

GENDER NEUTRALITY AND THE DEFINITION OF RAPE: CHALLENGING THE LAW'S RESPONSE TO SEXUAL VIOLENCE AND NON-NORMATIVE BODIES

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In 2005 the legislature of Aotearoa New Zealand chose for the second time, the first occurring in 1986, to retain the offence of rape as one of the ways in which the crime of sexual violation may be committed. The current definition of rape means that only those with a penis can be guilty of this offence, and only those with female genitalia can be a victim of such a crime. Despite use of the term in public vernacular being wider than the legal definition, little advocacy has been focussed on reforming this law, although those in the trans and intersex communities recognise their experiences are not reflected in the description of rape. In this piece I note the importance, and difficulty, of making visible within the legislative framework both the gendered nature of sexual offending as well as the vulnerabilities of those who have non-normative bodies. By considering the theory and critical analysis which informed the debates and law reform undertaken in other jurisdictions, I conclude that it is time to reconsider the actus reus of rape in Aotearoa New Zealand, with the aim of extending its scope so as to be responsive to all communities' experiences of sexual violence.

I INTRODUCTION

Beginning with reform which took shape primarily in the mid-1970s, most common law jurisdictions have now adopted revised definitions of varying types of sexual offences. Early advocates for change were primarily concerned with the limited scope of the traditional crime of rape, including the requirement for force and the marital exemption.¹ Feminists also agitated for

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¹ For example, see Loreen Snider, 'Legal Reform and Social Control: the Dangers of Abolishing Rape' (1985) 13 *International Journal of the Sociology of Law* 337.

the gendered nature of sexual offending to be acknowledged in terms of both substantive and procedural rules.

Legislative responses varied across jurisdictions, with some removing any reference to the crime of ‘rape’, with others defining rape more widely to include anal (as well as vaginal) penetration by a penis, or by other body parts or objects. While the reform in Aotearoa New Zealand which took effect in 1986 was wide-ranging and progressive in many areas, ‘rape’ was nevertheless preserved as a gender-specific crime within the broader umbrella of ‘sexual violation’. The actus reus of rape was defined at that time as the (non-consensual) penile penetration by a male, of a female’s vagina.²

In 2005 the offence of rape in s 128 of the Crimes Act 1961 (NZ) (‘the Act’) was again specifically preserved as an exception to one of the aims of the proposed reforms, namely gender neutrality. However, even though the Parliamentary Select Committee made the decision that rape (of a woman by a man) should be retained as one way that sexual violation can be committed, the enacted version refers not to the gender of the alleged offender (‘person A’), but rather to their possession (and use) of a penis.³ Similarly, the victim (‘person B’) is not named as female or a woman but rather as someone who has female ‘genitalia’ (s 128(2)).⁴

In this article I focus primarily on the reform debate concerning the definition of ‘rape’ in Aotearoa New Zealand, and the legislative response to that debate, while comparing that process and result with the reform of the definition of sexual violence in other common law jurisdictions. Although not always expressed in the formal records of the legislative processes, the primary tension observed, particularly by feminists, was between the desire for a law

² Section 128 of the Crimes Act 1961 (NZ) (historical text):

‘(1) Sexual violation is—

(a) The act of a male who rapes a female; or

(b) The act of a person having unlawful sexual connection with another person.

(2) A *male rapes a female* if he has sexual connection with that female occasioned by the penetration of her vagina by his penis...’.

³ Andrew Sharpe, ‘Attempting the ‘Impossible’: The Case of Transsexual Rape’ (1997) 21 *Criminal Law Journal* 23, 23: ‘The offence of rape has traditionally been gender specific. That is to say, it has required a male perpetrator and a female victim. Despite degrees of degenderisation ... rape continues to be a gendered offence where the target of the violence is the vagina. In some [Australian] States the gendered nature of this offence continues to require a female victim while, in those States which guarantee the possibility of conviction for transsexual rape, the gendered nature of the offence has come to be expressed, more minimally, in terms of orifice specificity’.

⁴ ‘Genitalia’ as the defining term was introduced on 1 July 1994 to replace ‘vagina’, to avoid argument about the extent of penetration required for the offence of sexual violation or rape: see *R v Karatoa* (1991) 11 CRNZ 691 (CA) and *R v King* [1995] 3 NZLR 409, 409–10.

that was responsive to all forms of serious sexual offending and the hope for a law that accurately reflected the gendered harm that is sexual violence.

While reform aimed at gender neutrality in many jurisdictions has had the effect of defining penetrative sexual offending against trans women, for example, in the same way as offending against cis women, I found no record of this being a stated *aim* of any reform.⁵ Similarly, where the definition of rape was extended in a number of jurisdictions to (also) include non-consensual penile penetration of a person's mouth or anus, most of the support for this type of reform was on the basis that it reflected the equivalence of harm of such offending, for both male and female victims. There has been little, if any, discussion of the consequential effect that such a change may have for trans and intersex people – despite the current recognition that they may also claim they have been raped, as long as the alleged offender used their penis to violate them. More recently, in jurisdictions where the term 'rape' has been extended to include penetration by body parts and objects, in some Australian states for example, there is acknowledgment that such a change does reflect the common usage of rape, and is inclusive of the experiences of gender non-conforming people.⁶

I agree that the terminology chosen to describe serious sexual offending is culturally (and legally) significant, as it 'defines deviant sexual activity and therefore establishes the limits and terms of normal heterosexual encounters and gender relations'.⁷ The choice between using 'rape' as opposed to 'sexual

⁵ Note that in this article I use the word 'trans' to refer to all people 'who do not perceive or present their gender identity as the same as that expected of the group of people who were given the equivalent sex designation at birth': Stephen Whittle, *Respect and Equality: Transsexual and Transgender Rights* (Cavendish, 2002), xxiii. I use the words 'trans woman' or 'trans women' to refer to trans people whose gender identity is female and 'trans man' or 'trans men' to refer to people whose gender identity is male (and 'trans masculine' is used to refer to trans people who identify on the masculine part of the gender continuum, but not as male). 'Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies' United Nations Free and Equal, 'Fact Sheet – Intersex' <https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf> ('Free and Equal Factsheet')

'Cisgender' or 'cis' means in this article a person whose gender identity is congruent with the sex they were assigned at birth. I find it helpful to use 'transmisogyny' as a way of referring to 'the negative attitudes, expressed through cultural hate, individual and state violence, and discrimination directed toward trans women and trans and gender non-conforming people on the feminine end of the gender spectrum': Laura Kacere, 'Transmisogyny 101: What It Is and What Can We Do About It', *Everyday Feminism* (27 January 2014) <<http://everydayfeminism.com/2014/01/transmisogyny/>>.

⁶ See, eg, Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 143, 144.

⁷ Danette C Cashman, 'Negotiating Gender: A Comparison of Rape Laws in Canada, Finland and Pakistan' (2000) 9 *Dalhousie Journal of Legal Studies* 120, 122.

assault', is, as Peter Rush argues, 'more than a matter of semantics ... as [the choice] addresses the symbolic importance of the language of the law, as well as seeks to register what is at stake in the legal regulation of sexual relations and social norms of sexual comportment.'⁸

It is now 15 years since the New Zealand Select Committee's claim that 'rape' is commonly used to refer to an abhorrent sexual crime against women, meaning penetration of a woman's vagina by a man's penis.⁹ However, this aspect of the actus reus of rape does not accord with the common usage of the term, either in Aotearoa nor in many other jurisdictions. The current definition preserves an aspect of the traditional (gendered) offence, through the requirement that the offender ('person A') has a penis – but this refers to possession of particular genitals rather than person A's sex or gender identity.

A number of issues are therefore raised by the current definition of the actus reus of rape in Aotearoa New Zealand. Should 'rape' be retained as a separate offence? If so, should it be defined in a way that reflects its common usage and/or to reflect the gendered nature of the crime? In particular, should it be defined to include penetrative offending against trans and intersex people,¹⁰ people who experience high levels of sexual violence?

