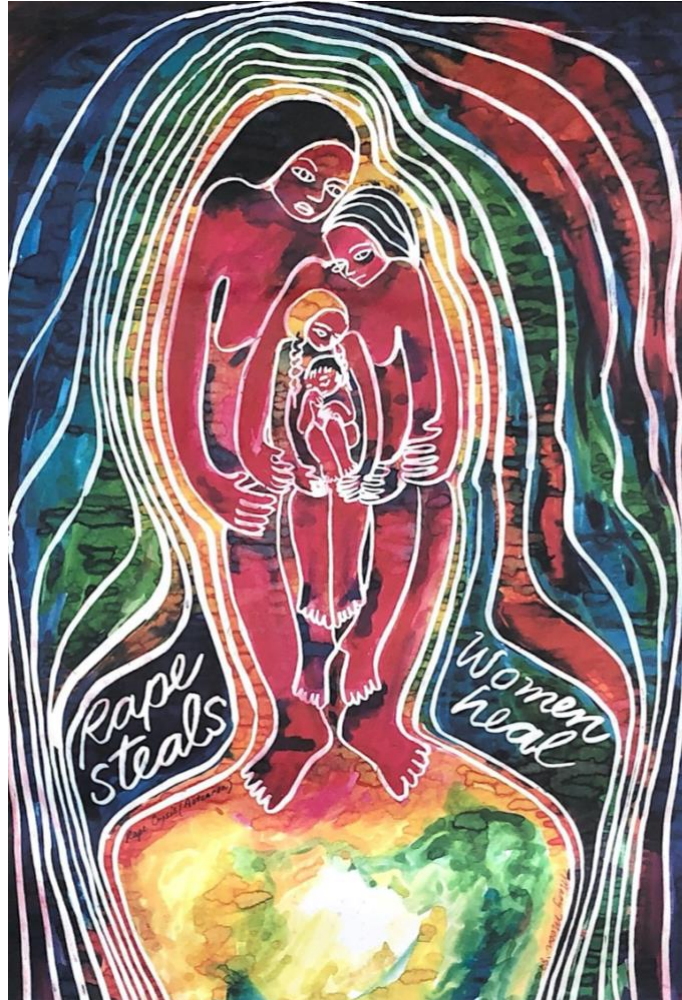


‘The Most Vital Change’

Feminist Activism and the Criminalisation of
Marital Rape in 1980s New Zealand



Mary Moon, 'Rape steals, Women heal,' 1989.
(Ōtepoti Collective Against Sexual Abuse)

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April 2021

This Thesis is submitted in fulfilment of the requirements of the University of Otago for the degree of Master of Arts in History.

Abstract

Spousal immunity, a husband's exemption to the legal consequences of rape, was an English legal import that was comprehensively protected in the patriarchal colonial context of New Zealand. Until 1985 New Zealand's legal system played a crucial role in legitimising marital rape. Spousal immunity was ended in New Zealand through the Rape Law Reform Bill No.2 (1985). Repeal of spousal immunity was supported by research on sexual violence and a wide spectrum of the New Zealand public. After decades of legitimisation for marital rape, parliamentary consensus shifted to agree that the principle was both illogical and wrong. By reforming rape laws politicians were not leading change, they were responding to change. This thesis argues that the criminalisation of marital rape in New Zealand was the result of feminist activism. Feminist initiatives included a critique of the existing marital structure, widening the definition of rape, and the establishment of feminist service organisations. The re-examination of spousal immunity which led to its repeal should be understood within the wider feminist concern for sexual violence rather than as an isolated campaign in its own right. Excerpts from public submissions to the Rape Law Reform process, feminist and government archives support this argument. To date, the limited research on marital rape in New Zealand has allowed the repeal of spousal immunity to be misunderstood as the inevitable modernisation of rape law from within the legal system. This thesis identifies social change, led by feminists, as preceding and prompting legal change. By centring the crucial role of feminist activists in the criminalisation of marital rape the relationship between feminism and the legal system can be more clearly understood.

Acknowledgements

I am immensely grateful to my supervisors, Associate Professor Angela Wanhalla and Professor Sonja Tiernan. I could not have asked for better supervisors. Under your supervision I have been challenged by new ideas, grown in confidence and had a lot of fun! Thank you also to my advisor Dr Jane Adams, for her legal wisdom. Your knowledge of and enthusiasm for the connections between the law, feminism and history have been inspiring to me.

Thanks to my parents, Tanya, Ben, wider family, friends and fellow arts postgraduate students. I appreciate being able to discuss ideas with you. You have cheered me up and chilled me out when necessary.

Finally, this thesis would not have been possible without generations of women speaking up about unspeakable violence. I am very grateful for all of the work women, past and present, have done towards a world without rape and violence. Thank you.

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List of Abbreviations

CEDAW	Convention on the Elimination of Discrimination Against Women
NCIWR	National Collective of Independent Women's Refuges
NOW	National Collective for Women
RCRG	Rape Crisis and Related Groups
UDHR	Universal Declaration of Human Rights
WEL	Women's Electoral Lobby
YWCA	Young Women's Christian Association

Introduction

My husband would force me to have sex with him. I'd give in as I couldn't be bothered with the hassle or being beaten. He doesn't drink though.

I've been beaten for six years. I'd seen my mother beaten so I'd just accept it. I didn't lay charges against him as I couldn't go through the hassle and I didn't bruise easily. Also, then I cared for him, and I didn't want his name dragged down because of his business. He'd only be fined, but not go inside – so it wasn't worth the trouble of going to court. Also, I didn't want to be hospitalized, which is what would have happened if I laid charges.

The law doesn't protect women, as a lot of men get off or are only fined. Just because a woman marries a man, it doesn't mean she's his property. It's a violation of someone's rights if a man doesn't pay for raping or beating his wife. I'd like to see changes in the law – an eye for an eye.¹

The term spousal immunity refers to Section 128(3) of the Crimes Act 1961, which reads:

'No man shall be convicted of rape in respect of intercourse with his wife.'² Spousal

immunity existed in both previous iterations of New Zealand's criminal code, the 1893

Criminal Code 1893 and Crimes Act 1908.³ Due to the existence of spousal immunity for

most of the twentieth century, rape within marriage was a legal impossibility. Politicians and

legal professionals protected and even reinforced spousal immunity from the 1890s to the

1980s.

In the 1980s a rapid transition took place. Rape law reform was proclaimed a priority for

Robert Muldoon's National Government (1975-1984) and later David Lange's Labour

Government (1984-1989). Minister of Justice Geoffrey Palmer (Labour) said in 1985

repealing spousal immunity was 'a reform whose time had surely come,' while the

opposition spokesperson for justice, National's Jim McLay, said that repeal was supported

¹ "Yvonne" in Joan Stone, Rosemary Barrington and Colin Bevan, 'The Victim Survey,' in *Rape Study Research Reports Vol.2*, ed. Warren Young and Mel Smith, (Wellington: Department of Justice, May 1983), 194.

² *Crimes Act 1961*, 128(3).

³ *Crimes Act 1908*, 211(1). *Criminal Code 1893*, 191(1).

by clear logic as spousal immunity was 'wrong.'⁴ Spousal immunity was repealed through an amendment to the Crimes Act which came into effect from the 1st February 1986. Such a change of political opinion on spousal immunity, from apathy to condemnation, presents a puzzle. My thesis seeks to understand the factors which led to the repeal of spousal immunity in the 1980s after ninety years without legal challenge. I argue that the criminalisation of marital rape in New Zealand was the result of feminist activism.

The law of rape is of social significance. Rape law reform was affected by and had a notable effect on the lives of New Zealanders. Although the topic of this thesis is a legal reform, this work is equally a social history. My focus is on the principle of spousal immunity and how feminist activism led to social and legal change. The intersection between the law and society has a lot to offer and has not yet received the attention it might in historical studies.

Private and personal aspects of people's lives are inevitably a part of the study of sexual violence. Angela Wanhalla argues that studying sexual violence in New Zealand history enables us to see connections between the large politics of government and the small politics of private life.⁵ The historical is personal and the personal is political. Histories of sexual violence hidden in the privacy of women's homes offer significant insight about New Zealanders lives. The theoretical basis of this thesis is the interweaving of sexual violence as both a personal experience for individual women, and also a collective political issue for New Zealand society as whole. Personal experiences and gender theory combine and support each other in the research. Sara Ahmed asserts 'The personal is theoretical.'⁶

⁴ *New Zealand Parliamentary Debates*, House of Representatives, 22nd August 1984, 72. 18th September 1984, 244.

⁵ Angela Wanhalla, 'Interracial Sexual Violence in 1860s New Zealand,' *New Zealand Journal of History* 45, no. 1 (2011): 80.

⁶ Sara Ahmed, *Living a Feminist Life* (Durham Duke University Press, 2017), 10.

The feminist theoretical understandings of rape and marriage discussed in Chapter three remain relevant in the present day. My own approach has been informed by these understandings. Ahmed's introduction to feminist theory in her book *Living a Feminist Life* has also been influential in my approach to feminist research.⁷

While historical work can make an important contribution, there are practical reasons why historians may be reluctant to research sexual violence. Historians might be reluctant due to limitations with archival material. Legal records, official records, medical records and newspapers may all include references to sexual violation but rarely in a victim's own words. Most sexual violence remains unreported and is impossible to trace in the archives. Where examples are found researchers are often faced with an ethical question. Is it appropriate to write about the sexual violation of someone else without their explicit consent? Rape is a violation of a person's privacy. For many victims and for their families, trauma remains with them for many years after the rape. Detailing someone else's experience of sexual violence should be done with care. Feminist activism encouraged women to reclaim the narrative power from medical professionals, police officers, lawyers and journalists and tell their own stories. I have tried to conduct this research in a way which is consistent with this aim.

Feminist movements, as defined by Charlotte Macdonald, seek 'to draw attention to a disparity between women and men.'⁸ Spousal immunity granted married men a specific impunity that married women did not have. From the 1970s in New Zealand the women's liberation movement 'flared up and spread like a bushfire' to become 'a large scale social

⁷ Ibid.

⁸ Charlotte Macdonald, *The Vote, the Pill and the Demon Drink: A History of Feminist Writing in New Zealand 1869-1993* (Wellington: Bridget Williams Books, 1993) 4. Accessed March 2021 <http://thevotethepillandthedemondrink.bwb.co.nz/>

and political movement' for the following twenty years.⁹ Feminism influenced how politicians and the public understood women's rights and sexual freedoms through campaigns such as equal pay, free childcare, abortion and contraception.

Rape and violence against women were part of a transnational feminist conversation about women's oppression. Marital rape was criminalised in Australia, Canada and some US states from the 1970s. These reforms loosely overlapped with the growth of what is considered second wave feminism. The criminalisation of marital rape in the UK and Ireland in the 1990s, were at the tail end of this second wave. Research in Australia by Lisa Featherstone and in the United States by Nancy Matthews demonstrated feminism to be crucial in the criminalisation of marital rape.¹⁰ Jacqueline O'Neill's MA thesis 'She asked for it' examined feminist re-negotiation of the meaning of rape in 1970s New Zealand. O'Neill states 'feminist knowledge and action helped shaped legal reform and brought radical changes to the treatment of rape victims.'¹¹ This thesis examines repeal of spousal immunity alongside O'Neill's argument. The central question of this thesis is therefore: To what extent was the criminalisation of marital rape in New Zealand in the late twentieth century a result of feminist activism?

While politicians viewed rape as a serious social ill, they did not see marital rape as an issue of similar concern. Their main motivation for change was in response to public outcry. Apathy characterised the political response to marital rape in New Zealand until

⁹ Ibid., 9,1.

¹⁰ Lisa Featherstone, "Criminalising the husband and the Home: Marital Rape Law Reform 1976-1994," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson, 78-91 (Melbourne : Monash University Publishing, 2019). See historiography for more extensive discussion of Featherstone's work. Nancy Matthews, *Confronting Rape, The Feminist Anti-Rape Movement And The State* (New York: Routledge, 1994).

¹¹ Jacqueline O'Neill, "'She asked for it': A Textual Analysis of the Re-negotiation of the Meaning of Rape in the 1970s-1980s," (MA Thesis, Massey University, 2006), 6.

feminist discourse transformed marital rape into a social problem that the state had a responsibility to address. This transformation was the result of a wider feminist campaign on sexual violence, which in turn changed how people viewed marital rape. Feminist ideas and actions challenged rape myths by gathering more accurate information on rape from the 1970s and encouraged women to speak out about how sexual violence had affected their lives. Activists rather than politicians were the driving force of much of this work. I argue that the change in marital rape law can only be understood in the context of concerted feminist activism, and more specifically with reference to wider feminist campaigns on sexual violence in the 1970s and 1980s. I also suggest that the push for a re-examination of spousal immunity which led to its repeal should be understood more as a distinct component within the wider feminist concern for sexual violence than as an isolated campaign in its own right.

I aim to place feminist efforts back at the centre of legislative change, demonstrating that grassroots activism, powered by people, can create change even in the most deeply embedded of legal principles. Charlotte Bunch has urged feminists to ‘act where it is clear that the changes achieved are the results of our efforts – not a gift from the system- but victories won by our pressure, our organisation and our strength.’¹² This research studies one such successful achievement.

Scope of the Thesis and Key Terms

Defining terms in relation to marital rape is a complicated undertaking for a historian.

Words used in the past such as ‘battered wives’ and ‘wife rape’ may now be considered out

¹² Charlotte Bunch, ‘The Reform Tool Kit,’ in *Building Feminist Theory: Essays from Quest: A Feminist Quarterly*, ed., Nicole Benevento (New York: Longman, 1981), 197.

of date or inappropriate. One reason for this is the growing understanding within the sexual violence sector that sexual violence can impact people of any gender. Current New Zealand law still defines rape as penetration of a vagina by a penis, although the broader charge of unlawful sexual connection is not sex specific.¹³ While a better understanding of the characteristics of how sexual assault affects men and people of other genders would be beneficial, women are still the most frequent victims and men the most frequent perpetrators. Spousal immunity was by definition an exemption for men who raped their wives. Women, and in particular married women, are therefore the main focus of discussions of rape and sexual violence in this thesis.

Sexual violence has complex and varied understandings. When referring to particular testimonies from individual women I have tried, where possible, to make use of the words used by the women themselves. The same is true of authors of other sources. Rape may be used in some sources to mean specifically forced penetrative intercourse, for others a broader understanding is meant. I have only made this distinction where it is clearly expressed by the original author of a source or necessary for legal purposes. In other cases, use of the term sexual violence applies more generally following the New Zealand Police definition: 'any unwanted or forced sex act or behavior that has happened without a person's consent.'¹⁴ This is a definition that covers the spectrum of non-consensual sexual behaviours which feminist activists were calling attention to in the 1980s. Sexual harassment, sexual assault, and rape are all encompassed by this definition.

Sexual violence which takes place within a marriage relationship is accompanied by specific characteristics. Marital rape can be defined as forced sex perpetrated by a

¹³ *Crimes Act 1961*, 128.

¹⁴ 'Understanding Sexual Assault and Consent,' New Zealand Police, 2021, <https://www.police.govt.nz/advice-services/sexual-assault-and-consent/understanding-sexual-assault-and-consent>.

husband.¹⁵ Marital rape is not a term which is currently in frequent use. New terminology of intimate partner violence signifies 'a shift in public interest away from wife rape' towards the wider issues of violence in relationships.¹⁶ Marriage is no longer the only way intimate relationships are understood. There has been continuity from the nineteenth century to the present with respect to privacy surrounding marriage and the home. This may be part of the reason that marital rape has garnered relatively little interest. Research on domestic violence shares similar aspects of suppression but not to the same extent that sexual violence in the home has had. Nothing equivalent to the popular and enduring 'Reclaim the Night' marches has arisen in anti-rape activism which focuses on sexual violence in the home. Sexual violence in the home is more likely to be physically violent and more likely to be a repeat occurrence than violence which occurs in public. Knowledge about sexual violence in the home is also particularly difficult to obtain. Yet the home is where feminist writer Margot Roth says 'we will learn the most' about women's lives.¹⁷ Joanna Bourke acknowledges these issues in her *History of Rape* calling marital rape 'the most common and most frequently excused form of sexual violation.'¹⁸

How to refer to people who experience sexual violence is another area of feminist discussion. Referring to women as victims has led to 'sustained critique amongst feminists,' as Rebecca Stringer notes in her book *Knowing Victims*.¹⁹ I agree with Jan Jordan's position

¹⁵ Spousal immunity in the law did not extend to former husbands. In the source materials some women use the term marital rape to describe rape perpetrated by an ex-husband after separation. It is not uncommon for the sexual violation to continue beyond the dissolution of a marriage. Rape perpetrated by ex-husbands is therefore closely linked to marital rape.

¹⁶ Diana Russell, *Rape in Marriage* (Bloomington and Indianapolis: Indiana University Press, 1982), PXVII.

¹⁷ Margot Roth, *Roll on the Revolution...but not till after Xmas!* (Auckland: Women's Studies Association, 2016), 42.

¹⁸ Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Virago, 2007), 306.

¹⁹ Rebecca Stringer, *Knowing Victims: Feminism, Agency and Victim Politics in Neoliberal Times* (London: Taylor Francis, 2014), 6.

that victim and survivor are 'parallel and simultaneous positions.'²⁰ Women may not always use the language which feminists see as the best option to describe their experiences. These women too must be included in research about rape.²¹ Writing about historical actors has a downside of not always knowing how those who have experienced sexual violence wish to identify themselves. Victim seems to better reflect the common use during the 1980s in rape crisis centres and women's refuges, although women did make reference to survival and resistance as well. Where specific words have been used by women themselves in the sources, I have maintained their use. Where women have been interviewed about their experiences and not used any self-identifying term, I have used the neutral term 'interviewee.' Outside of these circumstances the term victim will be used. This choice is not in any way meant as a negation of women's agency or resistance. As Stringer has argued 'not all images of women as agents are progressive and liberating.'²² Victim is meant as a recognition that women abused by their husbands suffered because of no choice of their own and of the multiple ways society ascribed blame to these women. I have chosen the word victim as an acknowledgement of their blamelessness, both in the case of the specific personal experience and wider culture where rape was condoned.

Public perception is difficult to measure. Where the terms 'New Zealand public' or 'public attention' have been used this should be understood as referring to people who engaged with the issue of spousal immunity, through written or spoken submissions, correspondence and newspaper articles. I have also incorporated public views on issues related to spousal immunity, such as marriage, women's rights, sexuality and violence.

²⁰ Jan Jordan, 'From Victim to Survivor and from Survivor to Victim: Reconceptualising the Survivor Journey,' *Sexual Abuse in Australia and New Zealand* 5, no.2 (December 2013): 54

²¹ Nicola Gavey, *Just Sex?: The Cultural Scaffolding of Rape*, 2nd ed. (London: Routledge, 2018), 170.

²² Stringer, 14.

Understanding the view of the so-called ordinary person within a diverse and changing society can only go as far as sources allow. It is not possible to know exactly what people thought about spousal immunity where it was never recorded or for many people even spoken aloud.

A few final definitions which will be explored in the greater detail in the main chapters are offered here. Reform is a word used both in a legal sense and to refer to 'any proposed change that alters the conditions of life in a particular area.'²³ Under this definition reform is a life changing process which can be social as well as legal.

The meaning of feminism is explored in different ways throughout the thesis. Charlotte Macdonald's defines feminism as both the ideas and a political movement which seeks to 'advance the cause of women or to draw attention to a disparity between women and men.'²⁴ As Macdonald recognizes, 'not all women called themselves feminists, but they all sought to advance the interests of women.'²⁵ This is particularly apt since it offers a broad definition which fits the ethos of the movement to repeal spousal immunity. Another definition of feminism which has informed my research is captured by Sara Ahmed:

What do you hear when you hear the word *feminism*? It is a word that fills me with hope, with energy. It brings to mind loud acts of refusal and rebellion as well as the quiet ways we might have of not holding on to thing that diminish us. It brings to mind women who have stood up, spoken back, risked lives, homes, relationships in the struggle for more bearable worlds.²⁶

²³ Bunch, 160.

²⁴ Charlotte Macdonald, 1, 4.

²⁵ Ibid, 5.

²⁶ Ahmed, 1.

Historiography

Research into marital rape is influenced by the shame and stigma which surrounds sexual violence. The violent and hidden nature of rape, which leaves a deep impact on survivors but a relatively light trace in the archives, reinforces the difficulties surrounding opening up these histories. Although, as seen in the abundance of interest in ANZAC history, not all forms of violence are avoided in the way which intimate and gendered expressions of violence have been. Only nine percent of sexual offences in New Zealand are brought to the police. Elisabeth McDonald and Rachel Souness point out this makes sexual violence ‘the least likely crime to be reported.’²⁷ Focusing on sexual violence within marriage adds another layer of pressure to be silent. Helen, who was interviewed in 1982 for ‘The Victim Survey’ said ‘being raped by one’s own husband is shameful and hard to talk about.’²⁸ Research in this context requires going behind closed doors into people’s private lives and unsettling ideas about the institution of marriage. Drawing these factors together shows why marital rape has received limited explicit attention in New Zealand historiography.

Nonetheless, marital rape and sexual violence are located at the epicentre of larger structures and movements in history which have been written about more extensively. Marriage, family and sexual politics in the nineteenth and twentieth centuries are the subject of a sophisticated scholarship in New Zealand. Referring to parallel gendered protest movements, namely for reform in domestic violence, broadens the range of scholarship further. Women’s liberation connects these movements and provides another source of relevant historiography. Rape and sexual violence have been touched on in Christine Dann’s

²⁷ Elisabeth McDonald and Rachel Souness, “From ‘Real Rape’ to Real Justice in New Zealand Aotearoa: The Reform Project,” in *From ‘Real Rape’ to Real Justice: Prosecuting Rape in New Zealand* edited by Elisabeth McDonald and Yvette Tinsley, (Wellington: Victoria University Press, 2011), 38.

²⁸ “Helen” in Stone, Barrington and Bevan, 142.

Up from Under, which charts the key goals and progress of the women's liberation movement in New Zealand from 1970-1985.²⁹ In her chapter on violence Dann weaves together issues of street harassment, sexual stereotypes, domestic violence and rape. Dann demonstrates the variety of tools the women's liberation movement utilised to confront this violence, of which legal reform was only one. Charlotte Macdonald's *The Vote, the Pill and the Demon Drink* presents a lively range of voices of feminism in Aotearoa.³⁰ Leaflets, conference reports, and other writing from women's organisations in the 1970s and 1980s demonstrate the wide range of attitudes and arguments surrounding the legislative reforms taking place. Overall, Macdonald characterises women's liberation as noticeably more radical than previous women's organisations.³¹

A History of New Zealand Women by Barbara Brookes presents New Zealand history through a female lens.³² In the late twentieth century Brookes consistently connects the influence of feminism to the lives of ordinary women. Brookes cites the 'ongoing failure to recognise rape within marriage' as a consequence of a wider failure to acknowledge the sexual autonomy of women.³³ Earlier work by Brookes, 'A Weakness for Strong Subjects: The Women's Movement and Sexuality,' historicised feminist advocacy for sexual autonomy within the suffragist movement.³⁴ In this article, Brookes details the way in which suffragists at the turn of the twentieth century linked sexual freedom, sexual danger, the marriage contract and citizenship.

²⁹ Christine Dann, *Up from Under Women's Liberation in New Zealand 1970-1985* (Wellington: Allen & Unwin: Port Nicholson Press, 1985).

³⁰ Charlotte Macdonald.

³¹ *Ibid*, 161.

³² Barbara Brookes, *A History of New Zealand Women* (Wellington: Bridget Williams Books, 2016).

³³ *Ibid*, 412.

³⁴ Barbara Brookes, 'A Weakness for Strong Subjects: The Women's Movement and Sexuality,' *New Zealand Journal of History* 27, no.2 (1993): 140-156.

