking Outside the (Witness) Box: Integrating Experts into Juries to Minimise the Effect of Rape Myths in Sexual Violence Cases" (2018) 49 VUWLR 157 at 160.
[98] Rogers, above n 94, at 682.

The impact of jury-held rape myths, especially the disconnect between their expectations for 'legitimate' sexual violations and reality, on the prosecution rate is very clear.[99] It is especially concerning because instances of sexual violation are already subject to one 'bottle-neck', in the form of only 9 per cent of all sexual violation instances being reported to police.[100] Rape myths being incorporated into the prosecution rate creates another 'bottle-neck' by only prosecuting 38 per cent of the cases reported.[101]

A high threshold for the Evidential Test tends to be justified as protecting the accused from juries that are tough on most crime.[102] However, in instances of sexual violation, juries are relatively permissive towards the accused and tend to question the victim's actions more. This means that the usual justification for the Evidential Test's threshold does not apply here, only making the justice system's struggle to censure sexual violation worse.

Ultimately, the predictive tests leaves prosectutors in a "feedback loop".[103] Prosecutors edit out the cases that do not suit the jury, so never see evidence that juries may be willing to convict these cases. Canada has recently raised concerns about this system, arguing that the law for rape is good but the surrounding process "still allows… juries to colour their assessment of credibility and reasonability with discriminatory myths and stereotypes."[104] The United Kingdom has also altered their evidence test to exclude juries and their rape myths from the prosecution test, discussed in detail at Part V, Section A.

Incorporating jury-held rape myth into the decision to prosecute is only one of many issues caused by rape myths within the justice response to sexual violation. However, the decision to prosecute is an important element in the justice system and its current function as a 'bottle-neck' for legitimate crimes means it must be addressed as its own issue. The decision to prosecute remains a key hurdle for sexual violation, even while extensive wider reform is also necessary. By allowing jury misinformation to be used when deciding whether or not to prosecute, the state is failing in its duty to the rule of law and the victim's right to procedural fairness because they are knowingly allowing bias into the judicial process.

[99]Triggs and others, above n 4, at 4.
[100]Ministry of Women's Affairs *Restoring Soul: Effective Interventions for adult victims/survivors of sexual violence* (2009) at 1.3.
[101]Stats NZ Tatauranga Aotearoa, above n 2.
[102]Rogers, above n 94, at 684.
[103]Caelainn Barr and David Pegg "Rape prosecution rate in England and Wales falls to five-year low" (6 March 2019) The Guardian <www.theguardian.com>.
[104]Government of Canada "Justice Canada Knowledge Exchange on the Criminal Justice System's Responses to Sexual Assault Against Adults-Summary of Proceedings" (23 June 2017) <www.justice.gc.ca>.

C. The Effect of Prosecutor-Held Rape Myth

Prosecutors also internalise rape myths, adding another source of arbitrary bias to prosecutorial decision making. This is expected, as prosecutors grow and operate within our society, where rape myths are prevalent and are embedded into our culture.[105] Aside from this natural assumption, the empirical evidence that prosecutors have inaccurate perceptions of sexual violation, 'real rape' and trauma responses is overwhelming. This creates a range of additional concerns about how the Evidential Test is applied.

Although the Attorney-General is constitutionally responsible for New Zealand prosecutors, the Solicitor-General oversees prosecutions in practice.[106] This is to avoid the politicisation of prosecutorial independence,[107] as the Attorney-General is always a Member of Parliament.[108] This aims to maintain a consistent and unbiased criminal justice system, because it prevents prosecutors being influenced by leadership during high profile cases with significant public pressure. It also prevents a shift in cases prosecuted when there is a change of government. Both of these situations would undermine the rule of law, as it would mean the same law would be applied differently when external factors change.

However, because prosecutors believe public misconceptions about sexual violence, the decision to prosecute is already politicised. This is because sexual violation has always been politicised in terms of the widespread socio-cultural debate around consent and how cases with only victim evidence should be treated.[109] This debate involves reliance upon misinformation, and perceptions rather than fact.[110] The evidence discussed below that prosecutors have internalised the misinformation within this debate is concerning because it means they will bring this politicised viewpoint into prosecutorial decisions. This means that the rule of law is not being upheld within the decision to prosecute for sexual violation.

[105]Tinsley, above n 11, at 125-126.
[106]John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 at 208.
[107]At 203.
[108]Cabinet Office *Cabinet Manual 2017* (2017) at 4.2.
[109]Daly, above n 57, at 378.
[110]Leotta, above n 77.

Prosecutors do not work from precedent; they work from basic guidelines that inform their exercise of discretion.[111] The standard of "objectively reasonable prospect of conviction" is a "matter of judgement for the prosecutor", and prosecutors are encouraged to consider all potential defences to the charge that may be utilised.[112] This will include all the arguments that may be brought forward by the defence that rely upon rape myth, such as emphasising that the victim was wearing provocative clothing when the assault occurred; it serves as another part of the test that encourages prosecutors to incorporate rape myths into the decisions. All of these factors have led to a wide acknowledgement that the decision whether or not to prosecute is very subjective to each prosecutor.[113]

There are studies finding conclusive evidence that prosecutors do not have a full understanding of sexual violation. The first of these is the New Zealand history of prosecutors wilfully miscategorising offences. Prosecutors and police have tended to immediately categorise a report of sexual violation as false if it didn't have strong corroboration or other evidence that would be expected of a 'real rape'.[114] Although police have recently improved the accuracy of their recordings, this has long term impacts on social understandings of sexual violation and its evidence. However, corroborative evidence is less common for the majority of sexual violations, which do not have witnesses or result in physical injury.[115] This is an example of prosecutors acting on these myths, by reporting sexual violations outside of the stereotype as false allegations.

This incorrect categorisation of reports as false allegations not only prevents the justice system from censuring the individual case (undermining the core purpose of censuring wrongdoing, ignoring the victim's right to procedural fairness and the rule of law) but it also effects the accuracy of statistics relating to sexual violence. The actual false accusation rate is around 3 per cent,[116] but for many years more than half of all reports were recorded as 'no offence' cases.[117] This made policy makers disproportionately concerned with protecting the falsely accused. It also perpetuated and substantiated the incorrect societal belief that false allegations are commonly made. Rape myths held by prosecutors will not only colour their individual acts

[111]Tinsley, above n 11, at 148.
[112]Crown Law, above n 14, at 5.4.
[113]Rogers, above n 94, at 684.
[114]Mandy Burton "How different are "false" allegations of rape from false complaints in GBH?" (2013) 3 Crim L R 203 at 205.
[115]Triggs and others, above n 4, at 2.3.
[116]Burton, above n 114, at 206.
[117]Triggs and others, above n 4, at 4.9.1.

of discretion, but also colour the statistics on sexual violation prosecutions. Rape myths place prosecutors and society in an echo chamber as their bias affects statistics, and the skewed statistics reinforce pre-existing biases.

