

BRIDGET ALICE FOSTER SINCLAIR*

**A DISCUSSION REGARDING A PARTIAL SHIFT IN
THE BURDEN OF PROOF IN SEXUAL VIOLENCE
OFFENDING IN NEW ZEALAND: THE SEARCH FOR
JUSTICE ON BEHALF OF COMPLAINANTS**

Submitted for the LLB (Honours) Degree

Faculty of Law
Victoria University of Wellington

2015

Word Count: 7965

* Paper submitted as part of LLB(Hons) programme at Victoria University of Wellington. I would like to extend a huge thank you to Elisabeth McDonald for her incredible insight and invaluable assistance.

Abstract

A reversal in the burden of proof in regards to sexual violence cases is an issue that has been discussed and debated both publically and politically. The focus of this paper involves a reversal in the burden of proof in regards to the mens rea element. A defendant in a sexual violence trial would be compelled to testify as to why they reasonably believed consent to have existed. The standard this element would need to be proved to would be on the balance of probabilities. In this paper I offer a critique of the current criminal justice process and outline how a partial reversal in the burden of proof could directly address the most pressing concerns for complainants of sexual violence. I argue that this proposal is certainly worth informed discussion and public debate. My overarching argument consists of the recognition that sexual violence is a prevalent and detrimental issue in New Zealand society and requires immediate address. It is therefore important that useful discussions such as the reversal of the burden of proof receive attention.

Sexual Violence – criminal law – Burden of Proof

The text of this paper (excluding the cover page, table of contents, keywords, abstract, footnotes and bibliography) consists of exactly 7965 words.

Table of Contents

I	Introduction	4
II	The Need for Change	6
	A The Failings of the Current System and the Search for Justice	6
	B Sexual Violence is Distinct from other Crimes	8
III	A Proposal to Reverse the Burden of Proof	10
	A The Proposal in Practice	10
	B Existing examples of Reversed Burdens	13
IV	The Areas of Concern regarding the Proposal.....	15
	A The Importance of the Presumption of Innocence	15
	B A Citizen’s Right to Silence	18
	C A divisive issue that politicians may be hesitant to advocate for	19
V	The Case for reversing the Burden of Proof	21
	A Improving the Complainant’s Experience in the justice process.	21
	B Addressing the adversarial system in order to safeguard complainant’s rights.....	23
	C A shift in focus: from complainant to defendant	23
VI	Limitations of Law Reform	26
VII	Conclusion	28
VIII	Bibliography	30

I INTRODUCTION

Sexual violence, in New Zealand as elsewhere, is not abating. Statistics illustrate the immense failings of the current criminal justice system.¹ Incidents of sexual violence are unlikely to be reported to police with only seven percent of victims electing to recount their experiences.² During the process of informing the authorities of the incident, complainants frequently withdraw their original complaints.³ When prosecution does occur, as few as 13 percent of alleged offenders will be convicted.⁴ Key elements of the criminal justice process directly conflict with appropriate means of achieving justice for victims of sexual violence. The questioning process, assumptions made by authorities and biases in the system have been linked to the initial retraction of statements.⁵ The sole institution that exists to offer complainants a resolution to the crime that is inflicted too often results in feelings of intimidation and humiliation.⁶ Despite substantial changes in legislation to address concerns regarding sexual violence cases, low conviction rates remain. Other options must be explored.

A proposition advanced to address areas of concern regarding sexual violence was a reversal in the burden of proof. The Labour party propositioned this law reform in July 2014.⁷ Andrew Little, as a spokesman for Labour, labelled the recommendation a “monumental shift” in New Zealand’s justice system. This paper will focus on the proposal of a reversal in the burden of proof in regards to the mens rea element. The rationale for a reversal of the burden of proof is threefold. First, the court process is

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

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

³ Sue Triggs, Elaine Mossman, Jan Jordan and Venezia Kingi *Responding to sexual violence: Attrition in the New Zealand criminal justice system* (Ministry of Women’s Affairs, September 2009) at 54.

⁴ At 58.

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

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

⁷ Derek Cheng “Rape accused would have to prove consent under Labour plan” *The New Zealand Herald* (online ed, 8 July 2014).

difficult in that it appears to assign the responsibility on the victim. The victim must experience the trauma of the courtroom process as well as provide evidence and answer probing and personal questions.⁸ A reversal in the burden of proof would address the major concern that complainants often experience feelings that they are on trial. This is because if the defendant possessed the burden of proof in regards to the mens rea they would virtually be compelled to testify. The defendant would have to argue why they reasonably believed consent to have existed. Second, the high attrition rates of sexual violence cases are of significant concern. Strong action is arguably required and a reversal in the burden of proof is certainly significant enough to create the far-reaching change that is being insisted upon. Third, this issue is societal as well as legal. Law reform is a mechanism to communicate standards of expectation to the public. A reversal in the burden of proof would create a shift in the law to concentrating on what occurs in the perpetrator's head and why consent was believed to have existed.

The proposition of reversing the burden of proof in sexual violence cases has been a focal discussion that has travelled in and out of the public arena, often discussed and debated. There is room for an analysis regarding the practicality of this proposal. This paper will address the gap in this discussion. Part I of this paper will analyse the need for change. It will be descriptive in nature, outlining the major concerns of the current criminal justice process in regards to sexual violence. It will explore the distinct nature of this offence and concentrate on the elements of the process that would be addressed if a reversal in the burden of proof occurred. These include complainants' feelings that they are on trial, the perception that the criminal justice process is unfairly weighed against complainants and the ability of the defendant to remain silent throughout trial. Part II will describe the proposal and explain how it could be applied in practice. It will outline current reversals in the burden of proof that exist under New Zealand law and explore when a reversal can be deemed appropriate or even necessary. Part III will critique the proposal and explore concerns regarding the presumption of innocence, a citizen's right to silence and why politicians may be hesitant to advance this issue. It will include an analysis regarding the withdrawal of

⁸ Elisabeth McDonald "Sexual violence on trial: An update on reform options" (2011) 25(1) Women's Studies Journal 63 at 67.

the proposal and why the legislature is hesitant to make such bold steps towards this law reform. This paper will assess these concerns and provide possible solutions to the most significant critiques of the proposal. Part IV will discuss the positive aspects of the proposal and conclude that the reversal of the burden of proof could appropriately deal with many of the concerns that exist in the current system. Part V will examine the limitations of law reform and discuss the critique that law reform is not sufficient to facilitate real change. It will analyse what appropriate measures could be implemented alongside the proposal in order to ensure effective change. The discussion focuses on the need for legislative direction on the definition of consent and education regarding sexual interaction. With a collaborative scheme essential change could realistically be achieved. This paper concludes that a reversal in the burden of proof could create educative change and encourage citizens to be more mindful regarding communication during intimate relationships. Research and discussion regarding the reversal of the burden of proof in regards to the mens rea element would be a worthwhile endeavour. An informed public debate regarding this issue could assist in achieving necessary change.