In order to explore these questions, I first consider the current research about the vulnerabilities of those within the trans and intersex communities. This is followed by discussion of the arguments made in favour of various reforms, both in New Zealand Aotearoa and in other jurisdictions. I do not focus, in this work, on cis male victims of sexual offending,¹¹ nor on other aspects of the actus reus of rape (such as consent). I do comment on whether

⁸ Peter R Rush, 'Criminal law and the reformation of rape in Australia' in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 237, 244.

⁹ Select Committee Report (2004).

¹⁰ Trans women and men, as well as those who identify and present as non-binary, are also at much higher risk of sexual and physical violence and the current legislative terminology does not reflect or address their vulnerabilities. For research about non-binary people and trans men reporting high rates of lifetime sexual assault see Sandy E James et al, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2016). Violence inflicted on those who challenge fixed or binary norms of what it means to be female or male can also be conceptualised as gendered harm, which s 9(1)(h) of the *Sentencing Act 2002* (NZ) acknowledges in some way (although it is not often referred to by sentencing judges - see further Elisabeth McDonald, 'No Straight Answer: Homophobia as Both an Aggravating and Mitigating Factor in New Zealand Homicide Cases' (2006) 37 *Victoria University of Wellington Law Review* 223). More attention needs to be given to the extent of violence and its impact on trans and gender diverse communities.

¹¹ See, eg, Ruth Graham, 'Male Rape and the Careful Construction of the Male Victim' (2006) 15 *Social & Legal Studies* 187.

different types of offending (including label choice) result in different procedural, evidential or sentencing outcomes, and to what extent the official recording of sexual offending may reinforce historical definitions, despite legislative change.

In particular, I am concerned as to whether the definition of rape can reflect and be responsive to the gendered nature of sexual offending as well as the particular vulnerabilities of those who are gender non-conforming. I conclude that the definition of rape should be extended to include all types of sexual violation currently captured by s 128, but only if this change is accompanied by much improved information-gathering about the age and gender identity of, and relationship between, alleged offenders and those who report rape.

II TRANS AND INTERSEX PEOPLE'S EXPERIENCES OF SEXUAL VIOLENCE

There is much evidence that trans women, as well as those who identify along the trans feminine spectrum, experience high rates of sexual and physical violence. Further, the international trans murder monitoring (TMM) project consistently reports that the vast majority of murders of trans people are of trans women.¹² Recent studies also show high rates of sexual violence against trans masculine people, particularly by family members and intimate partners.¹³ In November 2015, after reviewing the literature available, Taylor Brown and Jody Herman concluded:¹⁴

Findings of lifetime IPV [intimate partner violence] among transgender people from purposive studies range from 31.1% to 50%.

Only one study [has] directly compared the lifetime prevalence of IPV among transgender and cisgender people. This study found that 31.1% of transgender people [compared to] 20.4% of cisgender people had ever experienced [intimate partner violence] or dating violence.

¹² Transgender Europe, 'Trans Murder Monitoring' <<https://transrespect.org/en/research/trans-murder-monitoring/>>.

¹³ *Report of the 2015 U.S. Transgender Survey*, above n 10.

¹⁴ Taylor N T Brown and Jody L Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People: A Review of Existing Research* (Williams Institute, UCLA, 2015), 3. See also R L Stotzer's review in 2009, cited in Kristie L Seelman, 'Unequal Treatment of Transgender Individuals in Domestic Violence and Rape Crisis Programs' (2015) 41 *Journal of Social Science Research* 307, 310. Note however this material does not differentiate between transmasculine and transfeminine experiences.

The first research project in Aotearoa New Zealand to investigate experiences of sexual violence inside ‘Rainbow communities’,¹⁵ gathered material from hui (meetings),¹⁶ as well as an individual victimisation survey.¹⁷ Those participating in the research had experienced high rates of all kinds of abusive behaviour, including penetrative sexual violation. The context of transmisogyny created specific risks for trans women, including street violence, sexual harassment, threats of sexual violence and actual sexual assault in public contexts – all related in some way to trans women as breakers of gender norms. Within intimate relationships, trans people’s experiences of abuse included mis-gendering as well as hiding or removing hormones, gender affirming equipment or clothing, in order to control trans and gender diverse people’s movements.¹⁸

Research in other jurisdictions exposes similar patterns of violence, including high rates of sexual abuse.¹⁹ Other forms of violence which are particular to relationships involving trans people include: physical abuse that targets body parts which signify gender (such as chest, genitals and hair);

¹⁵ For this project, ‘Rainbow’ was used for people identifying under sex, sexuality or gender diverse umbrellas in Aotearoa New Zealand. The foreword to the survey invited people to respond if they identified as part of the Rainbow community, including akava’ine, asexual, bisexual, fa’afafine, fakaleiti, FtM, gay, gender fluid, gender-neutral, gender nonconforming, genderqueer, gender variant, hinehi, hinehua, intersex, lesbian, mahu, MtF, non-binary, palopa, pansexual, polysexual, queer, questioning, rae rae, tangata ira tane, takatāpui, tongzhi, trans man, trans woman, trans feminine, transgender, trans masculine, transsexual, vaka sa lewa lewa or whakawahine and more.

¹⁶ Hohou Te Rongo Kahukura – Outing Violence held 18 community hui (meetings) in 2015. Attendance included people explicitly identifying as takatāpui, leiti, fa’afafine, transmasculine, transfeminine, trans women, trans men, gender non-binary and genderqueer, gay, lesbian, bisexual, pansexual and asexual, intersex, queer and questioning. Trans and gender diverse people attended the majority of hui.

¹⁷ Four hundred and seven people answered the online survey, of which 150 people identified as one of: Transgender, Non-binary, Tangata Ira Tane or Whakawahine: Sandra Dickson, *Building Rainbow Communities Free of Partner and Sexual Violence 2016* (Hohou Te Rongo Kahukura – Outing Violence, 2016) <<http://www.kahukura.co.nz/uncategorized/reportandfindings/>>.

¹⁸ Ibid. For example, 17% of trans and gender diverse respondents reported experiencing at least one partner hiding or throwing away hormones or gender affirming equipment or clothing.

¹⁹ See, eg, Bianca Fileborn, *Sexual violence and gay, lesbian, bisexual, trans, intersex and queer communities – Resource Sheet* (March 2012) Australian Centre for the Study of Sexual Assault <<https://aifs.gov.au/sites/default/files/publication-documents/rs3.pdf>>; Australian Human Rights Commission *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights* (2015); Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities* (Washington DC, 2015); *Report of the 2015 U.S. Transgender Survey*, above n 10; Emily Waters, *Lesbian, Gay, Bisexual, Transgender, Queer, and HI-Affected Intimate Partner Violence in 2016* (National Coalition of Anti-Violence Programs, 2017); Erik Scheider, *An insight into respect for the rights of trans and intersex children in Europe* (Council of Europe, 2013); Brown and Herman, above n 14.

touching body parts where someone has asked not to be touched because of gender identity; or, coercion around sexual activities using gender conformity as the rationale or excuse (let me show you how ‘real’ women or ‘real’ men have sex).²⁰

For trans women, the fear of rape becomes an additional anxiety when their gender expression is female:²¹

Multiple transwomen cite the potential of rape as the impetus of their increased fears. Indeed, research suggests that rape frequently operates as a ‘master offence’ for women. Because other types of victimization, such as being mugged, could lead to sexual assault, rape is an omnipresent fear for (trans) women. For example, in response to why her safety perceptions have changed, Erica, a software programmer who is lesbian, communicates just that: ‘There is always the fear of rape.’ Erica, in her six years of living as a woman, has come to understand that rape is a constant threat.

To the concern about being positioned as a woman and vulnerable in the ways most cisgender women are, is added the fear of ‘discovery’ of their trans status or legal sex, which may make more serious, or be the catalyst for, sexual or physical violence.²² Violence as a consequence of ‘discovery’ remains an on-going reality for many trans people:²³

It is not uncommon for transpeople who are ‘exposed as deceivers’ to be sexually assaulted as a kind of punishment. And forced genital verification itself obviously constitutes sexual assault and abuse... [T]he raping of [trans men] [also] emerges as an obvious strategy for putting ‘women back in their rightful place’.