Outside New Zealand, there have been direct studies performed on prosecutors using statistics, interviews and prosecutor commentary on cases to investigate their understandings of sexual violence. A 2015 London study found that "some factors interpreted by prosecutors as indicators of untruth or unreliability betrayed an inadequate understanding of the impact of rape and the diverse reactions of complainants in its aftermath."[118] This was based on the tendency of prosecutors to misunderstand the natural trauma response to assault or victim behaviour during an assault. One description of a prosecutor's comments on a case "expressed concern about weaknesses in the case including that, 'She did not call the police. She complained to her friends and said that she would tell her Mum'. And in the same case, 'She was unable to adequately explain why she was unable to cry out for help.'"[119] This shows a complete misunderstanding of natural victim reactions, as choosing to delay reporting and freezing during an assault are both natural trauma responses that would not be treated with suspicion by a well-informed prosecutor.[120] The largest gap in understanding the review identified was in regards to the effects of different cultures on a sexual violation, within the act and the victim's trauma response. [121] This lack of cultural understanding is concerning in the context of New Zealand, and the overrepresentation of wāhine Māori as victims.[122]

In another study of United Kingdom prosecutors, their perceptions of rape were compared to their perceptions of grievous bodily harm. A huge disparity was found in prosecutor's perceptions of the prevalence of false accusations, blame-worthiness of the victim and sympathy for the offender between the two types of crime.[123] There has been evidence for years that prosecutors in the United Kingdom have very misinformed views about false accusations.[124] The study found that prosecutors use a much narrower definition for 'false' when classifying grievous bodily harm, tending to class any rape cases that weren't proved true as 'false' and only classing grievous bodily harm cases as false when they were proved false.[125]

[118]Angiolini, above n 15, at 655.
[119]At 656.
[120]At 4.
[121]At 257.
[122]Ministry of Women's Affairs, above n 100, at 4.4.
[123]Burton, above n 114, at 206.
[124]Cownie, Bradney and Burton, above n 18, at 301.
[125]Burton, above n 114, at 211.

This disparity in prosecutor's understanding of grievous bodily harm and sexual violation is further evidence that they are susceptible to rape myths. It demonstrates the prosecutors are subject to the social culture of doubting the veracity of sexual violation complaints, and often only treat rape with evidence of injury as a 'real rape'. Unsurprisingly, this study ends by urging prosecutors to challenge their stereotypes.[126]

Clearly grievous bodily harm is, by definition, more likely to have physical injury evidence than sexual violation, and this will account for part of the tendency to believe allegations of grievous bodily harm more than allegations of sexual violation. However, this does not explain why prosecutors so readily classify sexual violation allegations as false merely on the basis that they cannot be proven.

Prosecutorial belief in rape myth is agreed to be a baseless hindrance to the censure of sexual violation, allowing low reporting, prosecution and conviction rates to continue to the detriment of victims and the core purpose of censuring wrongdoing.[127] This lack of understanding from prosecutors, and biased prosecutorial decision making it causes, is also damaging to victims; "[n]ot only are survivors damaged by the violation committed against them but the court process and society repeats the harm through misunderstandings and a lack of justice."[128] Allowing this bias to perpetuate also breaches a victim's right to procedural fairness by knowingly allowing misinformation and prejudice within society to factor into prosecutorial decision making.

D. Credibility as a Central Rape Myth

Credibility must be mentioned as a particularly flawed element of rape myth that plays a key part in the decision to prosecute. This relates to the perceived credibility of the victim and their statement. Because sexual violation most commonly occurs with no other witnesses and may not have conclusive evidence of injury,[129] the victim's statement is often the key evidence in a case. This results in significant scrutiny on the victim as the source of this evidence. However, our analysis of credibility is flawed in terms of which factors are used in the analysis, whose

[126] At 212.
[127] Tinsley, above n 11, at 125.
[128] Bridget Sinclair "New Zealand's Rape Shield and the Need for Law Reform to Address Social Injury" (LLB(Hons) Dissertation, Victoria University of Wellington, 2016) at 9.
[129] Triggs and others, above n 4, at 2.3.

credibility is analysed and the weight placed on credibility in relation to the weight placed on the actual statement and other evidence.

Because the credibility of the victim is directly related to the strength of the evidence they provide, a flawed analysis of credibility becomes a huge barrier to prosecutions. The difficulty is that there may be times when it is justified to allow the victim's lack of credibility to alter the perception of the statement's veracity, such as when the victim has a history of allegations that have been proven false. 'Credibility' here means whether a person is perceived as believable, while 'veracity' refers to the factual accuracy of what the person is saying. Finding a balance between protecting the accused from accusations that do not seem credible, while acknowledging that seemingly discredited people may still be victimised by a crime, is difficult when any type of crime is alleged. However, the calculus of finding this balance is particularly flawed with regard to instances of sexual violation, because the evidence, discussed below, indicates that the factors taken into account by prosecutors and juries when considering a victim discredited are actually factors that are common to bona fide victims of sexual violation.

Many studies have found that perceptions of victim credibility and their related characteristics can be more decisive for prosecution than the circumstances of the assault and the statement itself.[130] An excessive focus on the victim and their credibility has been noted and criticised in New Zealand,[131] and an extensive report on prosecutors' perceptions of victim credibility and how it plays into their decision to prosecute was done in Australia in 2004. Although this study was done 15 years ago, there have been subsequent studies that indicate that credibility assessments remain much the same.[132] The report found a long list of factors that prosecutors considered valuable in deciding whether the victim was credible:[133]

1. Consistency:
    - in her statements at various times;
    - between her statements and those given by witnesses; and
    - in her post-assault behaviour.

2. Genuine and trustworthy:

[130] Rebecca Campbell and others "Predicting Sexual Assault Prosecution Outcomes: The Role of Medical Forensic Evidence Collected by Sexual Assault Nurse Examiners" (2009) 36 Crim Justice Behav 712 at 712.
[131] Triggs and others, above n 4, at 1.4.
[132] Angiolini, above n 15, at 75.
[133] Denise Lievore "Victim credibility in adult sexual assault cases" (2004) 288 Trends and Issues in crime and criminal justice at 4.

- she tells the story as it happened, without 'gilding the lily'. Embellishing the story to ensure she is believed is 'fatal' to the case, as is the tendency to 'understate the amount of alcohol they've consumed [because] they think it will look bad... They do themselves a disservice because this leads to inconsistencies';
- the story rings true;
- she makes eye contact with the prosecutor, defence and judge;
- she is herself - she acts, speaks and dresses as she usually would; and
- there are no other factors that 'set off alarm bells.'

3. Demeanour:

- she is not aggressive, 'smart', or argumentative towards the defence;
- she is confident and relaxed;
- where there is a prior relationship, she is motivated by a level of anger at what the defendant has done, but does not show animosity to an extent that raises doubts about her motive to lie;
- she shows some distress, but is not withdrawn or numbed by having to recall and relate the offence; and
- she is curious - she finds out about what will happen in the trial and why, and informs herself about how to withstand cross-examination.

4. Memory and communication skills:

- she can recall what happened;
- she is intelligent and articulate - she accurately and coherently describes the events; and
- she focuses on the elements of the offence and the circumstances of the act when giving evidence, rather than expressing her opinion of or feelings towards the defendant.

One prosecutor even stated that it "can help if she is attractive".[134]

This list of factors that support credibility to a prosecutor is remarkably out of touch with the realities of sexual violation and trauma. Point 2 correlates eye contact with credibility, when the trauma response often disempowers victims, hurting their ability to connect with others and assert themselves in social situations, making a lack of eye contact perfectly justified.[135] Point

[134]At 4.
[135]Franklin and others, above n 60, at 4.