II THE NEED FOR CHANGE

A The Failings of the Current System and the Search for Justice

The idea of justice in this paper concentrates on fairness in regards to process. Justice for sexual violence victims includes their experience being validated by the justice system and the conduct being deemed unacceptable. Because of the shameful and damaging nature of sexual violence it is extremely important that vulnerable victims are approached with sensitivity and care. Justice for sexual violence victims is about being heard and the search for accountability.⁹

The low conviction rates in sexual violence offending are distinct to this particular offence. It has been recognised that something different is occurring in the context of sexual offending. Recent situations such as the “Roastbusters” scandal illustrate that

⁹ United Nations Women (2011). *Progress of the World's Women: in pursuit of justice*. Geneva: United Nations at 10.

systematic problems remain both with policing and treatment of complaints.¹⁰ It is evident that greater diligence and widespread investigation is necessary.¹¹ Justice must be readily attainable for all.

Louise Nicholas provides a voice for victims of sexual violence, particularly those that have been failed by New Zealand's criminal justice process. Working within Rape Prevention Education, Nicholas represents survivor perspectives in service development and the sexual violence sector.¹² Nicholas, in her role as Survivor Advocate, states;¹³

I know the failings of our system but I am also hearing very loudly and very clearly from other victims/survivors that our court system does not give justice to victims of sexual violence. Survivors have told me that it is a system that unfairly supports the rights of offenders. Many survivors have complained to me that they experienced only intimidation, re-victimisation and re-traumatisation. Victims/survivors see the need for an overhaul within the court system.¹⁴

Professionals advocating for victims of sexual violence present a definite standpoint that simply not enough is being achieved for victims of this debilitating offence.¹⁵ During a Criminal Pre-Trial Processes Law Commission Investigation one rape victim was questioned whether a new sexual violence complaint system is necessary in New Zealand.¹⁶ The response was unequivocally clear.¹⁷ The individual responded;¹⁸

¹⁰ "Demand justice for Roast Busters Survivors" (2014) Action Station <<http://www.actionstation.org.nz>>.

¹¹ Jessie Hume, "Shocking IPCA Report Confirms Criminality of Roastbusters Actions and Police Failure" (19 March, 2015) The Daily Blog <<http://thedailyblog.co.nz>>.

¹² "Survivor Advocate" (2011) Rape Prevention Education <<http://rape.co.nz>>.

¹³ At 12.

¹⁴ Ministry of Justice, 2009. *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence*. Wellington: Ministry of Justice 79.

¹⁵ Elisabeth McDonald and Yvette Tinsley *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011).

¹⁶ Law Commission Alternative Pre-Trial and Trial Processes: Possible Reforms (NZLC IP30, 2012) at 37.

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

Experts across the sector agree that the system that deals with sexual violence is flawed. Members of the police, lawyers and judges acknowledge that reporting sexual violence is often contrary to the interests of the victim due to the punishing process necessary in the pursuit of justice. Successive governments have expended resources, time and public funds to commission reports with the object of improving sexual violence laws and services.¹⁹ Despite this, there has been a lack of significant change regarding either the occurrence of sexual violence or conviction rates.²⁰

B Sexual violence is Distinct from other Crimes

Sexual violence is frequently unreported thus statistics may fail to reflect its prevalence in society.²¹ However research conducted in New Zealand indicates a high prevalence of sexual violence. Rape Prevention Education's statistics on sexual violence in New Zealand state that up to one in three girls will be subject to unwanted sexual advances by the age of 16 years. The majority of these incidents are deemed serious with seventy percent involving genital contact.²² It is estimated that one in five women will experience sexual assault in their adult years.²³ In the United Nations Report on the Status of Women, New Zealand was classified the worst of all OECD

¹⁷ Kirsty Johnston "Better system will deliver justice" (8 December, 2013) Stuff
<<http://www.stuff.co.nz>>.

¹⁸ At 12.

¹⁹ Johnston, above n 17.

²⁰ McDonald and Tinsley, above n 17.

²¹ "Statistics: Sexual Violence in Aotearoa New Zealand" (2011) Rape Prevention Education
<<http://rpe.co.nz/information/statistics>>.

²² At 21.

²³ At 21.

countries based on rates of sexual violence.²⁴ Evidently sexual violence as a crime in New Zealand is not only distinct but extremely prevalent and in need of address.

Sexual violence is an extremely detrimental crime that devastates the lives of victims.²⁵ The psychological, physical and social harm impacts many New Zealand citizens and has far-reaching damaging affects. Victims experience shock, guilt, shame, depression, and a subsequent inability to trust others. Victims experience such severe consequences that their ability to contribute to society diminishes. According to a Treasury working paper, sexual violence is the most costly crime to New Zealand.²⁶ This paper asserted that, on a per criminal act basis, sexual violence offences cost approximately \$72,130 per incident.

DNA evidence establishes identity in sexual violation cases if it exists. Therefore the central issue in most sexual violation trials is the existence of consent and the issue of reasonable belief.²⁷ The focus is therefore on the complainant and the inquiry into their actions. The concentration on the complainant's evidence and credibility detracts from the behaviour of the accused. Due to the fundamental right to silence often the discussion is based solely on the complainant, constructing an impression that it is the complainant, rather than the accused, that is on trial. The complainant must act as witness to testify regarding the crime.²⁸ This aspect of sexual violence offending translates differently than other crimes when it comes to trial processes. Victims of other crimes may be called to provide evidence but the implications of being a victim treated as a witness for sexual violation crimes can be damaging.²⁹ Other crimes are

²⁴ United Nations Women (2011). *Progress of the World's Women: in pursuit of justice*. Geneva: United Nations at 50.

²⁵ Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand* (New Zealand Government, August 2008) at 2.

²⁶ At 3.

²⁷ Ministry of Justice, 2009. *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence*. Wellington: Ministry of Justice at 56.

²⁸ *Taskforce for Action on Sexual Violence*, above n 27, at 57.