While it remains a challenge to research and write sexual violence histories, feminist historians have already done much to confront this challenge. They have emphasised the need to bring these darker areas of gender relations into light in order to more accurately understand women's experiences. Lisa Featherstone's work in Australia is especially pertinent due to her focus on marital rape reform. Her 2017 article, "'That's What Being a Woman is For': Opposition to Marital Rape Reform in Late Twentieth Century Australia,' traces the 'heterogeneous opposition' to law change from 1976-1994.³⁵ She argues that removing the spousal immunity clause was the most controversial of the suggested reforms, facing discontent from both conservative and progressive advocacy groups. On one hand the reform was seen as state intrusion into the family unit and therefore destruction of paternal authority. On the other hand, feminist activists argued that it did not go far enough to solve the problems of violence in the home.³⁶ In a subsequent article, 'Women's Rights, Men's rights, Human rights: Discourses of Rights and Rape in Marriage in 1970s and 1980s Australia,' Featherstone examines the language of 'rights' as an argument for and against the criminalisation of marital rape.³⁷ Featherstone concludes that within rights based discourses the rights of the wife were 'subsumed to the rights of a husband.'³⁸ She suggests to gain support for reform individual stories of victimisation were more persuasive than women's rights-based discourse.³⁹ Featherstone demonstrates in 'Marital Rape and the Marital Rapist: The 1976 South Australia Rape Law Reforms' that the feminist construction

³⁵ Lisa Featherstone, "'That's What Being a Woman Is For': Opposition To Marital Rape Law Reform In Late Twentieth Century Australia,' *Gender & History* 29, no.1 (2017): 87-103.

³⁶ *Ibid*, 87.

³⁷ Lisa Featherstone, 'Women's Rights, Men's Rights, Human Rights: Discourses of Rights and Rape in Marriage in 1970s and 1980s Australia,' *Law & History* 5, no.2 (2018):1-29.

³⁸ *Ibid*, 28.

³⁹ *Ibid*, 1.

of a narrative of male deviance was crucial in the success of the contentious reforms.⁴⁰

Marital rape only became widely objectionable when an abnormal and violent man was attached to it. This construction served to put distance between rape and the majority of husbands who were 'everyday men' and led to significant amendments to the courts' definition of marital rape.⁴¹ Featherstone's work highlights some of the key tensions that arise in this research; state involvement in private life, traditional ideas about marriage and a changing society, and the persistence of rape myths.

Gender Violence in Australia is an edited collection which has also proved relevant.

Anna Stevenson and Brigitte Lewis' chapter "From Page to Meme: The Print and Digital Revolutions Against Gender Based Violence" and "Domestic Violence Activism In Victoria, 1974-2016" by Jacqui Theobald and Suellen Murray in particular have demonstrated the range of tactics Australian feminists used to protest men's violence against women.⁴²

Michelle Arrow explores the importance of feminist insistence 'the personal is political' in her book *The Seventies*.⁴³ Set in Australia, Arrow considers the role of feminism during 'a decade when many of our fundamental ideas about sex and marriage were challenged' including ideas about private and public realms and citizenship.⁴⁴ Many of these ideas persist in the twenty first century, Arrow argues, demonstrating the 'long legacy of the liberation movements of the 1970s.'⁴⁵

⁴⁰ Lisa Featherstone, 'Marital Rape and the Marital Rapist: The 1976 South Australia Rape Law Reforms,' *Feminist Legal Studies* 27, no.2 (2018): 57-78.

⁴¹ Ibid, 70.

⁴² Ana Stevenson and Brigitte Lewis, "From Page to Meme: The Print and Digital Revolutions Against Gender Based Violence," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne: Monash University Publishing, 2019), 177-192. Jacqui Theobald and Suellen Murray, "Domestic Violence Activism in Victoria, 1974-2016," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne: Monash University Publishing, 2019) 206-244.

⁴³ Michelle Arrow, *The Seventies* (Sydney: New South Wales Publishing, 2019).

⁴⁴ Arrow, 8, 10.

⁴⁵ Ibid, 149.

Taking a wider geographic scope introduces more extensive research on both rape and rape law reform. Scholarship, particularly from Australia and to a lesser extent the United States, will provide an essential touchstone where there may be limits in New Zealand national histories. It seems fitting to make use of international research when writing about women's liberation, a movement that was transnational. As well as international perspectives, interdisciplinary writing will be essential to consider, including insights from legal studies, women's studies, psychology and sociology.

Diana Russell's *Rape in Marriage* is perhaps the most comprehensive survey of the interlinking issues underlying marital rape.⁴⁶ Originally published in 1982 *Rape in Marriage* was the first book in the English language to address what Russell calls 'the crime in the closet.'⁴⁷ Writing during an active period for anti-rape advocacy and reform Russell's aim was to provide an understanding of why the problem exists, how it is linked to other problems, and to suggest possible solutions.⁴⁸ Although the book is written in a United States context it includes sources and personal letters from Australia, the Dominican Republic, India, Peru, the United Kingdom and more. *Rape in Marriage* provides both a theoretical underpinning and a contemporary insight to the breadth of marital rape.

In the area of legal studies feminist legal theory scholar Ngaire Naffine has written extensively about how women's lives are affected by the criminal law. Reading *Criminal Law and the Man Problem*, "Some Gentle Violence," 'A Struggle Over Meaning' and 'Men's Needs and Women's Desires' has been immensely helpful in my research. Naffine's work is incisive about the contradictory nature of the criminal law particularly its failure to protect

⁴⁶ Diana Russell, *Rape in Marriage* (Bloomington: Indiana University Press, 1990). Russell herself had an international outlook. She was born in South Africa, and lived in England before moving to the US.

⁴⁷ Ibid, 2.

⁴⁸ Ibid, 1.

women. She also provides extensive context through discussion of key cases such as *DPP v Morgan* and *PGA v The Queen*. *From "Real Rape" to Real Justice* edited by Elisabeth McDonald and Yvette Tinsley details the need for rape law reform to go further than has already occurred in New Zealand.⁴⁹ McDonald and Tinsley made recommendations towards the Sexual Violence Legislation Bill, 2019.

Grace Millar's article 'Women's Lives, Feminism and the *New Zealand Journal of History*' surveyed research on women published in the journal over the period 1993-2018.⁵⁰ Millar found sexual violence 'is most well developed in the colonial period.'⁵¹ Angela Wanhalla has written the sole *New Zealand Journal of History* article on sexual violence, titled 'Interracial Sexual Violence in 1860s New Zealand.'⁵² Wanhalla's work demonstrates how sexual violence is racialised, as well as gendered. Throughout the article it is clear the race-based rape myths, which maintained an influence in the twentieth century, were shaped in the early colonial context. Wanhalla also highlights the societal anxiety over the state's capacity to deal with sexual crimes sufficiently, and the regulating force of print culture on colonial morality.⁵³ As demonstrated in Wanhalla's work and emphasised by Millar, sexual violence necessitates an intersectional approach, which is conscious of race, gender, class and spatial dynamics.

Heather Bauchop's Honours Dissertation 'The Public Image of Rape in New Zealand: A Case Study of two Newspapers, 1950-1970' addresses the time period immediately prior

⁴⁹ Elisabeth McDonald and Yvette Tinsley, ed., *"Real Rape" to Real Justice: Prosecuting Rape in New Zealand*, (Wellington: Victoria University Press, 2011).

⁵⁰ Grace Millar, 'Women's Lives, Feminism and the *New Zealand Journal of History*,' *New Zealand Journal of History* 52, no.2 (2018): 134-152.

⁵¹ *Ibid*, 145.

⁵² Angela Wanhalla, 'Interracial Sexual Violence in 1860s New Zealand,' *New Zealand Journal of History* 45 no.1 (2011): 71-84.

⁵³ *Ibid*, 72,74.

to second wave feminism.⁵⁴ Bauchop analyses a sample of articles which mention rape covering eight years of the *New Zealand Herald* and *New Zealand Truth*. Bauchop found that in order to attract public concern, a rape case must involve a woman who was unquestionably innocent and, or a man who was unquestionably perverted.⁵⁵ Newspapers are demonstrated again as sites where sexuality and sexual crimes are regulated. As a member of Dunedin Rape Crisis at the time of her writing Bauchop is attentive to the way in which the reality of rape does not fit neatly into a legal framework. Much of the research on rape emphasises the need to be alert to the societal context and victims' perspectives.

Nicole Humphries' MA thesis in political science 'The Development of the Rape Law Reform Bills of New Zealand during the 1980s' looks at Rape Law Reform Bills (No.1) and (No.2).⁵⁶ Humphries does not explore the influence of feminism on the reform process. Former Minister of Justice Jim McClay is interviewed by Humphries and is assigned considerable credit for the reform. I agree with Jacqueline O'Neill's assessment of Humphries thesis, that McClay overstated his own personal contribution, and that the influence of social movements on political processes are not sufficiently explored.⁵⁷

Jacqueline O'Neill's own MA Thesis "'She Asked for it': A Textual Analysis of the Negotiation of the Meaning of Rape in the 1970s-1980s' explores the discursive changes to narratives of rape in the twentieth century.⁵⁸ O'Neill situates feminist knowledge and behaviour as the key catalyst for legal change.⁵⁹ Discourses of rape shift from being

⁵⁴ Heather Bauchop, 'The Public Image of Rape in New Zealand: A case study of two newspapers, 1950-1960' (Hons. diss., University of Otago, 1990).

⁵⁵ Bauchop, 26.

⁵⁶ Nicole Antionette Humphries, 'The Development of the Rape Law Reform Bills of New Zealand During the 1980's' (MA Thesis, The University of Auckland, 1991).

⁵⁷ O'Neill, "'She asked for it'" 19.

⁵⁸ Ibid.

⁵⁹ Ibid, 3.

perceived as provoked by the victim to an act committed by a perpetrator. Her work also lays out the unstable socio-political context for rape reform locally. In this context the influence of women's liberation and traditional ideas about marriage and family were conflicting in new ways. O'Neill's work is one of the few exceptions to Grace Millar's argument that 'much less has been written about the vast majority of sexual violence that is never reported to the police, let alone tried in a court of law and discussed in the media.'⁶⁰ My own study of the criminalisation of marital rape covers legal and publicly discussed aspects of sexual violence as well as moving beyond these aspects into the lesser studied social and personal aspects of sexual violence

Marital rape can also be incorporated into the wider framework of domestic violence, as is explored in Jacqueline O'Neill's subsequent research for her PhD, 'Men's violence against their wives and partners: the state and women's experience -1960-1984.'⁶¹ O'Neill argues that women's vulnerability to a husband's violence was often determined by their financial and legal autonomy.⁶² Discourses of family harmony and preservation presented a further challenge. O'Neill suggests that the Domestic Violence Protection Act 1982, which itself was a crucial step towards the end of spousal immunity, did not sufficiently address the institutional problems of heterosexual marriage.⁶³ Instead, O'Neill centres real change within 'a strong, autonomous women's movement, both international and local.'⁶⁴

⁶⁰ Millar, 145.

⁶¹ Jacqueline O'Neill, 'Men's violence against wives and partners: the state and women's experience, 1960-1984' (PhD Thesis, Massey University, 2012).

⁶² Ibid, 373.

⁶³ Ibid, 364, 368.

⁶⁴ Ibid, 363.

Marriage and family as a social, political and economic unit is the subject of a lively scholarship in New Zealand. Marital property rights are closely related to spousal immunity. 'From Civil Death to Separate Property: Changes in The Legal Rights Of Married Women In Nineteenth Century New Zealand' by Bettina Bradbury has been essential in connecting spousal immunity with its colonial origins.⁶⁵ Similarly Bradbury's chapter "Colonial Comparisons" in *Rediscovering the British World* on marriage, civilization and nationhood provides a strong basis for understanding the importance of marriage and family in settler New Zealand.⁶⁶

Marital rape reform occurred at a time when the institutions of marriage and family were experiencing instability. Divorce, domestic violence, and rape reform were amongst a series of reforms which were brought to the forefront by the women's liberation movement. Roderick Phillips has traced the evolution of divorce legislation from 1867-1980 in his book *Divorce in New Zealand: A Social History*.⁶⁷ Again, the family is emphasised as the fundamental social unit, and the later twentieth century as a time of instability for divorce patterns and law. Phillips combines legal and social approaches by looking at changes in attitudes, the law, and the frequency of divorce.

Outside of historical work a range of interdisciplinary scholarship can provide a useful theoretical underpinning. Susan Brownmiller's 1975 book *Against our Will: Men, Women and Rape* is a foundational text in understanding sexual violence.⁶⁸ Her argument that rape was not a crime of lust, but of power is now widely absorbed into feminist theory.

⁶⁵ Bettina Bradbury, 'From Civil Death to Separate Property, Changes in the Legal Rights of Married Women in Nineteenth Century New Zealand,' *New Zealand Journal of History* 29, 1 (1995): 40-66.

⁶⁶ Bettina Bradbury, "Colonial Comparisons: Rethinking Marriage, Civilization and Nation in Nineteenth Century White Settle Colonies," in *Rediscovering the British Word*, ed. Phillip Buckner and R Douglas Francis (Calgary, Canada: University of Calgary Press, 2005), 135-157.

⁶⁷ Roderick Phillips, *Divorce in New Zealand: A Social History* (Auckland: Oxford University Press, 1981).

⁶⁸ Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975).

Unequal power relations between men and women, or husbands and wives, perpetuated incidences of rape within marriage. The second wave feminist slogan ‘the personal is political’ rings throughout Brownmiller’s writing with its grounding in lived experiences. Brownmiller’s subjectivity is that of liberal white American woman, therefore while her message was ground-breaking, it was not all-encompassing or sufficiently intersectional. During a similar period, New Zealand feminist writing by Margot Roth challenged women’s domestic expectations and questioned whether marriage was a desirable state for women.⁶⁹

Leonie Pihama has been a leading scholar in the area of Māori understandings of sexual violence. In collaboration with Rihi Te Nana, Ngaropi Cameron, Cheryl Smith, John Reid and Kim Southey, ‘Māori Cultural Definitions of Sexual Violence’ provides definitions, historical context and recommendations for kaupapa Māori approaches to healing.⁷⁰ Pihama and her co-authors also demonstrate the link between colonisation and sexual violence, continuing the legacy of activists such as Donna Awatere.

University of Auckland Professor of psychology Nicola Gavey has examined the cultural and psychological conditions of rape culture in *Just Sex?: The Cultural Scaffolding of Rape*.⁷¹ Gavey examines the close connection between what is considered normative heterosexual behaviour and coercive sex. Read together, contemporary and current feminist insights demonstrate changes in how rape is understood and written about. The legacy and limitations of rape law reform become apparent when reading texts from across time periods.

⁶⁹ Roth.

⁷⁰ Leonie Pihama, Rihi Te Nana, Ngaropi Cameron, Cheryl Smith, John Reid, and Kim Southey, “Māori Cultural Definitions of Sexual Violence,” *Sexual Abuse in Australia and New Zealand: An interdisciplinary Journal*, 7,1 (2016): 43-51.

⁷¹ Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape*, 2nd ed, (London: Routledge, 2018).

As an often unreported and seldom discussed part of New Zealand's history marital rape could be regarded as a narrow area of investigation. Instead, the opposite is true. The reasons behind and consequences of marital rape reform are intricately connected with many other developments in New Zealand society during the late twentieth century. Work which has looked specifically at marital rape or sexual violence in New Zealand is valuable for demonstrating this interconnectedness. The ties to broader socio-political themes in New Zealand history are far-reaching including family life and marriage, domestic violence, divorce, women's liberation, feminist theory and the legal system. This research aims to be aware of the multitude of ways which marital rape and rape law reform can be seen as a part of New Zealand society. This awareness necessitates an expansive approach to historiography.

'One of filling in the gaps' is the approach to the history of rape which is currently underway.⁷² Unpublished theses and dissertations have been the most frequent sources I have come across focusing specifically on the area of sexual violence in New Zealand history. This suggests, sexual violence is a continually developing area of historiography. Marital rape, however, has not been looked at in detail, despite its importance. Nicola Gavey and Jade Farley remarked they 'could find virtually no recent literature on marital rape in New Zealand.'⁷³ A study of the criminalisation of marital rape is one way to respond to Raewyn Dalziel's call in her 1993 *New Zealand Journal of History* editorial to continue to study the parts of women's history which 'we don't know, others that we don't understand, and probably much more we need to re-interpret.'⁷⁴

⁷² Humphries, 1.

⁷³ Nicola Gavey and Jade Farley, 'Reframing Sexual Violence as "Sexual Harm" in New Zealand Policy: A Critique,' *Sexual Violence Policy in New Zealand* (2020): 230-231.

⁷⁴ Raewyn Dalziel, Editorial, *New Zealand Journal of History* 27, no.2 (1993): 125-126.

Recent activism reminds us of the persistence of the problem of rape and sexual violence in society. Feminist activism on the issue also endures, with a #Letuslive rally for a city free from sexual violence held in Wellington as recently as 31st March 2021.⁷⁵ Current feminist protests are important sources of inspiration for women's history.⁷⁶ At a time where 'consistent high-profile media discussions of sexual violence' have occurred reflections on how change has happened in our recent history can make an important contribution.⁷⁷ Many of the demands of today's anti-rape movement relate to ideas cultivated in the 1980s although the language may have changed. There is still an urgent need to uncover hidden parts of our recent history.⁷⁸ A study of the social context where such ideas developed is essential for the future of the anti-rape movement.⁷⁹

Sources

Sources in this thesis are drawn from the Hocken Archives, Dunedin, and the Alexander Turnbull Archives and Archives New Zealand, Wellington. Broadly speaking the majority of the sources used can be divided into two main categories: government and feminist. Government sources include Parliamentary debates, committee papers (for example Statutes Revision Committee and Advisory Committee on Women's Affairs) and Ministry of Justice reports. Reading 202 public submissions to the Rape Law Reform process was the most significant primary source undertaking related to the research process. I made notes on the content of individual submissions and recorded data on general patterns through an excel spreadsheet. The data included the stance, author and theme of the arguments

⁷⁵ Katie Harris, "'There is no excuse': Hundreds turn out to protest against sexual violence in Wellington,' *New Zealand Herald*, 31st March 2021, <https://www.nzherald.co.nz/nz/there-is-no-excuse-hundreds-turn-out-to-protest-against-sexual-violence-in-wellington/7AEJB5VQY7BJ6VB67MEFU47BVU/>.

⁷⁶ Millar, 141, 145.

⁷⁷ Ibid, 145.

⁷⁸ Ibid, 142.

⁷⁹ Gavey, 30.

presented in each submission. The submissions were spread across the three archives and multiple collections, therefore I had to be careful to ensure that I did not record the same submission twice. A wide-ranging approach to collecting feminist material has been taken due to the limited number of collections which specifically address spousal immunity or marital rape. I examined archival collections from women's groups, conferences and individual activists. Articles from the *New Zealand Women's Weekly* and *Broadsheet* have also been used.

Published material has also been available through the Hocken library and the Law library at the University of Otago. In two cases, interviews with victims of marital rape have been included from these published materials. These interviews are contemporary sources and have been conducted by a third party. I can only trust the original publishers and interviewers were motivated to represent the stories of their interviewees accurately.

Finally, in relation to access to sources during my study, the period March 2020 – April 2021 has been a strange one, disrupted by a national lockdown due to the Covid-19 pandemic. Charlotte Macdonald has highlighted the difficulty of accessing written material for feminist organisations that are anti-hierarchical and informal compared with the formal structures of government which maintain meticulous records.⁸⁰ Jane Vanderpyl found in her study of feminist service organisations some activist groups kept very few or no formal records.⁸¹ These difficulties are only magnified in a time of COVID 19 when level restrictions meant university, archives and library closures and resources were less accessible than previously. Online resources were the main primary sources available to me during the early stage of my research. The lockdown period served as a reminder of the importance of

⁸⁰ Charlotte Macdonald, 2.

⁸¹ Jane Vanderpyl, 'Aspiring for unity and equality: Dynamics of conflict and change in the "by women for women" feminist service groups, Aotearoa/New Zealand' (PhD Thesis, University of Auckland, 2004), 229.

continuing the digitisation process of New Zealand historical sources, in particular feminist sources.

Chapter Structure

Chapter one looks at spousal immunity in the law before rape law reform. This chapter examines how spousal immunity came to be a part of criminal law in New Zealand.

Foundational ideas about spousal immunity were transplanted to New Zealand from England. Challenges to and reinforcements of spousal immunity are also considered including the role of first wave feminism in the late nineteenth century and legal exceptions made before the 1960s. The first chapter is intended to set the background for the reform as well as point out areas of continuity and change in the legal system.

The second chapter explores the rape law reform process in Parliament from 1981-1985. The central question of this chapter is: how was spousal immunity repealed from the law? This chapter focuses on the research which increased public knowledge about rape and sexual violence, debates in Parliament and the arguments in public submissions. Opposition to repealing spousal immunity is also considered. The infiltration of feminist ideas and language into parliamentary process and debate is a thread that runs from the second to the third chapter.

Chapter three details the feminist initiatives which underpinned the parliamentary process. Wider feminist criticism of discrimination against women are connected to a feminist redefinition of rape. The feminist slogan 'the personal is political' is clearly seen in anti-rape activism in this period. Action in the form of service organisations and consciousness raising on sexual violence was intensifying and spreading at the time of reform. Feminist activism is presented as the answer to the question: why was spousal immunity repealed in 1985?

Chapter four makes an assessment on whether repeal of spousal immunity was a success for the feminist movement. The final chapter is a response to the question: what are the consequences and legacy of the reform? Scholarship from a broad range of disciplines is used to demonstrate the wide-reaching implications of criminalising marital rape both material and theoretical. Feminist history is a transnational history. Strategies, theory and successes known in countries across the world are connected together as a part of a global struggle for women's equality. While the focus of this research is New Zealand all four chapters reference developments in other countries which are related. This thesis concludes with an exploration of how ideas of the past have lingered in the present, despite the transformative changes which have taken place.

Recent History and "Historical Escape"

It can be difficult to understand the concept of spousal immunity within New Zealand history. It is a concept which feels so distant from a post #metoo society and at the same time, sits firmly in the ambit of recent history. A husband's exemption to the charge of rape may seem archaic, as many submissions to the reform pointed out, but it existed in New Zealand until just thirty-six years ago. Anecdotally, speaking about my research in an informal capacity with others I am struck by how often people tell me of their own memories of the reform process. I am only sad that the use of oral history in this research has been limited by the circumstances of the COVID 19 pandemic. For people unfamiliar with the criminalisation of marital rape in New Zealand, when they learn that this happened in 1985 the most common response is an expression of surprise at just how recently such a change occurred. I refer to these responses here as a reminder that spousal immunity is not as far from our living history as we often like to imagine. Marital rape, or as we may now

say, intimate partner violence, is a topic which sadly sits squarely in the present of the lives of many New Zealanders.

Working with recent history has been challenging. Charlotte Macdonald has written about the difficulties of seeing recent events in perspective.⁸² Kelly O'Donnell has argued the recent past is a time with which 'we are still deeply connected' and for this reason 'there is no "historical" escape.'⁸³ Certainly, as a young woman working on a topic of sexual violence while being immersed in public and private conversation about sexual violence on a regular basis, 'historical escape' has had no part in this thesis. Sexual violence has felt as much a part of the present as the past; a traumatic and ever-present reality. Ngaire Naffine's reflections as a feminist doing research on 'gruesome' parts of the criminal law resonated with me. Naffine says 'My subject has frequently slipped from my grasp, but when I have got a firm grip on it, I have not wanted to hold on to it for too long.'⁸⁴ By starting this introduction with a woman's story I hope to maintain a consciousness throughout this work of the real and personal impacts of spousal immunity. The title of this thesis 'the most vital change' is how a women's refuge staff member referred to the repeal of spousal immunity when interviewed for the Ministry of Justice Rape Study in 1982.⁸⁵ She identified the criminalisation of marital rape as the highest of all priorities in legal reforms on rape. It is a reminder of the lived experiences which are intertwined with this legal change. Despite its challenges there is something to be gained at this moment by looking to this recent part of our history.

⁸² Charlotte Macdonald, 2.

⁸³ Kelly O'Donnell, 'The Activist Archive: Feminist, Personal-Political Papers, and Recent Women's History,' *Journal of Women's History* 32, no.4 (2020): 104.

⁸⁴ Naffine, *Criminal Law and the Man Problem*, 1.

⁸⁵ Stone, Barrington and Bevan, 188.

The aim of this work was to learn something about how feminist responses to rape have created change in the past in order to maintain their legacy in the present. Such research is a fulfillment of the ambitions of many feminists who were 'eager to preserve their memories and transmit lessons from their activism for younger generations.'⁸⁶

⁸⁶O'Donnell, 99.

Chapter One

How Did Spousal Immunity Become a Part of New Zealand Law?