4 requires an excellent memory, when alcohol is often present in real instances of sexual violation, which can damage memory,[136] and the trauma response can also prevent a victim from perfectly remembering every aspect of their assault.[137] Point 4 also requires a 'credible' witness to be intelligent, a completely unfounded requirement as there is no evidence that intelligent people are any more likely to be victimised than anyone else. Point 3 requires a victim to be both relaxed and distressed. This list is evidence of the oppressive balancing act prosecutors expect victims to engage in to be 'credible' and have their statements respected, especially when some of these points directly contradict each other. These expectations are not a reflection of any genuine understanding of sexual violation.

In addition to misconceptions about credibility in Australia, the United Kingdom has also discovered a concerning reliance on credibility within the decision to prosecute. A 2015 London study found that "there was still a very acute focus of attention on the credibility and reliability of the complainant in all cases, to the detriment of any meaningful concentration on the behaviour and previous conduct of the suspect",[138] suggesting that little has changed since the 2004 Australian study. Their prosecutors tended to notice gaps in a victim's credibility and immediately treat them as significantly damaging to a case, rather than considering ways to reinforce the victim's credibility or use expert evidence to justify the behaviour.[139] This is evidence that prosecutors unquestioningly believe that credibility is at the core of a case, allowing a range of irrelevant victim characteristics to affect whether their assault and the resulting evidence will be respected and censured by the criminal justice system.

This reliance on credibility especially harms marginalised groups of victims. Victims with intellectual disabilities tend to be considered less credible and express their legitimate evidence in ways that align with a prosecutor's conception of 'discrediting behaviour', including giving less concise recounts and having greater difficulties with the pressure of cross examination.[140] Canada found that assessments of credibility disproportionately disadvantage indigenous victims, a clear result of racial bias as there is no evidence that indigenous people are any less truthful in reporting sexual violation.[141] In fact, both of these demographics are

[136]Sarah Croskery-Hewitt "Rethinking Sexual Consent Voluntary Intoxication and Affirmative Consent to Sex" (2015) 26 NZULR 614 at 616.
[137]Boyer, Allison and Creagh, above n 75, at 42.
[138]Angiolini, above n 15, at 621.
[139]At 49.
[140]Lievore, above n 133, at 5.
[141]Justice Canada, above n 104.

disproportionally likely to be victims of sexual violation.[142] This indicates that the focus on credibility is another route to introduce bias into their assessment of the evidence in a case, further harming groups that actually need greater state protection.

Not only is the focus on credibility reflective of prosecutor bias, but it naturally introduces more influence from jury-held rape myth. Because of the predictive test, prosecutors must consider the jury's reaction to the victim as the communicator of their statement, rather than the simple evidence alone. This forces even well-informed prosecutors to still allow jury perceptions of a credible witness to colour their judgement of the strength of evidence.

The inability of informed prosecutors to make better informed prosecutorial decisions is concerning alone, but it has even been found that victim characteristics that prosecutors believed to be material to the jury actually had no effect on the conviction rate.[143] This indicates that prosecutors are overestimating the importance of factors that supposedly discredit the victim, adding even more bias to the judgement of credibility than juries already bring.

A focus on victim credibility also reduces the victim down to nothing more than evidence, a dehumanising process that does not connect with the trauma they have.[144] It removes the focus of the criminal justice system from establishing whether the crime occurred based on the evidence and onto whether the victim is worthy of state trust and protection. Credibility assessments remove prosecutors from the reality that anyone can be victimised by sexual violation, forgetting that a "criminal case is about what happened not whether the complainant qualifies for sainthood".[145]

Having the victim's credibility at the forefront of an investigation rather than the evidence itself, with credibility as a secondary consideration, also contravenes the victim's right to procedural fairness. This is because the judgements of credibility are based on stereotypes and misinformation about victims' characteristics and behaviour, treating some evidence as less valuable without justification. This introduces prejudice against certain victims, such as people with intellectual disabilities, so that they are treated differently within the process.

There is a final issue with credibility within the decision to prosecute. Although there are many studies that have discovered a significant role of the victim's credibility within prosecutors and

[142]Triggs and others, above n 4, at 3.1.
[143]At 1.4.
[144]Lewis Herman, above n 44, at 573.
[145]Caelainn Barr and Alexander Topping "Police demands for potential rape victims' data spark privacy fears" (25 September 2018) The Guardian <www.theguardian.com>.

juries, there is never any mention of the accused's credibility. In most sexual violation cases the accused presents their own narrative of events to the police and at trial, usually based on the notion that the victim consented.[146] However there is comparatively less of a tendency for prosecutors to consider and question the accused's inherent credibility, instead taking the evidence at face value.

There are some justifications for this. First, the burden of proof is on the Crown in sexual violation trials. Unlike the accused's narrative, the victim's statement is part of the Crown's proof and the veracity of that evidence must be tested when deciding whether the crime has been proved beyond reasonable doubt. Additionally, there are protections in place for bringing in character evidence against the accused, including the requirement that inferences of guilt are not to be drawn from an accused's silence in certain circumstances.[147]

However, there are still admissible factors that may discredit the accused's statements, such as inconsistencies in their statements. The issue is that prosecutors do not conventionally place any focus on these discrediting points, and place an excessive focus on the victim's credibility.[148] Prosecutors go searching in the evidence for victim discrediting information, but assume the accused's credibility unless anything to the contrary becomes apparent. One statement is heavily scrutinised based on misinformation for prosecution, while the other statement is assumed to be valid. This causes such an unbalanced system of evidence that a 2015 independent investigation of sexual violation prosecutions in the United Kingdom has even suggested that, if credibility is to be considered, then the credibility of all parties must be actively analysed.[149]

The result of this is a prejudicial consideration of evidence, where the victim's evidence has far more hurdles to overcome to be credible to prosecutors than the accused's evidence. This is another reason that the current prosecutorial process operates with prejudice when applied to sexual violation, because of the particular tendency to focus on the victim's general characteristics and ignore the unreliability of the accused.

Overall, there is significant evidence that the prevalence of rape myths within the prosecutorial process is failing to censure sexual violation and does not uphold the victim's right to procedural fairness. The Evidential Test is interpreted so that jury-held rape myths become the

[146]Croskery-Hewitt, above n 136, at 618.
[147]Evidence Act 2006, s 33.
[148]Angiolini, above n 15, at 49.
[149]At 144.

perspective from which the strength of evidence must be assessed for prosecution. Prosecutors, as the assessors of this evidence, have proven to also act on and believe in rape myth. This results in prosecutorial decisions being made on a basis of prejudice and misinformation, rather than procedural fairness. Until the reality of sexual violation is understood throughout society, changes must be made to the prosecutorial process to prevent it continuing to be a key barrier to the criminal justice system's ability to censure such a serious crime.

IV. Arguments against Increasing the Prosecution Rate

As discussed in Part II, Section A, a core purpose of the criminal justice system is to censure wrongdoing. This purpose creates a presumption that, so long as there is sufficient evidence that a crime has been committed, the case must be prosecuted. This is reflected in the Evidential Test's "reasonable prospect of conviction" threshold.

However, it may be argued that it is fairer to an accused to avoid subjecting them to a trial unlikely to result in a conviction. However, sexual violation cases are in a unique position wherein prosecution is often not pursued because of the factors discussed at Part III. It is suggested that the prosecution rate be increased to pursue cases with sufficient evidence of guilt, because it is the criminal justice system's role to pursue such cases and a court may be more likely to convict these cases than a prosecutor suspects (as discussed further at Section c).