²⁰ Leigh Goodmark, ‘Transgender People, Intimate Partner Abuse and the Legal System’ (2013) 48 *Harvard Civil Rights-Civil Liberties Law Review* 51.

²¹ Jill E Yavorsky and Liana Sayer, ‘“Doing Fear”: The Influence of Hetero-Femininity on (Trans) women’s fear of Victimization’ (2013) 54 *The Sociology Quarterly* 511, 520.

²² *Ibid* 521. This is also a fear for trans masculine people who have not had gender affirming genital surgery – which is the majority of trans men in New Zealand. See further Elisabeth McDonald and Jack Byrne, ‘The Legal Status of Transsexual and Transgender Persons in Aotearoa New Zealand’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia, 2015) 527–568.

²³ Talia Mae Bettcher, ‘Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion’ (2007) 22(3) *Hypatia* 43, 55–57. See also generally Jens M Scherpe and Peter Dunne, ‘Comparative Analysis and Recommendations’ in Jens M Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia, 2015) 615–663.

The historical story of the vulnerabilities of trans and intersex communities in Aotearoa New Zealand is consistent with the outcome of more recent research. In 1996 the following piece appeared in what is now *The Dominion Post* newspaper in Wellington:²⁴

‘Rape victim’ charged

A transvestite, 28, who claimed to have been raped by three men in a Petone house ... was yesterday charged with making a false complaint.

[P]olice had already charged the three men with sexual violation by unlawful sexual connection ... But police said they would drop the charges.

It appeared the complainant, a man dressed as a woman, offered to have sex with the men, who beat him up when they discovered he was not a woman...[the] Detective said.

The transvestite laid a rape complaint and was admitted to hospital overnight.

There are many aspects of these events and their reporting which are troubling. Leaving to one side the connection made between gender expression and credibility, it appears as though ‘the men’ faced no consequences for their assault of the complainant, despite the fact that their actions led to the complainant’s hospitalisation. It is also unclear whether the assault formed part of a sexual violation which occurred after the ‘discovery’. Nor has any care been taken to use the gender identity of the complainant – who is referred to as ‘a man dressed as a woman’.

Five years later in 2001 there was evidence in the New Zealand media about the difficulty trans men may have reporting sexual violence. In this case the headline stated ‘Police drop sex charges’. The article read:²⁵

Police have dropped charges against a 47-year-old man after *discovering* that the *so-called victim* was not a 16-year-old boy but a 30-year-old woman.

The man ... faced 27 charges and spent five weeks in custody before the police realised they had been *conned*.

The woman could face prosecution and the man is considering seeking compensation...

According to the police summary, the man had picked up the woman in central Auckland in November and met her on a semi-regular basis until March this year ...

²⁴ “‘Rape victim’ charged”, *The Dominion Post*, (Wellington), 14 April 1992, Wellington, 6.

²⁵ ‘Police drop sex charges’, *The Press*, (Christchurch), 27 July 2001, 3 (emphasis added).

The complainant's credibility was demolished when it was discovered that she was a woman and not a teenage boy.

Charges were dropped when police found the complainant had given a false birth certificate.

[Defence counsel] said the woman had *fooled* not only the police about her gender but also health professionals. She had previously had her breasts removed.

This newspaper report also makes for worrying reading. Here is again a public, and not at all nuanced, link made between the complainant's gender expression and credibility. Whether the person was a trans man, gender-fluid or a woman should not, in any event, make any difference to an inquiry into whether they were sexually assaulted or violated. The language of 'discovery', 'fooling', 'conned' and 'so-called victim' indicates that the police response was due to their reaction to the complainant's gender identity, viewed as fraudulent conduct, as opposed to the fact of their complaint, which may well have been true.

To me, this report suggests a tragic story of a vulnerable trans man, surviving by working in the sex industry (perhaps the only way to pay for reconstructive surgery), changing identity documents to assist with personal safety, when the requirements to do so legally were likely financially and socially unavailable (at that time, and for many, still).²⁶ His report to the police of sexual offending was reacted to not from a place of knowledge and understanding, but from misinformation and discrimination. No doubt changing a legal document would impact to some extent on the credibility of any complainant, but it is unlikely to result in failure to fully investigate the truthfulness of the claims as it was in this case.

It may be overly optimistic to say that police response to these events would be different in 2019, but it is certainly still sadly the case that trans women experience this kind of violence. Framing a transgender woman's privacy as 'deceit' has been critiqued as both a homophobic and transmisogynistic justification for so-called 'trans panic' defences.²⁷ Such media reporting reconfirms that over time it has consistently been unsafe for trans people to report offending to the police, especially sexual offending, a context in

²⁶ See McDonald and Byrne, above n 22, 545ff.

²⁷ See *Report of the 2015 U.S. Transgender Survey*, above n 10.

which trans people are viewed as deceptive and therefore culpable themselves.²⁸ Most recently, trans or gender non-conforming people have been convicted of committing sexual offending, based on the ‘fraud’ of not disclosing their trans status or legal sex.²⁹ Lack of safety for trans and gender non-confirming people within the prison system is also well documented in all jurisdictions who have undertaken research to explore the issue.³⁰

Coupled with a high incidence of sexual violence, trans and intersex people are therefore likely to experience little support from either community-based groups or from the criminal justice system.³¹ The recent research into partner and sexual violence in Rainbow communities in Aotearoa New Zealand identified both high levels of sexual and physical violence, and also disappointing responses received by members of trans and intersex communities when seeking help after such experiences, including from police.³²

It is uncertain how many people have been successfully prosecuted for sexually violating a trans person in Aotearoa. Only one sentencing case in searchable legal databases refers to the trans status of a complainant in relation to a sexual assault or rape charge. In that case the defendant was convicted of the sexual violation of a ‘transsexual’ sex worker as well as the rape of a 17 year old girl.³³

In another case, *R v Accused (CA 202/91)*,³⁴ the New Zealand Court of Appeal dismissed the defendant’s appeal of his conviction for two charges of sexually violating sex workers. In the appellate decision, one of the

²⁸ Alex Sharpe, ‘Expanding Liability for Sexual Fraud through the Concept of ‘Active Deception’: A Flawed Approach’ (2016) 80 *Journal of Criminal Law* 28; Alex Sharpe, ‘Sexual Intimacy, Gender Variance, and Criminal Law’ (2015) 33(4) *Nordic Journal of Human Rights* 380.

²⁹ Samantha Pegg, ‘What the Gayle Newland sex deceit case means for transgender people’, *The Week UK* (online), 16 September 2015 <<http://www.theweek.co.uk/65251/what-the-gayle-newland-sex-deceit-case-means-for-transgender-people>>.

³⁰ See the work and associated submissions to the Special Rapporteur against Torture, for example: *APT note to the United Nations Special Rapporteur on Torture* (4 November 2015) The Association for the Prevention of Torture <http://www.apt.ch/content/files_res/apt_briefing-note-to-unsrt_report_gender.pdf>.

See also the New Zealand Equal Justice Project, *The Rights of Transgender People in Prison* (Auckland, 2016) <<https://cdn.auckland.ac.nz/assets/central/about/equal-opportunities/information-for-students/lgbti/Transgender-People-in-Prisons-Research-Paper-EJP.pdf>>.

³¹ See, eg, *Advocating For Intersex Survivors of Sexual Violence – Brochure*, Transformative Healing <http://www.thiowa.org/uploads/4/7/1/7/47170477/intersex_survivor_advocacy_brochure.pdf>.

³² See also Dickson, above n 17, 14: a trans woman reports having an unhelpful and distressing experience complaining to police about an assault as a consequence of her husband justifying his behaviour to the police on the basis he had just found out she was trans.

³³ *R v Cruller* [2004] BCL 977.