Introduction

An English legal system was imported to New Zealand during the mid to late nineteenth century. English laws evolved in the distinctive New Zealand context where Māori customary law pre-existed. Marriage law was a key tool used by the colonial government to regulate social behaviours. English jurists from centuries earlier provided the foundational ideas for English marriage law which were later transplanted to New Zealand, including the idea of spousal immunity. Spousal immunity, the principle that a husband could rape his wife with legal impunity, became codified into New Zealand law through the criminal law code of 1893. Quietly present in criminal law for much of the twentieth century, spousal immunity was affirmed by English cases which were persuasive to New Zealand judges.

Property and marital rights which bolstered spousal immunity were successfully challenged from the mid-nineteenth century. Campaigns from first wave feminists led to women gaining the right to own property and vote by the 1890s, and later expanded the circumstances of acceptable divorce. The legal infrastructure which supported spousal immunity was gradually eroded, yet it was another eighty years before exceptions were made to the principle of spousal immunity. This chapter will argue that spousal immunity was an English legal import that was comprehensively protected in the patriarchal colonial context of New Zealand.

Spousal immunity remained in New Zealand law until the 1980s with little criticism from within the legal system. In 1987, the New Zealand Court of Appeal found that in the

case of *R v N* six years of marriage did not give the appellant unlimited sexual access to his wife's body. In fact, the opposite was emphasised; that to treat a married woman differently would deny her 'the rights over her own body which are accorded to every other woman.'¹ In the face of centuries of legal sanctioning of marital rape the Court found that 'no separate regime of sentencing is called for simply because the parties are married.'² Decisions in Australia and the UK have similarly dismissed the legitimacy of spousal immunity arguing that it was never a part, or at least it should never have been a part, of the common law.³ Regardless of the legal legitimacy, it is clear from examining the origins and development of spousal immunity in New Zealand that the principle was established and protected by law. Legal academics Wendy Larcombe and Mary Heath argued that in Australia the High Court's denial of this same truth ignores the law's part in authorising marital rape and is 'effectively rewriting history.'⁴ The purpose of this chapter is to recognise the role of the law in authorising marital rape in the New Zealand context.

Establishing a Colonial Legal System in New Zealand

The application of the English legal system to New Zealand after British annexation under Te Tiriti o Waitangi/Treaty of Waitangi 1840 instituted 'a constitutional monarchy with a unitary state, an elected government and an unwritten constitution' which remains in place today.⁵ In addition to existing Māori custom, two new sources for marital law were imposed by the settler state; statutes written by Parliament and judicial decisions, known as common

¹ *R v N* [1987] CA99/87 2 NZLR 268.

² *Ibid.*

³ United Kingdom see: *R v R* [1991] UKHL 12. Australia see: *PGA v The Queen* [2012] 245 CLR 355.

⁴ Wendy Larcombe and Mary Heath, 'Case Note: Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*,' *Sydney Law Review* 34, no.785 (2012): 785.

⁵ Māmari Stephens and Rhonda Powell, "Law in Aotearoa" in *Feminist Judgements of Aotearoa: Te Rino: A Two Stranded Rope* ed. Elisabeth McDonald (Oxford: Hart Publishing, 2017), 19.

law. The English Laws Act 1858 affirmed that English laws were in force in the new colony before the signing of the Treaty of Waitangi, from 14 January 1840. Through the nineteenth and twentieth centuries Parliament amended laws and enacted Statutes with increasing autonomy, but particularly after New Zealand ratified the Statute of Westminster in 1947 statutes began to reflect a more distinctive local character.⁶ Common law is guided by 'legal precedents' in prior cases with analogous facts. Precedents established in English common law remained influential to the decisions in New Zealand courts.⁷ The 'Women Speak out Report' from the Pacific Women's Conference in Suva 1976, described non-indigenous systems of law as 'Western and imported, not always suited to the needs of our countries and sometimes to the benefit of only a certain sector.'⁸

Legal historian Alan Watson is credited with coining the term 'legal transplants' in 1973. 'Legal transplants,' defined as 'the moving of a rule or system of law from one country to another' proved an essential theory on how law has developed around the world.⁹ Controversial at the time, Watson argued that law is primarily moved from one society to another and operates as a reflection of the society of origin rather than a reflection of the destination society.¹⁰ Watson considered New Zealand a striking example of a legal transplant for how closely it remained tied to English law. He also acknowledged that this intimacy was reciprocal, with statute changes in one jurisdiction resulting in change in the other.¹¹ Historian Shaunnagh Dorsett, writing in 2014, credits the New Zealand legal system

⁶ Ibid.

⁷ Ibid, 20.

⁸ Vanessa Griffen, 'Women Speak Out! A report of the Pacific Women's Conference, October 27th – November 2nd 1976, accessed November 2020, <http://nzetc.victoria.ac.nz/tm/scholarly/GriWom1-fig-GriWom1056b.html>.

⁹ Alan Watson, *Legal Transplants* (Charlottesville: University Press of Virginia, 1973), 21.

¹⁰ Ibid, 27.

¹¹ Ibid, 74.

with a higher level of autonomous development than Watson does.¹² Dorsett argues the development of the legal system in a new context is a crucial feature of legal transplants. According to Dorsett the defining tradition of New Zealand, and other common law jurisdictions, is 'not one of constitutionalism but of colonisation.'¹³ Considering the theory of legal transplants, the English origins of spousal immunity should be understood alongside the role of colonisation in domesticating English law to New Zealand.

Marriage in Colonial New Zealand

Marriage was a key tool for the colonial government to regulate settler behaviour, with family as the primary social unit. Historian Angela Wanhalla found in her research on interracial marriage in New Zealand that marriage 'was a matter of importance to the state.'¹⁴ Driven by the desire to build a better Britain, married couples were essential for upholding the morality of the new society. Marriage was a sign of a stable and respectable colony.¹⁵ Childbirth was a key measure of the success of colonial marriages.¹⁶ A dutiful wife therefore, was to have reproductive sex and submit to the patriarchal authority of her husband.¹⁷ Historian Deborah Montgomerie suggests that the vast majority of Pākehā New Zealanders in the nineteenth century shared the view of the colonial government that

¹² Shaunnagh Dorsett 'How do things get started? Legal Transplants and Domestication: An Example from Colonial New Zealand,' *New Zealand Journal of Public and International Law* 12, 1 (2014): 106.

¹³ Ibid, 122.

¹⁴ Angela Wanhalla, *Matters of the Heart: a History of Interracial Marriage in New Zealand* (Auckland: Auckland University Press, 2013), 47.

¹⁵ Bettina Bradbury, "Colonial Comparisons: Rethinking Marriage, Civilization and Nation in Nineteenth Century White Settle Colonies," in *Rediscovering the British Word*, ed. Phillip Buckner and R Douglas Francis (Calgary, Canada: University of Calgary Press, 2005), 135, 138.

¹⁶ Angela Wanhalla, 'Interracial Sexual Violence in 1860s New Zealand,' *New Zealand Journal of History* 45, no. 1 (2011):71.

¹⁷ Lisa Featherstone, "'That's What Being a Woman Is For': Opposition To Marital Rape Law Reform In Late Twentieth Century Australia,' *Gender & History* 29, no.1 (2017): 74. Bettina Bradbury, 'From Civil Death to Separate Property, Changes in the Legal Rights of Married Women in Nineteenth Century New Zealand,' *New Zealand Journal of History* 29, 1 (1995): 56.

marriage and domesticity were 'part of the bedrock of a stable settler society.'¹⁸

Montgomerie considers the gender roles assigned to men and women as operating at two levels; practical and ideological. Practical refers to domestic responsibilities, paid employment and public roles. Ideological refers to 'self-image and aspirations.'¹⁹ For women, historian Raewyn Dalziel has observed an 'intense emphasis' on their domestic role in nineteenth century New Zealand. Dalziel has linked women's 'main occupation' as wives and homemakers to men's ability to engage in productive industry. Dalziel argues that women's contribution to building the settler society did give them some satisfaction.²⁰ Pākehā women's identity was formed in relation to their domestic role.

According to historian Bettina Bradbury marriage law was considered a reflection of 'the character of a nation' demonstrating the level of civilisation and strength of a society.²¹ For Māori women evading colonial marital laws required 'avoiding entanglements with European men and land systems.'²² As Wanhalla has argued, avoiding European men was not a realistic option for many Māori women. There is evidence of intimate relationships between Māori and Pākehā dating from the first European visitors in the eighteenth century.²³ Regulating behaviour through marriage was a key part of colonisation.²⁴ Through marriage, missionaries and colonial governments 'managed private lives.'²⁵ Both Māori and Pākehā women who married Pākehā men were subject to the marital laws of the English

¹⁸ Deborah Montgomerie, 'New Women and Not-So-New Men, Discussions about marriage in New Zealand 1890-1914' *New Zealand Journal of History* 51, no.1 (2017): 38.

¹⁹ Ibid, 39.

²⁰ Raewyn Dalziel, 'The Colonial Helpmeet: Women's Role and the Vote in Nineteenth Century New Zealand,' *New Zealand Journal of History*, 11, no.2 (1977): 115, 113.

²¹ Bradbury, "Colonial Comparisons," 135, 140.

²² Bradbury, 'From Civil Death to Separate Property,' 50.

²³ Wanhalla, *Matters of the Heart*, 1.

²⁴ Ibid, 47.

²⁵ Ibid., 23.

legal system. The Marriage Act 1904 did not apply to marriage between Māori couples.²⁶ Māori couples were able to marry in pākūwhā, following Māori customary practises.²⁷ However, Māori couples and families still experienced the wider impacts of ‘colonial belief systems’ on Māori society in ‘major ways.’²⁸

A defining characteristic of the transplanted system was its ‘maleness.’²⁹ Legal scholars, law makers and judges, the overwhelming majority of whom were men, defaulted to see the law through their own perspective, as a man, a father or a husband.³⁰ Unchallenged on arrival in New Zealand, the male legal persona became localised as a settler male legal persona. Controlling marriage through legislation served to protect ‘white men’s sexual freedom and civil rights’ in relation to property laws, land ownership and inheritance.³¹ Marriage law was, according to Bettina Bradbury, a ‘powerful instrument of male accumulation’ in the early colonial period.³² In this context of patriarchal colonialism spousal immunity was easily accepted and affirmed.

Underlying Ideas about Spousal Immunity from Blackstone and Hale

Spousal immunity was based on two ideas about the marital contract; that a wife submits irrevocable consent to sexual intercourse and that her legal identity is united with that of her husband. Husbands through marriage became ‘not only owners of their wives’ property but also of their wives’ bodies.’³³ Ideas about the marital contract came from ‘a shared

²⁶ *Marriage Act, 1904, Schedule A, Analysis Point 2, 74.*

²⁷ Wanhalla, *Matters of the Heart*, 11.

²⁸ Leonie Pihama, Rihi Te Nana, Ngaropi Cameron, Cheryl Smith, John Reid, and Kim Southey, “Māori Cultural Definitions of Sexual Violence,” *Sexual Abuse in Australia and New Zealand: An interdisciplinary Journal*, 7,1 (2016): 46.

²⁹ Mary Heath and Ngaire Naffine, “Men’s Needs and Women’s Desires: Feminist Dilemmas about Rape Law Reform,” *Australian Feminist Law Journal* 3, (1994): 52.

³⁰ Ngaire Naffine, *Criminal Law and the Man Problem* (Oxford: Hart, 2019) 13.

³¹ Wanhalla, *Matters of the Heart*, 47.

³² Bradbury, “Colonial Comparisons,” 137.

³³ Ibid.

colonial culture' which 'circulated throughout the empire.'³⁴ The concept of 'irrevocable consent' originated in the writings of English jurist, Justice Matthew Hale. Although the legitimacy of Hale's proclamation as a source has been questioned by legal scholars, irrevocable consent became a part of common law through landmark cases. Section 211 of the Crimes Act 1908 defined rape as 'the act of a male person, over the age of fourteen years, having carnal knowledge of a woman or girl who is not his wife without her consent.'³⁵

Two prominent English jurists, Sir Matthew Hale (1609-1676) and William Blackstone (1723-1780) provided the underlying ideology for a wife's explicit exclusion from the definition of rape. Sir Matthew Hale served as Justice of the Common Pleas, Chief Baron of the Exchequer and Chief Justice on the King's Bench before his death in 1676. It was not for another 60 years that his most famous writing, *Historic Pleas of the Crown* was published. In this Treatise Hale explicitly examined a husband's immunity from the crime of rape. Hale wrote 'the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract.'³⁶ Some boundaries in how a husband may use his wife's body did seem reasonable to Hale; A husband was not to 'prostitute' his wife to another man, nor should he force a woman to marry him so that he may rape her.³⁷ Preservation of the honour and decency of the husband, rather than the bodily autonomy of the wife was a central focus of Hale's thinking.

³⁴ Ibid, 149.

³⁵ *Crimes Act* 1908, 211.

³⁶ Matthew Hale, *Historia Placitorum Coronae* (Woodward and Davis, 1736), 628. Accessed March 2020 https://books.google.co.nz/books/about/The_History_of_the_Pleas_of_the_Crown.html?id=u1FDAAAACAAJ&redir_esc=y

³⁷ Ibid, 629.

Marriage, sex and the law are knotted together in Hale's statement, by consenting to the first a wife has consented to any treatment with regards the latter two. Hale's reasoning that a wife gave her body to her husband on marriage indicates his view that sexual intercourse is a privilege unlocked by marriage. Legal scholars such as Morris and Turner in their 1952 article 'Two Problems in the Law of Rape' took this reasoning further by suggesting that intercourse may even be seen as a 'a right and a duty inherent in the matrimonial state.'³⁸ Writer and activist, Diana Russell, wrote in her pioneering book *Rape in Marriage* 'many people still believe that when a woman says I do she gives up her right to says I won't.'³⁹ Sex, consensual or otherwise, was positioned as an essential element of marriage. English Philosopher John Stuart Mill wrote in *The Subjection of Women* (1859) that men 'who are little higher than brutes' are permitted to 'obtain a victim' and cause a 'breadth and depth of human misery' through the law of marriage.⁴⁰ A wife's refusal to consent was seen as a failure to fulfil her contractual obligation and wifely duty.⁴¹ Under Hale's framework the blame for forced sex, or rape, shifts from the husband's behaviour to the wife's refusal. Hale's words established a husband's irrevocable access to marital sex as an entitlement he had earned, and his wife had already given.

Blackstone's writing developed the idea that the legal identity of a woman is suspended in marriage as she enters the state of coverture. Coverture is defined as the legal status of a woman being underneath her husband's protection or authority. Following ten years as a member of Parliament, Blackstone served on the Kings Bench for five months in

³⁸ Norval Morris and Alan Turner, 'Two Problems in the Law of Rape,' *The University of Queensland Law Journal* 2, (1952): 2. Accessed April 2020. <http://www.austlii.edu.au/au/journals/UQLJ/1954/3.html>

³⁹ Diana Russell, *Rape in Marriage* (Bloomington and Indianapolis: Indiana University Press, 1982), X.

⁴⁰ John Stuart Mill, *The Subjection of Women* (London: Savill, Edwards and Co, 1869), 65. Accessed March 2020 <http://www.gutenberg.org/ebooks/27083>

⁴¹ Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Virago, 2007), 307-308.

1770 and as Justice of the Common Pleas from 1770 until his death in 1780. His role in legitimising spousal immunity was more implicit than Hale's in the previous century. He believed 'the very being or legal existence of the woman is suspended during marriage' and becomes 'incorporated and consolidated into that of the husband.'⁴²

Married was a protected status in the law with specific privileges and exceptions granted for married couples. It was not possible for a wife to steal from her husband while cohabiting.⁴³ Under Section 5 of the New Zealand Evidence Act 1908 wives were neither a 'competent or compellable witness' and could not testify against their husbands in court, except in cases of adultery.⁴⁴ The same was true of husbands.⁴⁵ Married couples were granted immunity in criminal law in to shield their marriage from 'scrutiny or review by the courts.'⁴⁶ The rights and safety of married individuals was not the primary reason for these spousal immunities. Spousal immunities served to protect the prominence of the institution of marriage by limiting the circumstances where couples could air legal grievances. Other spousal immunities also reinforced the central underlying idea was that husband and wife were one legal entity. To do something to the other would be to do it to themselves. Unsurprisingly, the single legal entity was that of the husband, leaving the wife with no separate legal identity outside of her marriage.⁴⁷ For a wife to disrupt or dissolve a marriage was to risk her only means of existence in the law.

⁴² William Blackstone, *Commentaries on the Laws of England*. Vol.1, 430. Accessed March 2020. https://avalon.law.yale.edu/subject_menus/blackstone.asp

⁴³ Bradbury, 'From Civil Death to Separate Property,' 62.

⁴⁴ *Evidence Act 1908*, 5.

⁴⁵ Bradbury, 'From Civil Death to Separate Property,' 43.

⁴⁶ Peter Donald McKenzie Barrister and Solicitor, and Murray David Darroch Public Servant, Written Submission, 5-6. 'Rape Law Reform Bill' Submissions [part 2] in Sir Michael Cullen Political Papers, MS-2686/164, Hocken Library, University of Otago, Dunedin.

⁴⁷ Naffine, *Criminal Law and the Man Problem*, 13.

The simple logic of husband and wife becoming one person through marriage was pervasive.⁴⁸ Blackstone's writing gave the biblical principle of marriage, that man and wife 'become one flesh,' an enduring legitimacy in the law.⁴⁹ The corporeal language of Genesis indicates the centrality of sexual intercourse for the purpose of procreation to the essence of Christian marriage. 'Becoming one flesh' is echoed in both Hale and Blackstone's perceptions of the marital contract; that a husband obtains both unlimited sexual access to and the legal personhood of his wife. Theologically speaking marriage for Christian couples was a relationship between husband, wife and God. Practically speaking, certainly by the nineteenth century the third party to marriage was not God but the state. Legislation on marriage affirmed the reality of Christian marriage in colonial New Zealand to be more like entering a contract than a covenant. Sexual intercourse becomes a condition of the contract under this framing. Marriage as a contract was a key legal principle underlying Hale and Blackstone's proclamations.

Critics have since pointed out that marriage does not follow the legal conventions of a contract. There are no written provisions or specified penalties. Neither husband nor wife are aware they are agreeing to anything beyond their marital vows.⁵⁰ To be consistent with the principles of contract law a marital contract would have to clearly specify what a woman is submitting by signing. Furthermore, the proper solution to a broken contract is to seek damages, not violent enforcement of the terms.⁵¹ Principally, the existing matrimonial law did not assume a wife's agreement to sexual intercourse and did not treat refusal as

⁴⁸ Ibid, 48.

⁴⁹ Genesis 2:24, NASB.

⁵⁰ Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Virago, 2007), 324.

⁵¹ Russell, 358.

grounds for a divorce.⁵² Discrepancies in the concept of a marital contract are only the beginning of the flaws in Hale and Blackstone's authoritative base for spousal immunity.

Recent criticism of the legal authority of spousal immunity has ranged from describing it as a 'legal oxymoron' to a 'performative utterance' which was 'novel and fallacious.'⁵³ There was no reference to any case in Hale's description of spousal immunity. Although Hale was a jurist, he was writing in a personal capacity. It is not clear he intended *Historic Pleas of the Crown* to be published at all. Hale's dictum was assumed to be a suitable authoritative source while lacking sufficient 'explanation, justification or reflection.'⁵⁴ Although subject to recent scathing analysis, it seems at least until the 1970s Hale's dictum was accepted without questioning its authority.⁵⁵ Legal recognition of marital rape relied on a rejection of the idea that man and wife were one legal entity.⁵⁶

Challenges from First Wave Feminists

Property law reinforced the idea that husband and wife were not only one entity but that husbands owned their wives. Establishing a wife as the property of her husband was crucial for justifying an exemption for marital rape. John Stuart Mill argued that 'marriage is the only actual bondage known to our law.'⁵⁷ When viewed as a possession of her husband a wife's capacity to consent to sexual activity was limited.⁵⁸ Marriage also meant a loss of

⁵² Ngaire Naffine, "'Some gentle violence': Marital rape immunity as contradiction in criminal law," in *Research Handbook on Feminist Jurisprudence*, ed. Robin West and Cynthia G. Bowman (Cheltenham: Edward Elgar Publishing, 2019), 242.

⁵³ Lisa Featherstone and Alexander Winn, 'Marital Rape and the Marital Rapist: The 1976 South Australian Rape Law Reforms,' *Feminist Legal Studies* 27, no.1 (2019): 61.

Chris Lloyd, "'Ce qui arrive": Deconstruction, invention and the legal subject of *R v R*,' *Australian Feminist Law Journal* 37, (2012): 65, 69.

⁵⁴ Naffine, *Criminal Law and the Man Problem*, 44.

⁵⁵ Larcombe and Heath, 785-786.

⁵⁶ Bradbury, 'From Civil Death to Separate Property,' 50.

⁵⁷ Mill, 116.

⁵⁸ Naffine, *Criminal Law and the Man Problem*, 44.

financial autonomy for women. Legally husbands had a claim to the bodies, property and possessions of their wives.⁵⁹ In her 1982 survey of marital rape in the United States, Diana Russell suggested that 15 percent of women who were raped by their husbands were raped after the two had separated.⁶⁰ A sense of possession persisted beyond the dissolution of a marriage. Russell argues that the prevalence of rape by an ex-husband is 'simply one more consequence of the view of wives as the property of their husbands.'⁶¹ By reimagining wives as property not persons, rape of wives and ex-wives could be constructed as exempt from condemnation within the criminal law. Changes to property law over the late nineteenth and early twentieth century were necessary to overcome coverture.

First wave feminists played a key role in critiquing a husband's control of their wife's property. Historian Bettina Bradbury has called the fight for property rights 'the major feminist issue of the nineteenth century.'⁶² The Married Women's Property Act 1870 allowed only very limited protection of a wife's property. Protection was permitted if a wife could prove her husband's drunkenness, cruelty, adultery or failure to provide maintenance in court.⁶³ The Married Women's Property Act 1884 allowed all married women the possibility of legal ownership over their own wages, property and possessions. A Special Committee on Matrimonial Property reported to the Minister of Justice in June 1972 that the 1884 Act was 'far more comprehensive' than the previous legislation and altered the legal view of property from 'theirs' to 'his or hers' in most cases.⁶⁴ Many women were not affected by these changes as they had never owned property.⁶⁵ The legislation was 'almost

⁵⁹ Featherstone, 'Marital Rape and the Marital Rapist,' 68.

⁶⁰ Russell, 237.

⁶¹ Ibid, 237, 245.

⁶² Bradbury, 'From Civil Death to Separate Property,' 54.

⁶³ Barbara Brookes, *A History of New Zealand Women* (Wellington: Bridget Williams Books, 2016), 106.

⁶⁴ Matrimonial Property, Report of a Special Committee, (Wellington: Ministry of Justice, June 1972), 3.

⁶⁵ Bradbury 56-57. Report of a Special Committee, 3.

identical' to the English Married Women's property Act of 1882.⁶⁶ The possibility for married women to own property separately to their husband's challenged the idea that a married woman's legal identity only existed through her husband. As Bettina Bradbury argues 'wives became real legal beings.'⁶⁷ By the mid-twentieth century married women held the same rights and liabilities in relation to property 'in all respects as if she were unmarried.'⁶⁸

Access to and acceptance of divorce also steadily increased from the late nineteenth to the mid twentieth century. In his book *Divorce in New Zealand: A Social History* Roderick Phillips charted 'a dramatic shift in the direction of tolerance and approval of divorce as a remedy for marital exploitation and marital unhappiness.'⁶⁹ The first New Zealand divorce law in 1867 allowed divorce only in circumstances of adultery. Conditions for divorce were extended with the 1898 Divorce Act to include desertion, drunkenness when combined with a failure to perform marital duties and a conviction for attempted murder of the petitioning spouse. The last clause afforded recognition only to the most extreme cases of partner violence.

Six subsequent acts related to divorce over the following 50 years added a number of other justifications including 'unsound mind' (1907), alternative definitions of desertion (1913, 1919), violence towards a child (1907, 1920), court ordered separation (1920) and living apart for at least seven years (1953).⁷⁰ In 1963 the Matrimonial Proceedings Act replaced all previous legislation, consolidating and expanding on prior justifications. Major change came in the form of the 1980 Family Proceedings Act which considered the

⁶⁶ Bradbury, 'From Civil Death to Separate Property, 51, 56. Matrimonial Property, Report of a Special Committee, June 1972, 2.

⁶⁷ Bradbury, 'From Civil Death to Separate Property, 57

⁶⁸ *Married Women's Property Act* 1952.