However, even if the prosecution rate increases, the conviction rate is still very low. The two key concerns this creates are whether taking victims into a doomed trial traumatises them further, and whether this process will be too inefficient when sexual violation is already so costly to the state.

A. Victim Traumatisation

It is worth considering whether putting victims through this damaging court process may do more harm than good in instances when a conviction is highly unlikely. Sexual violation trials

are well known to be difficult experiences for victims of sexual violation[150] with victims struggling to assert themselves due to the natural trauma response.[151] Cross-examination and the overall trial is a key point of trauma for victims.[152] These traumatising effects suggest that it may only harm the victim more to pursue cases unlikely to result in convictions.

However, a 2001 study found that, despite 52 per cent of rape victims evaluating their contact with the legal system negatively, "(v)ictims who did not have their cases prosecuted were more likely to rate their contact with the legal system as hurtful."[153] This means that the trauma of a trial is not a reason to avoid prosecution; not prosecuting at all is more traumatising that the trial process, and the traumatic effects of the trial process are only decreasing (as discussed below). The concerns that prosecuting cases unlikely to succeed will place the victim in a more traumatised position are, therefore, unfounded.

Procedural fairness also has a very large effect on the victim's evaluation of the court process, so the biased treatment of sexual violation cases may be a key reason that victims prefer to have their cases prosecuted than not, despite the traumatising trial.[154] Improving the procedural fairness of the prosecutorial process so that the decision to prosecute is on the merits of the evidence would, therefore, increase the victim's sense that justice was done by the prosecutor. This is less harmful to them culling out the case in reaction to the influence of rape myths within the prosecutorial test.

Additionally, the traumatising nature of a sexual violation trial is not inevitable. The District Courts of New Zealand have been running a Sexual Violence Pilot Court since 2017 and have found encouraging improvements; most victims who went through the trial process "felt that the trials were managed in a way that did not cause them to be retraumatised by the process."[155] This Pilot Court is only used for a very limited number or cases, but with further systemic change to the trial system we can be more confident that the victim will not be more harmed that helped by prosecuting evidentially sufficient cases.

[150]Temkin, Gray and Barrett, above n 89, at 2.
[151]Franklin and others, above n 60, at 4.
[152]At 2.
[153]Rebecca Campbell and others "Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers" (2001) 16 J Interpers Violence 1239 at 1250.
[154]Tamara Rice Lave "The Prosecutor's Duty to 'Imperfect' Rape Victims" (2016) 49 Tex Tech L Rev 219 at 242.
[155]Sue Allison and Tania Boyer *Evaluation of the Sexual Violence Court Pilot* (Ministry of Justice, June 2019) at 5.8

B. Efficiency

Efficiency is another potential reason to not prosecute cases that a jury would be unlikely to convict. Trialling more cases when a jury is unlikely to convict will only increase the cost of the crime without reward.

This argument is based on one understanding of efficiency: the conception of efficiency as using as little resources as possible to get likely convictions. However, Packer advances an alternative conception of an efficient legal process as:[156]

> One that throws off at an early stage those cases in which it appears *unlikely that the person apprehended is an offender* on these cures, as expeditiously as possible.

On this notion of efficiency, it is best to prevent misinformation within the criminal justice process that could serve as a barrier to conviction, rather than simply not prosecute a case when it does appear that the accused committed the offence. It is not efficient here to cull out legitimate cases for the sake of saving money.

Additionally, while efficiency is an important consideration when designing criminal justice policy, it is not a core value of the system.[157] It does not justify the systems failure to censure sexual violation, as censuring wrongdoing is more central to the theory of criminal justice than efficiency.

A focus on efficiency based on minimising resource expenditure is especially egregious in the case of sexual violation. As Lave discusses, sex workers are significantly less likely to have their sexual violation reports prosecuted or convicted.[158] A resource-focused definition of efficiency would call for all cases with a sex worker victim to be ignored. This perverts the importance of censuring all sexual violation, gives no procedural fairness to sex worker victims, and absolutely does not justify "excluding an entire category of victim on the grounds that their cases are "unwinnable.""[159]

Additionally, sexual violation is an incredibly costly crime to New Zealand, at $1.2 billion per annum, or $72,000 per offence.[160] Not prosecuting cases with sufficient evidence of guilt may

[156]Packer, above n 32, at 160.
[157]Sian Elias "Managing criminal justice" (2017) NZCLR 316 at 316-317.
[158]Rice Lave, above n 154, at 242.
[159]At 244.
[160]Tim Roper and Andrew Thompson *Estimating the costs of crime in New Zealand in 2003/04* (New Zealand Treasury, Working Paper 06/04, 1 July 2006) at 3.

result in a higher cost to New Zealand overall. There is evidence that the censure of sex crimes by the criminal justice system does lower reoffending.[161] Prosecuting a case that may not seem likely to result in a conviction, so long as there is sufficient evidence of guilt, seems to lower the likelihood of offending against another victim. This would mean that prosecution is more efficient overall by preventing further instances of this costly crime.

C. Additional Reasons to Prosecute

There are two additional reasons to increase the prosecution rate for cases with meritorious evidence. The first is the evidence that we are currently not prosecuting cases that may actually succeed in court. The second is that prosecuting cases with good evidence upholds the legitimacy of the law.

There is compelling evidence that prosecutors are excessively filtering out cases. In the last few years, the United Kingdom's prosecution rate for rape has plummeted from a 61.9 per cent high in 2013-2014[162] to 37 per cent in 2018,[163] for reasons discussed in detail at Part V. Despite this, the conviction rate after a case is prosecuted in 2013-2014 was 60.3 per cent[164] and in 2018-2019 it was 63.4 per cent.[165] This is crucial evidence that halving the prosecution rate made almost no difference to the conviction rate, meaning that many cases that would have been convicted are not being prosecuted at all. Based on this, New Zealand prosecutors may be filtering out many cases that would actually result in a conviction. This means that our current system is not censuring as much sexual violation as it may be able to.

Finally, increasing the prosecution rate by recognising the current role of rape myths would also increase the legitimacy of the criminal justice process.[166] Legitimacy is based on

[161]Arul Nadesu *Reconviction Rates of Sex Offenders- Five year follow-up study: Sex offenders against children vs offenders against adults* (Department of Corrections, January 2011) at 15.
[162]United Kingdom Crown Prosecution Service *Violence Against Women and Girls Crime Report 2013-2014* (2014) at 7.
[163]Barr and Pegg, above n 103; the Crown Prosecution Service did not provide details of how many prosecutions were made comparative to the number of reports in their 2018-2019 publication.
[164]United Kingdom Crown Prosecution Service, above n 162, at 45.
[165]United Kingdom Crown Prosecution Service *Violence Against Women and Girls Crime Report 2018-2019* (2019) at 14.
[166]Rice Lave, above n 154, at 244.

procedural fairness, and allowing misinformation to affect decisions harms this legitimacy. As Lave writes:[167]

> Prosecuting cases even though the victim is unsympathetic demonstrates at least two components of procedural justice: consistency and ethicality. It demonstrates consistency because it treats rape victims the same regardless of their race, criminal history, or socioeconomic status. It also demonstrates ethicality by taking seriously the victimization of all persons and, by doing so, conveys that they are worthy of care and respect.