²⁹ At 56.

unlikely to require the disclosure of intimate and traumatising details. The nature of the specifics required can be deeply personal.³⁰

Experts across the sector have asserted that the process by which rape is handled by the criminal justice system is flawed “from the ground up”.³¹ There is a lack of education, understanding and therefore prevention of sexual violence. Victims of sexual violence are hesitant to report the offence due to the perceived trauma of the process of seeking justice. Police experience difficulties in obtaining enough evidence.³² Defence lawyers and judges themselves acknowledge that reporting sexual violence is often contradictory to the interests of a victim, one defence lawyer stating that he would rarely advise a complainant to participate in the criminal justice system: “Alas, I would never advise members of my family to report a rape.”³³ The distinct nature of sexual violence is the subjection to such an appalling and devastating act and yet a complete lack of resources provided by the criminal justice system to advance accountability or promote justice. Sexual violence is distinct in nature and its distinctiveness carries onto the justice process whereby complainants of this violent act are denied justice. The main issues are the mistrust in the system, the perception that it is the complainant who is on trial and the way in which the process appears to be weighed in favour of defendants. These concerns create a justice process that appears unfair to complainants of sexual violence.

III A PROPOSAL TO REVERSE THE BURDEN OF PROOF

A The Proposal in Practice

The Labour party’s motivation for change was founded in the victim’s mistrust in the system.³⁴ In order to facilitate procedural fairness, the Labour Party considered it viable to adopt a reversed burden of proof in sexual violence trials. While proposing

³⁰ At 58.

³¹ Johnston, above n 17.

³² *Taskforce for Action on Sexual Violence*, above n 27, at 48.

³³ At 49.

³⁴ Andrew Little “Victims should be at centre of domestic violence measures” (press release, 2 July 2014).

the reversal of a burden of proof Andrew Little recognised the significant impact of this reform but emphasised the clear need for change;³⁵

When you look at the volume of sexual violence cases and the 1 per cent of cases that result in a conviction, there is something wrong with the way we are handling sexual violation cases. The circumstances may well justify doing something radically different.

In order to discuss the validity of this proposal it is important to assess the current legislation and whether it could be altered. Sexual violation is defined in New Zealand under s 128 of the Crimes Act. The relevant part provides as follows;³⁶

128 Sexual violation defined

...

- (2) Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis,—
- (a) without person B's consent to the connection; and
- (b) without believing on reasonable grounds that person B consents to the connection.

A reversal in the burden of proof in regards to the mens rea would result in the prosecution still needing to prove the actus reus. Prosecution would have to prove that sexual contact occurred and deal with the issue of consent as well as the absence of relevant defences. The Crown would possess the responsibility of proving that there was sexual contact, the identity of the defendant and establish that the complainant perceived the contact to have been “unwanted and unwelcomed”.³⁷ The only element of the offence that would shift onto the accused is mens rea. This would entail the discussion of the accused and their belief on reasonable grounds that consent existed. The proposal to reverse the burden of proof would alter the application of s 128. A shift in the burden of proof in regards to mens rea would transfer the onus regarding this element and virtually create an obligation on the defendant to testify. The defendant would have to argue why they possessed reasonable belief in consent. The alleged unfair advantage and protection of purported offenders would be addressed

³⁵ Derek Cheng, above n 35.

³⁶ Crimes Act 1961, s 128.

³⁷ Interview with Andrew Little, Justice Spokesperson for the Labour Party, (The Wire)

<<http://www.95bfm.co.nz/assets/sm/216651/3/andrewlittle.mp3>>.

due to the result in the defendant being virtually compelled to testify. The legislation could be expected to assert that the defendant must prove that they possessed reasonable belief in consent on the balance of probabilities. Without reasonable belief proved by the defendant, in conjunction with the prosecution having proved their elements of the case, it will be assumed that the offence was indeed committed.

The Labour Party identified this change as a monumental shift.³⁸ Andrew Little, Labour's spokesman, justified this with the acknowledgment that the current system is damaged and requires drastic change. Little stated "we think fairer steps need to be taken to upgrade the way that we deal with sexual offending".³⁹ It was also emphasised in Little's address that the controversial response to this proposed reform illustrated how sexual violence offences are weighed very seriously against complainants.⁴⁰ Little stated that although Labour favoured this system the official policy was to conduct a Law Commission report into alternative systems and initiate changes in response to their findings. Former Justice Minister Simon Power supported this suggestion and requested a Law Commission investigation.⁴¹ However his successor Judith Collins labelled the system "a step too far" and discontinued the Commission's examination.⁴² Currently there is no action being taken into researching this proposal further. Minister of Justice Amy Adams has rejected suggestions to inquire into a partial reversal in the burden of proof.⁴³

It must be clearly stated that this proposal is not suggesting that defendants would have to prove their innocence or that any citizen would face unfair prosecution. The probative onus of proving the actus reus would rest on the prosecution. The defendant would have to prove that they possessed a reasonable belief in consent at the time of the offence. The burden would shift onto the accused only in regards to the mens rea element of the offence. If the defendant could prove on the balance of probabilities

³⁸ Cheng, above n 35.

³⁹ Interview with Andrew Little, above n 37.

⁴⁰ At 39.

⁴¹ Cheng, above n 35.

⁴² At 41.

⁴³ (25 November 2014) 702 NZPD 759.

that they believed reasonably that consent existed then no liability would exist. What is significant about this proposal is that it would promote questions and important discussion regarding consent. It would illustrate the fact that consent must be freely provided. An individual who is speechless due to fear is not providing consent. Additionally, under some circumstances individuals might be too incapacitated to meaningfully provide consent.⁴⁴ This proposal has the potential to shift thinking in regards to sexual violence and encourage responsibility on behalf of the defendant in regards to ensuring consent is valid. It would become incumbent on the accused person to ensure that consent existed before initiating sexual contact. If this reform occurred, it would send a clear message that an individual must ensure that valid consent is provided before sexual contact occurs. This would encourage more responsible behaviour.

B Existing examples of Reversed Burdens

In certain situations reverse burden provisions are deemed necessary due to the difficulty of the prosecutor otherwise meeting the required burden.⁴⁵ This is particularly relevant where the individual accused possesses enhanced access to relevant information, for example the defence of insanity.⁴⁶ In these cases the legal burden of proof is described as “reversed” due to the burden of that issue existing with the accused. However it is important to note that the issue is raised by the accused who is only expected to demonstrate a defence, not to negate an assertion made by the prosecution. The overarching principle of fair trial process upholds the presumption of innocence.⁴⁷

⁴⁴ Tan Ghee Phaik, “Reversing the burden of proof in rape cases – a tantalizing proposal?” (2011) Attorney General’s Chambers of Malaysia <<http://www.agc.gov.my>>.

⁴⁵ Anthony Gray “Constitutionally Protecting the Presumption of Innocence” (2011) 31(1) The University of Tasmania Law Review 131 at 131.

⁴⁶ Crimes Act 1961, s 23.

⁴⁷ “No Right Turn: Time to defend the presumption of innocence” (9 July 2014) No Right Turn <<http://norightturn.blogspot.co.nz>>.