⁶⁹ Roderick Phillips, *Divorce in New Zealand: A Social History*, (Auckland: University of Oxford Press, 1981), 83.

⁷⁰ *Ibid*, 146-148.

breakdown of marriage for any reason after a period of separation for two years the 'sole ground' for divorce.⁷¹ Petitions for divorce increased from 50 petitions and 32 decrees in 1898 to between 200-300 in 1917 and then 1,234 in 1939. Increases continued exponentially from 1,912 in 1950 to 7,426 by 1980.⁷² These changes affected men as well but as Phillips notes 'many more women than men have historically been prevented from initiating divorce actions.' Relatedly divorce has always been restricted to those with the financial means to bear the monetary cost.⁷³

Access to and growing social tolerance of divorce was important in relation to spousal immunity because the 'threshold of acceptable discord in marriage was lowered.'⁷⁴ Relaxation in divorce laws extended the legally acceptable circumstances to leave an unhappy marriage but did not completely remove the social stigma. Divorce law marked another area where transformative changes had taken place which was linked to women's rights and freedoms more broadly.

Women's suffrage, achieved in 1893, remains the most cited example of the gains made by first wave feminist campaigns. Through winning the vote women consolidated their ability to organise for political change and became increasingly alert to issues of inequality.⁷⁵ Desires and demands of women and children had to be considered in political decisions in a way they had not been afforded before.⁷⁶ Closely related to the campaign for suffrage, was the temperance movement. Barbara Brookes has called temperance 'the

⁷¹ Ibid, 124.

⁷² Ibid, 57.

⁷³ Ibid, 125.

⁷⁴ Ibid, 83.

⁷⁵ Patricia Grimshaw, 'Politicians and Suffragettes: Women's Suffrage in New Zealand, 1891-1893,' *New Zealand Journal of History* 4, no.2 (1977): 165.

⁷⁶ Brookes, *A History of New Zealand Women*, 121.

international lightning rod' drawing women into political advocacy.⁷⁷ Temperance advocates linked abusive and disorderly behaviour in the home to alcohol consumption. Patricia Grimshaw identified alcohol related disorder and violence compromised the 'morality of the colony and the sanctity of the family.'⁷⁸ Abused women experienced acutely the negative consequences of alcohol.⁷⁹ Temperance, although it was never passed, remains an example of women's political organising in response to men's violence.

Barbara Brookes links the right to vote with spousal immunity in another way. In 'A Weakness for Strong Subjects,' Brookes demonstrates how sexual freedom was understood by first wave feminists as central to gaining other freedoms.⁸⁰ Historian Charlotte Macdonald notes feminist campaigns to address women's sexual danger included raising the age of consent in the 1890s and for more women in the police and the judiciary.⁸¹ Second wave feminists continued to acknowledge women's sexuality and physical body as having political meaning. By the 1980s the connection between women's bodies and politics achieved wider popular acknowledgment.

In her examination of marriage in New Zealand from 1890 to 1914 historian Deborah Montgomerie argued 'marriage was not trounced by feminism: instead, it was transformed.'⁸² Property rights, suffrage, and increased access to divorce were all interrelated parts of the transformation taking place. It is difficult to imagine repeal of spousal immunity would have been possible in a legal context where the property and

⁷⁷ Ibid, 122.

⁷⁸ Dalziel, 120.

⁷⁹ Charlotte Macdonald, *The Vote, the Pill and the Demon Drink: A History of Feminist Writing in New Zealand 1869-1993*, (Wellington: Bridget Williams Books, 1993), 33. Accessed March 2021

<http://thevotethepillandthedemondrink.bwb.co.nz/>

⁸⁰ Brookes, 'A Weakness for Strong Subjects,' 141.

⁸¹ Charlotte Macdonald, 9.

⁸² Montgomerie, 40.

possessions of wives remained under the control of their husbands, or in a legal context where wives had such narrow recourse to leave their marriages. Increased property and separation rights disrupted the foundations of spousal immunity, coverture and a husband's control. A women's right to vote led to increased political power strengthening the capacity of women to influence elections and legislation. Rights gained for married women were 'gradual and uneven.'⁸³ Other barriers for marriage to become an equal partnership remained.

Spousal Immunity in Common and Parliamentary Law

First wave feminist legal gains did not immediately affect spousal immunity which had been reinforced in common law. Spousal immunity continued to be affirmed in landmark cases and consequently referred back to as a precedent. *DPP v Morgan* is perhaps the most salient example of such a case. In 1973, at a pub in Wolverhampton, England, Morgan convinced three of his RAF colleagues to come home with him and have sex with his wife. On the drive home Morgan warned his colleagues that his wife 'might put up a charade of struggling' but advised them this was a sign of her sexual excitement. Each of the four men raped her, including her husband.⁸⁴ Morgan was charged as an accessory to rape, while the others were charged with rape.⁸⁵ During the trial of the four men the judges applied the ancient common law doctrine that a husband cannot be guilty of raping his own wife. The judgement referred to Hale's definition of rape, without questioning the principle of spousal immunity. This common judiciary practise affirmed a husband's immunity.

⁸³ Bradbury, 'From Civil Death to Separate Property,' 50.

⁸⁴ *DPP v Morgan* [1975] UKHL 3.

⁸⁵ Naffine, *Criminal Law and the Man Problem*, 5.

Beyond the exoneration of a husband for the rape of his wife, *DPP v Morgan* reflected the very quiet manner with which marital rape was dealt with in the law. Spousal immunity was given 'highly selective attention and inattention.'⁸⁶ Discussion of *DPP v Morgan* among New Zealand scholars and judges focused on the 'mens rea' or 'mental element.'⁸⁷ The central physical element of the case, marital rape, was quickly brushed over. Rape, it was held, was only rape if the accused knew they did not have consent. The English House of Lords three to two majority found that 'honest belief in consent' was sufficient, 'whatever his grounds for so believing.'⁸⁸ The affirmed supremacy of 'honest belief in consent' combined with the societal perception of marriage as irrevocable consent formed a toxic mix. The decision in *DPP v Morgan* that Morgan was not guilty of rape reinforced the principle of spousal immunity. The mental element was thought to be so important that in 1980 the Criminal Law Reform Committee based in Wellington, recommended that the principles of the case be put in statutory form and incorporated 'expressly' into New Zealand law.⁸⁹ The Committee wrote 'we take the view that the law as stated by the majority of their lordships in *Morgan* is also the law in New Zealand.'⁹⁰ Decisions of the English courts still had significant influence on how rape law developed in New Zealand in 1980. Law student M W Frawley wrote in the *Otago Law Review* that the *Morgan* case 'though not binding on the New Zealand courts, is at least persuasive.'⁹¹

⁸⁶ Ibid, 19.

⁸⁷ Report of the Criminal Law Reform Committee 'The decision in *DPP v Morgan*: Aspects of the Law of Rape', Wellington New Zealand, May 1980, 1.

⁸⁸ Ibid, 4.

⁸⁹ Ibid, 16.

⁹⁰ Report of the Criminal Law Reform Committee, 1.

⁹¹ M W Frawley, 'Proposed Reforms to the Law of Rape,' *Otago Law Review* 5, no.3, (1983): 494.

The international influence of *DPP v Morgan* extended beyond common law countries. For example, in Norway intent had to be established for rape to be proven.⁹² *PGA v The Queen* [2012] revealed that some judges in Australia denounced ‘the inappropriateness and offensiveness’ of Hale’s proposition and still followed it obediently in their judgements.⁹³ Most often however, judges quietly inserted spousal immunity into decisions such as *DPP v Morgan* and left it as an unquestioned part of common law.

Spousal immunity had also been codified into New Zealand legislation in 1893 and reiterated in subsequent legislation in 1908 and 1961. Supreme court judge Alexander Johnson and solicitor general Walter Reid were commissioned to work on the adaptation of a criminal code in New Zealand. Johnson and Reid combined English statutory law, particularly the English Bill of 1880, with substantial elements of the common law to draft the Criminal Code Act of 1893. Legal historian Jeremy Finn argues that through the Criminal Code Act, English penal law was accepted in New Zealand with very few amendments.⁹⁴ A husband’s immunity to be convicted of the rape of his wife was one such clause transferred directly from the English penal code to the New Zealand equivalent. Before the 1960s spousal immunity remained very similar to the original English clause with only minor changes in terminology. The Crimes Act 1908 defined rape as the act of having ‘carnal knowledge’ without consent in section 211 of Crimes Against the Person and Reputation.⁹⁵ In the Crimes Act 1961 rape appears in the category ‘Sexual Crimes’ with ‘carnal knowledge’ replaced by the term ‘sexual intercourse.’⁹⁶

⁹² Russell, 349.

⁹³ Larcombe and Heath, 801.

⁹⁴ Jeremy Finn, “Codification of the Criminal Law: The Australasian Parliamentary Experience,” in *Crime and Empire 1840-1940: Criminal justice in a Local and Global Context*, ed. Barry S. Godfrey and Graeme Dunstall (London & New York: Routledge, 2005), 225.

⁹⁵ *Crimes Act* 1980, 211.

⁹⁶ *Crimes Act* 1961, 127-.

Judges in common law jurisdictions made a series of exceptions through cases in the 1960s to overcome a number of practical difficulties of maintaining spousal immunity in contemporary society. These exceptions exposed flaws in the law while allowing the overall rule of spousal immunity to remain in place. Ex-wives were legally protected from marital rape, along with a number of other exceptions made to the spousal immunity rule. Excessive violence meant the husband was liable for battery and physical assault but not rape.⁹⁷ 'Unreasonable demands,' or danger of contracting venereal diseases, were deemed acceptable circumstances for a wife to refuse consent in Australia.⁹⁸ In New Zealand, wives in mental health institutions were protected from any man, including their husband, forcing them to have sex through an exception to the Mental Defectives Act 1911.⁹⁹

The Crimes Act 1961 revised the specifics of exceptions for formerly married couples in New Zealand. Conditions required to be legally separated included a decree nisi, divorce, nullity, judicial separation or separation order. All of these options were formally regulated by the state. For example, simply filing a petition was not deemed sufficient to prove separation.¹⁰⁰ Following their separation the parties also had to cease cohabitation.¹⁰¹ State regulated separations were not equally accessible. In *Feasey v Feasey* [1984] the judgement emphasised the importance of low-income families remaining as one unit to spare the taxpayer from having to support two households instead of one. Children were one of the

⁹⁷ Francis Boyd Adams, *Adams on Criminal Law* Vol. 1 (Wellington: Thomson Reuters, 1992), 283.

⁹⁸ Lloyd, 75. Bourke, 325.

⁹⁹ Barbara Brookes, "A Weakness for Strong Subjects: The Women's Movement and Sexuality," *New Zealand Journal of History* 27, no.2 (1993): 153.

¹⁰⁰ Stephen Mitchell, ed., *Archbold, Pleading, Evidence and Practice in Criminal Cases*, (Auckland: Sweet and Maxwell, 1982), 1571.

¹⁰¹ Francis Boyd Adams, *Adams on Criminal Law*, 264.

reason judges suggested that married couples 'should be expected to put up with more' than if the violence was perpetrated by a stranger.¹⁰²

By the 1980s the circumstances within common law which afforded a wife the right to prosecute for marital rape were complicated further. Five significant cases in the English Courts established a set of rules and exceptions followed in New Zealand. Separation voided a wife's consent as held in *R v Miller* but before separation took place a wife did not have a case for rape. *R v O'Brien* contended that for the absolute end to a husband's immunity a divorce needed to be completed. *R v Steele* provided an exception when a non-molestation or assault order was in place, otherwise immunity was affirmed. *R v Roberts* followed the precedent from *R v Steele*. *R v J* was perhaps the most philosophical, interrogating whether sex within marriage could ever be seen as unlawful, positioning the marital bed as the only location of lawful sex.¹⁰³

Exceptions to spousal immunity offered, in a backwards way, a sense of legitimacy to the principle overall. Considering the various exceptions which arose from cases in the late twentieth century, legal scholar Chris Lloyd concludes that 'the exceptions is not outside of the point in question but rather exactly what affirms it.'¹⁰⁴ Wives who left their husbands were recognised in law to have revoked their consent.¹⁰⁵ Inversely this recognition implied wives who remained with their husbands had not revoked their consent. The differences between marital and non-marital rape were arguably more clearly expressed in the law than before the exceptions. Spousal immunity remained in place despite legal exceptions made in case law and increased rights in divorce and property law for women.

¹⁰² *Feasey v Feasey* [1984] 3 NZFLR.

¹⁰³ See discussion of these five cases in: Lloyd, 75-76 and Mitchell 1571.

¹⁰⁴ Lloyd, 77-78.

¹⁰⁵ Naffine, "'Some gentle violence,'" 245.

Feminist legal scholar Ngaire Naffine has argued that spousal immunity is a direct contradiction to the foundational values of criminal law.¹⁰⁶ Spousal immunity was particularly incongruent with the criminal law value of protecting bodily autonomy. Rape was, and is still, regarded one of the most gross violations of bodily autonomy. Hale declared rape to be 'a most detestable crime' which should 'be punished with death.'¹⁰⁷ Thus the condemnation of rape was an essential thread in the logic of criminal law.¹⁰⁸ The disconnect between the condemnation of rape and acceptance of spousal immunity is what Naffine calls 'the contradiction of criminal law.'¹⁰⁹ John Stuart Mill considered the 'servitude' of married women a 'monstrous contradiction to all the principles of the modern world.'¹¹⁰ Bodily autonomy, so central to the values of criminal law, was disregarded in favour of patriarchal authority. Violence was held as both contrary to the purpose of criminal law and justified to establish marital order. 'Gentle violence' was even recommended in some cases.¹¹¹ Physical violence and indecency of some kind were a requirement of establishing marital rape had taken place in South Australia from 1976.¹¹² A 'profound tension' in the logic of criminal law persisted.¹¹³ During the Rape Law Reform process a small fraction of legal professionals suggested similar conditions should be implemented in New Zealand.¹¹⁴ Rather than addressing the failure of criminal law, married women were often encouraged to seek remedies in family law.¹¹⁵

¹⁰⁶ Naffine, *Criminal Law and the Man Problem*, 2.

¹⁰⁷ Hale, 635.

¹⁰⁸ Naffine, *Criminal Law and the Man Problem*, 22.

¹⁰⁹ Naffine, "'Some gentle violence,'" 231.

¹¹⁰ Mill, 147.

¹¹¹ Ibid, 234.

¹¹² Featherstone, 'Marital Rape and the Marital Rapist,' 75. Naffine "'Some Gentle Violence,'" 236.

¹¹³ Naffine, 'Criminal Law and the Man Problem,' 2. Naffine, "'Some gentle violence,'" 233, 236.

¹¹⁴ Prue Oxley, 'Results of Questionnaires to the Judiciary and Lawyers,' in *Rape Study Research Reports Vol.2*, ed. Warren Young and Mel Smith (Wellington: Department of Justice, May 1983), 5, 31.

¹¹⁵ Patricia Easteal, 'Marital rape: conflicting constructions of reality,' *Women Against Violence* 3, (1997): 23.

Conclusion

In 2012, the Australian High Court's decision in *PGA v The Queen* heard the appeal of a husband seeking immunity for the rape of his wife.¹¹⁶ His argument, that marital rape was not a crime in Australia in 1963 when the rape was committed, was not accepted. The majority decision held that the marital exemption was never a part of the common law, or at the very least it no longer existed in Australia due to statutory reforms by 1935.¹¹⁷ Increased property and divorce rights for women were cited as evidence for spousal immunity having 'fallen away.'¹¹⁸ Central to the majority decision was a critique of the authority of spousal immunity in the common law of Australia. Surely, the majority argued, Australian law had moved far enough away from its imperial roots that English common law principles no longer had an influence in an Antipodean context.¹¹⁹ Secondly, the majority opinion of the Australian High Court argued that Hale's words lacked authority as extra judicial writing and that academic citations cannot state the common law.¹²⁰ Dissenting judges argued that just because the law 'is without foundation' did not mean it had no bearing in 'the legal mechanisms.'¹²¹ In other words, while the authority of Hale's dictum was dubious, it was a part of the common law and could not be retrospectively erased.

Spousal immunity was an amalgamation of seventeenth and eighteenth century legal ideas with questionable legal authority in common law and in complete contradiction to the values of criminal law. The principle was transplanted to New Zealand where it developed in close connection to its English origins. Spousal immunity held a specific place

¹¹⁶ *PGA v The Queen* [2012] 245 CLR 355.

¹¹⁷ Larcombe and Heath, 785.

¹¹⁸ *Ibid.*

¹¹⁹ Francis Boyd Adams, 866.

¹²⁰ Larcombe and Heath, 800.

¹²¹ *Ibid.*, 794.

in New Zealand due to the importance of marriage and family as tools of colonisation and state control. Still, ideas of irrevocable consent and the legal absorption of a wife into her husband continued to be imported from English cases to influence New Zealand law. First wave feminists made significant gains for women in the areas of property and marital law, weakening the foundations of spousal immunity. Exceptions to the principle were recognised as necessary to protect women from ex-partners and risks to their health, while retaining spousal immunity. Overall, despite a number of credible avenues to challenge the legitimacy of spousal immunity, the rule was deeply entrenched. Quietly and firmly, it remained a part of New Zealand law until the Rape Law Reform process of the 1980s.

Chapter Two

‘A reform whose time has surely come’

Introduction

Common law countries Australia, Canada and New Zealand passed major reforms to the rape law in the 1970s-1980s. One of the reforms, the removal of spousal immunity for rape, was anticipated by politicians in each of the three countries to be a deeply controversial issue. Lisa Featherstone and Alexander Winn argue in South Australia removing spousal immunity was the one proposed change ‘that proved to be divisive, dominating media coverage of the legislation and sparking a prolonged and partisan debate.’¹ This chapter draws from three main sources to examine the reform process in New Zealand; firstly, contemporary research reports and surveys, secondly parliamentary debates recorded in Hansard, thirdly 202 public submissions to lawmakers. Together these sources demonstrate the surprising agreement which existed among the vast majority of researchers, the public and eventually parliamentarians that spousal immunity should be abolished. Opposition to repealing spousal immunity came from only a vocal minority. Far from the anticipated controversy, and despite the lengthy process, the repeal of spousal immunity in New Zealand was characterized by consensus.

Research indicated that sexual violence was a widespread issue in New Zealand requiring urgent action. In particular, surveys from the *New Zealand Women’s Weekly* and the *Rape Study* research reports established the prevalence of rape committed by someone

¹ Lisa Featherstone and Alexander Winn, ‘Marital Rape and the Marital Rapist: The 1976 South Australian Rape Law Reforms,’ *Feminist Legal Studies* 27, no.1 (2019): 57-58.

known to the victim and in private spaces. Nearly half of the public submissions saw the issue as so straightforward they simply stated that spousal immunity should be repealed with no further arguments. Submissions which included persuasive arguments evoked common themes of logic, modernisation, sexual choice, non-discrimination and protection. Submissions which advocated for retaining spousal immunity were comparatively uncommon, and at times presented overlapping arguments with those they opposed. Despite the clear evidence and consensus when Minister of Justice Jim McLay (National) introduced the Rape Law Reform Bill (No.1) in 1983 spousal immunity was retained. The 1984 election disrupted the passage of the first bill before the stance on spousal immunity was amended. Following a change in government Minister of Justice Geoffrey Palmer (Labour) introduced the Rape Law Reform Bill (No.2) which abolished spousal immunity. By the time spousal immunity was repealed through an amendment to the Crimes Act on the 1st February 1986, politicians across the aisle offered their enthusiastic support for repeal and their commitment to dealing with issues of sexual violence. In the words of Geoffrey Palmer, it was 'a reform whose time had surely come.'² Such robust political support was influenced by a broad coalition of New Zealanders, particularly women and women's organisations.

New Zealand Women's Weekly Questionnaires 1977 and 1981

Violent crime was a source of significant public interest and panic in the 1980s. New Zealanders were increasingly concerned about what they saw as rising incidences of rape

² *New Zealand Parliamentary Debates*, House of Representatives, 22nd August 1984, 72.

and assault.³ Very little information was known about the scope and characteristics of rape in New Zealand so data from the United States and Australia was often relied on.

Newspapers were one of the only local sources of information about rape. After analysing New Zealand newspapers from 1975 to 2015 for her MA thesis Angela Barton found them to be 'exclusionary of women's experiences.'⁴ Barton identified three dominant narratives presented; firstly that rape is perpetrated by people who are strangers to the victim, secondly that women should fear rape and take responsibility to reduce their risks, thirdly that 'real rape only happens to good women.'⁵ Staff writer Frances Levy wrote in the *New Zealand Women's Weekly* that misunderstandings about rape 'allow men to rape – without having to accept the blame.'⁶

In a 'hope to find out more of the truth' amongst the misinformation Miriam Jackson from the National Organisation of Women published a questionnaire in *New Zealand Women's Weekly* in March 1977. The questionnaire asked specifically for the experiences of women who had been raped or sexually assaulted and received 101 responses. Four years later, in September 1981, the *New Zealand Women's Weekly* published a second questionnaire this time organised by Auckland Rape Crisis. The second questionnaire used many of the same questions as the first one and received twice the number of responses, 202.⁷

³ Warren Young, *Rape Study Vol.1: A Discussion of Law and Practice*, (Wellington: Department of Justice, February 1983), 1.

⁴ Angela Millo Barton, 'It's the Same Old Story: Rape Representation in New Zealand Newspapers 1975-2015' (MA Thesis, Victoria University of Wellington, 2017), iii.

⁵ Ibid, 80, 82, 84.

⁶ Frances Levy, 'Help is on the way for Rape Victims,' *New Zealand Women's Weekly*, 7th September 1981, 13-14.

⁷ 1981 Questionnaire on Rape Results, Auckland Rape Crisis Centre, September 1982, Advisory Committee Women's Affairs: Policy and Work Programme – Rape and Research Symposium, 3/0/14, Box 3, Archives New Zealand, Wellington.

Questions such as “What type of force was used against you?” included the options of ‘Mental or emotional pressure’ and ‘money pressure’ alongside the traditional understanding that force implied physical or threat of physical violence. Another question addressed the myth that rape was always a single isolated incident asking ‘were you raped/abused once or over a period of time?’⁸ Particularly pervasive was the myth that rape was most often perpetrated by a deviant stranger in dark streets.⁹ Of the 101 women who responded to the 1977 survey with rape experiences, 19.6 percent were raped in their own homes and 36 percent of the women were married. The vast majority of the perpetrators were married men of European ethnicity who were known to their victims.¹⁰ A *Broadsheet* article in 1977 titled ‘Rape in New Zealand’ used the results of the survey to contrast rape myths with the facts.¹¹ Even after doubling the sample size in 1981 the results remained largely consistent with the previous survey. Both surveys showed around one third of the responses were from women who worked in the home and four fifths of respondents knew their attackers.¹² One in three respondents indicated that they were raped by the same man repeatedly, over a period ranging from 6 months to 16 years. In 1981 fathers or close relatives were the most frequent repeat perpetrators, in 1977 it was husbands, lovers or dates. In total 22 percent of the respondents were raped by current or former husbands, boyfriends or lovers in 1977 and 10 percent in 1981.¹³ These women ‘all felt violated in a

⁸ Auckland Rape Crisis Centre, ‘Questionnaire on Rape and Sexual Abuse,’ 14.

⁹ Heather Bauchop, ‘The Public Image of Rape in New Zealand: A case study of two newspapers, 1950-1960’ (Hons. diss., University of Otago, 1990), 6.

¹⁰ Paper Presented by the Minister for Justice at Seminar ‘Sexual Violence – A Case For Law Reform,’ 27th August 1982, Legal Research Foundation, 24-25. Accessed April 2020
<http://www.nzlii.org/nz/journals/NZLRFSP/1982/8.pdf>

¹¹ ‘Rape in New Zealand,’ *Broadsheet* 55, December 1977, 18.

¹² 1981 Questionnaire on Rape Results, 2.

¹³ This is based on the victim’s own language, and therefore is likely to exclude other women who had a similar experience but did not attach the word rape to it for a variety of reasons.

similar way' to victims of stranger rape despite or in some cases, because of, their relationship with the perpetrator.¹⁴

Overall, the two questionnaires uncovered that rape was one of the most common and underreported forms of violent crime. Reported rapes were only 21 percent (1977) and 23 percent (1981) of the total number disclosed in the survey.¹⁵ Staff and volunteers in women's refuges and rape crisis centres felt these statistics accurately represented the reality of their work.¹⁶ There was clearly a crisis of violence taking place. The questionnaire results indicated that rather than deviant strangers lurking in public spaces this crisis could be located to private residences and in many cases intimate relationships.