This increase in legitimacy may even increase reporting rates, because of the importance victims place on fairness within their perceptions of the process.[168] Regardless, it is important for the law to be seen as respecting all victims, with an emphasis on responding to crime and not allowing misinformation to be a barrier to this.

V. Proposed Solutions to the Prosecutorial Process' Failure

With the importance of changing our current status quo for the prosecution of sexual violation established, we turn to solutions to this issue. Because both juries and prosecutors play a role in the current problems, multiple solutions are required.

A. A Focus on the Intrinsic Merits of the Evidence

As discussed at Part I, our current approach to the Evidential Test is predictive, which results in prosecutors incorporating rape myth bias into their analysis of the evidence.

However, there is an alternative method to analyse whether the evidence is strong, while still finding it sufficient to prosecute. The alternative approach is the 'intrinsic merits' approach.[169] This approach only looks at the law, the evidence required and the strength and reliability of that evidence. It does not take into account historical jury reactions to such evidence. The intrinsic merits approach "is a legal standard applied by various prosecutors to case files that

[167]At 242.
[168]Patricia A Frazier and Beth Haney "Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives" (1996) 20 Law Hum Behav 607 at 620.
[169]Ashworth and Redmayne, above n 19, at 201.

determine decisions", rather than a standard set by a jury's perception.[170] Procedural fairness is maintained, as the strength of the evidence is still fairly assessed but without the inclusion of misinformation. This is the standard adopted by the United Kingdom in 2009.[171]

The intrinsic merits approach is about fidelity to the law and "aspires to advance the purpose of the law", preventing prosecutors from applying the law differently.[172] This is not about reflecting a lay person's perceptions. It is about promoting the purpose of the law, preventing limits on censure being exercised with prejudice. Ashworth and Redmayne believe the intrinsic merits approach is better justified despite the "approach [placing] considerable weight on prosecutors' judgement". The Evidential Test prevents cases with insufficient evidence going to trial and potentially resulting in a false conviction. This model will only ensure all cases with sufficient evidence go to trial, without allowing rape myth to limit this.

Sexual violation provides additional reasons to utilise the intrinsic merits approach. The predictive approach's reliance on lay adjudication fits with the orthodox values of criminal law.[173] However, this value is mitigated by the discussion in Part III, Section D, about jury bias in sexual violation trials. They are not interpreting the evidence based on fact, thereby diminishing their value as reliable judges of evidence.

Lay adjudication's value is based on it being representative of society's values. Society is already largely in agreement that sexual violation warrants censure. The issue is that the prevalence of misinformation in lay adjudication, demonstrated in Part III, Section B, prevents the censure of an act that society has already decided is wrong. We must, therefore, place less weight on the importance of lay adjudication because its value has been tainted by misconceptions. A prosecutor relying on this same flawed judgement is also not helpful to procedurally fair prosecutorial decision-making, while the intrinsic merits approach eliminates these factors from the decision.

The predictive approach also slows the proliferation of large advancements in the understanding of sexual violence into our criminal trials. Sudden shifts in opinion, as may have occurred with the #MeToo movement, will not affect prosecution rates for some time, as the predictive test forces prosecutors to wait to see more favourable treatment of evidence by juries. This will be entirely based on their prediction, whereas the intrinsic merits test will always be

[170] At 201.
[171] Angiolini, above n 15, at 123.
[172] Ashworth and Redmayne, above n 19, at 202.
[173] At 201.

prosecuting the cases that should be prosecuted, regardless of how far behind society is in understanding sexual violation.

The United Kingdom exemplifies the positive effects the intrinsic merits approach can have in reality. The United Kingdom and New Zealand both require a "realistic prospect of conviction" for their evidence tests.[174] Despite these similarities, the United Kingdom's prosecution rate for rape from 2013 to 2014 was 61.9 per cent,[175] whilst New Zealand's was only 38 per cent in 2014.[176] The difference is that United Kingdom prosecutors have been using an intrinsic merits approach since "pioneering" the strategy for rape cases in 2007.[177] This highlights the practical effects that the removal of rape myths can have on prosecutorial discretion; it also exemplifies the volume of cases with meritorious evidence that are currently being excluded from censure.

There are potential downsides to this approach. As Tinsley writes, increased prosecution rates may result in lower conviction rates because juries will not suddenly change their understanding of sexual violation. This will potentially lead to an increased belief that false allegations are commonplace.[178] However, the United Kingdom recently began applying a predictive approach again, resulting in a plummet of the prosecution rate from 56 per cent just before the change was made in 2017 to 32.8 per cent now.[179] Crucially, as discussed in Part IV, Section C, the conviction rate has only changed minimally over this time. Additionally, civil law systems, such as Germany, prosecute whenever there is any credible evidence.[180] This results in higher prosecution rates and higher acquittal rates.[181] Despite this, there is no difference in authorities' perceptions and classifications of false allegations between common law and western civil law societies.[182]

Although the intrinsic merits approach will likely eliminate the effects of jury-held rape myths on the decision to prosecute, the decision will still be made by prosecutors. As discussed at Part III, Section C, prosecutors tend to also believe rape myth to some extent. For this reason,

[174]Crown Prosecution Service (United Kingdom*) The Code for Crown Prosecutors* (26 October 2018) at 4.6; Crown Law, above n 14, at 5.3.
[175]United Kingdom Crown Prosecution Service, above n 162, at 7.
[176]Stats NZ Tatauranga Aotearoa, above n 2.
[177]Rachel Krys "The CPS is denying justice to thousands by secretly changing rape prosecution rules" (10 June 2019) The Guardian <www.theguardian.com>.
[178]Tinsley, above n 11, at 121.
[179]Barr and Pegg, above n 103.
[180]Stenning, above n 61, at 265.
[181]At 265.
[182]Jo Lovett and Liz Kelly *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe* (Child and Women Abuse Studies Unit (United Kingdom), 2009) at 61.

additional efforts outside of the intrinsic merits test are necessary, to make the process procedurally fair and maximise censure when sexual violation has been committed.

B. Leadership within Prosecutors

Without jury tendencies to adhere to as a guide, concerns have been raised that the intrinsic merits approach will be based on individual values, and prosecutor-held rape myths will continue to go unchallenged.[183] The United Kingdom is a particularly strong example of this, as a large gap between policy and practice has recently emerged.[184]

Although the United Kingdom has been using the intrinsic merits approach for ten years, leadership recently urged them to take "weak cases out of the system" because prosecutors were being criticised for the low conviction rate of rape.[185] This instruction was delivered to prosecutors at training seminars, characterised as a subtle shift,[186] but has practically resulted in a switch from intrinsic merits to the predictive approach.[187]

The result of this change in leadership has been dramatic, leading to the drop in the prosecution rate to almost half of what it was in 2013-2014, as discussed in Part IV, Section C. This drop is now being invested by the United Kingdom Home Office.[188]

This shift in messaging to prosecutors may be attributed to the key exit of the previous Chief Legal Advisor to the United Kingdom Director of Public Prosecutions, Alison Levitt QC.[189] She guided prosecutors to not be put off prosecution because of rape myths and stereotypes, and that it is legally and morally "worth it" to prosecute evidentially strong cases.[190] Levitt gave her last guidance on this in 2013, when the aforementioned 61.9 per cent peak in the prosecution rate occurred. Since then, there has been a slow decline in the rate, before its