³⁴ (1991) 7 CRNZ 604 (CA).

complainants is described as female, and the other is interchangeably described as a 'transvestite' and as a 'male prostitute'.

In both of these cases in which trans women were victims of sexual offending, it must be noted that the defendant was also charged with attacks on cis women, indicating a higher likelihood of prosecution (and conviction) than in cases in which the (sole) victim is trans. I have found no cases in the publically accessible legal databases in which a person was convicted solely of the sexual violation of a trans woman or trans man.³⁵

There are also no cases in which an intersex person (or a person of 'indeterminate' sex) is identified as a complainant in a case involving sexual violence. As the verdict (and sentencing) in most District Court trials are never publically accessible (except to the extent they are reported in the media), this does not mean no such cases exist, however the most recent local research³⁶ indicates that the reporting rate for trans and intersex people is extremely low. People in these communities simply do not engage with the criminal justice system.

Given the information now available about the extent of offending against trans and intersex (or non-binary) people, it is likely the lack of publically available information about prosecution of such offences is the result of a combination of extremely low reporting rates and high rates of attrition. This invisibility or absence of these communities is no doubt compounded when data is not collected consistently about complainants' gender identity, particularly if the sole document used to verify a person's identity is a birth certificate. This is one of the reasons to consider how rape is legally defined. Changing the definition may impact on increased resources provided to support agencies, higher reporting rates and less attrition, as well as influencing how such crimes are understood, both by those committing them and by trans and intersex victims and survivors. In the context of the move to gender neutrality in sexual offences beginning in 2003, however, no particular attention was paid to the specific experiences of those in the trans and intersex communities.

³⁵ Cases available on legal databases include, primarily, appeals from guilty verdicts or pre-trial evidential rulings. Verdicts from jury trials are not reported, and only infrequently are verdicts from High Court judge alone trials uploaded to the databases. This claim about visibility of trans or intersex complainants must therefore be read with that limitation in mind. Extended research of police or court files is needed to identify the extent to which members of these communities report sexual violence.

³⁶ Hohou Te Rongo Kahukura, above n 16; Dickson, above n 17.

Some thought was given to the situation of trans and intersex people, it must be presumed, because of the definitions that were introduced as part of the 2005 reforms. ‘Penis’ and ‘genitalia’ are now defined in s 2 of the Crimes Act 1961 so as ‘to include a surgically constructed or reconstructed organ analogous to a naturally occurring penis [or genitalia] (whether the person concerned is male, female, or of indeterminate sex)’. Despite this (arguably) inclusionary language, the current definition of rape in Aotearoa New Zealand actually means that:³⁷

- People with female genitalia cannot rape (this includes most trans men in Aotearoa New Zealand as it is rare for them to have undergone genital reconstruction surgeries – so they are usually in the position of ‘person B’);
- People without female genitalia cannot be raped (this includes most trans women in Aotearoa New Zealand as only a minority will have undergone genital reconstruction surgeries – so they are therefore often in the position of ‘person A’);³⁸
- An intersex person will have their position (as able to be raped or not) defined by their genitals, not their sex. Given intersex variations are inherently about body diversity it is unclear when an intersex person’s genitals would be assessed as ‘analogous’ to what the legislation refers to as naturally occurring genitalia – and this requirement, regardless of the person’s affirmed sex or gender identity, will dictate whether the definition of rape (as ‘person A’ or ‘person B’) applies to them.

In the next part I consider the arguments made for particular types of reform of the definition of rape, including a focus on the legislative history of

³⁷ Elisabeth McDonald, Jack Byrne and Sandra Dickson, ‘The Significance of Naming Harm for Trans Women: Defining Rape in Aotearoa New Zealand’ in Evan Hazenberg and Miriam Meyerhoff (eds), *Representing Trans: Linguistic, legal and everyday practices* (Victoria University Press, 2017) 104, 105ff.

³⁸ This is a consequence both of cost and availability for both trans men and trans women (see McDonald and Byrne, above n 22, 545ff), but also because of the desirability of undergoing significant medical procedures: ‘Many feminists are still troubled by the severe bodily interventions involved in transsexual medicine. It is worth saying that many transsexual women are too. Most hesitate, often for years, and only go forward after agonising debate. Most are well aware of the limits of bodily change in transition and know the results will not be normative’: Raewyn Connell, ‘Transsexual Women and Feminist Thought: Toward New Understanding and New Politics’ (2012) 37 *Signs: Journal of Women in Culture and Society* 857, 873.

the decision to retain ‘rape’ as a specific type of penetrative sexual offence in Aotearoa New Zealand.

III REFORMING THE DEFINITION OF RAPE

A *The Introduction of Gender Neutral Sexual Offences: Removing ‘Rape’ as a Specific Offence*

As part of a reform package aimed at gender neutrality, especially with regard to offences against children, the retention of rape as an exception to gender neutrality was a particular focus of the legislative process in Aotearoa New Zealand. As was discussed in the context of critiquing law reform initiatives elsewhere,³⁹ gender neutrality can be seen as consistent with the notion of formal equality.⁴⁰ However, it may also operate to render invisible a particular dynamic which has historically been a focus for feminist concern, that is: women and girls make up the majority of victims/survivors and men make up the majority of offenders.⁴¹ When commenting on proposals to move to gender-neutral drafting of sexual offences, Reg Graycar and Jenny Morgan referred to meeting this aim as delivering ‘equality with a vengeance’,⁴² given the effect of such reform is to obfuscate the gendered nature of sexual violence. Long-standing feminist opinion is that rape (of a woman by a man) is a gendered and therefore political act of violence which must be retained in law so as to name, record and respond to such offending.⁴³

According to Susan Brison, rape is ‘gender-motivated violence against women, which is perpetrated against women collectively, albeit not all at once and in the

³⁹ See, eg, Peter R Rush, ‘Criminal law and the reformation of rape in Australia’ in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 237, 239, noting that the new definitions ‘provided a reverse-image of the empirical reality of rape’.

⁴⁰ See further Elisabeth McDonald, ‘Feminist Legal Theory in Aotearoa New Zealand: The impact of international critical work on local criminal law reform’ (2014) *Women’s Studies Journal* 68, 70 ff.

⁴¹ The cultural scaffolding of sexual violence in western societies, including Aotearoa New Zealand, relies on notions of gender which hold women responsible as the ‘gatekeepers’ of sex and construct men and masculinities as permanently up for being sexual ‘gatecrashers’ of sex: see Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2005).

⁴² Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 1990) 34. See also Ngaire Naffine, ‘Possession: Erotic Love in the Law of Rape’ (1994) 57 *Modern Law Review* 10, 24.

⁴³ Lisa Campo-Engelstein, ‘Rape as a Hate Crime: An Analysis of New York Law’ (2016) 31 *Hypatia* 91, 97 (citations omitted).

same place'. Rape is an integral part of the broader social structure of male dominance and heteronormativity in which men lay claim to women's bodies. Indeed, rape is one way for men to perform hegemonic masculinity by 'conquering' the weaker and lesser 'other': women. Rapists are 'able to attain hegemonic forms of gender while the structurally subordinate status of their victims is reconstructed'. Through rape, the feminine body is identified and (re)produced as essentially violable. Women's bodies are often seen as weak, passive and possessions to be had by men.

Such arguments were not, however, referred to as part of the New Zealand Select Committee's reasons for retaining rape as a distinct offence. However, the importance of acknowledging the gendered nature of sexual offending did form part of the more recent advocacy concerning the definition of rape in India:⁴⁴

The proposal to make the [2013] law gender neutral was opposed by most feminist groups, citing the patriarchal social reality of the country. It was argued that, given the power structure of Indian society, the perpetrators of rape were almost always male, and the victims, female. The offence of rape, to reflect these conditions, would have to be gender specific. This does not explain, however, why homosexual rape (of men by other men, or of women by other women), and the rape of, or by, transgendered persons was not included.