Rape and Research Symposium

In an attempt to understand the problem Jim McLay, Minister of Justice in Robert Muldoon's National government, requested in March 1982 that the Department of Justice and the Institute of Criminology at Victoria University Wellington conduct research on rape in New Zealand. The research consisted of a symposium, two published reports and a third report which analysed public submissions to the first two reports. This research was intended to focus on the 'effects of rape on the victim and the victim's perception of the response of the criminal justice system.'¹⁷ Overall the objective of the research was to 'determine whether the law and/or criminal justice system should be modified.'¹⁸ The

¹⁴ 1981 Questionnaire on Rape Results, 4.

¹⁵ 1981 Questionnaire on Rape Results, 3.

¹⁶ Joan Stone, Rosemary Barrington and Colin Bevan, 'The Victim Survey,' in *Rape Study Vol.2: Research Reports*, ed. Warren Young and Mel Smith, (Wellington: Department of Justice, May 1983), 13.

¹⁷ Warren Young, appendix, terms of reference, 3.

¹⁸ Ibid.

existing law, including section 128(a) of the Crimes Act relating to spousal immunity, was up for discussion under the terms of reference of *the Rape Study*.

Delegates from women's refuges, rape crisis, women's organisations, medical and legal professionals, police and politicians were all invited to be represented at the Rape and Research Symposium held in Wellington on the 11th-12th September 1982. Discussion groups, workshops and presentations aimed to give a diverse range of participants 'exposure to one another's views.'¹⁹ Organisers Nicky Hill and Rosemary Barrington sought to continue the work of the 1977 and 1981 questionnaires by addressing the 'considerable public ignorance' and encouraging 'conscious raising' on the issue of rape.²⁰ For example one workshop question asked 'To what extent is rape a sexual crime and to what extent is rape a crime of violence?'²¹ In his opening address Jim McLay highlighted the need for societal change to accompany legal and political efforts. Lawmakers, including himself, held a 'special obligation' to submit their own views to close scrutiny, as leaders in this change. Speaking about rape in marriage McLay showed caution saying, 'certainly I have no fixed or firm view on the topic.'²² Instead, McLay signaled the potential of the research and the public consultation process in assisting with making this decision. There was an element of promise in his words, indicating that 'if there are definitive pointers to particular areas of change I hope these can be introduced promptly.'²³

¹⁹ Opening Remarks, Nicky Hill, Wellington 11-12 September 1982. Advisory Committee Women's Affairs: Policy and Work Programme – Rape and Research Symposium, 3/0/14, Box 3, Archives New Zealand, Wellington.

²⁰ Ibid.

²¹ Workshop questions, Rape Symposium, September 1982, Advisory Committee Women's Affairs: Policy and Work Programme – Rape and Research Symposium, 3/0/14, Box 3, Archives New Zealand, Wellington.

²² Jim McLay, Address to the Symposium on Rape, Saturday 11th September 1982, Advisory Committee Women's Affairs: Policy and Work Programme – Rape and Research Symposium, 3/0/14, Box 3, Archives New Zealand, Wellington, 56-57, 67.

²³ Ibid, 70.

The Rape Study Vol.1 and Vol.2

The next stage of the research project, the first volume of *the Rape Study* was published in February 1983. Volume one examined the existing law in New Zealand. The author of the report, criminologist and legal scholar Warren Young, was careful to express the complexity of the issues and was skeptical of 'solutions that are both obvious and easy.'²⁴ Impartiality, fairness and evidence were guiding principles of the research. The research approach was intended to balance victims needs with protecting innocent people from conviction. Considering these precautions, the position on spousal immunity was striking. After a comprehensive review of the reasons to retain spousal immunity the report found 'none of them to be convincing or supported by evidence.' Young was clear, stating that spousal immunity was 'obviously untenable in the present day.'²⁵

The second volume of *the Rape Study* covered four areas; 'The Victim Survey,' 'Rape Complaints and the Police,' '1980 and 1981 Court Files' and 'Results of Questionnaires to the Judiciary and Lawyers.' In 'The Victim Survey' seven of the fifty women interviewed had experienced marital rape. Two of these were single incidents, five had occurred repeatedly and at times been witnessed by children in the family.²⁶ Home, either the victim's, the perpetrator's or someone else's, was the most frequent location.²⁷ While four of the women experienced physical violence as well as sexual violence the other three did not.²⁸ Reasons the interviewees did not formally report were primarily due to a mixture of

²⁴ Warren Young, 6, 3.

²⁵ Ibid, 118-119

²⁶ Joan Stone, Rosemary Barrington and Colin Bevan, 'The Victim Survey,' in *Rape Study Vol.2: Research Reports*, ed. Warren Young and Mel Smith (Wellington: Department of Justice, May 1983), 135-139.

²⁷ Stone, Barrington and Bevan, 9.

²⁸ Ibid, 135.

financial and family reasons, and feelings of fear, isolation or blame.²⁹ Although some of the interviewees cited legal recognition as part of the reason they did not report, the criminality of the offence alone was unlikely to change whether or not they reported.³⁰ Regardless, all the women who experienced marital rape wanted the immunity to be removed. Glimpses of the reality of marital rape were seen through these interviews but the full extent of the problem remained hidden.

Married women were unlikely to define themselves as rape victims when the cultural and legal assumptions deemed that an impossibility.³¹ Based on the 1971 census 90 percent of the female population between 25-34 was or had been married.³² Diana Russell's 1982 survey of 930 San Francisco women found that one in seven married or formerly married women had been raped by their husbands or ex-husbands at least once. They were women whose experiences were invisible in the justice system. As one refuge worker commented 'there is no legal action they can take.'³³ Raewyn Good, a representative from the National Women's Refuge Collective, was quoted in *The Dominion* as saying, 'for 80 percent of the injuries we see no charge can ever be laid because of spousal immunity.'³⁴ Another refuge worker saw the removal of spousal immunity as 'the most vital change we see as being necessary.'³⁵

The survey of legal professionals was more varied and cautious in advocating for change. Of the 51 lawyers and judges who responded, 15 were in favour of retaining spousal

²⁹ Ibid, 143-145.

³⁰ Ibid, 24.

³¹ Levy, 14.

³² Judith Aitken, *A woman's place? A study of the changing role of women in New Zealand* (Auckland: Heinemann Educational Books, 1975), 33.

³³ Stone, Barrington and Bevan, 188.

³⁴ Anna Smith, 'Focus on rape in marriage,' *The Dominion*, 24 Jan. 1984.

³⁵ Stone, Barrington and Bevan, 188.

immunity. Conditional abolition was favoured by 18 legal professionals.³⁶ Conditions cited included in cases of threats or actual bodily harm to spouse or child, or gross indecency. Similar conditions were included when marital rape was criminalised in South Australia, limiting prosecutions of marital rape to cases where physical bodily harm or threats of bodily harm had taken place.³⁷ The final 18 respondents favoured abolition.³⁸

Lawyers were twice as likely to support abolition of spousal immunity than judges. Reasons for retention mentioned by judges included the existence of more appropriate courses to end marriages, the need to keep law out of the marital bedroom and the practical problems which would arise in proving such a crime.³⁹ The impracticality of proof and prosecution was mentioned frequently in submissions opposed to removing spousal immunity. The law could not possibly decide, they argued, whether intercourse between a married couple was unlawful. A group of young women in law school were among the many advocating for abolition of spousal immunity who dismissed the 'difficult to prove' argument as 'irrelevant' to whether or not the law should be changed.⁴⁰ As Nicole Humphries found in her study of the 1980s Rape Law Reforms 'multiple problems envisaged' never eventuated, and neither did the anticipated widespread opposition.⁴¹

³⁶ Prue Oxley, 'Results of Questionnaires to the Judiciary and Lawyers,' in *Rape Study Research Reports Vol.2*, ed. Warren Young and Mel Smith, (Wellington: Department of Justice, May 1983), 31.

³⁷ Lisa Featherstone and Alexander Winn, 'Marital Rape and the Marital Rapist: The 1976 South Australian Rape Law Reforms,' *Feminist Legal Studies* 27, no.1 (2019): 74.

³⁸ Oxley, 31.

³⁹ *Ibid*, 5.

⁴⁰ Law School Women submission, 15 June 1983, Jennifer Daphne Rowan, 1949-: Papers relating to women's issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

⁴¹ Nicole Antionette Humphries, 'The Development of the Rape Law Reform Bills of New Zealand During the 1980's' (MA Thesis, The University of Auckland, 1991), 247.

Analysis of Submissions Following *the Rape Study*

A clear consensus that spousal immunity should be abolished was visible in the public submissions in response to *the Rape Study*. In a sample of 61 public submissions available spousal immunity was mentioned in 44. Overall, it was mentioned more than any other topic. Thirty six of the 44 public submissions advocated for the abolition of a husband's immunity. Jonathon Peterson's analysis of 111 public submissions found 57 out of the 66 submissions which mentioned marital rape advocated for abolition of a husband's immunity and only nine were in favour of retaining immunity.⁴² One submission suggested a lesser sentence for those convicted of marital rape.⁴³ Although the sample sizes vary significantly between 'The Victim Survey,' 'Results of Questionnaires to the Judiciary and Lawyers' and the members of the public who wrote submissions it is worth noting the distinctions. All of the women interviewed wanted to see the complete removal of spousal immunity, 86 percent of submissions from the public that mentioned spousal immunity agreed, compared to just 35 percent of the legal professionals questioned.

When analysing the submissions for the Department of Justice, Peterson characterized the discussion on spousal immunity as one of 'sharp disagreement.' Certainly a 'diversity of views' was present among both those for and against abolition.⁴⁴ The submissions overall indicated divisions in how New Zealanders understood and experienced violence, marriage and gender more broadly. Two submissions detailed personal accounts, in one case a mother, and in another a friend who had recent experience of sexual assault.

⁴² Jonathon Peterson, *Submissions to The Minister Of Justice On The Rape Study: An Analysis* (Wellington: Department of Justice, July 1983), 15.

⁴³ Ibid, 2, 15.

⁴⁴ Ibid.

These personal stories were shared alongside a plea for the ministers to do more to help but without declaring a stance on spousal immunity.⁴⁵ Another submission from an individual urged for ‘tougher sentences and more consideration for victims.’⁴⁶ The Young Women’s Christian Association (YWCA) came out strongly for abolishing spousal immunity which they considered ‘offensive.’⁴⁷ Similarly, Whangarei Rape Crisis group called spousal immunity ‘outdated and grossly sexist’ and ‘unfair to married women.’⁴⁸

Miramar, Ōhāriu and Wellington Central Women’s Section of the National Party and the National Council of Women New Zealand found disagreement within their organisations. Both reported support for abolition of spousal immunity except for one member who wished to be recorded in favour of retaining spousal immunity.⁴⁹ Women’s Division of Federation of Farmers NZ reported ‘incredibly little feedback or interest shown by the bulk of our membership,’ ‘despite repeated requests.’⁵⁰ Defending spousal immunity one individual argued that ‘the law should support marriage’ and ‘hard cases should not change this.’⁵¹ Another called the alterations suggested by *the Rape Study* research report

⁴⁵ Mrs Morgan submission, 25th June 1983 and D. E. Walker Submission, 13th April 1983, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

⁴⁶ Helen Bremner submission, 13th June 1983, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

⁴⁷ Young Women’s Christian Association submission, 1st July 1983, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

⁴⁸ Whangarei Rape Crisis Group submission, 18th June 1983, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/1-9/13, MS-Papers-11269-28, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Alexander Turnbull Library, Wellington.

⁴⁹ Women’s Section National Party, Miramar, Ōhāriu, Wellington Central submission, 16th June 1983 and National Council of Women submission, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

⁵⁰ Women’s Division of Federation of Farmers New Zealand submission, June 1983, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/167-9/180, MS-Papers-11269-37, Alexander Turnbull Library, Wellington

⁵¹ Elizabeth O’Neill submission, 14th June 1983, Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

‘destructive.’⁵² Fervent opposition to abolishing spousal immunity was present but should not be overstated as equal in size to those who advocated for abolition.

The Rape Study was initiated by the Minister of Justice to provide a wide consultation and evidence base for legislative changes. While public submissions were ‘not a representative survey’ they covered ‘a wide spectrum of New Zealand society, particularly New Zealand women.’⁵³ A third of the submissions came from women’s organisations and another third from individual women. By responding to *the Rape Study* at higher rates than men, women were demanding that ‘those most affected by each institution have the power to determine its nature and direction.’⁵⁴ Victims and legal professionals surveyed and the public submissions agreed that spousal immunity ought to be abolished.

Unfortunately, in the words of historian Joanna Bourke, ‘greater awareness of the harm caused by rape within marriage did not necessarily translate in legislative reform.’⁵⁵ McLay was aware of the support for repeal and the harm caused by marital rape when he introduced the Rape Law Reform Bill (No.1) in the House on the 13th December 1983. Yet, the bill did not seek to change the law on spousal immunity. Instead, McLay continued to frame the issue as something requiring further research due to its contentious nature.

Rape Law Reform Bill (No.1) 1983, Introduction and Debate

When McLay introduced the Rape Law Reform Bill (No.1) into the House, he proudly attributed the bill to a ‘much wider background of research and public discussion’ than

⁵² Alice Steenhof submission, 14th June 1983. Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

⁵³ Peterson, 2.

⁵⁴ Charlotte Bunch, ‘The Reform Tool Kit’, in *Building Feminist Theory: Essays from Quest: A Feminist Quarterly* (New York: Longman, 1981), 198.

⁵⁵ Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Virago, 2007), 321.

would normally occur.⁵⁶ Over 100 organisations and individuals made a contribution to the bill before it had even been introduced. The bill, which ‘originated from a groundswell of public opinion,’ included a number of significant changes to the current law.⁵⁷ Forced oral or anal sex, and violation by an object, were included in the offence of rape alongside sexual intercourse without consent. Belief in consent was to be based on reasonable grounds, which reversed the decision from *DPP v Morgan* [1975].⁵⁸ The requirement, unique to rape cases, for a judge to warn the jury about the ‘danger of uncorroborated evidence’ was removed. An increasingly punitive approach to the crime, especially through longer maximum and minimum sentences was also a part of the bill.⁵⁹ Through these changes the bill seemed to be a genuine attempt to extend the scope of the offence of rape and improve the trial process for victims. The area which received the most ‘definitive pointers’ to change throughout the consultation process remained the same.⁶⁰ No change to the clause which granted spousal immunity was included in the bill. Again, McLay spoke of the need for the revisions committee to conduct further study. McLay suggested leaving spousal immunity unaltered at this stage as it would allow ‘public opinion to be fully canvassed’ on what was a difficult issue.⁶¹

First to respond to the bill from the Labour opposition was Island Bay member Frank O’Flynn, who offered to support the reforms once they were ‘well thought out and thoroughly discussed.’ While O’Flynn affirmed the overall ‘conservative approach’ of the bill he was most critical of its failure to make progress on forced intercourse in marriage.⁶²

⁵⁶ *New Zealand Parliamentary Debates*, House of Representatives, 13th December 1983, 4800.

⁵⁷ *Ibid*, 4802

⁵⁸ *DPP v Morgan* [1975] UKHL 3.

⁵⁹ *Parliamentary Debates*, 13th December 1983, 4800.

⁶⁰ Jim McLay, Address to the Symposium on Rape, 70.

⁶¹ *Parliamentary Debates*, 13th December 1983, 4801

⁶² *Ibid*, 4803.

Labour MP Ann Hercus (Lyttleton) expressed 'great sadness' that spousal immunity remained a part of the legislation. It remained unclear why, as Hercus said, McLay missed such an opportunity to show leadership and consistency.⁶³ She argued that the suggestion this clause would stimulate public discussion was an unconvincing justification. Fran Wilde (Wellington Central) and Helen Clark (Mount Albert) echoed this position from Labour, calling the decision a missed opportunity to enable real and just change. Historians Barbara Brookes and Jane Adams have agreed the state plays a central role in 'regulating standards of sexual behavior.'⁶⁴ To leave spousal immunity unchanged in the Rape Law Reform Bill (No.1) was in the view of many Labour politicians an abdication from this responsibility.

Colleagues in the National-led government came to McLay's defense on the issue. Those with legal backgrounds expressed the 'problems in practical terms' of implementing spousal immunity as some of the judges had done when surveyed.⁶⁵ Paul East (Rotorua) emphasized the lack of available evidence for marital rape cases, suggesting the private nature of the offence would make prosecution very difficult. The member from Helensville, Dail Jones, took a more unorthodox approach to offer support to McLay's position. Referring to comments made by Fran Wilde that the existing law was based on an outdated idea of a wife being the property of their husband, Jones accused Wilde of being 'somewhat sexist in her concern about conjugal rights.' He continued by assuring Wilde that she had nothing to worry about since 'if she were my property I might be willing to give her away.'⁶⁶ Dail Jones was later chosen to chair the Statutes revisions committee for the bill. As one of the two women MPs in National, Ruth Richardson (Selwyn) acknowledged both the practical

⁶³ Ibid, 4805-06

⁶⁴ Jane Adams, "'The 'Coital Factor': Medico-Legal Approaches Towards Sexual Incapacity And Infertile Marriages In Mid-Twentieth-Century New Zealand,' *New Zealand Journal of History* 50, no.1 (2016): 102.

⁶⁵ *Parliamentary Debates*, 13th December 1983, 4809.

⁶⁶ Ibid, 4808.

difficulties of policing rape within marriage and the alternative remedies for women raised by her colleagues. She affirmed that such a reform was 'largely of symbolic worth' and therefore saw abolition as a 'matter of unfinished business.'⁶⁷ In spite of their criticism, Labour MPs joined the National Government in supporting the bill to progress to the Statutes revisions committee stage. Here the details of the bill were refined over a period of about six months. Questions could be asked of the bill and further public submissions invited in order to make the bill as robust as possible before re-entering it into debate.

It is not clear why McLay left spousal immunity in the Rape Law Reform Bill (No.1) at its introduction. University of Victoria Law faculty, Neil Cameron and Warren Young found it difficult to believe McLay would seriously suggest retaining the immunity.⁶⁸ One reason for this view was the inconsistency with the remainder of the bill. The bill's immunity provision defined rape as penetration of a woman by a man, which did not fit with the bill's expansion of the offence and the shift towards gender neutrality. Compared to the outrage at spousal immunity the rest of the bill was generally well received by the public. Many individual submissions identified spousal immunity as an omission in an otherwise excellent piece of legislation.⁶⁹ This could be seen as a benefit of including such an inconsistent provision, whether it was intentional or not. It is possible McLay did genuinely believe that including immunity in the original bill would stimulate public submissions or that spousal immunity provided a clear area for McLay to concede and demonstrate his willingness to work with the public gaining him political favour.

⁶⁷ Ibid, 4806.

⁶⁸ Neil Cameron and Warren Young submission, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

⁶⁹ Rape Crisis and other Women's groups were more outspoken than most public submissions with their critique of other parts of the bill.

When political scientist Nicole Humphries interviewed McLay in October 1991 for her Masters thesis he justified the retention of spousal immunity as a way ‘to encourage submissions.’⁷⁰ Personally, he said, he did want to see spousal immunity removed from the law but it would be ‘very difficult to convince other members of parliament to support such a reform’ without strong public support.⁷¹ Humphries quotes McLay as saying:

I took the view that, if such a provision was included in the bill it could become something of a “lightning rod” for anti-submissions; and that it was quite possible that it would be deleted by the Select Committee, on the other hand, omitting the provision and inviting submissions on it meant that the exclusion of the issue become the “lightning rod”; and the change (for the better) was likely to be made by the Select Committee. History has proved that strategy to be correct.⁷²

Certainly, McLay was correct that there was a strong public reaction to the proposed retention of spousal immunity. Considering his role as Minister for Justice, one of the key figures in the National Government, and the ample existing evidence of the public support for repeal, McLay’s retrospective ‘lightning rod’ reflection seems disingenuous. It is hard to believe McLay truly felt retaining spousal immunity was the most effective way to abolish it.

Journalists and newspaper editors were not going to allow the retention of spousal immunity go unnoticed. Its omission allowed them to report on the controversial rape within marriage debate taking place in and outside of Parliament. Labour MP Bill Jefferies (Heretaunga) was particularly outspoken in the media. Jefferies argued that by acting with such caution McLay was ‘prepared to politicize the crime of rape’ for his own interests in the

⁷⁰ Nicole Humphries, ‘The Development of the Rape Law Reform Bills of New Zealand During the 1980’s’ (MA Thesis, The University of Auckland, 1991), 26.

⁷¹ Ibid.

⁷² Ibid.

1984 election.⁷³ Political gain, Jefferies said, was the only reason that McLay would simultaneously ignore the advice of expert groups, provide a short timeframe for public submissions, and continue to support a law which is 'increasingly unacceptable the world over.'⁷⁴ This sentiment was reflected in the submission from the Porirua Women's Refuge. In their submission to the Rape Law Reform Bill (No.1) the author describes being 'deeply disappointed' at the Minister for ignoring the stance of the majority of submissions to *the Rape Study*. To conclude the author argues 'surely this makes the democratic exercise of seeking submissions a farce.'⁷⁵

Another cause for criticism was the time limit of only eleven weeks to make public submissions after the bill was introduced on the 13th of December 1983. Marlborough's NOW branch expressed disappointment that this issue was held until so late in the National government's term with an election quickly approaching.⁷⁶ While schools were closed for summer, women were often carrying a greater amount of responsibility for childcare. Many women's organisations did not meet in the holiday period for this reason. For students the submission period from December to February did not give them a chance to meet for discussion as university was out of session until March.⁷⁷ Staff in Rape Crisis Centres and Women's Refuges were also already stretched at this time of year due to increased incidences of violence over the holiday period.

⁷³ W.P Jefferies MP Heretaunga Statement, 27th Jan 1984. Advisory Committee Women's Affairs: Liaison – Justice Department Rape Legislation, 30/3/16/3 Box 27, Archives New Zealand, Wellington.

⁷⁴ Ibid.

⁷⁵ Porirua Women's Refuge submission, 16th February 1984, 'Rape Law Reform Bill' Submissions [part 2] in Sir Michael Cullen Political Papers, MS-2686/164, Hocken Library, University of Otago, Dunedin.

⁷⁶ National Organisation for Women Marlborough submission, 8th Feb 1982, 40th Parliament – Statutes Revision Committee – Bills – Public Bills – Domestic Violence [Session 1] 1981-1982, ABGX 16127 W3706 Box 41, Archives New Zealand, Wellington.

⁷⁷ NZUSA submission, 14th February 1984, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

MP and Chair of the Statutes Revision committee Dail Jones was dismissive of the justifications for an extended period of submissions. He was reported as arguing that women's groups should meet in January as 'men's groups do, so why can't women's?'⁷⁸ His National Party colleague Ruth Richardson agreed that 'exhaustive opportunities' had been given for public participation.⁷⁹ The short time frame was commented on in a number of the submissions as a barrier to their participation. Under time constraints some organisations and individuals prioritised the issue of spousal immunity at the expense of a deeper exploration of other aspects of the bill.⁸⁰ Following a series of complaints, the deadline for the first round of submissions was extended from February to June 1984.

Public Submissions to the Rape Law Reform Bill (No.1)

A clear and strong message was sent in response to the introduction of the Rape Law Reform Bill (No.1), that spousal immunity should not remain. Of the 141 submissions that were collected, 120 submissions were in favour of abolishing spousal immunity.⁸¹ Compared to the responses to *the Rape Study* reports the number of submissions focused on ending spousal immunity rose from 51 percent to 85 percent of total submissions. Submissions which argued that spousal immunity should be retained dropped from 8 percent to 6 percent of total submissions. The sharp increase in responses calling for an end to spousal immunity demonstrates a sense of alarm that the Rape Law Reform Bill (No.1) did not fulfil the abolition outlined in *the Rape Study*.

⁷⁸ Ibid.

⁷⁹ Ruth Richardson MP Selwyn statement, 13th December 1983, Advisory Committee Women's Affairs: Liaison – Justice Department Rape Legislation, 30/3/16/3 Box 27, Archives New Zealand, Wellington.