[183]Angiolini, above n 15, at 131.
[184]At 131.
[185]Topping and Barr, above n 40.
[186]Alexandra Topping "Prosecutors urged to ditch 'weak' rape cases to improve figures" (24 September 2018) The Guardian <www.theguardian.com>.
[187]Cownie, Bradney and Burton, above n 18, at 296.
[188]Barr and Pegg, above n 103.
[189]Barr and Pegg, above n 103.
[190]Topping, above n 186, see also Angiolini, above n 15, at 124, where Levitt is quoted: "In other words, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths or stereotypes of the type which, sadly, still have a degree of prevalence in some quarters".

sudden plummet in 2017 after the discouraging training seminars that led to the switch to the predictive approach (as discussed in Section a).[191]

The effect of Levitt exemplifies the importance of dedicated leadership in ensuring that prosecutors adhere to the intrinsic merits approach and question rape myths in their decision making processes. If New Zealand hopes to benefit from this same higher prosecution rate, we also need to ensure we have strong leadership in place for our prosecutors.

C. Increased Review of Prosecutorial Decisions

Another cause of concern is the general opacity in how prosecutors make their decisions and any trends in the cases they prosecute. The common law world has never subjected the prosecutorial process to much scrutiny.[192]

New Zealand has never had any true, complete research into the exercise of this discretion.[193] New Zealand prosecutors are not informed about how their colleagues work, leaving them with no opportunity to notice systematic inconsistencies or problems, and, alarmingly, the rest of the system uncritically trusts that prosecutors are making fair decisions.

There are no central decisions to bind prosecutors' discretion and ensure consistency.[194] There is an internal review process for New Zealand prosecutions, but it uses a very small sample, there is no evidence that concerning trends are noted and acted on, and none of the findings of these reviews are released publicly.[195] Additionally, there is a judicial culture of leaving prosecutors to their own devices, based on the emphasis on prosecutorial independence discussed in Part III, Section C. This culture means that courts only exercise any power to review very rarely, not nearly often enough to prevent systemic concerns within prosecutors that the prevalence of rape myth exemplifies.[196] For this reason, there have been calls for a better, more accessible review of prosecutorial discretion.[197]

[191]Topping, above n 186.
[192]Stenning, above n 61, at 122.
[193]At 123.
[194]Tinsley, above n 11, at 148.
[195]Stenning, above n 61, at 228.
[196] Jeremy Finn and Don Mathias *Criminal Procedure in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2015) at 46.
[197]Stenning, above n 61, at 122.

This lack of oversight is aggravated by factors unique to sexual violence. The amount each prosecutor is informed about the reality of rape can differ substantially. This is problematic because the result of these widely different perspectives is that offenders may be far less likely to face justice based on which prosecutor they face. This undermines the rule of law, procedural fairness and the core criminal law purpose of censuring wrongdoing.

To be truly effective, individual case reviews would need to be both transparent and frequent. Transparency is important because it allows the whole criminal justice system to keep track of prosecutors. This ensures that the system can trust the prosecutorial process. This is also the system's obligation because the core purpose is censuring wrongdoing, which remains relevant when it comes to prosecution. For the criminal justice system to truly fulfil this purpose it must ensure that each part of the process is committed to censuring wrongdoing, whilst screening out cases in which there is insufficient evidence. It is, therefore, not only beneficial but required of the justice system to scrutinise prosecutors to ensure they are adhering to the system's values.

Additionally, reviews must be frequent. This is because the decision to prosecute can face a lot of political pressure.[198] The result of this is that trends within the decision to prosecute can emerge quickly as political opinion shifts. It is important to quickly recognise these trends so that we can be sure that the prosecutorial process is operating correctly even during times of change. Frequent reviews will also ensure the procedural fairness is protected, as it gives less time for prosecutors to drift apart in how they exercise their discretion.

Scrutiny is a key method to keep prosecutors accountable, consistent, and readjust concerning biased that emerge. Any increase in the scale, transparency or frequency of reviews would be an improvement on the current, lasses-faire system of prosecutorial discretion.

D. Specific Guidelines

Sexual violation is a crime with many unique elements, including the prevalence of misinformation around rape, the heavy reliance on victim statements in improving the crime, and the risk of traumatisation. These unique elements lead some to the conclusion that specific criminal processes are needed to acknowledge and provide for this uniqueness.

[198] At 228.

The United Kingdom has the specific CPS Policy for Prosecuting Cases of Rape.[199] The focus of these guidelines is the erosion of rape myths within the Service, transparency of process for victims, and promoting cooperation between services necessary when handling rape cases. They do not change the core Evidence and Public Interest tests in the decision to prosecute.[200] These guidelines specifically list a range of rape myths:[201]

> We are aware that there are myths and stereotypes surrounding the offence of rape. Examples of such myths include:
>
> - rape occurs between strangers in dark alleys;
> - victims provoke rape by the way they dress or act;
> - victims who drink alcohol or use drugs are asking to be raped;
> - rape is a crime of passion;
> - if they did not scream, fight or get injured, it was not rape;
> - you can tell if they 'really' have been raped by how they acts (sic);
> - victims cry rape when they regret having sex or want revenge;
> - only gay men get raped/only gay men rape men; and
> - prostitutes cannot be raped.
>
> …We will not allow these myths and stereotypes to influence our decisions and we will robustly challenge such attitudes in the courtroom.

This pledge to "not allow these myths and stereotypes to influence out decisions" reminds all prosecutors to question their decisions, demonstrating that the CPS does not stand for misinformation in their prosecutions.

The effect of these specialised guidelines in the United Kingdom was encouraging, as guilty pleas for rape doubled after the guidelines were adopted.[202] This is likely due to a combination of effects. The promotion of collaboration between police, prosecutors and other services helped to avoid holes in the evidence during the investigation process[203] and, with the focus on keeping the victim supported, may have kept the victim on board with the process. On top of these effects, the focus on questioning rape myth encourages prosecutors to present juries with facts and reinforces the reality of rape. The combined factors of victim retention, oversight

[199]Crown Prosecution Service (United Kingdom*) CPS Policy for Prosecuting Cases of Rape* (2012).
[200]At 4.1.
[201]At 5.5.
[202]Tinsley, above n 11, at 159.
[203]Angiolini, above n 15, at 522.

during the investigation, and the conscious challenging of rape myths likely propelled this increase in guilty pleas.

New Zealand has adopted its own new, separate guidelines in June of this year, the Solicitor-General's Guidelines for Prosecuting Sexual Violence. These Guidelines place an increased emphasis on supporting and informing the victims to "mitigate or remove existing systemic barriers which create difficulties for complainants, while upholding and enhancing wider legal requirements around the prosecution process and fair trial rights".[204] The Guidelines promote victim support, and collaboration between police, prosecutors and support services has also been promoted recently.[205] This may help achieve the positive results that the United Kingdom Policy has.

However, our Guidelines are completely silent on rape myths and the role of prosecutors in combatting them. This concerning complacency allows prosecutor-held rape myths to go completely unchallenged within our Guidelines, and places no onus on prosecutors to challenge them in court or in their own exercises of discretion. Having the Guidelines clearly set out expectations and the concerns caused by rape myths is especially important in light of the little accountability otherwise faced by prosecutors, as it shows prosecutors that their role is to be unbiased and combat misinformation regardless of the politics behind sexual violence.