Gendered neutrality in regulation or legislation undoubtedly carries with it the risk of diminishing the law's ability to appropriately address gender inequalities. Davina Cooper and Flora Renz note:⁴⁵

Child care and sexual violence are two core areas where critics argue gender-neutral laws do little to combat existing inequalities, and may, by *masking* socially inscribed gender distinctions, have iniquitous effects instead, whether in relation to the unequal distribution of domestic responsibilities, or in relation to men's use of sexual violence to control women.

In the first comparator jurisdiction to remove the term 'rape' and replace it with a three-tiered 'sexual assault' law in 1983, Canadian feminists hoped that

⁴⁴ Shradha Chaudhary, 'Reconceptualising Rape in Law Reform' (2017) 13 *Socio-Legal Review* 156, 159.

⁴⁵ Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to its Meaning and Value?' (2016) 43 (4) *Journal of Law and Society* 483, 488 (emphasis in original). See also Kathryn McNeilly, 'The Illusions of Post-feminism, Ghosts of Gender and the Discourses of Law' (2012) 1(2) *feminists@law* 2.

gender neutral language and desexualising rape would result in a culture change regarding the prevalence and response to sexual violence. The aim was to challenge the (unequal) notion that rape as legally defined could only be by a man on a woman (reinforcing the position of men as normatively sexually aggressive and women as normatively sexually passive). By ‘shifting to a generic sexual assault provision, which emphasized the violent nature of rape, women hoped to overcome the gender discrimination inherent in the law.’⁴⁶ However, as Lise Gotell observes, ‘this strategy misrepresent[ed] the problem of rape by removing it from its deeply gendered context and obscuring the relationship between male power, violence and sex’.⁴⁷ She argues that such reform has made no appreciable difference to the criminal justice response to sexual violence, nor to the gendered nature of the harm.⁴⁸ Loreen Snider foretold of the likely undesirable consequences of the changes while the legislative process had just concluded:⁴⁹

[T]he reform initiative went forth because the old laws seemed to threaten the principles of universality and equality which the Anglo-American legal system purports to embody. The package was ‘sold’ because it seemed to extend the goal of ‘justice for all’. In fact, the result will be most likely to reinforce state control over the large and impotent underclass.

Also writing in 1985, Christine Boyle argued that “we cannot understand the concept of sex divorced from its meaning in our society”, and noted the inherent risks in a reform that ‘neutralises’ rape:⁵⁰

The change to a gender-neutral sexual assault law discourages analysis of the law in gender-specific terms. This change was a legislative order to raise the level of abstraction beyond gender and to stop thinking about sexual assault as something that men do to women (or to other men, thus putting those other men into the degrading position of being treated like a woman). Although a sex-blind and gender-neutral law will hardly help clarify the meaning of the term

⁴⁶ Danette C Cashman, ‘Negotiating Gender: A Comparison of Rape Laws in Canada, Finland and Pakistan’ (2000) 9 *Dalhousie Journal of Legal Studies* 120, 126.

⁴⁷ Lise Gotell, ‘Canadian sexual assault law: Neo-liberalism and the erosion of feminist-inspired law reforms’ in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 209, 210.

⁴⁸ *Ibid* 213.

⁴⁹ Snider, above n 1, 352.

⁵⁰ Christine Boyle, ‘Sexual Assault and the Feminist Judge’ (1985) 1 *Canadian Journal of Women and the Law* 93, 104.

sexual, a meaning which must be deeply imbued with the significance attached to gender, it should hardly be surprising when judges do what they have been told to do and leave gender out of the context.

In their 16 April 2004 submission to the New Zealand Select Committee the Auckland Women Lawyers Association ('AWLA') favoured removal of the term 'rape', making similar observations to those previously made in Canada and some Australian jurisdictions:⁵¹

Factors favouring the repeal of the term from the Crimes Act include the fact that:

5.1 The definition of rape is currently limited to male/female sexual genital assault. That definition is out of step with the fact that male/male and male/female anal sexual assault occurs. A gender neutral approach, through a generic offence of unlawful sexual connection, would reflect reality and would be consistent with the (positive) trend in the reforms to use gender neutral language;

5.2 Many forms of sexual offending are horrific. Any victim who has suffered a degrading form of abuse, but not penetration, should not be made to feel that what he or she has endured is less serious because it is not technically 'rape'. Providing a single category of offence (unlawful sexual connection) would more accurately reflect our society's abhorrence for all forms of sexual abuse, no matter the nature of the abuse; and

5.3 A shift away from the term 'rape' may reduce the adverse impact of the 'rape myths' that have evolved over many years. Rape myths have long been suspected of impacting on the low conviction rates for rape. Any steps to lessen the effect [that] such myths have [as to] decisions on whether charges can be laid and/or the prospects of victims achieving real justice through the trial process are to be encouraged. While AWLA recognises that removal of the term 'rape' from the legislation will not immediately halt the negative influence of rape myths, such a change would be an important first step.

The benefit of gender neutrality (with no particular emphasis on penile penetration as of greater harm) is that such a definitional structure does offer equal treatment, so that sexual violence of trans and intersex people is defined

⁵¹ Copy on file with the author. See also Jennifer Temkin, *Rape and the Legal Process* (Sweet & Maxwell, 1987) 118–119.

in the same way as that of cis women (and men). In 2005, however, the law in Aotearoa New Zealand was reformed to retain the offence of rape (as one way to commit the offence of sexual violation), while ‘unlawful sexual connection’ is defined in a gender neutral way.

B *The Reform in Aotearoa New Zealand: Retention of ‘Rape’ as a Specific Type of Penetrative Sexual Offence*

Hansard reveals that many New Zealand Members of Parliament strongly supported the removal of ‘rape’ from the legislation. However, when the Select Committee reported back to the House of Representatives, they failed to refer to the number of submissions that had favoured abandoning the term and went on to conclude ‘rape’ should be retained. Instead they simply gave the following reasons:⁵²

The term ‘rape’ carries powerful and specific connotations, and is commonly used to refer to an abhorrent sexual crime against women deserving of significant punishment. However, submissions contained quite diverse views on whether this distinction was still appropriate given that other forms of sexual violation (anal and oral penetration) could be considered just as traumatic as vaginal penetration, and that men can also be the victims of these types of sexual violations and suffer the same psychological and physical consequences ...

[The options considered were]:

- retain the present distinction of rape as a gender-based offence;
- abolish the distinction by including within the term ‘rape’ all forms of sexual violations, making the offence gender-neutral;
- abolish the distinction by deleting the word ‘rape’ from the law thereby bringing everything under the term ‘sexual violation’ and making the offence gender neutral;

⁵² Law and Order Committee, New Zealand House of Representatives, *Crimes Amendment Bill (No 2)* (2004) 7–8 <https://www.parliament.nz/resource/en-NZ/47DBSCH_SCR2904_1/c4e6729d2f8eb8c1c769d9f315c023a8e7abo321> (emphasis added). See also Damian Warburton, ‘The Rape of a Label – Why It Would Be Wrong to Follow Canada in Having and Single Offence of Unlawful Sexual Assault’ (2004) 68 *Journal of Criminal Law* 533, 542: ‘Rape violates the autonomy of the person, it is a grievous assault on the interests and integrity of the victim; the victim is denied control over an important area of his or her life. Therefore, and rightly so, a conviction for rape carries a huge social stigma, it is an offence in a category of its own. This high level of social repulsion respects the gravity of degradation that is suffered by each victim; and if this unique awfulness is removed, then the crime will have been trivialised and diluted.’

- retain the distinctions but widen the term ‘rape’ to include anal penetration, making the offence partially gender neutral [an option also supported in the alternative by AWLA – see above].