⁸⁰ Labour Women's Council submission, 15th February 1984, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

⁸¹ These 141 submissions were collected across multiple archives and manuscripts. Submissions were used from Alexander Turnbull and Archives New Zealand in Wellington and the Hocken library in Dunedin. See bibliography for the full list of relevant files containing submissions.

Of the 120 submissions in favour of repeal, 51 of them presented this view in one or two sentences, usually something along the lines of ‘we recommend the removal of spousal immunity.’ The plain and concise language demonstrates the extent that for many of the submission authors support for repeal was a straightforward issue. Perhaps, to them, the justification for abolition was so obvious further explanation was unnecessary. The remaining 69 submissions include arguments intended to persuade. Five main themes are present in these arguments; logic, modernity, sexual choice, non-discrimination and protection. There was significant overlap between the five themes and in 39 of the submissions two or more themes were present.

Logic was the most prominent theme, present in 46 of the 69 submissions which detailed arguments in favour of abolition. One individual submission said the law was ‘not only morally and legally unjust but illogical’ and if the law remained unchanged unmarried women living with their partners had legal protection while married women did not. Equal treatment of single and married women under the law was presented as ‘logical.’ Other submissions argued that a logical way for the government to support marriage was to allow women to retain their rights after marriage rather than lose them.⁸² Illogic of the reform was also discussed in terms of being at odds with the remainder of the bill. NZ Mental Health Foundation called spousal immunity a ‘serious anomaly’ which ‘cannot be reconciled with the tone of the remainder of the bill.’⁸³ Gender neutrality throughout the rest of the

⁸² Letter to Bay of Plenty refuge, 1st February 1984, ‘Rape Law Reform Bill’ Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

⁸³ NZ Mental health foundation submission, February 1984, and Gisborne Rape Crisis Centre submission, February 1984, ‘Rape Law Reform Bill’ Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

bill was frequently contrasted with the gendered nature of spousal immunity to demonstrate this inconsistency.⁸⁴

Submission authors used ideas of logic, consistency and rationality to be more palatable to the Statutes Revisions Committee. Using legal language and concepts was a 'savvy' tactic of advocates for repeal demonstrating, as Law and society scholar Rose Corrigan has argued, they understood 'where they can push and how they must placate.'⁸⁵ By including such ideas advocates for repeal found an unlikely ally in the New Zealand Law Society who advised that if spousal immunity was retained it must be amended to become gender neutral in order to fit with the rest of the bill.

The need to modernise the law to be appropriate for people's lives in the 1980s was the next most common theme, visible in 23 submissions. One submission from a woman who disclosed her experience of marital rape read 'we are in the 20th century not the 17th.' Another from Gisborne Rape Crisis Centre called spousal immunity an 'archaic hangover,' arguing that marriage today is meant to be an agreement mutually entered by two people and therefore each person should have equal rights and protection under the law.' NOW Christchurch claimed the consequence of retaining spousal immunity would be to 'set back the cause of women, to Victorian or even old testament ages.'⁸⁶ Alan Brash, on behalf of the National Council of Churches, agreed. He argued that the 'concept of a husband's

⁸⁴ Law School Women's Group Auckland submission, February 1984, Jennifer Daphne Rowan, 1949-: Papers related to women's issues, Submissions on changes to Rape Laws, 9/14-9/30, MS-Papers-11269-29, Alexander Turnbull Library.

⁸⁵ Rose Corrigan, *Up Against a Wall: Rape Reform and the failure of success*, (New York: New York University Press, 2013), 259

⁸⁶ National Organisation for Women Christchurch submission, 13th February 1984, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

entitlement to rape is archaic' and had 'no reality in present day society.'⁸⁷ Similarly, Auckland Council for Civil Liberties wrote 'the arguments against abolition of spousal immunity are in our view, no longer persuasive in the 1980s.'⁸⁸ These arguments align with Bourke's observation that the underlying assumptions of spousal immunity were 'increasingly regarded as profoundly distasteful.'⁸⁹ There was a tangible sense in the words of the submissions, and words of politicians, that spousal immunity was an outdated concept unfit for contemporary society which should be urgently repealed.

Sexual choice, the freedom to consent or refuse sexual activity was included in 21 submissions as a key reason for reform. One individual submission against removing spousal immunity likened this reform to affording wives 'the legal right to decide when sexual activity should take place.' Ironically this submission outlined exactly what advocates for removing spousal immunity thought should happen. As the Women's Electoral Lobby wrote 'a wife is not her husband's possession, she still has the right to choose not to have intercourse with him.' Another individual submission argued that marriage should not lead to a loss of the 'right of choice.'⁹⁰ A women's right to choose was one of the 'fundamental ideas about sex and marriage' which Michelle Arrow argues was challenged by feminists in the 1970s.⁹¹ In the words of the Labour Women's Council the 'attitude that marriage is a relationship based on cooperation not coercion' was increasingly prevalent.⁹² Alongside

⁸⁷ Church and Society Commission of the National Council of Churches submission, 1st February 1984, 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

⁸⁸ Auckland Council of Civil Liberties submission, 8th February 1984, 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/166, Hocken Library, University of Otago, Dunedin.

⁸⁹ Bourke, 324.

⁹⁰ Alison De Boer submission, 25th January 1984, 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

⁹¹ Michelle Arrow, *The Seventies* (Sydney: New South Wales Publishing, 2019), 7.

⁹² Labour Women's Council submission, 15th February 1984.

advocating for women's sexual choice a number of submissions urged the government to adopt positive definitions of consent.⁹³

Non-discrimination includes arguments of spousal immunity being unjust, perpetuating gender inequality and being against women's or human rights. Arguments related to non-discrimination were present in 21 of the submissions and drew on international as well as domestic legislation. Legal historian Lisa Featherstone has written that two central rights emerged out of human rights discourses surrounding the criminalisation of marital rape in Australia; firstly 'that all women must have sovereignty over their bodies,' and secondly that 'married women must not have fewer rights over bodily agency than other women.'⁹⁴ Featherstone concluded that 'rights based discourses' were 'effective when they articulated inconsistencies in the legislation and the culture which propelled the law.'⁹⁵ Gore Women's Refuge named spousal immunity as 'discrimination against married women' and therefore 'contrary to human rights.'⁹⁶ Tauranga Business and Professional Women's Association pointed to various articles under the Universal Declaration of Human Rights (UDHR) and the United Nations Convention for the Elimination of Discrimination Against Women (CEDAW) in their submission. South Wairarapa Women's Network and the Federation of Business and Professional Women's Clubs said spousal immunity was 'clearly against' the Human Rights Commission Act 1977.⁹⁷ Feminist Teachers of Wellington reflected that 'justice requires all women be treated

⁹³ Rosemary Barrington, 'Standing in the shoes of the rape victim: Has the law gone too far?,' *NZLJ* (1986): 410.

⁹⁴ Lisa Featherstone, 'Women's Rights, Men's Rights, Human Rights: Discourses of Rights and Rape in Marriage in 1970s and 1980s Australia,' *Law & History* 5, no.2 (2018): 8.

⁹⁵ Featherstone, 'Women's Rights, Men's Rights, Human Rights,' 8.

⁹⁶ Gore Women's Refuge submission, 12th February 1984, 'Rape Law Reform Bill' Submissions [part 4] in Sir Michael Cullen Political Papers, MS-2686/166, Hocken Library, University of Otago, Dunedin.

⁹⁷ South Wairarapa Women's Network submission, 10th February 1984, and Tauranga Business and Professional Women's Association, 7th February 1984, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

equally.⁹⁸ The right to 'life, dignity and freedom' was affirmed by the Universal Declaration of Human Rights in 1948 as 'inherent to all human beings' 'without distinction of any kind.'⁹⁹ The Convention for the Elimination of Discrimination Against Women, which was ratified in New Zealand in 1985, made more explicit the rights of married women. Particularly CEDAW recognised women to have the 'same rights and responsibilities during marriage' as men.¹⁰⁰ Sexual violence was a 'central plank' in the wider oppression of women.¹⁰¹ Human rights based arguments connected spousal immunity to a broader range of issues needed to be addressed in order to achieve equality, justice and non-discrimination.

The need to protect women was the final key theme, referred to in 19 submissions, often at length. An individual submission pointed to the 'overwhelming evidence' that women are in greater danger at home than they are out in public.¹⁰² One example of such evidence was included in a submission from a Christchurch refuge. In their survey of 100 women entering their refuge, 62 out of 100 women had been raped in the previous 12 months.¹⁰³ For more than half of those women, this had happened at least three times.¹⁰⁴ From their survey results they estimated that marital violence was an issue which affected 20,000 women around the country and in 1982, 50 women would lose their lives as a result.¹⁰⁵ These submissions argued the law was failing to protect women from sexual harm.

⁹⁸ Feminist Teachers Wellington submission, 13th February 1984, 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

⁹⁹ United Nations Universal Declaration of Human Rights Preamble, 1948.

¹⁰⁰ Convention on the Elimination of Discrimination Against Women, Article 16 C, E.

¹⁰¹ Lisa Featherstone, "'That's What Being a Woman Is For': Opposition To Marital Rape Law Reform In Late Twentieth Century Australia," *Gender & History* 29, no.1 (2017): 88.

¹⁰² Jill Abigail submission, 25th January 1984, 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

¹⁰³ Christchurch Women's Refuge submission, 14th June 1984, Jennifer Daphne Rowan, 1949-: Papers relating to women's issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

¹⁰⁴ Ibid.

¹⁰⁵ Battered Women's Support Group submission, 13th January 1982, 40th Parliament – Statutes Revision Committee – Bills – Public Bills – Domestic Violence [Session 1] 1981-1982, R316924, ABGX 16127 W3706 Box 41, Archives New Zealand, Wellington.

Members of the New Zealand Marriage Guidance Council remarked, based on their experience as counsellors, rape in marriage is 'quite common.'¹⁰⁶ New Zealand Association of Social Workers included a reminder in their submission that 'elements of violence and power are integral' in rape and the law should be conscious of how those elements can operate within marriage.¹⁰⁷ The role of the state in protecting women had to be carefully balanced with ideas about privacy. Barbara Brookes identified that by the 1970s an 'increasing number of New Zealand felt that behaviour of two consenting adults was not the business of the state.' Brookes continues, 'where consent was not present feminists argued the state needed to do more.'¹⁰⁸ Feminist ideas about how to keep women safe were assimilated by the state through the narrative of presenting rape as a law and order problem.¹⁰⁹

Concern extended to the safety of the children in a marriage as well as women. Marital rape often occurred within sight of the children, intentionally or otherwise. Mothers and children who had experienced this made submissions indicating the trauma that remained with them for years after the rape took place. The Society for the Promotion of Community Standards focused instead on the trauma for children if a charge was made. They advocated for spousal immunity to remain in order to protect families from the criminal court process.¹¹⁰ Māori and Pasifika voices from the YWCA emphasised the need to

¹⁰⁶ New Zealand Marriage Guidance Council submission, 1st February 1983, 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken, University of Otago, Dunedin, New Zealand.

¹⁰⁷ NZ Association of Social Workers submission, 10th February 1982, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

¹⁰⁸ Brookes, *A History of New Zealand Women*, 374.

¹⁰⁹ Jacqueline O'Neill, "'She asked for it': A Textual Analysis of the Re-negotiation of the Meaning of Rape in the 1970s-1980s,' (MA Thesis, Massey University, 2006), 156.

¹¹⁰ Society For The Promotion Of Community Standards submission, 14th February 1984, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

address issues of violence within the whole family network, by looking not only at rape but also incest and child abuse. Betty Hunapo, President of Kotiri Maori Women's Welfare League, suggested the Minister of Justice appoint a researcher from her organisation to conduct a study of family abuse and rape as they affect Māori. Neither McLay nor Palmer took up this suggestion.¹¹¹

There is evidence of people working together on submissions or working on multiple submissions. Waikato's Branch of the New Zealand Labour Party and Waikato Women in Education wrote remarkably similar submissions suggesting communication between the two groups on the issue or the involvement of women who held membership of both groups.¹¹² Women's Electoral Lobby (WEL) passed a national policy to oppose spousal immunity in 1978. Submissions from the Kapiti, Wellington, Christchurch and Hamilton WEL Branches reflected this shared policy.¹¹³ Within one week of the introduction of the bill nine women from Northland coordinated identical submissions each individually signed. Their submissions argued by retaining spousal immunity the law condemns the choices of the victim rather than the act of rape.¹¹⁴ A group of 15 men from Upper Hutt cosigned a shared submission asking for the removal of spousal immunity. They wrote 'as married men we find the concept of the exemption deplorable and consider that no man should have any such protection from the consequences of his actions.' A married couple in Westport authored

¹¹¹ Kotiri Maori Women's Welfare League submission, 16th June 1983, Jennifer Daphne Rowan, 1949-: Papers related to women's issues, Submissions on changes to Rape Laws, 9/14-9/30, MS-Papers-11269-29, Alexander Turnbull Library, Wellington.

¹¹² Waikato Women in Education submission, June 1983, Jennifer Daphne Rowan, 1949-: Papers related to women's issues, Submissions on changes to Rape Laws, 9/14-9/30, MS-Papers-11269-29, Alexander Turnbull Library, Wellington.

¹¹³ Women's Electoral Lobby branch submissions, Jennifer Daphne Rowan, 1949-: Papers relating to women's issues, Submissions on changes to Rape Laws 9/84-9/105, MS-Papers-11269-34, Alexander Turnbull Library, Wellington.

¹¹⁴ 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/166, Hocken Library, University of Otago, Dunedin.

two individual submissions which mirrored each other. They detailed how their farming background related to their opposition to the law asserting control over women.¹¹⁵ These examples indicate the diversity of New Zealanders working together to make public submissions, men and women from across the country.

Within the diversity of backgrounds, gender patterns remained consistent with the public submissions to *the Rape Study*. Again, the majority of submissions on the Rape Law Reform Bill (No.1) were written by women's organisations and individual women. Women's organisations contributed over one third of the total submissions (39 percent).¹¹⁶ Individual women authored another third of the submissions. Individual men authored approximately nine percent of the submissions and a range of other groups combined to write the final 20 percent. Examples from the public submission process to *the Rape Study* and Rape Law Reform Bill (No.1) illustrate the importance of rape law reform in the lives of a range of New Zealand women. Even if it was mostly men who held positions of power, women and women's organisations were determined to use the tools they had to make their voices known and heard.

Opposition

There was not one 'women's view' on the issue of spousal immunity and consequently women's voices were present within the minority of submissions defending spousal immunity too. Defence of spousal immunity was more present in submissions from individual women than from organisations. A number of examples of conservative religious opposition can be found. These groups did not appear with the same vigour as the

¹¹⁵ 'Rape Law Reform Bill' Submissions [part 4] in Sir Michael Cullen Political Papers, MS-2686/166, Hocken Library, University of Otago, Dunedin.

¹¹⁶ Barrington, 408. Women's organisations refers to groups either comprised mostly of women or whose aims were specifically oriented to improving the lives of women.

Australian Federation of the Festival of Light who led protests against ending spousal immunity.¹¹⁷ Similar organisations in New Zealand were much smaller in size and already engaged in other protests against abortion and homosexual law reform.¹¹⁸ Submissions from individual men and men's organisations were more likely than their female counterparts to oppose the removal of spousal immunity. Arguments on either side of the debate followed a number of the same themes and even borrowed arguments from one another. Those who opposed the removal of spousal immunity held fundamentally different understandings on issues such as marital sanctity, equal rights and appropriate protection. As with submissions in response to *the Rape Study*, the strength of feeling amongst those opposed to removing spousal immunity should not be misrepresented as strength in numbers.

Opponents of repeal were also engaging in the argument about protection, but in a different way. For their perspective the family, home and marital bed should be protected from state intervention keeping the 'split between private and public worlds' undisturbed.¹¹⁹ Featherstone recognizes these discourses as blaming the involvement of the law and not the rape itself as disruptive to the family unit.¹²⁰ As Featherstone points out these arguments did not deny that marital rape happened.¹²¹ This concurs with Michelle Arrow's acknowledgement that 'in some cases privacy perpetuated oppression.'¹²²

¹¹⁷ Proceedings of public hearing on the reform of NSW Rape legislation, NSW Women's Advisory Council, 30th Sept, 1980. Advisory Committee Women's Affairs: Information and Resources Overseas Reports and Legislation on Rape, 30/2/13/24, Box 18, Archives New Zealand, Wellington.

¹¹⁸ Joyce Herd, *Cracks in the Glass Ceiling, New Zealand Women 1975-2004*, (Dunedin: New Zealand Federation of Graduate Women, 2005), 99.

¹¹⁹ Featherstone, "'That's What Being a Women is for,'" 88.

¹²⁰ Featherstone, 'Marital Rape and the Marital Rapist,' 66.

¹²¹ Featherstone, "'That's What Being a Women is for,'" 94.

¹²² Arrow, 9.

Marital sanctity was a central concept, particularly for submissions grounded in religious ideas. One couple who had been married for 44 years, and opposed removing spousal immunity, considered the offence of marital rape 'one more nail in the coffin of marriage and the family.' The submission was written by the husband with the statement 'I concur with all of the above' located next to his wife's signature.¹²³ A submission from Mrs J M Nihoniho, on behalf of the National Working Women's Council, asked the government to live out their responsibility to uphold the sanctity of marriage by keeping spousal immunity in the law.¹²⁴ It was 'a holy bond,' of the 'highest significance to the human race' in which rape was 'an impossible situation.'¹²⁵ A range a bible verses were used to illustrate her argument.

Biblical evidence for either position was divisive. Association of Anglican Women member Marylyn Boyes in Porirua felt 'a Christian philosophy of marriage has never sanctioned by force a man's will and body against the will and body of his wife.'¹²⁶ For those in favour of abolition, marriage was something which they held in high esteem. 'Pseudo Christian' was the phrase used by the National Council of Women to suggest spousal immunity forced misinterpreted beliefs about marriage on a mostly non-church going population.¹²⁷ Instead of 'pseudo Christian' ideas the Inter-Church Council on Public Affairs argued 'societal stray' away from Christian morals was the reason for marital rape. Their submission spoke of the need for 'common consent' to regulate sexual relations within

¹²³ Terence Joseph deLacy submission, 7th February 1984. 'Rape Law Reform Bill' Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

¹²⁴ Mrs Nihoniho submission, 27th February 1984, 'Rape Law Reform Bill' Submissions [part 4] in Sir Michael Cullen Political Papers, MS-2686/166, Hocken Library, University of Otago, Dunedin.

¹²⁵ Ibid.

¹²⁶ Marylyn Boyes submission, 17th May 1983, Advisory Committee Women's Affairs: Liaison – Justice Department Rape Legislation, 30/3/16/3 Box 27, Archives New Zealand, Wellington.

¹²⁷ National Organisation for Women submission, 13th February 1984, 'Rape Law Reform Bill' Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

marriage.¹²⁸ Neither side of the debate had a monopoly on using marital sanctity as a justification for their argument.

Some submissions argued that spousal immunity was unnecessary as alternative remedies already existed in law for abused women. Again, this was the result of an adamant stance that criminal law should not encroach on the marital bedroom. The Equal Parental Rights Society suggested increased funding for counselling was a more suitable method to resolve marital abuse.¹²⁹ Others pointed out divorce was already available and those in unhappy marriages should simply end them. Such arguments seemed to neglect the fluctuating but significant criticism of divorce in the public discourse.¹³⁰

Statistics supplied by the Christchurch helpline for Battered Women showed that 40 percent of their callers were still living with their abusers at the time of calling, and thus the alternative remedies were not meeting the needs of women in violent marriages.¹³¹ Regardless of the other methods of redress available, the lack of safety for these women showed how the law fell short. As Dorothy E. Walker wrote in her submission, abolishing spousal immunity was 'a move to protect women who are financially reliant on their husbands.'¹³²

Equal rights were addressed in submissions opposing the removal of spousal immunity in the context of men's rather than women's rights. An Auckland based men's rights campaign group asserted men's place in the debate arguing that 'men have daughters

¹²⁸ Interchurch Council on Public Affairs submission, 7th February 1984, 'Rape Law Reform Bill' Submissions [part 4] in Sir Michael Cullen Political Papers, MS-2686/166, Hocken Library, University of Otago, Dunedin.

¹²⁹ Equal Parental Rights Society submission, 40th Parliament – Statutes Revision Committee – Bills – Public Bills – Domestic Violence [Session 1] 1981-1982, ABGX 16127 W3706 Box 41, Archives New Zealand, Wellington.

¹³⁰ Jane Adams, 98.

¹³¹ Battered Women's Support Group submission.

¹³² Dorothy Walker submission, 13th April 1983, Advisory Committee Women's Affairs: Liaison – Justice Department Rape Legislation, 30/3/16/3 Box 27, Archives New Zealand, Wellington.

too.’ Although the group did not take a stance on spousal immunity in their submission their survey of men falsely accused of rape was one of the only examples of research done by a men’s organisation.¹³³ Of 48 respondents who claimed to have been falsely accused of rape, 96 percent of them identified their wife as the source of these false allegations.¹³⁴ Men’s Rights advocate Barry Woods took a different approach using his submission to criticize feminists: ‘the more they get, the more they demand’ he said. Where, he asked, was the minister for men’s affairs or even people’s affairs. He also felt that for most men their busy lives ‘holding down a job and earning a living’ prevented them from taking part in the public discourse.¹³⁵ This suggestion seemed to ignore the fact that women were the majority of staff and volunteers engaged in advocacy around sexual and domestic violence, and sexual violence was most often perpetrated by men against women.¹³⁶

Women’s Political Power and the 1984 Election

While submissions to the Rape Law Reform Bill (No.1) were being reviewed by the Statutes revisions committee a major disruption came in the form of a snap election called by Prime Minister Robert Muldoon. National’s three terms came to an abrupt end when the Labour party won 56 seats to National’s 37.¹³⁷ Labour party leader David Lange, took over from Muldoon as Prime Minister. Among both parties was a new generation of politicians who brought new energy and perspectives.¹³⁸

¹³³ Men’s Rights Campaign Group Auckland submission, January 1984, ‘Rape Law Reform Bill’ Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

¹³⁴ Ibid.

¹³⁵ Barry Woods submission, 40th Parliament – Statutes Revision Committee – Bills – Public Bills – Domestic Violence [Session 1] 1981-1982, ABGX 16127 W3706 Box 41, Archives New Zealand, Wellington.

¹³⁶ Community Volunteers Inc submission, 17th February 1984, ‘Rape Law Reform Bill’ Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

¹³⁷ Keith Sinclair, *A History of New Zealand* 5th ed. (Auckland: Penguin, 2000), 334

¹³⁸ Michael King, *The Penguin History of New Zealand* (Auckland: Penguin, 2003), 489.

Phillipa Mein Smith identifies 1984 as 'a major turning point' in New Zealand history when domestic politics was pressed to respond to global and regional pressure on issues of injustice. Crucially, as the public submissions reflected, the newly elected government had a mandate to meet the demands of the significant shifts in public opinion, including taking action on gender equality. Women were politically active, as organisers, party members and as voters. Prioritizing the rights and justice of women in some way was now necessary for political success.¹³⁹ An individual submission provided an example of women's awareness of their own political agency. Two months before the election took place the author urged the government to take action on the issue of rape. She warned 'I will be looking to both individual candidates and parties as a whole to fight for this important issue.'¹⁴⁰ For the first time more women voted for the Labour party than the National party.¹⁴¹ The 'ordinary bloke(s) of middling New Zealand' who supported Muldoon had to concede to his opponents, men and women from a range of protest causes including the women's liberation movement.¹⁴² Addressing issues that women experienced personally was increasingly politically advantageous. Feminist efforts positioned rape as a unifying cause across the political spectrum.¹⁴³ Action against rape and sexual violence was therefore one of the key expectations of the incoming government from within and outside of the feminist movement.

¹³⁹ Media Release, Church & Society Commission, National Council of Churches in New Zealand, 21st December 1984. National Council of Churches in New Zealand: Further records, Church & Society Commission – Media Releases and Submissions, 90-387-15/2, Alexander Turnbull Library, Wellington.

¹⁴⁰ Lynne White submission, 8th March 1984, 'Rape Law Reform Bill' Submissions [part 4] in Sir Michael Cullen Political Papers, MS-2686/166, Hocken Library, University of Otago, Dunedin.

¹⁴¹ Brookes, *A History of New Zealand Women*, 404.

¹⁴² Phillipa Mein Smith, *A Concise History of New Zealand* (Cambridge: Cambridge University Press, 2006), 204-205.