Strict and absolute liability offences require solely the proof of the prohibited act or state of affairs. Once the action has been proven the prosecution is not required to find fault. In the regulatory context the burden of establishing the defence of absence of fault in public welfare cases rests with the defendant. When a burden is placed on the defence, it need only reach the civil standard of on the balance of probabilities.⁴⁸ The New Zealand Misuse of Drugs Act 1975 governs a rebuttable presumption that a person in possession of more than a specified amount of a controlled drug is presumed to be holding it for the purpose of supply or sale.⁴⁹ In *Hansen v R* the Supreme Court held that section 6(6) imposed a legal burden of proof.⁵⁰ As a result the burden is shifted from the Crown to the individual found with the drug to prove that the possession of the substance was for personal use rather than intended for supply.

The New Zealand Bill of Rights Act and fundamental legal principles assert that the courts must deem legislation that unjustifiably limits guaranteed rights or freedoms inappropriate.⁵¹ However there can be justified limitations on fundamental principles. The examples provided above illustrate that in some cases the presumption of innocence can be justifiably overridden. Importantly there are exceptions to the general burden of proof rule in regard to illegal sexual action. These exceptions are specific to offences committed against young persons who are considered particularly vulnerable in New Zealand. For instance, s 131B “Meeting young person following sexual grooming, etc”⁵² and s 134A “Defence to charge under section 134”⁵³ create a burden on the defendant to prove that steps were committed to avoid committing an offence. Andrew Little applied the example of the legal and evidentiary burden on the accused⁵⁴ already existing in regards to sexual conduct with an individual under the

⁴⁸ “Section 25: Minimum standards of criminal procedure” (2004) Ministry of Justice
<<http://www.justice.govt.nz>>.

⁴⁹ Misuse of Drugs Act 1975, s 6(6).

⁵⁰ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [45].

⁵¹ At [59].

⁵² Crimes Act 1961, s 131B(2).

⁵³ Section 134A.

⁵⁴ *Sexual Crime Law Symposium* (Equal Justice Project, August 2014) at 10.

age of 16. In this instance the defendant must prove the defence exists.⁵⁵ Little emphasised that in some situations a reversal is necessary. Not only is it relevant that a reversal of the burden of proof is a possible tool to address certain crimes, it is significant that this reversal applies to particularly offensive sexual crimes. It is evident that there are circumstances in New Zealand where the burden of proof is absolutely or partially reversed.

IV THE AREAS OF CONCERN REGARDING THE PROPOSAL

A The Importance of the Presumption of Innocence

The presumption of innocence is a fundamental component of the right to a fair trial. The question of which party carries the burden of proof determines the responsibility for convincing the court of a matter being proceeded over.⁵⁶ In New Zealand criminal trials the prosecution bears the burden of proof and must prove that the accused individual committed the crime to the standard of “beyond reasonable doubt.”⁵⁷ This includes actus reus, mens rea and absence of any defences.⁵⁸ This has been described as “the golden thread of English criminal law” and is of significant importance.⁵⁹ The burden of proof and the requirement that guilt be verified beyond reasonable doubt are essential components of the presumption of innocence. The presumption of innocence is a central tenet of New Zealand’s criminal justice system.⁶⁰ This presumption acts as a protective function for citizens against the power of the state. It is an acknowledgment of the inherent power imbalance between citizen and the state regarding resources.

⁵⁵ AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 39.

⁵⁶ “Civil Pecuniary Penalties” New Zealand Law Commission
<<http://ip33.publications.lawcom.govt.nz>>.

⁵⁷ At 56.

⁵⁸ *Woolmington v DPP* [1935] AC 462, [1935] All ER 1 (HL).

⁵⁹ *Civil Pecuniary Penalties*, above n 56.

⁶⁰ Kuan Chung Ong “Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights” (2013) 32(2) *UTasLawRw* 247 at 248.

The relevance of the presumption of innocence to this paper is that a reversal of the burden of proof in sexual violence cases undermines this principle. The major concern when reversing the burden of proof is that it may result in an accused person being convicted despite the existence of reasonable doubt regarding their guilt.⁶¹ New Zealand's Law Society has confirmed a strong stance on the traditional principles of the legal system. This relates particularly to the presumption of innocence until proven guilty beyond reasonable doubt.⁶² The presumption of innocence is codified and protected by 25(c) of the New Zealand Bill of Rights Act. This provides that "everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proven guilty according to law."⁶³ A citizen's right to be presumed innocent is affirmed in New Zealand cases *R v Rangi* and *R v Hansen*.⁶⁴ This principle is acknowledged as one of the most powerful safeguards ensuring human dignity and liberty.⁶⁵ The presumption of innocence protects a suspected individual against a verdict that has not reached the required legal standard of proof.⁶⁶

Judicial assertions in New Zealand and comparable jurisdictions emphasise that the public interest in ensuring that innocent individuals are not convicted significantly outweighs the need to convict a particular criminal.⁶⁷ Public confidence in the judicial system rests in the insurance that innocent individuals will not suffer prosecution. Lord Bingham asserted that an onus on the defendant to disprove an accusation is 'repugnant to ordinary notions of fairness'.⁶⁸ The presumption of innocence upholds

⁶¹ "Strict liability or reversal of the burden of proof for offences" The Treasury <<http://www.treasury.govt.nz>>.

⁶² Derek Cheng, above n 35.

⁶³ New Zealand Bill of Rights Act 1990, s 25(c).

⁶⁴ *R v Rangi* [1992] 1 NZLR 385; *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

⁶⁵ Gabriela Chihaiia "Short Essay on Presumption of Innocence" in *Legal Practice and International Laws* 193 at 193.

⁶⁶ At 198.

⁶⁷ Anthony Gray "Constitutionally Protecting the Presumption of Innocence" (2011) 31(1) *The University of Tasmania Law Review* 131 at 133.

⁶⁸ Andrew Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010) at 27.

the importance of protecting the innocent from wrongful conviction.⁶⁹ Conviction for a criminal offence results in negative consequences including social stigma, punishment and censure.⁷⁰ The punishment itself can include financial reparation, community work or imprisonment, all of which infringe on an individual's most fundamental right: liberty.⁷¹ The imposition of stigma and punishment requires sound justification. Due to the considerable impact of criminal proceedings on defendants, the presumption of innocence is a fundamental safeguard to protect New Zealand citizens.⁷²

The prosecution must prove that the accused committed the offence to the standard of beyond reasonable doubt. This is a high standard to acknowledge the social implications of an individual facing conviction: labelling, stigmatisation and isolation. These consequences are even more severe in cases of sexual offending. The stigma attached to perpetrators of sexual violence can be damaging. Because of mythology and misunderstanding regarding sexual offending perpetrators are labelled as "other" and subsequently isolated from communities. The consequences for sexual offending can persist long after the criminal sanction has been completed.⁷³ The extreme stigma attached demonstrates the immense need to ensure that individuals are not wrongly convicted. In addition to the issue of social stigma, a relevant consideration is the fact that the offence of sexual violence involves a harsh penalty. The maximum penalty for rape is a term of 20 years imprisonment.⁷⁴ The nature of sexual violence means that usually there will be no witnesses to testify to the offence. Therefore the evidence will generally consist of two conflicting experiences – one individual's word against another's.⁷⁵ Significant breaches of liberty are involved with the sentencing of this offence. Arguably a reversal is simply inappropriate in offences that concern such serious consequences.