Our new Guidelines acknowledge the challenges in prosecuting sexual violation and better supporting victims, but they will not ensure prosecutors are exercising their discretion without bias. They must address rape myths head on, acknowledging the key role prosecutors play in ensuring a sexual violation does not go uncensored due to bias.

E. Specialisation for Prosecutors

Although alterations to the evidential test can eliminate the effects of jury-held rape myths on the decision to prosecute, leadership will ensure prosecutors respect the ethos of prosecutors, scrutiny can create consistency, and specific guidelines will tailor prosecutor discretion to the unique challenges of sexual violation, prosecutors will always have some need to exercise individual discretion. These discretionary decisions to prosecute are still at risk of being based

[204]Crown Law *Solicitor-General's Guidelines for Prosecuting Sexual Violence* (2019) at page 3.
[205]Law Commission, above n 3, at 11.9.

on misconceptions rather than reality. For this reason, educating prosecutors about the reality of rape and trauma is vital to any prosecutor working with sexual violation cases because changes in procedure will have limited meaning without shifting the perceptions of rape within those involved with the criminal justice process.[206]

There is a strong consensus that such education is needed in New Zealand. In the most recent report by the United Nations Committee on the Elimination of the Discrimination against Women (CEDAW), New Zealand was recommended to adopt better specialist programmes for sexual violation within the justice system, including prosecution.[207] Tinsley writes that:[208]

> Because of the high level of discretionary decision-making in the early stages of an investigation, for policy and guidelines to work, this requires work to ensure that the underlying beliefs fit with the policy set out.

It is also believed that uneducated prosecutors are part of the reasons that sexual violation statistics have historically been poorly recorded, leading to inflated false accusation statistics.[209]

This is not to diminish the need for greater education around sexual violence within our society. This need has been acknowledged by our Government since the 1980s,[210] yet the same 2018 CEDAW report criticised how New Zealand continues to allocate few resources to prevention, such as education.[211] However, educating the general public will likely be a slow process. We must target key decision makers who work with sexual violation early for extensive education, because they are in the best position to quickly drive a positive shift in the handling of sexual violation within our criminal justice system.

Education for prosecutors also improves the experience of victims within the justice system. This is by ensuring the prosecutor better knows how to treat the victim with respect, and improving their ability to challenge the rape myths utilised by the defence to discredit the victim.[212] There is international evidence that specialised prosecutors tend to lessen the victim's trauma experience during the formal criminal justice process.[213] Victims also prefer

[206]Tinsley, above n 11, at 129.
[207]United Nations Committee on the Elimination of Discrimination against Women, above n 5, at 25.
[208]Tinsley, above n 11, at 129.
[209]Johnston and Knox, above n 6.
[210](6 August 1985) 465 NZPD 6052.
[211]United Nations Committee on the Elimination of Discrimination against Women, above n 5, at 25.
[212]Temkin, Gray and Barrett, above n 89, at 6.
[213]Tinsley, above n 11, at 159.

prosecutors who understand their experience.[214] Additionally, since specialised police officers yield increased reporting and higher victim confidence in the process,[215] it is likely that specialisation within prosecutors will yield these same benefits.

There is also a lot of evidence that educating prosecutors to be specialists in sexual violation improves the viability and processing of cases. The Sexual Violence Pilot Court utilises specially trained prosecutors and better education for judges.[216] The Court covers section 128 sexual violation specifically.[217] Although this Court has not been running long, it has yielded encouraging results thus far. The Pilot Court reports that better education for prosecutors and other criminal justice workers has had a positive effect on the justice process.[218] The specialised process has increased the timeliness with which cases are processed,[219] and resulted in better general management of cases and collaboration between justice services.[220] This Pilot Court provides encouraging evidence that better education for prosecutors will not only challenge rape myths among prosecutors, but also cause greater collaboration between services and faster processing of cases.

The United Kingdom has specialised prosecutors with dedicated training on how to understand and handle rape cases.[221] However, there are already issues with the high cost of adult sexual violation in New Zealand.[222] This, as well as our lower population, may mean that New Zealand cannot sustain such a team of specialist sexual violation prosecutors. Proportionality between the cost, the seriousness of the crime, and the rate of censure it causes tends to be the key requirement for funding new criminal justice projects.[223] Although sexual violation is one of the most serious crimes, there is no evidence that funding a separate group of prosecutors only for these crimes alone will be have a significant impact on the level of censure of sexual violation.

For this reason, it is likely not feasible to have a specific, specialised group of prosecutors who work solely on sexual violation. However, the benefits to the exercise of fair prosecutorial

[214]Elisabeth McDonald and Yvette Tinsley ""The Law as It Should Be" when Prosecuting Sexual Offences: The Contribution of Legal Academics to Law Reform" (2013) 25 NZULR 758 at 768.
[215]Tinsley, above n 11, at 138-139.
[216]Jan-Marie Doogue "District Courts to Pilot Sexual Violence Court" (press release, 20 October 2016).
[217]Doogue, above n 216.
[218]Jan-Marie Doogue "Sexual Violence Court Pilot at 12-Month Milestone" (press release, 15 December 2017).
[219]Jan-Marie Doogue "Milestone for Sexual Violence Court Pilot" (press release, 23 May 2017).
[220]Doogue, above n 218.
[221]Angiolini, above n 15, at 22.
[222]Law Commission, above n 3, at 2.40-2.60.
[223]Cownie, Bradney and Burton, above n 18, at 295.

discretion creating procedural fairness, better victim experience and confidence in the justice system, increased collaboration, wider censure for sexual violation and timely processing of cases are too strong to ignore. For this reason, New Zealand would do well to strike a balance by focussing resources on comprehensive, accurate education about the realities of sexual violation for a select group of prosecutors, and then ensuring that sexual violation investigations are directed to those prosecutors to decide whether or not to prosecute.

F. Victim Autonomy within the Process

The victim has very little say in the decision to prosecute. As people that are directly affected by prosecutorial decisions, allowing them some input or autonomy within the process naturally corresponds with the victim's right to procedural fairness. There are multiple ways to allow this autonomy, but the feasibility and legal implications of each must be considered.

Some believe the victim's opinion should be obtained before and considered during the exercise of prosecutorial discretion.[224] New Zealand prosecutors currently include the victim's desires for prosecution (or lack thereof) when looking at the Public Interest Test.[225] The value of having the victim heard and their welfare considered is not only helpful for the victim's psychological recovery,[226] but is also the most cost effective decision because so much state expenditure is spent on victim recovery.[227]

However, New Zealand does not allow the victim any further voice when there is a decision to not prosecute, and potential avenues to allow the victim a right to address such decisions need to be discussed.