¹⁴³ Vicki McNickle Rose, 'Rape as a Social Problem: A Byproduct of the Feminist Movement,' *Social Problems* 25, no.1 (Oct, 1977): 86.

Rape Law Reform Bill (No.2) 1984, Introduction and Debate

As a demonstration of their commitment to improving the lives of women, rape law reform was an early priority for the new Labour government. After one month in government, Minister of Justice Geoffrey Palmer introduced the Rape Law Reform Bill (No.2). Points of distinction between the two bills became key areas of contest. Labour MPs maximized these distinctions as opportunities to profess their superior commitment to deal with the problem of rape. The bill introduced by the Labour government was very similar to the one which McLay had introduced eight months earlier. Where there were differences, they had arisen from recommendations of the committee work on the previous Rape Law Reform Bill. Sexual violation was suggested in place of the word rape. Palmer argued the term sexual violation more accurately reflected the offence after it was expanded to include forced oral or anal sex and violation by an object. Changing the terminology, it was hoped, would also bypass some of the myths attached to the word rape, which could provide reassurance to both victims and juries disturbed by the severe connotations. The second main difference from the previous bill was the addition of two new offences; obtaining sexual connection by coercion and compelling a person to do or submit to an indecent act with an animal. Spousal immunity was the third key area of difference. The new section 128 expressly stated that the marital relationship did not exclude a person from conviction. Palmer included this provision while being aware that for some of his colleagues abolishing spousal immunity would raise 'difficulties of conscience.'¹⁴⁴ Criminalisation of rape within marriage was an acknowledgement of the more than 180 submissions on the topic, many of which focused on spousal immunity alone.

¹⁴⁴ *Parliamentary Debates*, 22nd August 1984, 72.

Palmer was not shy in celebrating the promptness of his bill in comparison to the previous government who had not been successful in reforming rape law over three terms. Positioning his own bill as a noble step towards justice, particularly for women and victims of sexual violence, obscured potential political motives behind Palmer's actions. McLay challenged Palmer's intentions, suggesting accelerated action on rape law reform was only due to pressure from his female Labour colleagues and the opposition.¹⁴⁵ Allegedly, the previous week Palmer became aware of McLay's intention to reintroduce his Rape Law Reform Bill. According to McLay he was then 'desperate to ensure that the National opposition did not get any credit for the bill,' and urgently assembled a group of his party's women and lawyer members to draft their own reform bill.¹⁴⁶ Just four weeks after the introduction of the Rape Law Reform Bill (No.2), the Rape Law Reform Bill (No.1) was reintroduced on the 18th September. On reintroduction of the Rape Law Reform Bill (No.1) some notable changes had been made, including the abolition of spousal immunity.¹⁴⁷ With the reintroduction of the bill McLay had finally made a decision to repeal spousal immunity. He stated that ending the immunity was 'strongly supported' by National MPs. This change of party position had been public from at least April when Muldoon was interviewed on the subject in the *Dominion*. The National Party Caucus were convinced, although not unanimously, by the overwhelming majority of public submissions which advocated for the change, including some from their own party branches.¹⁴⁸ Speaking on September 18th McLay declared repeal of spousal immunity was supported by clear logic. He said: 'It is wrong for the law to state that a husband can be convicted and sentenced for

¹⁴⁵ Ibid, 74.

¹⁴⁶ Ibid.

¹⁴⁷ *Parliamentary Debates*, 18th September 1984, 243.

¹⁴⁸ 'Few Prosecutions Expected,' *Dominion Post*, 12th April 1984, Advisory Committee Women's Affairs: Liaison – Justice Department Rape Legislation, 30/3/16/3 Box 27, Archives New Zealand, Wellington.

assaulting his wife in the kitchen or the living room of their own home but may not be convicted for an even more savage assault in the bedroom, by way of rape.’¹⁴⁹

Both parties did now agree that spousal immunity obstructed the rights of the victim and should be ended. However, their approaches on how to achieve this differed. The Rape Law Reform Bill (No.2), proposed by Labour, criminalised marital rape by naming rape within marriage as an offence. In their bill, National repealed the section which granted a husband immunity for rape, removing any distinction by marital status from section 128 of the Crimes Act. The Labour government considered themselves willing to go one step further to denounce marital rape. The final draft of the legislation explicitly included spousal rape as Labour had advocated. The new Section 128, read: ‘a person may be convicted of sexual violation in respect of sexual connection with another person notwithstanding those persons were married to each other at the time of sexual connection.’¹⁵⁰

Politicians across party lines had come to an agreement that removing spousal immunity was, in the words of Geoffrey Palmer ‘a reform whose time has surely come.’¹⁵¹ Palmer’s words bare striking resemblance to legal historian Ngaire Naffine’s remarks on the Australian High Court judges’ perception of spousal immunity in *PGA v The Queen*. Naffine argued, ‘when it finally came to be seen as unacceptable, as indeed a contradiction, it was characterized as an anomaly, rather than integral, or an antique curiosity, or simply denied. It was now a tired old thing, a quaint creature from another time, which had run its course.’¹⁵²

¹⁴⁹ *Parliamentary Debates*, 18th September 1984, 244.

¹⁵⁰ *Crimes Amendment Act No.3 1961*, 12th December 1985.

¹⁵¹ *Parliamentary Debates*, 22nd August 1984, 72.

¹⁵² Ngaire Naffine, “‘Some gentle violence’: Marital rape immunity as contradiction in criminal law,” in *Research Handbook on Feminist Jurisprudence*, ed. Robin West and Cynthia G. Bowman (Cheltenham: Edward Elgar Publishing, 2019), 245.

Naffine considers this dismissal of spousal immunity a reflection of the complete lack of accountability from individuals in the criminal legal profession for the original existence of the immunity. She continues by suggesting high court judges 'sliced (spousal immunity) cleanly out of criminal law, leaving the rest of criminal law' unchanged in what she calls a 'quiet excision.'¹⁵³ New Zealand was not dissimilar in the fact that spousal immunity was embedded in criminal law and then eradicated by Parliament without accompanying accountability for why it had remained for so long. In New Zealand repealing spousal immunity did not create the same widespread opposition and deep controversy which had limited the scope and pace of change in Australia. However, it was still a staggered and laborious process for a change which the majority involved seemed to agree on.

Although there was little interest in accepting responsibility for the previous decades of inattention to the clause the then two bills being debated in the house indicated an eagerness to receive credit for changing the law in the 1980s. Both Robert Muldoon's National and later David Lange's Labour government wished to be seen as advancing women's rights. Reforming rape law offered a symbolic way to do this with broad public support. Lively debate ensued over which party deserved more credit for addressing the issue of rape in society. It became more about gaining partisan political support and less about improving the lives of women. Palmer called the drawn out process of the Rape Law Reform Bill (No.1) a procedural 'failure' to take 'the normal and obvious steps.'¹⁵⁴ By introducing a second bill, Ann Hercus, the Minister for Social Welfare in Lange's cabinet, proclaimed they were redeeming the efforts of the members of the public who submitted on the previous bill which were set to go 'down the drain.'¹⁵⁵ Quick to remind the House

¹⁵³ Ibid.

¹⁵⁴ *Parliamentary Debates*, 22nd August, 71, 73.

¹⁵⁵ Ibid, 76.

that the original bill was his, McLay argued that the new government were only continuing a reform process he and his colleagues had started in 1982.

Two Rape Law Reform Bills proceeded to the Select Committee stage and invited public submissions by the end of 1984.¹⁵⁶ Despite, or perhaps due to the remarkable similarity between the two bills' provisions National and Labour party politicians each argued for their bill to be recognized as the original. The Select Committee returned only one bill for a second reading in the house, the Rape Law Reform Bill (No.2). The material which accompanied the Rape Law Reform Bill (No.1), such as *the Rape Study* and first two sets of public submissions were still included in the process. The amendments to the Crimes Act 1961 brought by the Rape Law Reform Bill (No.2) came into force on the 1st of February 1986, including the removal of spousal immunity from section 128. Without the support of MPs in government and in opposition rape law reform would not have been able to progress in the 1980s. It was not one party or the other that was due credit for rape law reform. As Ruth Richardson remind the house 'no one politician of any particular party has a monopoly on concern for rape law reform.'¹⁵⁷

Female MPs demonstrated a particular responsibility towards the task of rape law reform. Nearly two years before the introduction of the Rape law Reform Bill (No.1) New Zealand's 40th Parliament included two female MPs in the National Government and six female MPs in the Labour opposition out of a total of 92 MPs in Parliament. Fran Wilde wrote to the seven other female MPs suggesting together they could raise the 'collective consciousness' of Parliament 'to the level where some action can be taken' on the issue of

¹⁵⁶ Between 1984 and 1985 the Statutes Revisions Committee was renamed the Select Committee.

¹⁵⁷ *Parliamentary Debates*, 22nd August, 77.

rape.¹⁵⁸ She considered radical legislative change was necessary. After the 1984 election a further four female MPs were elected from the Labour party into a slightly expanded Parliament with 95 MPs total. Now with twelve female MPs in total the workload of raising 'collective consciousness' could be shared further, and a sense of solidarity increased. The contest, led by Palmer and McLay, to be acknowledged as the protagonist of rape law reform, detracted from the underlying work of women on both sides of the house. Labour MP Judy Keall (Glenfield) expressed her delight at the bipartisan efforts of the Select Committee in 'solidarity with my sisters on the other side of the house.' Keall was promptly asked if her brothers in the house were also included.¹⁵⁹ Female MPs were not even given space to celebrate the reform as a remarkable achievement for and by women without interruption.

Although McLay acknowledged that 'women's groups have been at the forefront of this change' at the *Rape Study* Research Symposium the contributions of women in legal and political professions were often hidden behind their male colleagues.¹⁶⁰ One submission responding to the research reports regretfully noted 'Rosemary and Joan Stone did not get kudos in the paper, the guys who did were their boss, but I felt sorry for the ladies still.'¹⁶¹

In some ways for men to lead the response to sexual violence seems appropriate. As McLay has written 'rape is not merely a woman's problem.' It makes sense that as the vast majority of perpetrators men should contribute most to the solution.¹⁶² Viewed more

¹⁵⁸ Fran Wilde, letter, 29th January 1982, Jennifer Daphne Rowan, 1949-: Papers relating to women's issues, Submissions on changes to Rape Laws 9/31-9/62, MS-Papers-11269-30, Alexander Turnbull Library, Wellington.

¹⁵⁹ *New Zealand Parliamentary Debates*, House of Representatives, 6th August 1985, 6054.

¹⁶⁰ Hon. J K McLay, Address to the Symposium on Rape, 2.

¹⁶¹ Ana Wallwork submission, 7th May 1983, 9/130-9/166, p3. Jennifer Daphne Rowan, 1949-: Papers relating to women's issues, Submissions on changes to Rape Laws 9/130-9/166, MS-Papers-11269-36, Alexander Turnbull Library, Wellington.

¹⁶² Hon. J K McLay, Address to the Symposium on Rape, 2.

critically, positioning men at the front of the response to women's issues, allows the continuation of primarily male control over women's lives and men receiving credit for work which came out of women's painful experiences. An individual submission acknowledged the power male lawmakers had stating that 'you hold our fate and our rights in trust until we are taught to stand alongside you.'¹⁶³ The majority male Parliament had the power to change women's legal rights much sooner and did not act. A growing number of women in Parliament, women's participation in research reports and public submissions made rape law reform an issue that was no longer possible to ignore.

Analysis of the legal reform process confirms politicians working within the parliamentary process were influenced by a much wider process of social change happening outside of the debating chambers. Arguments made in the public submissions provide an insight into how ideas about rape, gender and marriage were shifting. Without locating rape discourses in a social and political context, Jacqueline O'Neill has argued individual men are acknowledged as responsible for legal changes and the work of the feminist movement becomes 'largely invisible.'¹⁶⁴ Reform relied on 'a strong activist presence' outside of Parliament.¹⁶⁵ Whether it was writing submissions, organising meetings, conducting interviews or responding to questionnaires with personal experiences women and women's organisations expedited rape law reform in 1980s New Zealand and internationally. Feminist theorist Charlotte Bunch reminds us that 'if we do not make it clear that women made a reform happen, it can look like the result of a benevolent establishment.'¹⁶⁶ Certainly the

¹⁶³ Jacqui Brokenshaw submission, 14th June 1983, Jennifer Daphne Rowan, 1949-: Papers related to women's issues, Submissions on changes to Rape Laws, 9/14-9/30, MS-Papers-11269-29, Alexander Turnbull Library.

¹⁶⁴ O'Neill, "'She Asked for it,'" 2.

¹⁶⁵ Arrow, 154.

¹⁶⁶ Charlotte Bunch, 'The Reform Tool Kit', in *Building Feminist Theory: Essays from Quest: A Feminist Quarterly* (New York: Longman, 1981), 199.

process of legal reform took place in Parliament and was executed by politicians but the pressure to act came from New Zealand women, and in particular New Zealand feminists.

Conclusion

The Rape Law Reform Bill (No.1) and (No.2), and especially the removal of spousal immunity, was driven by women, not only in Parliament but outside of it. Women of different ages and backgrounds from across the country made submissions that advocated for the removal of spousal immunity in numbers that could not be ignored. Through writing, protests and teaching women transformed the way they were perceived in society and called for a more equal relationship between husband and wife. It was not just a vocal minority of radical feminists as their opponents claimed. In order for such a long overdue reform to finally break into a legal system steeped in tradition, the call for change had to come from a significant portion of the population. A wider societal shift was taking place, where feminist thinking was increasingly informing how the typical New Zealander understood sex, violence, relationships and power. This process, which Barbara Brookes has called 'a reverberation of feminism throughout New Zealand society,' underlay the legislative changes taking place in the 1980s.¹⁶⁷ Politicians could not ignore this shift and certainly could not allow spousal immunity to continue in law, especially when it was at such odds with public consensus.

¹⁶⁷ Brookes, *A History of New Zealand Women*, 377

Chapter Three

‘I am rapidly becoming a feminist and an activist’

Introduction

By 1985 there was strong political and public consensus in New Zealand that spousal immunity should be abolished. National and Labour politicians alike vocally condemned spousal immunity as outdated and unacceptable. A rapid change had taken place in Parliament after a nearly a century of quiet acceptance; politicians now had a different view of spousal immunity. This chapter will use activist archives, feminist magazines and organisational papers to explore the close connection between feminist activism and changing societal understandings of marriage, sex and violence. Feminist ideas extended far beyond their own circles influencing politicians and other New Zealanders who did not identify as feminist. By leading these shifting understandings feminist initiatives played a pivotal role in the re-examination of spousal immunity. Feminist influence in the criminalisation of spousal immunity should be understood more as a distinct component within the wider feminist concern for sexual violence than as an isolated campaign in its own right.

Feminist initiatives discussed in this chapter included a critique of women’s role in the existing marital structure, widening the definition of rape to reflect women’s experiences, and the establishment of feminist service organisations such as Women’s Refuges and Rape Crisis Centres. Feminists in the 1970s developed a strong critique of the traditional conventions of heterosexual marriage. Marriage was posited as a site of unequal power relations. Feminist knowledge also redefined sexual violence as an abuse of power

which had more to do with social than individual factors. An increasing number of women recognised their experiences within this feminist definition and shared their stories, for example in consciousness raising groups. Feminists were successful at amplifying these stories through print media and public protest. Concurrently, women's refuge and rape crisis centres opened all around New Zealand in the 1970s and 1980s. The work of these services, which focused on support and healing for survivors and community education, was essential for grounding feminist discourse in reality. While these service organisations made important progress, significant tensions characterised their activities.

The anti-rape movement provides one of the clearest examples of the second wave feminist slogan 'the personal is political.' Women's individual experiences of sexual violence were asserted as part of a structural system of oppression in which the state was complicit. Women's testimonies, therefore, form a key component of the work of feminists and will be woven throughout the chapter. I draw from the original testimonies published in John and Doris Church's *Listen to me Please* and 'The Victim Survey' conducted by Joan Stone, Rosemary Barrington and Colin Bevan published in *the Rape Study Vol.2*.¹ 'The personal is political' is the foundational idea which disseminated throughout New Zealand society and provided a vehicle for the other feminist ideas discussed in this chapter. As Michelle Arrow has argued the idea 'seems so obvious to us today that it is hard to conceive of a time before it but it was genuinely transformative.'²

¹ John and Doris Church, *Listen to me please: The Legal Needs of Domestic Violence Victims*, (Christchurch: Battered Women's Support Group, 1981). Joan Stone, Rosemary Barrington and Colin Bevan, 'The Victim Survey,' in *Rape Study Research Reports Vol.2*, ed. Warren Young and Mel Smith, (Wellington: Department of Justice, May 1983).

² Michelle Arrow, *The Seventies* (Sydney: New South Wales Publishing, 2019), 7.

Critique of Marriage

In 1971, a *Ms* magazine article by Judy Syfers entitled 'I want a wife' was reprinted in New Zealand and distributed by Auckland Women's Liberation. Syfers wrote 'I want a wife who is sensitive to my sexual needs... a wife who makes sure I am satisfied.' Furthermore, 'I want a wife who will not demand sexual attention when I am not in the mood for it.'³ These were two among many characteristics of Syfers' desired wife and which indicated a sense of dissatisfaction with the roles of husband and wife. Judith Aitken's 1975 study of the changing role of women in New Zealand asked, 'do housewives participate fully in society?' Aitken concluded from the data that in most cases they did not. For example, a quarter of housewives surveyed made no use of day babysitting and even less had used night services in the last month.⁴ Domestic and childcare responsibilities restricted women's social and political mobility in a way that men did not experience. New Zealand feminist, and founding editor of the New Zealand *Women's Studies Journal*, Margot Roth said this 'ever present focus' on family was 'too heavy a burden.'⁵ Roth rejected the idea that women should be expected to 'develop into nothing more than a useful amoeba on call about the house.'⁶ A need to be liberated from the expectations of domesticity was exactly what Syfers was articulating in 'I want a wife.' Reflecting on 'I want a wife' in 2007 Judy Syfers contrasted the drudgery of the domestic sphere with the 'exhilarating' feeling of being 'involved in something outside of the four walls of my home.'⁷

³ Judy Syfers, 'I want a wife,' *MS Magazine* (1), December 1971, reprinted by Auckland Women's Liberation 1-2, Kathleen Johnson, Miscellaneous Papers, MS-Papers-4580-7, Alexander Turnbull Library, Wellington.

⁴ Judith Aitken, *A Woman's Place? A Study of the Changing Role of Women in New Zealand* (Auckland: Heinemann Educational Books, 1975), 45-46.

⁵ Margot Roth, *Roll on the Revolution...but not till after Xmas!* (Auckland: Women's Studies Association, 2016), 176.

⁶ *Ibid*, 32.

⁷ Diane Bernard, ' "Why I want a Wife": The Overwhelmed Working Mom Who Pined For A Wife 50 Years Ago, ' *The Washington Post*, 5th September 2020, <https://www.washingtonpost.com/history/2020/09/05/judy-brady-syfer-wife-essay-feminist/>.

While second wave feminists began to express their dissatisfaction with marriage, the strict marital contract was losing momentum.⁸ Jacqueline O'Neill considers how the 67.5 percent increase in legal separations and 28.9 percent increase in divorce between 1966 and 1971 contributed to this change. De facto partnerships gained recognition and divorce became easier to obtain and generally more tolerated by the 1980s.⁹ Erosion of the traditional rigidity of marriage created space for a different view of marriage where husband and wife were understood increasingly as equals. Growing numbers of married women took up paid work challenging the idea of the sole male breadwinner. 'Virtually all women' in Wellington recorded paid employment as their occupational title on their marriage certificates in the latter half of the twentieth century according to sociologist David Pearson.¹⁰ Pearson's study of marriage and mobility contrasts the record of paid employment with the blank space or 'domestic duties' present on the majority of marriage certificates pre-1950. The idea that men were the exclusive earners for the family was no longer accurate. However, this pattern was uneven and dependent on class and geography. Overall, in New Zealand married women were 14 percent less likely to engaged in paid work than their English counterparts.¹¹ For the 26 percent of married women who were employed in 1971, paid work rarely resulted in any change to the division of domestic labour. Divorce and employment patterns hinted at a loosening of the grip of traditional marriage and a rise in the idea that marriage was an equal partnership. Reflecting this idea through men and women's every day practises was much harder.¹²

⁸ O'Neill, 'Men's Violence Against Wives and Partners,' 359.

⁹ Ibid, 341.

¹⁰ David Pearson, 'Marriage and Mobility in Wellington 1881-1980,' *New Zealand Journal of History* vol.22, no. 2 (1988): 140.

¹¹ Brookes, *A History of New Zealand Women*, 347.

¹² Ibid, 359.

The first wave feminist slogan 'for god, home and humanity' did not reflect the feminists of the 1970s. Instead, they favoured the idea that 'the personal is political' and interrogated the meaning of women's contributions in the home from sexual expectations to the division of labour.¹³ The National Organisation for Women (NOW) sought to 'change the structure of marriage' as a primary objective. In a 1970s pamphlet setting out their beliefs they offered an alternative vision for marriage: 'we believe that a union between free and equal beings is the only marriage worth having.' Freedom was considered as important as equality. NOW advocated for interconnected solutions to achieve this such as 24/7 childcare centres and free contraception.¹⁴

Recognising marriage as a site of unequal gender relations was key to shifting public and political understandings of marital rape. Feminists argued that even if husbands did not abuse their power, they had far too much of it in the first place. This echoes arguments made by the nineteenth century British philosopher, John Stuart Mill who wrote that 'the abuse of the power cannot be very much checked while the power remains.'¹⁵ Rape was a consequence of and tool for consolidating this power.¹⁶ Andy Kaladelfos' study of familial sexual abuse in Australia identifies financial authority, privacy, social expectations, including sexual expectations of female family members as 'elements of control' within a family

¹³ Ibid, 344-345.

¹⁴ Auckland Women's Liberation Pamphlet, 1970, Sandra Coney Papers 1944-: Newspaper Clippings, newsletters and flyers, 98-162-1/01, Alexander Turnbull Library, Wellington.

¹⁵ John Stuart Mill, *The Subjection of Women* (London: Savill, Edwards and Co, 1869), px. Accessed March 2020 <http://www.gutenberg.org/ebooks/27083>

¹⁶ Diana Russell, *Rape in Marriage* (Bloomington and Indianapolis: Indiana University Press, 1982), 360. Jacqueline O'Neill, "'She asked for it': A Textual Analysis of the Re-negotiation of the Meaning of Rape in the 1970s-1980s' (MA Thesis, Massey University, 2006), 5.

unit.¹⁷ Therefore, in order to address the issue of wife rape feminists needed to work towards equal power relations in marriage.

Nineteenth century ideas about wives as their husband's property, particularly sexual property, were embedded in law and remained visible in the social and sexual obligations which Kaladelfos discusses. Noni, an interviewee at the Christchurch Battered Women's Support Group described the pressure she felt constantly to please her husband. Noni's husband turned to 'wild rages and physical attacks' when he was not pleased.¹⁸ Another interviewee Penelope remembered her therapist telling her she 'wasn't being a very good wife' because (she) wasn't having sex her husband. Penelope also recalled that during a particularly violent assault 'the house was a mess.'¹⁹ For interviewee Barbara whether the evening meal was on the table at 5pm or 5.15pm could result in a violent attack by her husband.²⁰ Barbara reflected that 'no woman walks out of her marriage easily' suggesting something of the intensity with which some women felt bound to these obligations.²¹

Rape was clearly linked to a wider context of violence in the home and other forms of authority which husbands exercised over their wives. Transnational feminist rhetoric connected marriage with sexual slavery emphasising the lack of freedom women experienced, particularly bodily autonomy and financial freedom.²² Australian historian

¹⁷ Andy Kaladelfos, "Uncovering a hidden offence: Social and legal histories of familial sexual abuse," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne: Monash University Publishing, 2019), 77.

¹⁸ "Noni" in John and Doris Church, *Listen to me please: The Legal Needs of Domestic Violence Victims*, (Christchurch: Battered Women's Support Group, 1981), 7. Hocken Library, University of Otago, Dunedin.

¹⁹ "Penelope" in Joan Stone, Rosemary Barrington and Colin Bevan, 'The Victim Survey,' in *Rape Study Research Reports Vol.2*, ed. Warren Young and Mel Smith, (Wellington: Department of Justice, May 1983), 135.

²⁰ "Barbara", Church, 11.

²¹ "Barbara", Church, 10.