⁶⁹ At 28.

⁷⁰ At 27.

⁷¹ At 28.

⁷² "The Presumption of Innocence" (2015) Fair Trials <<http://www.fairtrials.org>>.

⁷³ *Sexual Crime Law Symposium*, above n 54 at 5.

⁷⁴ Crimes Act 1961, s 128B.

⁷⁵ Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand* (New Zealand Government, August 2008) at 18.

The presumption of innocence is of great importance. However it could be appropriate to assess its significance with an understanding of the context in which it is considered. In order for the reversal of the burden of proof to be palatable, a shift in thinking is required. The importance of procedural justice that is focused on in an adversarial system could be replaced by emphasis on substantive justice. If the adversarial system received alteration in regards to process then the principles underpinning the system could change also. Perhaps if the system underwent this paper's proposed changes then different principles would be of greater value. It is also relevant that the reversal is in regards to the mens rea only. The prosecution would have to prove all other elements. Although the presumption of innocence would arguably be undermined under this proposal, it would not be disregarded altogether.

B A Citizen's Right to Silence

The proposal to reverse the burden of proof in sexual violence cases in regards to the mens rea element would result in the defendant being virtually compelled to testify as to why consent was presumed. This is a fundamental alteration to proceedings as a critical aspect of the justice system in New Zealand is the right to silence. S 23(4) of the New Zealand Bill of Rights Act upholds the right of a defendant to refrain from making any statement regarding criminal action when arrested or detained.⁷⁶ For practical purposes often defendants will provide evidence to rebut their guilt in order to establish reasonable doubt but by law they are under no obligation.⁷⁷ A reversal in the burden of proof would impose a responsibility on defendants to explain their belief in consent regarding their mens rea at the time of the alleged offence. This would undermine the right to silence. It would result in a different approach compared to the assessment of other offences. The benefit in a reversal is that it would enable an increase in information on what actually occurred rather than presuming facts. Valuable information that would otherwise be inaccessible would become available. A reversal of the burden of proof would allow for greater access to important

⁷⁶ New Zealand Bill of Rights Act 1990, s 23(4).

⁷⁷ "Section 23 Rights of persons arrested or detained" (2004) Ministry of Justice
<<http://www.justice.govt.nz>>.

information and complainants' to perceive the process as fairer. The right to silence is interlinked with the presumption of innocence. When envisaging how a reversal in the burden of proof would work in practice it is vital to acknowledge that both the presumption of innocence and the right to silence would be undermined. However there are possible procedural options that could address certain concerns regarding the rights of defendants. For instance the defendant could be interviewed pre trial in order to avoid cross-examination. As a consequence the necessary information would be disclosed without the defendant needing to testify in court. This is an illustration of the fact that although some rights may be eroded as a result of this law reform there are possible alternative processes to be explored in order to address this.

C A divisive issue that politicians may be hesitant to advocate for

Labour's consideration of a reversal of the burden of proof in sexual violence cases resulted in media criticism and concern from legal experts.⁷⁸ Warren Brookbanks, Auckland University law professor, asserted that Labour's policy challenged the fundamental principle of the presumption of innocence that is protected in the Bill of Rights Act. He emphasised that this policy possessed the potential to "capture the innocent".⁷⁹ President of the Criminal Bar Association, Tony Bouchier, asserted that the presumption of innocence is "absolute, almost constitutional" and condemned "political parties playing ping-pong with such important legal presumptions."⁸⁰ Jonathan Natusch, a criminal lawyer, labelled Labour's policy as "an insult to the fundamentals of justice."⁸¹ The proposal was contentious in its nature and prompted wide-ranging disapproval.

The negative response that followed Little's announcement of the proposal led party leader David Cunliffe to adjust his position, stating that reversing the burden of proof was one of "a range of options on the table" to generate improvements in conviction

⁷⁸ John Braddock and Tom Peters "NZ Labour Party plans to reverse burden of proof in rape cases" (28 July 2014) World Socialist Web Site <<https://www.wsws.org>>.

⁷⁹ At 78.

⁸⁰ John Braddock and Tom Peters, above n 78.

⁸¹ At 80.

rates.⁸² This demonstrates a clear difficulty in reversing the burden of proof. Legislative change is political and thus populist opinion will deter fundamental change. Politicians may be hesitant to create radical change and will be quick to reverse their position if it appears their policies will lose votes.

In regards to current action concerning the reversal in the burden of proof in sexual violence cases it is not even being considered as an option. Upon inquiry into current research developments in this area the Minister of Justice Hon Amy Adams responded:⁸³

In deciding to reject suggestions that we should reverse the burden of proof in sexual offending cases I did not require officials to provide any research or briefing papers. Instead, I made this decision because (as I noted in the House of Representatives on 25 November 2014) this Government recognises that the presumption of innocence and the right to a fair trial are fundamental parts of our criminal justice system protected under the New Zealand Bill of Rights Act. Reversing the burden of proof on such a serious criminal charge would, in my view, be inconsistent with these fundamental values.

This paper holds the position that the reversal of the burden of proof is worth consideration and research. The evidence is clear that sexual offending must be a top priority in regards to legislative reform due to the immense failings in process and conviction rates. It is appropriate to at least research proposals such as this in order to ensure that real change is distinctly possible. It is also worth noting that National proposed a reform plan regarding sexual violence during the 2014 campaign that intended to enable courts to draw an adverse inference if a defendant chose not to provide evidence.⁸⁴ This undermines the fundamental right to silence. Evidently at that point the fundamental right to silence could be undermined if it facilitated votes. Arguably it is a positive indication that policy change was being debated regarding sexual violence during election time. That illustrates a clear recognition of the necessity for change. However placing it in the public sphere to provide the illusion

⁸² At 80.

⁸³ Email from Amy Adams (Minister of Justice) to Bridget Sinclair regarding reversing the burden of proof in sexual violence cases (31 March 2015).