The first of these is a right to review a prosecutor's decision, to allow victims to be sure in their knowledge that the decision made was the necessary one. The recent Prosecution Guidelines for Sexual Violence allow victims a right to review.[228] The United Kingdom also has such a process.[229] This would allow victims to submit their case for review by other prosecutors to ensure the exercise of discretion is consistent and justifiable to all prosecutors, giving them a

[224]McDonald and Tinsley, above n 214, at 764.
[225]Crown Law, above n 14, at 5.9.5.
[226]Lewis Herman, above n 44, at 577.
[227]Roper and Thompson, above n 160, at Table 5.
[228]Crown Law, above n 204, at 4.2.2.
[229]Rogers, above n 94, at 687.

sense of clarity and autonomy. Individual prosecutorial decisions are in danger of being arbitrary if there is no ability to review decisions as they are made.[230]

The alternative is allowing the victim to appeal when a prosecutor decides to not prosecute a case. This would give victims a great deal of autonomy and force prosecutors to justify any decisions they make. Additionally, it would be another method to directly challenge any evidence of rape myth with the prosecutor's decision.

However, the ability for a victim to appeal a decision would place an extra strain on prosecutors to set up an entirely new system that is capable of responding to victim appeals. The extra cost of this in both money and time may take up even more resources, when sexual violation is already so costly per incident.[231] The extra resources may even be taken from the already very meagre funds dedicated to sexual violation prevention.

Most importantly, an appeal process would put extra strain on the victim to continue to operate as a 'driving force' in pursuing justice, by placing the onus on them to pursue their case and formulate arguments against the prosecutor. This adversarial viewpoint would be inherent to any appeal and place further strain on the victim's relationship with the justice system, potentially becoming another source of trauma. A review process allows victims to ensure the decision is correct and respects their position within the justice process without putting extra pressure on them by forcing them to argue for a prosecution that is already considered unlikely.

For these reasons, the ability for a victim to request that their case be reviewed by another prosecutor is the best option for New Zealand. It allows the victim some voice and ability to check decisions without the resource strain and onus on the victim that an appeal would cause.

There are still valid concerns about whether this review, which would likely be done within the Service, would be independent enough to be effective. However, the improved leadership, external scrutiny for the prosecutorial process and guidelines with specific expectations for the decision to prosecute that are set out in this chapter will likely go some ways in ensuring that internal review will at least be done consistently, with a core understanding of sexual violation and with more oversight from leaders within the service. A truly independent review process would be best, but, considering both the cost of an independent review process and the

[230] At 680.
[231] Roper and Thompson, above n 160, at 3.

consistency that the suggestions in this chapter will likely create within the prosecutorial process, a complete independent review process may not be cost-effective or urgent.

If done right and with enough consistency, a right to review also maintains the rule of law and impartiality within the test. It maintains the value of allowing the victim's needs to have some expression within the prosecutorial process, giving them a sense of autonomy and respect from the state whilst still balancing the requirement that the justice system not pursue cases without sufficient evidence.

VI. Conclusion

Until society gains a deeper understanding of sexual violation, we will not truly be doing victims of sexual violation justice. However, with the issues within the decision to prosecute instances of sexual violation so obvious and prejudicial, changing this system is necessary and urgent. The state cannot justify the continued use of such a clearly flawed system that ignores current victims of sexual violation and allows the continued targeting of certain demographics for further sexual violation.

The solutions suggested here will likely go some way towards making the decision to prosecute more equitable, improving society's opinion of the criminal justice system overall. The intrinsic merits approach will eliminate the problematic inclusion of jury misconceptions about sexual violation from prosecutorial discretion, while leadership within the system will encourage prosecutors to stick to this system and not buy into the bias held by juries. Greater scrutiny upon prosecutors will force the criminal justice system to be informed about this 'bottle neck' of prosecutions and ensure that prosecutors are remaining consistent. Guidelines that acknowledge rape myths and education for prosecutors about sexual violation will ensure any discretionary decisions made by prosecutors will challenge rape myths within society and prosecutors themselves. Finally, a right to review and listening to the victim's desires acknowledges their victimisation within the criminal justice process, and the state's responsibility to support them and provide them with justice and information through this process.

All of these proposals will promote the elimination of misinformation from the prosecutorial decision making process, fulfilling the victim's right to procedural fairness. It will also shift

the previous prejudices against the majority of sexual violations that do not reflect the 'real rape' stereotype, making it more likely that these cases will be prosecuted so that the wrongdoing may be censured.

Sexual violence is a multifaceted issue, with criminal justice, sociological and psychological elements interrelating and requiring consideration for any new policy; an improvement in one area can improve many issues within the crime. These measures are fundamentally important to not only the prosecution rate, but also the likelihood of a victim reporting an assault and increasing the number of offenders held to account overall.

Many of these solutions will have substantial effects on the decision to prosecute sexual violation because it provides such an extreme example of the issues with the prosecutorial process in New Zealand. However, they will also have a positive effect on the justice of the process for other crimes. Additional scrutiny and a focus on the merits of the evidence can only enhance the fairness of the decision to prosecute overall.

Shaking off the prosecutorial status quo, acknowledging its flaws, and creating a more modern system will improve the quality of our justice system. More importantly, it will improve outcomes for victims of sexual violation. We owe it to them to do much better.

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Appendix 1

5. THE DECISION TO PROSECUTE

The Test for Prosecution

5.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:

5.1.1 The evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and

5.1.2 Prosecution is required in the public interest – the Public Interest Test.

5.2 Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor must analyse and evaluate all of the evidence and information in a thorough and critical manner.

The Evidential Test

5.3 A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

5.4 It is necessary that each element of this definition be fully examined when considering the evidential test in each particular case.

Element	Description
Identifiable individual	There will often be cases where it is clear that an offence has been committed but there is difficulty identifying who has committed it. A prosecution can only take place where the evidence sufficiently identifies that a particular person is responsible. Where no such person can be identified, and the case cannot be presented as joint liability there can be no prosecution.

Element	Description
Credible evidence	This means evidence which is capable of belief. It *may* be necessary to question a witness before coming to a decision as to whether the evidence of that witness could be accepted as credible. It may be that a witness is plainly at risk of being so discredited that no Court could safely rely on his/her evidence. In such a case it may be concluded that there is, having regard to all the evidence, no reasonable prospect of obtaining a conviction. If, however, it is judged that a Court in all the circumstances of the case could reasonably rely on the evidence of a witness, notwithstanding any particular difficulties, then such evidence is credible and should be taken into account. Prosecutors may be required to make an assessment of the quality of the evidence. Where there are substantial concerns as to the creditability of essential evidence, criminal proceedings may not be appropriate as the evidential test may not be capable of being met. Where there are credibility issues, prosecutors must look closely at the evidence when deciding if there is a reasonable prospect of conviction.
Evidence which the prosecution can adduce	Only evidence which is or reliably will be available, and legally admissible, can be taken into account in reaching a decision to prosecute. Prosecutors should seek to anticipate even without pre-trial matters being raised whether it is likely that evidence will be admitted or excluded by the Court. For example, is it foreseeable that the evidence will be excluded because of the way it was obtained? If so, prosecutors must consider whether there is sufficient other evidence for a reasonable prospect of conviction.
Could reasonably be expected to be satisfied	What is required by the evidential test is that there is an objectively reasonable prospect of a conviction on the evidence. The apparent cogency and creditability of evidence is not a mathematical science, but rather a matter of judgment for the prosecutor. In forming his or her judgment the prosecutor shall endeavour to anticipate and evaluate likely defences.
Beyond reasonable doubt	The evidence available to the prosecutor must be capable of reaching the high standard of proof required by the criminal law.

Element	Description
Commission of a criminal offence	This requires that careful analysis is made of the law in order to identify what offence or offences may have been committed and to consider the evidence against each of the ingredients which establish the particular offence.