We heard compelling submissions, some of which supported retaining the status quo, while others supported extending rape to include other forms of sexual violation. We carefully considered these views and consulted widely with our colleagues. *On balance, the majority of us consider that, at this time, retaining rape as a gender-based offence covering only penile penetration of the female genitalia ... is the most appropriate option.*

However, as previously noted, the ultimate result was not retention of the existing offence of rape (that is the option to ‘retain the present distinction of rape as a gender-based offence’) but rather the introduction of a re-defined offence which removed the references to male and female and focussed on the body parts of ‘person A’ and ‘person B’. The relevant part of s 128 now reads (emphasis added):

- (1) Sexual violation is the act of a person who—
 - (a) rapes another person; or
 - (b) has unlawful sexual connection with another person.
- (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.
- (3) Person A has *unlawful sexual connection* with person B if person A has sexual connection with person B—
 - (a) without person B’s consent to the connection; and
 - (b) without believing on reasonable grounds that person B consents to the connection.

The terms used in s 128 are defined in s 2 of the Act:

- sexual connection** means—
- (a) connection effected by the introduction into the genitalia or anus of one person, otherwise than for genuine medical purposes, of—
 - (i) a part of the body of another person; or
 - (ii) an object held or manipulated by another person; or
 - (b) connection between the mouth or tongue of one person and a part of another person’s genitalia or anus; or

(c) the continuation of connection of a kind described in paragraph (a) or paragraph (b)

genitalia includes a surgically constructed or reconstructed organ analogous to naturally occurring male or female genitalia (whether the person concerned is male, female, or of indeterminate sex)

penis includes a surgically constructed or reconstructed organ analogous to a naturally occurring penis (whether the person concerned is male, female, or of indeterminate sex)

Despite the definition of ‘genitalia’ referring to ‘male or female’, on a statutory interpretation argument (given the use of the terms ‘penis’ and ‘anus’ elsewhere in the section), it must mean only *female* genitalia (including the vagina) for the purposes of s 128(2).

It is important to also note that these definitions reflect the requirements at the time (2004) for changing sex details on birth certificates – that is, complete genital reconstruction surgery.⁵³ It may well be, therefore, that Parliamentary intent was to use the reference to genitals as a way of legally defining male or female bodies, and did not consider the status of those (many) trans or gender diverse people who could not (and cannot) access the required medical treatments to amend their legal sex.⁵⁴

Nor does the use of ‘indeterminate’ imply legislative attention to the experiences of intersex people. It is a term that carries with it no legal consequences, and was likely included as the word used rarely on a birth

⁵³ Subsequently, the decision *Michael v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 considered whether the legislature intended to require individuals to undergo all gender affirming surgeries before being able to change sex details on a birth certificate. The Judge held ‘it is not necessary in all cases for an applicant to have undergone full gender reassignment surgery in order to obtain a declaration under this section. Just how much surgery he/she needs to have had is determined on a case by case basis by reference to the evidence in the particular case, including that of the medical experts’ (at [50]). On 10 August 2018 the Governance and Administration Select Committee reported back to the New Zealand House of Representatives recommending an administrative rather than Court process for amending sex markers on birth certificates: Governance and Administration Committee, New Zealand House of Representatives, *Births, Deaths, Marriages, and Relationships Registration Bill* (2018) <https://www.parliament.nz/en/pb/sc/reports/document/SCR_79010/births-deaths-marriages-and-relationships-registration>. On p 2 the Committee stated: ‘As part of the change to a self-identification process, we also recommend removing all references to “medical treatment”, “medical evidence”, “physical conformation”, “sexual assignment”, and “sexual reassignment” from the bill.’

⁵⁴ The words in parentheses in the s 2 definitions indicate a recognition that genital surgery of itself does not change the legal sex of the person – that is, someone may have female genitalia but may not be ‘female’ in terms of legal recognition.

certificate to indicate that an infant's sex is not immediately clear.⁵⁵ The term does not accurately reflect the diversity of intersex bodies and it is by no means certain that an intersex person will have genitals analogous to either anatomical definition contained in s 2 of the Act.⁵⁶ There was no discussion (that I have been able to source) about extending the definition of rape to include violation of a person who identifies as female but does not have what is normatively considered female genitalia – nor any consideration of the position of trans men who have not had any genital surgery.

The actual outcome of the reform was to obscure the gendered nature of 'rape' by changing the definition to refer the possession of particular (binary) types of genitals. Although the majority of people possessing penises identify as male, and the majority of people who have (female) genitalia identify as female, that is not true for every person. A crime that reflects the gendered nature of sexual offending (men primarily as offenders),⁵⁷ may well include anal and oral penetration by a man, using his penis. Such an offence can be found in s 1 of the Sexual Offences Act 2003 (England & Wales) and s 1 of the Sexual Offences (Scotland) Act 2009.

C *Extending the Definition of 'Rape' to Include Other Types of Penetrative Sexual Offences*

In most common law jurisdictions where rape has been retained as a specific offence (along with sexual assault or the like), the definition has been extended to include either penile penetration of the mouth or anus of the complainant, or to also include penetration using another body part or an object. In 1981 when the Criminal Law Reform Committee in England and Wales was considering

⁵⁵ Despite the common occurrence of intersex variations, it is rare for a child's sex to be recorded on a New Zealand birth certificate as 'indeterminate'. Data from the Department of Internal Affairs showed that between 1997 and 2007 there were 32 instances where the sex recorded on a birth certificate was listed as 'indeterminate'. Of those, only 6 were live births. New Zealand Human Rights Commission, *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (Wellington, 2008) at 84.

⁵⁶ 'Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies': Free and Equal Factsheet, above n 5; United Nations Human Rights Office of the High Commissioner, 'Combating discrimination based on sexual orientation and gender identity - Fact Sheets' (2018) <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTFactSheets.aspx>.

⁵⁷ This is not to overlook or ignore sexual offending in same-sex or similar gender situations or male victims of sexual offending by women, but rather that there are different cultural dynamics at play in that scenario.

the scope of a legislative definition, Richard Card referred to common usage of the term, as well as the situation of trans and intersex people (while not using contemporary language to refer to members of those communities), to support his argument that the definition of rape should be extended:⁵⁸

[R]ape is now popularly understood to include, as variants, non-consensual fellatio or buggery; terms such as 'oral rape' and 'homosexual rape' are frequently encountered in the press ...

[T]he restriction of rape to vaginal intercourse with a woman results in the oddity that a man who has non-consensual vaginal intercourse is only guilty of indecent assault where the victim was born male but has undergone a sex-change operation; in law, the victim does not become a woman and therefore cannot be the victim of rape. Similar problems might be encountered in the case of hermaphroditic victims. Of course, such cases are unlikely to arise, but if they did such a strange result would have been resolved if there was simply one offence of penile penetration of the vagina, anus or mouth of another person.

It is submitted that, if the CLRC's view is accepted, a golden opportunity will have been missed not only to simplify the law but also to make it accord with popular opinion.

Extending the definition of rape in this way, as noted by Sharon Cowan, 'acknowledges the argument that forced anal and oral penetration is just as degrading and humiliating, and possibly, particularly in the case of anal rape, even more injurious to the victim than non-consensual vaginal penetration.'⁵⁹ However, Cowan also points out that although part of the reason for the reform in Scotland (as in Aotearoa New Zealand) was because of a commitment to gender equality, under this definition only men can be guilty of rape and rape can only be committed with a penis, including a surgically constructed penis.⁶⁰ Other feminist academics are of the view that the definition need not be extended to include penetration by objects, for example, as this is conduct primarily undertaken by men and such a reform would misrepresent the gendered nature of sexual offending.⁶¹

⁵⁸ Richard Card, 'The Criminal Law Revision Committee's Working Paper on Sexual Offences' [1981] *Criminal Law Review* 361, 373.

⁵⁹ Sharon Cowan, 'All change or business as usual? Reforming the law of rape in Scotland' in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 154, 158.

⁶⁰ *Ibid.*

⁶¹ Pamela R Ferguson and Fiona E Riatt, 'Reforming the Scots Law of Rape: Redefining the Offence' (2006) 10 *Edinburgh Law Review* 185, 198.