⁸⁴ John Braddock and Tom Peters, above n 80.

that government is concerned with sexual violence is simply not sufficient. Real change is necessary and it is time for action. An informed public conversation regarding a reversal in the burden of proof is appropriate. This is a potential reform issue that could create necessary impact and allow change. Citizens should be informed regarding an issue that has potential to create important change. Arguably it is not appropriate for the legislature to cease a discussion without first researching or discussing the proposal. A discussion regarding the partial reversal of the burden of proof could inform other legal reforms and initiate important public discussion. Arguably it is time to have the proposal of reversing the burden of proof discussed.

V THE CASE FOR REVERSING THE BURDEN OF PROOF

A Improving the Complainant's Experience in the Justice Process

As this paper has outlined, sexual violence as a criminal offence is distinct. It is distinct in its devastating nature as well as the associations of shame and judgment that are entrenched in society. A fundamental shift such as a reversal of burden of proof would be so monumental that it could create significant change, from the process itself to the way it is perceived by New Zealand citizens. There is a pressing need for law change and a fundamental alteration of the system.⁸⁵ Arguably a reversal of the burden of proof could be the drastic measure necessary to create positive change in terms of increase in reporting, conviction rates, and overall awareness and understanding of the need to understand victim vulnerability and the necessity of free consent.

Researchers, victims of sexual violence, professionals in the sexual violence sector, academics and legal professionals have attributed the limited reporting of sexual violence to the fear of their experience with the criminal justice system.⁸⁶ The principal issue expressed by complainants who experience the trial process state that they perceive their behaviour is scrutinised as opposed to the actions of the accused.⁸⁷

⁸⁵ Elisabeth McDonald, above n 6 at 490.

⁸⁶ Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand* (New Zealand Government, August 2008) at 3.

⁸⁷ Elisabeth McDonald, above n 15.

Anecdotal evidence illustrates that the process of cross-examination can be extremely traumatic.⁸⁸ This is where the reversal of the burden of proof regarding the mens rea element is advantageous as it places the focus on the accused. The current system is difficult for complainants because the defendant does not need to testify. As a result the defence focuses on consent and thus often attacks the complainant's credibility. Shifting the burden of proof could result in increased participation by the accused. Therefore the improvement of the complainant's experience is twofold. First, the process would appear fairer as the complainant would not be the only individual scrutinised. Second, the accused would be compelled to take a more active role in the proceedings. This is more reasonable as then the accused is the individual accountable to the law. Not only does this provide an improved illustration of fairness to the complainant, it sends a distinct message to the public that accountability in sexual violence rests with the accused. Regardless of the actions of the complainant, their clothing, their decisions, the accused has potentially committed a wrong and they are answerable to that fact.

A reversal in the burden of proof directly addresses the primary concern that the complainant believes their character is examined. It is crucial that complainants of sexual violence perceive the criminal justice process as an avenue to provide justice and accountability rather than a traumatic experience where they view their character to have been dissected. It is the fairness in the process that is of utmost importance. A reversal in the burden of proof regarding mens rea addresses the fact that the current system is weighed against complainants.⁸⁹ The distinct positive in the reversal of the burden of proof is therefore the fact that it directly addresses the difficulties with the current system.

Arguably sexual violence targets the vulnerable.⁹⁰ Due to the fact that most sexual violence offences are committed against women, particularly Maori women, it could be contended that this crime disadvantages a vulnerable segment of society.⁹¹ Thus a shift in the burden of proof compensates for the particular vulnerability of the affected

⁸⁸ *Sexual Crime Law Symposium*, above n 54 at 10.

⁸⁹ Interview with Andrew Little, above n 37.

⁹⁰ *Sexual Crime Law Symposium*, above n 54 at 10.

⁹¹ Ministry of Women's Affairs, above n 3, at 84.

group. Complainants require significant assistance to counteract their vulnerability and therefore their rights are of considerable importance.

B Addressing the Adversarial System in order to safeguard Complainants' rights

The adversarial method is used in common law countries including New Zealand. The purpose of this method is to gain insight into the truth through the competition between the prosecution and the defence. The outcome of a case is decided through determining who has provided the most compelling argument for their case. A critique of this system is that the pursuit of winning can overshadow the search for truth.⁹²

A core obstruction of justice for sexual violence victims is the adversarial system. As previously stated sexual violence complainants require a space to be heard and for justice to be attainable in a safe environment. The adversarial system directly contradicts this need and does not address sexual violence victims appropriately. The adversarial nature of the process results in the complainant receiving vigorous and aggressive questioning. The defendant, who possesses the fundamental right to silence, does not need to present their version of the events.⁹³ The reversal of the burden of proof would appear fairer to complainants as the defendant would possess responsibility to explain why they believed reasonably that consent existed. Reversing the burden of proof in regards to the mens rea could assist in addressing the aspects of the adversarial system that are unfairly weighed against complainants.

C A Shift in Focus: from Complainant to Defendant

A particularly beneficial aspect of a reversal in the burden of proof regarding the mens rea element is that it would enable a shift in focus from complainant to

⁹² "Appendix B: a comparison of the inquisitorial and adversarial systems" Ministry of Justice
<<http://www.justice.govt.nz>>.

⁹³ Above n 16, at 34-36.

defendant. It would address the overarching concern that causes complainants to perceive the justice system as unfair.

It is normal practice in the analysis of crime to investigate an offender's conduct and state of mind, with the victim's conduct being merely a mitigating factor with regards to sentencing. When it comes to sexual crimes, however, the victim's conduct is of central focus. Perpetrators' motivations are minimalised in a unique way that is entirely absent in other aspects of crime. Take for example the crime of theft. If an individual had their wallet stolen from them, their actions and character would not be scrutinised. The responsibility of the offence would rest solely on the accused. Sexual violence is distinct because victims are answerable to the crimes committed against them. Arguably a change is required, a shift in focus from complainants to defendants. Perhaps it is not the complainant who should bear the sole burden of stopping unwanted sexual advances. There should be shared responsibility. It should not be exclusively the complainant's duty to show that consent was not provided. This is of significant importance because many sexual violations involve duress or the perpetrator in a place of authority.⁹⁴ Often victims are in vulnerable positions.⁹⁵ Thus it may be appropriate for the perpetrators to ensure that consent is freely given. Opportunistic and coercive sexual assaults are the most pervasive and difficult to prove. A reversal in the burden of proof regarding mens rea would address this element of offending effectively.

The difficulty in ensuring justice for victims of sexual violence is a problem experienced in comparable jurisdictions. Alison Saunders, a British barrister and the Director of Public Prosecutions, has implemented significant changes to the process of sexual violence investigations. Saunders stated that it is crucial that the legal system develops a shift in thinking and focus. It is the actions of the defendant not the victim that demands attention.⁹⁶ The proposal highlights the importance of acknowledging that sexual violence victims should not experience scrutiny regarding

⁹⁴ "Types of Sexual Violence" (2015) Moving to End Sexual Assault.