In undertaking a comparative review of rape law reform across Pacific island nations, Christine Forster was critical of limiting the offence of rape to the historical conception of the crime. She argues, echoing the claims of Canadian feminists in the 1970s and 1980s, that:⁶²

[C]entralising rape as the primary offence in sexual offences provisions and framing it to exclude other, equally harmful, sexual violations does not represent good practice. Indeed, the focus on (forced) penile-vaginal penetration in sexual offences provisions reflects a historic conceptualisation of rape as ‘a theft of male property in female sexuality’ ... rape provisions formulated in this way bear little relationship to the range of forced and coerced sexual acts which women find ‘frightening, humiliating, invasive and injurious’.

In Aotearoa New Zealand, as previously stated, the term ‘rape’ is also claimed much more broadly as a description of sexual assault in many communities including by trans and gender diverse people as well as in the mainstream media. Further, the New Zealand Court of Appeal judgment *R v AM*,⁶³ which established guideline sentences for judges to apply in cases of sexual violation used the term ‘rape bands’ as the starting point of sentencing for particular types of harm. The ‘rape bands’ category encompasses legal rape, penile penetration of mouth or anus or any violation involving objects. The Court also stated that the sentencing guidelines ‘are to be applied in the same way *regardless of the gender of the offender or of the victim*’,⁶⁴ and the maximum penalty for any type of sexual violation, legal rape or otherwise, is the same. This approach seems to recognise, for example, that anal sexual violation is often used as an intentionally degrading aspect of sexual violence (including against cis women), yet this type of harm is not defined as ‘rape’ in the Crimes Act 1961 (NZ).

Nearly two decades before the 2004 gender neutrality debate, in a sentencing decision, there was acknowledgment that the impact of sexual violence is similar whether or not the victim is female or male, but no reference was made to the significance (or not) of the gender of the offender. The judge in that 1987 decision, in which they sentenced a ‘transvestite’ for unlawful sexual

⁶² Christine Forster, ‘Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards’ (2009) 33 *Melbourne University Law Review* 833, 836. See also Lillian Artz and Helene Combrinck, ‘A Wall of Words: Redefining the Offence of Rape in South African Law’ [2003] *Acta Juridica* 72.

⁶³ [2010] 2 NZLR 750 (CA).

⁶⁴ *Ibid* [80].

connection stated: '[A]ny suggestion of a hierarchy of sexual offences classifying violation of a female as prima facie more serious than violation of a man has to be avoided.'⁶⁵

A number of jurisdictions in Australia now define rape to include more than just penile penetration,⁶⁶ with Wendy Larcombe recently applauding this aspect of the reforms.⁶⁷

As a feminist and queer scholar, I view it as a significant achievement that rape and other forms of sexual offending against male, trans and intersex people are now recognised, while only non-consensual (and not consensual) sex within lesbian, gay, bisexual and queer communities is now prosecuted.

Tasmania is the most recent state in Australia to reform the definitions of sexual violence, with the enactment of the Criminal Code Amendment (Sexual Assault) Act 2017. During its Second Reading in the House of Assembly, Ms Giddings spoke about the significance of extending the definition of rape:⁶⁸

It is important we continue to encourage all victims – whether female, male, transgender and others – of sexual violence – to come forward, to know the system and the law are there to seek justice ... We wanted to ensure this was modern legislation, which took into account that rape is not something suffered just by women, nor is it something committed just by men. A woman can rape a man, and there can be other forms of rape. It does not just have to be through penile penetration. Any penetration of a person's genitalia or mouth of a sexual nature can also be humiliating, frightening, invasive, unwanted and very much sexualised in nature.

⁶⁵ *R v Ngawhika* (1987) 2 CRNZ 433. In this case, the defendant was referred to as a 'transvestite', but was also known to the 16 year old male complainant as 'auntie'. The defendant was convicted of sexual violation, by anal penetration of the young man with the defendant's penis. According to the case, this was the first time the complainant knew the defendant 'was a man'.

⁶⁶ See, eg, s 83 of the *Crimes Act 1958* (Victoria) and s 48 of the *Criminal Law Consolidation Act 1935* (SA).

⁶⁷ Wendy Larcombe, 'Rethinking Rape Law Reform: Challenges and Possibilities' in Ron Levy et al (eds), *New Directions for Law in Australia* (ANU Press, 2017) 143, 144.

⁶⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 3 May 2017 (Lara Giddings). See also the speech of Matthew Groom: 'While the current crime of rape is not gender-specific, the current discrimination between sexual penetration involving a penis with other forms of sexual penetration does not reflect modern society and modern concepts of sexual intercourse or adequately reflect the seriousness of other crimes of sexual violence.'

The definition of rape in Tasmania is now as follows:

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- (1) Any person who has sexual intercourse with another person without that person's consent is guilty of a crime.

2B Sexual intercourse

- (1) In this Code –

sexual intercourse means –

- (a) the penetration, to the least degree, of a person's vagina, genitalia, anus or mouth by a penis; or
- (b) the penetration, to the least degree, of a person's vagina, genitalia or anus by a body part of a person other than a penis; or
- (c) the penetration, to the least degree, of a person's vagina, genitalia or anus by an object held or manipulated by, or attached to, another person; or
- (d) the continuation of an act of penetration referred to in paragraph (a), (b) or (c) of this definition.

- (2) In this section –

penetration does not include penetration carried out for a proper medical purpose, for the purposes of hygiene or for any purpose that is authorised by law.

Reform that extends the definition of 'rape' in this way, is, however, open to the same criticism as the gender-neutral approach: equality of scope does not reflect the reality of the harm. By re-defining rape in this way, such reform also deprives 'rape' of its historical, gendered, sexed meaning – as observed by Ngaire Naffine.⁶⁹

Now much of the modern Australian law of rape has been liberalised and democratised to the point that it is no longer even about men and women - what were once the basic, irreducible categories of sexual being ... The male member has been demoted in significance: rape can now be achieved by other means, with fingers, with bottles. The vagina is no longer the only prohibited target of the rapist: the mouth and the anus are now included in the definition of non-consenting intercourse proscribed by the law of rape. The crime which was once, in essence, about the unlawful possession of a woman by a man is now a crime without gender. It seems that the liberal ideal of treating all citizens identically ... has been realised in the crime which was once utterly about the sexes and their sexuality. In Australian law, the rapist and the victim are

⁶⁹ Naffine, above n 42, 23.

now abstract individuals, atomised, desexualised, even though the crime is still all about sex.

IV OPTIONS FOR CHANGE

The reform options for Aotearoa New Zealand, regarding the definition of rape, remain similar to those considered by the Select Committee in 2004. One would be to remove the reference to ‘rape’ meaning that sexual violation (to use the term in s 128 of the Crimes Act 1961 (NZ)) would apply to all forms of unlawful sexual connection and to all offenders, regardless of their sex, genitals or gender identity (this was the option favoured by a number of submitters, including the Auckland Women Lawyers Association, but was rejected by the Select Committee). It is the approach that has been taken in Canada, Western Australia, Northern Territory, Australian Capital Territory and New South Wales.⁷⁰ It was also the recommended approach of the New South Wales and Australian Law Reform Commissions in their combined report on family violence in 2010:⁷¹

[T]he definition of sexual intercourse or penetration should be broad and not gender-specific, and should be made more consistent across jurisdictions. The definition recommended below is in keeping with the shift away from historically gendered and restrictive definitions of sexual intercourse and is consistent with the definition in the Model Criminal Code.

Another option would be to redefine (and retain) the offence of rape to include all forms of sexual violation. This is the approach that has been taken in Victoria, Queensland, South Australia and Tasmania.⁷² Implementing either of these two options would mean the term ‘rape’ in Aotearoa New Zealand would no longer be limited to historical conceptions of a gender-specific harm – which it arguably does not currently do despite the claims of the Select Committee, given the focus on possession of particular genitals. To adapt the words of Ngaire Naffine to the New Zealand context: ‘So keen [was] the

⁷⁰ See s 54 of the *Crimes Act 1900* (ACT); s 61 of the *Crimes Act 1900* (NSW); s 192 of the *Criminal Code Act 1983* (NT); s 325 of the *Criminal Code Act Compilation Act 1913* (WA).

⁷¹ *Family Violence - A National Legal Response* (ALRC, R114, 2010) at [25.30].

⁷² See s 349 of the *Criminal Code* (Qld); s 48 of the *Criminal Law Consolidation Act 1935* (SA); s 185 of the *Criminal Code* (Tas); s 38 of the *Crimes Act 1958* (Vic).

legislature to demonstrate its commitment to gender neutrality that the possessor of a penis becomes [person A] not a man.⁷³

A third alternative would be to extend the definition of rape just to include oral and anal penetration (by a penis) – which is the approach taken in England and Scotland. Within this alternative there may remain the possibility of a definition of rape that reflects the gendered nature of sexual violence while ‘taking into consideration a more embodied and female-focussed experience of sexual violation’.⁷⁴

Phillip Rumney, among others, has argued that the term rape should be extended to include when women sexually violate men, and that naming such violence ‘rape’ does not prevent a gendered analysis of rape.⁷⁵ The issue of how to appropriately acknowledge the existence of women offenders is for another piece of work.⁷⁶ My focus is on the situation of trans and intersex people as victims/survivors of sexual violence, and the extent to which a re-definition of legal rape can assist, in terms of both criminal law and social justice,⁷⁷ and with how gender diverse people are supported following such violence. This issue does raise feminist concerns about the gendered nature of family and sexual violence. If gender neutral laws obscure systemic issues of gender-based violence they may also unhelpfully mask the extent and nature of the harm that both trans people and cis women fear, and experience.

One concern is that information about the impact of sexual offending on particular groups or communities would be lost if the legal crime of rape was removed. The use of the term ‘rape’ in the legislation, for now at least, means that some (limited) charging and outcome statistics are gathered by the police, albeit under the historical title: ‘Male rapes female over the age of 16’. All other offending charged under s 128 of the Act is just coded as unlawful sexual connection, and any more detail can only be gathered by access to individual case files, which is appropriately very limited given the privacy implications.

In my view, any move to gender neutrality in the law must be accompanied by increased (and more nuanced) information-gathering about the age, sex, gender identity and sexual orientation of the alleged offender and the

⁷³ Naffine, above n 42, fn 82.

⁷⁴ McNeilly, above n 45.

⁷⁵ Philip N S Rumney, ‘Gender Neutrality, Rape and Trial Talk’ (2008) 21 *International Journal of the Semiotics of Law* 139, 141 and ‘The Review of Sex Offences and Rape Law Reform: Another False Dawn?’ (2001) 64(6) *Modern Law Review* 890, 894–898.

⁷⁶ See also Bennett Capers ‘Real Rape Too’ (2011) 99 *California Law Review* 1259, fn 35.

⁷⁷ See Krista Scott-Dixon, ‘Towards Transfeminisms’ in Krista Scott-Dixon (eds), *Trans/Forming Feminisms: Trans/Feminist Voices Speak Out* (Sumach Press, 2006) 239.

victim/survivor at the point of disclosure to a support agency or the police.⁷⁸ This would mean a significant shift in the process of recording complaint, as well as education for those obtaining the information to ensure the process is safe, especially for trans and gender diverse people. As part of a change in recording practices, it would also be helpful for the purposes of policy development and law reform, to collect information about the relationship between the offender and the victim. Such statistical information would assist in the development and funding of appropriately targeted crisis, intervention and prevention services, as well as documenting the need for training of criminal justice workers, including police, lawyers, victim advisors and judges.

Removing the term 'rape' would result in gender neutral drafting, with the accompanying risks already outlined – but what would the impact be on the strength of rape mythology, or on critical advocacy politicised around the term 'rape'? As stated earlier, feminists have argued that removal of the term could decrease the prevalence of rape myths, and have a consequential impact on both the incidence of sexual violence and the significance of rape myth on the prosecutorial process. Some work to examine the validity of such arguments has been done in jurisdictions where gender neutral laws are in place.⁷⁹

Writing about the reform in New South Wales, Annabelle Mooney concludes that 'the removal of gender specific terms [does] not solve the problem' of rape.⁸⁰ Her analysis of the discourse in trials concerning sexual violence indicates that the same rape mythology is being reinforced, even in the absence of a 'rape' charge. Given it is likely that removing the word rape will have little impact on the existence and impact of rape mythology, it may nevertheless be important to keep it as a powerful word with political significance.

⁷⁸ Collecting this kind of information should be standard practice in all situations in which violence is being investigated/interrogated, for example national victimisation surveys. Most existing victimisation research, has simply not asked respondents any questions about their sexuality or gender identity. For example, this often cited report only asked questions about sexuality: Mikel L Walters, Jieru Chen, and Matthew J Breiding, *2010 Findings on Victimization by Sexual Orientation* (January 2013) <www.cdc.gov/ViolencePrevention/pdf/NISVS_SOfindings.pdf>. See also Ruth Halperin-Kaddari and Marsha A Freeman, 'Backlash Goes Global: Men's Groups, Patriarchal Family Policy, and the False Promise of Gender-Neutral Laws' (2016) 28 *Canadian Journal of Women and the Law* 182.

⁷⁹ Gotell, above n 47.

⁸⁰ Annabelle Mooney, 'When a woman needs to be seen, heard and written as a woman: Rape, law and an argument against gender neutral language' (2006) 19 *International Journal for the Semiotics of Law* 39, 41. See also Warburton, above n 52.

V CONCLUDING THOUGHTS

There are likely to be a variety of views about whether removing the word ‘rape’ from the Crimes Act 1961 (NZ) would reduce the ability to highlight gender-based violence. It is clear that the current definition of rape does not sufficiently encompass such gendered harm. The current definition, which focusses on anatomy rather than gender, not only fails to respond to the feminist concerns about retaining the term, but it also excludes sexual violence that most communities would consider to be ‘rape’,⁸¹ and, in particular, fails to recognise the ways in which trans women experience sexual violence as women. It is time to reconsider the scope of what the law calls rape.

In my view, the language of rape should be retained, but extended to include other forms of penetrative harm. Although this version of gender neutral drafting may mask the gendered nature of sexual violence, if such reform is accompanied by significant changes to the way sexual offending is recorded, researchers and policy makers will still be able to access material about the incidence and dynamics of sexual offending. This will enable law reform and community-based initiatives to be based on information about the actual nature of the harm occurring.

Despite the trans, intersex and gender diverse communities of Aotearoa New Zealand being aware that the definition of rape in s 128 of the Crimes Act 1961 does not cover their experiences of sexual violence, advocating for reform is not a current priority when many other changes to law and practice are more pressing.⁸² The legal definition of, and response to rape, does seem to be an issue for feminist trans and intersex allies to engage with, and an opportunity to continue (or begin) conversations about the shared concerns of all those who

⁸¹ See, eg, Kathy Doherty and Irina Anderson, ‘Making Sense of Male Rape: Constructions of Gender, Sexuality and Experience of Rape Victims’ (2004) 14 *Journal of Community & Applied Social Psychology* 85; Jocelyne Scutt, ‘Reforming the law of rape: The Michigan example’ (1976) 50 *Australian Law Journal* 615; and Christine Boyle, above n 50.

⁸² Such as: changes to how birth certificates may be amended (see further Emily Blincoe, ‘Sex Markers on Birth Certificates: Replacing the Medical Model with Self-Identification’ (2015) 46 *Victoria University of Wellington Law Review* 57; but see above n 53); adding gender expression/gender identity to the grounds of prohibited discrimination in the *Human Rights Act 1993* (NZ) (see further Elisabeth McDonald, ‘Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993’ (2007) 5 *New Zealand Journal of Public and International Law* 301); and, for intersex advocates, ending genital surgery on non-normative bodies (see further Elisabeth McDonald, ‘Intersex People in Aotearoa New Zealand: The Challenges for Law and Social Policy’ (2015) 46 *Victoria University of Wellington Law Review* 705).

are especially vulnerable to sexual violence, with a view to obtaining real change to law, practice and social support.