<<http://movingtoendsexualassault.org/information/types-sexual-violence>>.

⁹⁵ At 94.

⁹⁶ Gordon Rayner and Bill Gardner "Men must prove a women said 'Yes' under tough new rape rules" *The Telegraph* (online ed, 28 January 2015).

their actions, whether they were intoxicated or did not react in the expected manner. Instead, the authorities and prosecutors must actively promote a greater onus on sexual violence suspects to demonstrate how the complainant had consented freely and with full capacity.⁹⁷ There should be a shift of responsibility onto the alleged offender and an emphasis on scrutinising their actions as opposed to the victims. Evidently victims are experiencing blame, judgment and embarrassment during their process in the justice system. This suffering is comparable to victims of sexual violence in New Zealand. Social prejudices are influencing the justice system and consequently victims of sexual violence are treated differently from victims of other crimes.

Martin Hewitt, who leads the Association of Chief Police Officers in regards to sexual offences, described the result of these variations, including a 22 per cent increase in reporting of sexual offences. Hewitt attributed the change to increased confidence in the justice system, but emphasised that there is significant room for improvement and continuing to send a “clear and unequivocal message to victims about how they will be treated.”⁹⁸ Sarah Green, Britain’s Director of the End Violence Against Women Coalition stated that despite the continuing need to increase justice provided for survivors of sexual violence, the changes already implemented ensured that the behaviour of the defendants would be focused on as well as that of the complainant.⁹⁹ This discussion in the United Kingdom is transferrable to the issue prevalent in New Zealand.¹⁰⁰ The discussion of procedural changes in a comparable jurisdiction shows the importance of two issues. First, the exercise of focusing on the actions of the alleged offender is crucial. It shifted the responsibility from the victim and promoted the discussion and awareness of free consent. A similar shift is necessary in New Zealand in order to promote justice and to educate. This leads to the second issue, with a fundamental change of the justice system a significant increase in awareness will result. This will exist as a deterrent for perpetrators and an encouragement for victims to seek justice. As more victims are encouraged to report sexual violence, redress could become expected rather than faintly possible. It could result in a greater

⁹⁷ At 96.

⁹⁸ At 96.

⁹⁹ At 96.

¹⁰⁰ Johnston, above n 17.

number of offenders admitting their actions and consequently pursuing help for their behaviour. Changes in the system have proven extremely valuable in Britain. In New Zealand a similar fundamental change could assist in creating an educational dialogue regarding sexual violence. Importantly the focus would be shifted from the complainant to the defendant. Consent is not the absence of no; it is the presence of yes. A reversal in the burden of proof would clearly send this message. This is educational in practice, would seem fairer to complainants and could increase reporting and conviction rates.

In New Zealand more can and should be done to rectify the weaknesses in the justice system regarding the trial process of sexual violence. A shift in focus from the complainant to the defendant could improve victim's experiences of the system and uphold their rights.¹⁰¹ There is a strong recognition that sexual violence is distinct and thus warrants a fundamental change to the current system.¹⁰² Victims and the New Zealand public must observe sexual violence being addressed seriously and that harmful sexual behaviour will not be tolerated by society or the justice system.¹⁰³

VI LIMITATIONS OF LAW REFORM

It could be argued that law in itself cannot alter attitudes and social perceptions. Prejudicial myths and stereotypes will remain regardless of change in the law. Sexual violence is a crime that requires community-level engagement. It is rarely an act between strangers but instead a crime that occurs within families, friends, schools and partners.¹⁰⁴ This is an issue that arguably needs to be engaged with by all citizens not a selected few politicians. The limitation with law reform in regards to sexual violence is the necessity of social change. If sexist myths and stereotypes pervade throughout New Zealand society then this will disadvantage complainants regardless

¹⁰¹ Ministry of Justice, 2009. *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence*. Wellington: Ministry of Justice at 59.

¹⁰² At 54.

¹⁰³ Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand* (New Zealand Government, August 2008) at 19.

¹⁰⁴ Jessie Hume, "Shocking IPCA Report Confirms Criminality of Roastbusters Actions and Police Failure" (19 March, 2015) The Daily Blog <<http://thedailyblog.co.nz>>.

of legislation. Misunderstandings and unconscious biases affect communities and therefore potential jurors.¹⁰⁵ What stereotypes a citizen holds is what a potential juror could be influenced by also. The most substantial weakness of legislative change in this area is the need to alter preconceptions of society as a whole. Arguably law reform simply does not extend as far as is required.

There is an urgent need to address sexual violence issues in New Zealand.¹⁰⁶ While it is true that a law change is not sufficient to change the discourse on sexual violence in New Zealand it is an appropriate step in the correct direction – towards understanding and justice for sexual violence victims. Legislative change firmly demonstrates standards and expectations. A reversal of the burden of proof in regards to the mens rea element would send a clear message to New Zealanders that consent should be confirmed rather than assumed. It is a fundamental change that could create a significant shift in social practices. Legal and social change is necessary. A reversal of the burden of proof could create far-reaching beneficial change for sexual violence victims.

This reform proposal would require a monumental shift in thinking. In order to allow this to be possible other measures would require implementation. This paper proposes that education is essential. A reversal in the burden of proof would provide an effective platform to promote societal discussion regarding what qualifies as consent. With education, awareness and understanding follows. The ultimate goal would be the promotion of asking questions of defendants and why they perceived consent to exist rather than a sexual violation always promoting a discussion of the complainant's character, behaviour, decision to walk home alone at night or level of intoxication. It is time that all citizens start becoming engaged in this issue and participate in a shift of thinking. Education would allow understanding as to why a reversal in the burden of proof regarding mens rea is appropriate. Sexual violence is a subject often avoided. However it is important that a public dialogue commence regarding what it means to consent. Another important element that would assist with this process is the need for

¹⁰⁵ Oliver Wright "Police need to take rapes more seriously, admits director of public prosecutions" *The Independent* (online ed, 23 August 2014).

¹⁰⁶ Nina Russell *What works in Sexual Violence Prevention and Education* (Ministry of Justice, July 2008) at 11.

the legislature to indicate the meaning of consent. Currently there is no legislative definition of consent. It would be useful if the legislature could show leadership on this issue by providing a clear definition of what it means to consent to sexual activity. The reversal of the burden of proof in regards to the mens rea accompanied by a clear definition of consent and education could create real meaningful change in this area of law that so urgently requires it.¹⁰⁷ With this collaborative proposal understanding and change is a distinct possibility.

Limitations should always be discussed and kept at the forefront of any considered policy. Law reform possesses inadequacies as all modes of change do. It is the position of this paper that regardless of possible limitations of law reform it is still worth consideration. New Zealand is a nation that prides itself on being innovative and forward thinking regarding policy change. New Zealand women fought to be the first country in the world to gain universal suffrage. Complete equality is still yet to be achieved. Legislative change is an avenue that should be explored in order to address the fact that sexual violence victims are being failed by the criminal justice system.

VII CONCLUSION

This paper has demonstrated that the criminal process fails to achieve justice for victims of sexual offences. With a focus on the Labour Party's proposal of reversing the burden of proof in sexual violence cases, this paper has concluded that there is certainly room to explore this proposal and worth in researching it further. There are many failings of the current system that a reversal in the burden of proof regarding the mens rea element would effectively address. There is a correlation between complainants mistrust in the criminal justice process and the lack of accountability provided in the crime of sexual violence. The link between complainants perceiving their character as on trial and the process being unfairly weighed in favour of defendants could be addressed by a partial reversal in the burden of proof. This paper has asserted that this reform proposal is certainly capable of addressing key problems with the current process.

¹⁰⁷ As demonstrated by the statistics provided in this paper.

Sexual violence is an issue in New Zealand that urgently requires address. This paper has facilitated a necessary discussion regarding sexual violence and how to create meaningful change. It has analysed the positive and negative aspects of a proposal to partially reverse the burden of proof. The injustice for sexual violence victims and the failings of the current system must be measured against the importance of the presumption of innocence and an individual's right to a fair trial. There are two competing interests that are both of importance. As this paper discussed there are possible amendments to the proposal that could address the concerns to fair trial processes. Sexual violence is so distinct in its nature that this paper has argued that a different response may be necessary.

This paper has concluded that a reversal in the burden of proof in regards to mens rea has not received adequate consideration. It is an issue worthy of informed public debate. As this paper has illustrated there are aspects of the criminal justice process that are of concern that this proposal could directly address. It certainly has potential to create effective change. A comprehensive scheme including a reversal of the burden of proof regarding the mens rea element, education and a legislative definition of consent is worth proper consideration. Only time will tell whether the legislature deems the injustice experienced by sexual violence victims as enough to justify a fundamental change.

VIII Bibliography

A Cases

R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1.

R v Rangī [1992] 1 NZLR 385.

B Legislation

Bill of Rights Act, 1993.

Crimes Act, 1961.

C Texts

Andrew Stumer *The Presumption of Innocence: Evidential and Human Rights Perspectives* (Hart Publishing, 2010).

AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012).

C Ramazanoglu and J Hollan *Feminist Methodology: Challenges and Choices* (Sage Publications, London, 2002).

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

J Finn and J Bruce Adams *on Criminal Law* (Student Ed, Thomson Reuters, Wellington. 2014).

D Journal Articles

Anthony Gray "Constitutionally Protecting the Presumption of Innocence" (2011) 31(1) *The University of Tasmania Law Review* 131.

Elisabeth McDonald "From 'Real Rape' to Real Justice? Reflections on the Efficacy of more Than 35 years of Feminism, Activism and Law Reform" (2014) 45(3) *VUWLR* 487.

Elisabeth McDonald "Sexual violence on trial: An update on reform options" (2011) 25(1) Women's Studies Journal 63.

Kuan Chung Ong "Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights" (2013) 32(2) UTasLawRw 247.

Kwong-leung Tang "Rape Law Reform in Canada: The Success and Limits of Legislation" (1998) 42(3) International Journal of Offender Therapy and Comparative Criminology 258.

E Parliamentary and Government Materials

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

Ministry of Justice *Improvements to Sexual Violence Legislation in New Zealand* (New Zealand Government, August 2008).

Ministry of Justice. 2009. *Te Toiora Mata Tauherenga: Report of the Taskforce for Action on Sexual Violence*. Wellington: Ministry of Justice.

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

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

(25 November 2014) 702 NZPD 759.

F Internet Materials

"Appendix B: a comparison of the inquisitorial and adversarial systems" Ministry of Justice <<http://www.justice.govt.nz>>.

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

“Civil Pecuniary Penalties” New Zealand Law Commission

<<http://ip33.publications.lawcom.govt.nz>>.

“Demand justice for Roast Busters Survivors” (2014) Action Station

<<http://www.actionstation.org.nz>>.

“Feelings after sexual assault” (1 May 2013) Centre Against Sexual Assault

<<http://www.secasa.com.au>>.

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

John Braddock and Tom Peters “NZ Labour Party plans to reverse burden of proof in rape cases” (28 July 2014) World Socialist Web Site <<https://www.wsws.org>>.

Kirsty Johnston “Better system will deliver justice” (8 December, 2013) Stuff

<<http://www.stuff.co.nz>>.

“No Right Turn: Time to defend the presumption of innocence” (9 July 2014) No Right Turn <<http://norightturn.blogspot.co.nz>>.

“Section 23 Rights of persons arrested or detained” (2004) Ministry of Justice

<<http://www.justice.govt.nz>>.

“Section 25: Minimum standards of criminal procedure” (2004) Ministry of Justice

<<http://www.justice.govt.nz>>.

“Statistics: Sexual Violence in Aotearoa New Zealand” (2011) Rape Prevention Education <<http://rpe.co.nz/information/statistics>>.

“Strict liability or reversal of the burden of proof for offences” The Treasury

<<http://www.treasury.govt.nz>>.

“Survivor Advocate” (2011) Rape Prevention Education

<<http://rpe.co.nz/advocacy/survivor-advocate>>.

Tan Ghee Phaik, “Reversing the burden of proof in rape cases – a tantalizing proposal?” (2011) Attorney General’s Chambers of Malaysia <<http://www.agc.gov.my>>.

“The Presumption of Innocence” (2015) Fair Trials <<http://www.fairtrials.org>>.

“Types of Sexual Violence” (2015) Moving to End Sexual Assault. <<http://movingtoendsexualassault.org/information/types-sexual-violence>>.

G Newspaper Articles

Derek Cheng “Rape accused would have to prove consent under Labour plan” *The New Zealand Herald* (online ed, 8 July 2014).

Gordon Rayner and Bill Gardner “Men must prove a women said ‘Yes’ under tough new rape rules” *The Telegraph* (online ed, 28 January 2015).

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

H Papers

Gabriela Chihaiia “Short Essay on Presumption of Innocence” in *Legal Practice and International Laws* 193.

Sexual Crime Law Symposium (Equal Justice Project, August 2014).

Wood, N. and Dickson, S. (2013). *Reporting Sexual Violence in Aotearoa New Zealand*. Taiwi Prevention Project, TOAH-NNEST.

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