²² Alana Piper, "Understanding economic abuse as domestic violence," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne: Monash University Publishing, 2019), 38.

Alana Piper has studied economic abuse within the context of marital violence. Piper concluded that economic abuse was 'built into household gender relations.'²³ Lily, an interviewee at Christchurch Battered Women's Support Group recalled her husband leaving with large truckloads of furniture which belonged to her.²⁴ In 'The Victim Survey,' interviewees mentioned feeling trapped, fear of retaliation and lacking money to support themselves and their children as reasons they did not leave. Reporting rape risked putting their marriage in jeopardy.²⁵ For those women who, according to Margot Roth, have been 'trained to believe that her life purpose is matrimony,' ending their marriage may be unthinkable.²⁶ A *Broadsheet* article 'Battered Wives' published in 1978 argued choosing to remain in violent marriages was a result of conditioning women to think they are 'inadequate' and 'unfulfilled without a husband.'²⁷ A 38-year old housewife who had experienced nine years of violence was quoted in the same article saying 'I stay because I have no money to leave. My husband would only find us and keep harassing us and would murder me.'²⁸ Economic independence, or at least the ability to make a living separately of their spouse is 'one of the pre-conditions essential to divorce' which Rodrick Phillips identifies in his social history *Divorce in New Zealand*.²⁹ Where women cannot do this, they are much less likely to be able to leave their husbands. In order to overcome all forms of this economic oppression Piper suggested 'a wider shift in the gendered economic and social relations' was needed.³⁰

²³ Piper, 37.

²⁴ "Lily", Church, 12.

²⁵ Stone, Barrington and Bevan, 19.

²⁶ Roth, 33.

²⁷ Miriam Saphira, 'Battered Wives,' *Broadsheet* 64, November 1978, 26.

²⁸ Ibid.

²⁹ Rodrick Phillips, *Divorce in New Zealand: A Social History* (Auckland: Oxford University Press, 1981), 80.

³⁰ Piper, 48.

Another shift which needed to occur was the perception that rape could not occur within marriage. Marriage was perceived as a settled and orderly relationship where men and women behaved appropriately. Feminists argued that the expectations of heterosexual marriage, enabled coercive sexual behaviours rather than neutralised them. A full spectrum of non-consensual sexual behaviour occurred within the ordinary relationships of men and women creating a culture where forced sex or coercion was normalised. Lisa Featherstone and Alexander Winn's study of the 1976 South Australian Rape Law Reforms found forced intercourse 'did not deviate from the marital norm.'³¹ One interviewee from *the Rape Study* 'The Victim Survey,' Sarah, said of her experience 'I was so confused and terrified at the time and I didn't see it clearly. I thought this is marriage.'³² Psychologist Nicola Gavey has argued that rape is often obscured 'under the guise of normal sex.' Feminists therefore identified the connections between rape and common expressions of heterosexuality.³³ Marriage was a key site of these expectations.

Feminists also had to address the myth that men who perpetrated rape were perverted and deviant men on the margins of normal society.³⁴ Christchurch Battered Wives Support Group interviewee Sarah recalled 'I suffered severe and regular assaults throughout my marriage. Incidentally, other people found him charming.'³⁵ *New Zealand Women's Weekly* Questionnaire results found 40.4 percent of respondents in 1977 and 20.82 percent of respondents in 1981 were raped by someone whom they knew was married.³⁶ Although

³¹ Lisa Featherstone and Alexander Winn, 'Marital Rape and the Marital Rapist: The 1976 South Australian Rape Law Reforms,' *Feminist Legal Studies* 27, no.1 (2019): 58.

³² "Sarah", Stone, Barrington and Bevan, 138.

³³ O'Neil, "'She Asked for it,'" 2.

³⁴ Heather Bauchop, "The Public Image of Rape in New Zealand: A case study of two newspapers, 1950-1960" (Hons. diss., University of Otago, 1990), 6.

³⁵ "Sarah", Church, 5.

³⁶ 1981 Questionnaire on Rape Results, Auckland Rape Crisis Centre, September 1982, Advisory Committee Women's Affairs: Policy and Work Programme – Rape and Research Symposium, 3/0/14, Box 3, Archives New Zealand, Wellington.

the results demonstrate a range between the two years, they provide clear evidence that married men as well as single men raped women. Despite the evidence to the contrary the perceived division between deviant men (rapists) and decent men (husbands) was never fully overcome. Featherstone and Winn argued that Australian feminists created a persona for particularly violent abusive husbands which framed them as a beastly. Only through this persona could husbands be understood as rapists.³⁷ It is unclear whether an equivalent persona was created by New Zealand feminists. A blunter approach was taken by some feminist groups in New Zealand, including the distribution of stickers which read 'Is your husband a rapist?'³⁸

Feminist critique of marriage firstly identified the dissatisfaction many women were feeling. Secondly, it problematised the division of power in the home. Particularly relevant was the connection drawn between marital power relations and economic and sexual abuse. Thirdly, feminist discourse located rape as possible within marriage and husbands as capable of rape. Even more clear from their threefold critique of marriage was that spousal immunity was a legally sanctioned right of a husband over his wife which promoted unequal marital relations. In order to articulate the consequences of this inequality feminists needed to broaden the definition of what constituted rape.

Redefining Rape to Reflect Women's Experiences

Transnational sharing of knowledge developed and consolidated feminist understanding of rape as a tool of social oppression. Feminists sought to challenge previous understandings

³⁷ Featherstone and Winn, 76.

³⁸ Women Against Pornography Stickers, EPH-B-SEXUAL HARASSMENT-WAP-1980S-01, Alexander Turnbull Library, Wellington.

of rape and to create a definition which reflected the female reality.³⁹ As Jacqueline O'Neill argues in her thesis 'She Asked for it' rape was 'a male defined event.'⁴⁰ A 1983 study of how general practitioners in the United States defined marital violence indicated three instances where they recognised marital violence. Firstly, physically violent behaviour or threats had occurred; secondly, injuries had been sustained; and thirdly there were possible legal remedies which fitted the circumstances.⁴¹ Women who experienced violence outside of this definition often dismissed the severity of their own experience. This tendency to dismiss sexual assaults was reinforced by reactions from friends and relatives as well as legal and medical professionals. Fear of people's reactions was the number one reason in the 1982 *Women's Weekly* questionnaire that women did not report rape. A definition of sexual violence, which included survivors' experiences, marked a departure from such rigid medical and legal definitions which were previously favoured.⁴² In 'The Victim Survey' the definition of rape was left up to the individual respondent. Contrary to legal definitions, only 64 percent of respondents referred to sexual intercourse.⁴³

Addressing two key myths about rape was necessary to redefine rape on feminist terms. Firstly, that rape was about sex and secondly that rape was a result of individual behaviours. Feminists argued that rape was not about sexual urges or lust, it was about asserting power.⁴⁴ Susan Brownmiller defined rape as 'nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.'⁴⁵

³⁹ Nancy Matthews, *Confronting Rape, The Feminist Anti-Rape Movement And The State* (New York: Routledge, 1994), 13.

⁴⁰ O'Neill, "'She asked for it,'" 1, 153.

⁴¹ Margaret Borkowski, Mervyn Murch and Val Walker, *Marital Violence: The Community Response* (London,: Tavistock Publications, 1983), 42-44.

⁴² O'Neill, "'She asked for it,'" 152.

⁴³ Stone, Barrington and Bevan, 15.

⁴⁴ Susan Brownmiller, *Against Our Will* (New York: Simon and Shuster, 1975), 256. 'All rape is an exercise in power.'

⁴⁵ Ibid, 15.

Although sex might have been considered an expectation within marriage, abuse of power and mistreatment should not be. A consequence of distancing ideas about sexual desire from rape was to erode some of the privacy which sexual behaviour was afforded. Therefore, the more distance between rape and sexuality, the more openly it could be discussed as a matter for state intervention.⁴⁶

Feminist understandings connected rape to wider public social structures rather than private individual relationships. Research by the US National Clearinghouse on Marital Rape and Date Rape indicated that between one in seven and one in 10 married women in the United States had experienced rape within their marriage.⁴⁷ These statistics illustrated that the level of violence was too widespread to be dismissed as a few individuals behaving badly. According to social work scholars Jacqui Theobald and Suellen Murray moving beyond a framework of blaming individual violent men and towards acknowledging the wider societal problems which enabled violence was a crucial step in the feminist reframing of domestic violence in Australia.⁴⁸ Forty years before Theobald and Murray's writing American sociologist Vicki McNickle argued identifying rape as a social rather than individual problem was 'a by-product of the feminist movement.'⁴⁹ There was a growing awareness in the anti-rape movement that incidences of sexual violence were underpinned by wider 'cultural values at every level of society.'⁵⁰ Together this formed a pattern of oppression,

⁴⁶ Heather Lee McDonald, 'Rape Crisis Services "Standing Alone," Policy making as problem representation: the response to sexual violence in New Zealand 1983-89,' (PhD Thesis, Victoria University Wellington, 2017), 44.

⁴⁷ Patricia Mahoney and Linda Williams, "Sexual Assault in Marriage: Prevalence, Consequences and Treatment of Wife Rape," in *Partner Violence*, ed. Jana L. Jasinski and Linda M. Williams (Thousand Oaks, California: Sage, 1998), 122.

⁴⁸ Jacqui Theobald and Suellen Murray, "Domestic Violence Activism in Victoria, 1974-2016," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne: Monash University Publishing, 2019), 209.

⁴⁹ Vicki Rose McNickle, 'Rape as a Social Problem: A Byproduct of the Feminist Movement,' *Social Problems* 25, no.1 (Oct, 1977): 75.

⁵⁰ Brownmiller, 389.

abuse and inequality. Unequal power relations between men and women were therefore directly connected to incidences of rape and sexual violence. The feminist slogan 'there are no individual solutions' indicates the shifting definition of rape as a wider social problem.⁵¹ A key aim of feminist discourse was for women to realise that 'your personal problems are not only yours.'⁵²

Interconnectedness between women who had experienced rape and sexual assault transcended national borders. Michelle Arrow has called the anti-rape protest movement an 'imagined transnational sisterhood.'⁵³ Personal experiences of the American Women's Liberation movement while overseas were influential for many of the founding members of the Dunedin Collective for Women.⁵⁴ Texts such as Susan Brownmiller's *Against our Will*, Betty Friedan's, *The Feminist Mystique* and Simone De Beauvoir's, *The Second Sex* were popular reading. Historian Charlotte Macdonald called international feminist texts the 'currency of the new movement.'⁵⁵ International texts could also be ordered from *Broadsheet* bookshop in Auckland or in the feminist bookshops open in many other New Zealand cities. The ideas inside these books were unpacked and argued about by women's groups in order to create 'a coherent political perspective.'⁵⁶

Defining rape and sexual violence necessitated extensive discussion, including disagreements and divergent opinions. Intersecting aspects of women's identities affected

⁵¹ Matthews, 9.

⁵² Unknown Author, 'Consciousness raising.' Sandra Coney Papers 1944-: Newspaper Clippings, newsletters and flyers, 98-162-1/01, Alexander Turnbull Library, Wellington.

⁵³ Arrow, 148

⁵⁴ Elizabeth Harrison "Dunedin Collective for Woman 1971-1982," in *Women Together 'A History of Women's Organisations in New Zealand Ngā Rōpū Wāhine O te Motu*, ed. Anne Else (Wellington: Daphne Brasell Associates Press, 1993), 96-98.

⁵⁵ Charlotte Macdonald, *The Vote, the Pill and the Demon Drink: A History of Feminist Writing in New Zealand 1869-1993*, (Wellington: Bridget Williams Books, 1993), 9. Accessed March 2021

<http://thevotethepillandthedemondrink.bwb.co.nz/>

⁵⁶ Matthews, 13-14.

how they viewed sexual violence. For lesbian feminists, intimate partner violence between women, although much less common than in heterosexual relationships, was often silenced further due to homophobia. Māori feminists connected sexual violence with colonisation. For example, Donna Awatere spoke of the white immigrants who invaded New Zealand as always 'ready to do violence' in order to 'impose the white will over the Māori.'⁵⁷ In the case of spousal immunity, not every wife would receive the same legal protection if marital rape was criminalised as police and legal systems served different outcomes based on race.⁵⁸ In Australia the campaign to criminalise marital rape, Featherstone argues, 'assumed a universal wifely body; a non-indigenous, white female protagonist who required, and could ask for the protection of the law and the state.'⁵⁹ Ending spousal immunity within a Pākehā legal system would bring greater protection for Pākehā women.

Outside of groups like the Māori Women's Welfare League and the Māori Pacific Caucus of the YWCA issues of race were scarcely addressed in discussions of marital rape. Leah Whui summarised these issues poignantly when detailing her experience as a student in a class dedicated to women, law and policy at University of Waikato in 1994. Whui wrote 'I can't ignore patriarchy in my struggle. Yet you can and do ignore the "colour" of patriarchy, the cultural-specificity of patriarchy. And in so doing you ignore me.'⁶⁰ The strength of the women's movement coincided with a revitalised Māori land protest movement in the 1970s, with wāhine Māori often involved in both. The failure of Pākehā feminists to engage with mana wāhine concepts was also a failure to engage with the local

⁵⁷ Donna Awatere, 'Maori Sovereignty,' *Broadsheet* 100, June 1982, 42.

⁵⁸ Lisa Featherstone, 'Women's Rights, Men's Rights, Human Rights: Discourses of Rights and Rape in Marriage in 1970s and 1980s Australia,' *Law & History* 5, no.2 (2018): 22.

⁵⁹ Featherstone, 'Women's Rights, Men's Rights and Human Rights,' 22.

⁶⁰ Leah Whiu, "A Maori Woman's Experience of Feminist Legal Education in Aotearoa," *Waikato Law Review* 8, no. 2(1994): 161.

context which Matthews argues feminist action should be rooted in.⁶¹ As Ripeka Evans wrote, Māori feminism was 'grounded in the identity and creation of this country.'⁶² Historian Anne Else and former Human Rights Commissioner Ros Noonan later reflected on the consequences of this failure. Writing in 1993, Else and Noonan said, 'If we had known our own history better, both as women and as Pākehā, we would have made much faster progress.'⁶³

Disagreements based on identity were not uncommon in feminism internationally, however in a country the size of New Zealand splintering significantly affected the momentum of the feminist movement. For the most part Pākehā feminists failed to yield any meaningful inclusion within mainstream feminist discourse to the contributions of Māori and Pasifika feminists. Suggesting a single unified feminist viewpoint on rape would be inaccurate as feminism in New Zealand was not a monolithic movement. Activist Sandra Coney has referred instead to 'pockets' of feminist activism, such as women's centres, welfare leagues, rape crisis and refuges.⁶⁴ Between these 'pockets' of New Zealand feminism there was apparent agreement with the definitional shift that rape was a societal problem rooted in power and inequality. Beyond this agreement there was no widespread recognisable acknowledgement that sexual violence can be experienced differently in the lives of individuals dependent on race, class, marital status, parenthood and sexual orientation. There remained a tendency in the key feminist messaging to obscure the

⁶¹ Matthews, 163.

⁶² Ripeka Evans, 'The Negation of Powerlessness: Maori Feminism, a perspective,' *Hecate* 20, no.2 (1994): 58.

⁶³ Anne Else and Rosslyn Noonan, "Unfinished Business," in *Heading Nowhere in a Navy Blue Suit and Other Tales from the Feminist Revolution*, ed. Sue Kedgley and Mary Varnham (Wellington: Daphne Brasell Associates Press, 1993), 193.

⁶⁴ Sandra Coney, "Why the Women's Movement Ran out of Steam" in *Heading Nowhere in a Navy Blue Suit and Other Tales from the Feminist Revolution*, ed. Sue Kedgley and Mary Varnham (Wellington: Daphne Brasell Associates Press, 1993), 54.

complexity and differences between women's experiences of rape and sexual violence. In the words of Sandra Coney, the simplicity of the notion of sisterhood 'masked the complexities of the real differences between women.'⁶⁵ Unfortunately, all women's ability to recognise and speak out about their experiences were uneven and limited as a result.

By redefining rape on feminist terms it was hoped women could recognise their experiences within the meaning of sexual violence. A 1985 *Broadsheet* article contended that due to the lack of legal or public recognition women rarely identified themselves as victims of marital rape. Di Cosslett wrote that 'women don't discuss it and rarely acknowledge they have been raped.'⁶⁶ This reflects legal scholar Patricia Easteal's observation that marital rape is 'one of the most underreported and misunderstood forms of either domestic violence or sexual assault.'⁶⁷ By opening up the public discussion women began to see the existing violence unrecognised by strict medical or legal approaches. Feminist understandings of rape were grounded in lived experiences, in turn other women who had similar experiences saw themselves as fitting within this feminist understanding. Married women, who may not have done so previously, could identify themselves as victims of rape. For some women, seeing themselves as victims of sexual violence encouraged them to engage with feminism as was the case in one of the accounts collected by John and Doris Church. Janand wrote 'I have always been a traditionalist, but in view of what has happened to me I am rapidly becoming an activist and a feminist.'⁶⁸ Women recognising themselves within the definition built the strength of the anti-rape movement and feminist activism in tandem.

⁶⁵ Coney, "Why the Women's Movement Ran out of Steam," 62.

⁶⁶ Di Cosslett, 'Marital Rape,' *Broadsheet* 128, April 1985, 35.

⁶⁷ Patricia Easteal, 'Marital Rape: Conflicting Constructions of Reality,' in *Women Against Violence*, 3, (November 1997), 13.

⁶⁸ "Janand", Church, 15.

Making sense of personal experiences, in a climate of broad and evolving definitions, occurred in diverse ways. For some women, the line was extremely clear. For example, Prue told 'The Victim Study' interviewers that 'rape is rape.'⁶⁹ Similarly, Andrea said 'I didn't fight or attack him or struggle. You don't if it's your husband. But it was definitely a rape. I wasn't consenting.'⁷⁰ Susan's definition reflected more nuance. 'It happened a few times before I realised it was rape,' she recalled. 'His attitude was "If a man can't have sex with his wife there must be something wrong." But to me it was violence.'⁷¹

Sharing Personal Experiences

Breaking the silence on the prevalence of marital rape was necessary in order to make progress on the issue. Brownmiller wrote in 1975 that in making rape a 'speakable crime' the women's movement 'fired the first retaliatory shots in a war as ancient as civilisation.'⁷² In her interview for the Ministry of Justice Rape Study, Helen said 'the humiliation of the rape is the main thing that was hard to bear and to remember.'⁷³ For this reason it took Helen a long time to speak about the rape which occurred in her marriage over a number of years. Feminist writer Diana Russell argued that in order to break through this shame 'women must realise that rape in marriage is common.'⁷⁴ Consciousness raising groups were a space where women were encouraged to 'clean out your head, uncork and redirect your anger, learn to understand other women.'⁷⁵ In groups of five to ten women, an open style of discussion took place. Artist and activist, Sue James, described consciousness raising as

⁶⁹ "Prue", Stone, Barrington and Bevan, 137.

⁷⁰ "Andrea", Ibid, 135.

⁷¹ "Susan", Ibid, 136.

⁷² Brownmiller, 396.

⁷³ "Helen" Stone, Barrington and Bevan, 136.

⁷⁴ Russell, 26.

⁷⁵ Unknown Author, 'Consciousness raising.' Sandra Coney Papers. Sandra Coney Papers 1944-: Newspaper Clippings, newsletters and flyers (2), 98-162-1/02, Alexander Turnbull Library, Wellington.

‘increasing our awareness of ourselves as women.’ It was based on listening without interruption to other women sharing their feelings.⁷⁶

Childhood, marriage, sexualisation and ambitions for the women’s movement were all covered as topics covered in consciousness raising groups. Examples of questions included ‘Discuss your relationships with men as they have evolved. Have you noticed any recurring patterns?’ and ‘Have you ever felt that men have pressured you into having sexual relationships? Have you ever lied about orgasm?’⁷⁷ These questions guided women to talk about how mundane and normalised behaviours had affected them as well as the more recognisable traumatic incidences. Sexual harassment, assault and rape were discussed as interrelated parts of a bigger picture of male oppression. Acknowledging the spectrum of violence eroded another barrier for victims of marital violence, that only the most extreme and physically violent examples were recognised as marital rape.⁷⁸ Consciousness raising groups also allowed women to share the injustices they faced in the legal system. Helen described her husband being ‘rapped over the knuckles in court’ and fined \$30 after ‘his most vicious assault’ resulted with her hospitalisation. Later he received a \$100 fine for interfering with a motor vehicle.⁷⁹ These testimonies encouraged women to seek change not only in societal behaviours but the existing legal structures. Consciousness raising groups were a place where women reminded one another of their rights, such as the right to decline a husband’s sexual advances.⁸⁰

⁷⁶ Sue James, ‘Consciousness raising.’ Sandra Coney Papers 1944-: Newspaper Clippings, newsletters and flyers (2), 98-162-1/02, Alexander Turnbull Library, Wellington.

⁷⁷ Unknown Author, ‘Consciousness raising.’

⁷⁸ Russell, pxi.

⁷⁹ “Helen”, Church, 8.

⁸⁰ Russell, 26.

The President of Auckland's branch of NOW concluded in her annual report for the year 1976-1977 that in the area of rape 'although there has been little real change the subject itself is at least being talked about.'⁸¹ This perspective on 'real change' perhaps underplays what McNickle called 'considerable progress in a short life span.'⁸² The boundary between talking about change and creating change was porous in these groups. As sociologist Nancy Matthews argues 'the overarching project' of consciousness raising groups 'was changing consciousness about rape.'⁸³ Consciousness raising groups were not intended to be a space to discuss sexual violence exclusively, however these topics were frequently raised which encouraged the women's movement to turn their efforts more directly to anti-rape advocacy. It was essential that discussion of marital rape was not exclusive to private spaces such as consciousness raising groups. In order for the police, politicians and lawyers to care marital rape had to be discussed in more public spaces too.⁸⁴

Feminists needed to find ways to amplify their message. The National Organisation of Women, a New Zealand branch inspired by the American women's liberation movement, led public protests in this area. In 1973 NOW's Wellington branch organised a weekend teach-in about how to make a submission to the Select Committee on women's issues. Auckland Women's Liberation group held its first speak outs on sexual violence the following year.⁸⁵ These events were \$1 or pay 'what you can afford', held in community halls with creche services available.⁸⁶ 'Reclaim the Night' marches, which had first been held

⁸¹ Presidents Report for the year March 1976-1977, Shirley Andrews (Auckland). National Organisation for Women Papers, 83-247-14, Herbert Otto Roth, 1917-1994: Collected papers and personal papers, photographs and ephemera, Alexander Turnbull Library, Wellington.

⁸² McNickle, 85.

⁸³ Mathews, 13.

⁸⁴ Russell, pxxi.

⁸⁵ Jane Vanderpyl, 'Aspiring for unity and equality: Dynamics of Conflict and Change in the "by Women for Women" Feminist Service Groups, Aotearoa/New Zealand' (PhD Thesis, University of Auckland, 2004), 105.

⁸⁶ 'Rape in New Zealand,' *Broadsheet*, 1977.

in Germany, were held in New Zealand for the first time in 1979.⁸⁷ Workshops and speak outs provided a public forum for testimony from victims.⁸⁸ Featherstone argues that in the Australian context the 'very human evidence of family violence' was the most impactful strategy of feminist groups in their condemnation of rape in the home.⁸⁹ Historian Christine Dann considered sharing the message that New Zealanders together must take responsibility for the societal role in the harm caused was a crucial part of consciousness raising.⁹⁰

Along with physical gatherings, print media was another strategy for amplifying the feminist message against rape. Historian of gender and violence Ana Stevenson and communication sociologist Brigitte Lewis argued that in the context of Australian sexual violence activism 'for these activists women's rights were articulated in print and then fought and won on the streets.'⁹¹ Amplifying the message occurred through diverse channels. Feminist magazines, particularly *Broadsheet*, were sites of nurture, critique and construction for the women's movement. Carmen Daly suggests that *Broadsheet* led the way in discussing issues of violence against women and sexual violence 'long before they became general society concerns.'⁹² Academic journals played their own role, continuing the discourse of redefining rape and developing a theoretical framework to explain it. Heather Bauchop's study of representations of rape in two New Zealand newspapers from

⁸⁷ The 31st March 2021 Let us Live Protest held in Wellington happened 42 years after the first 'Reclaim the Night' protest.

⁸⁸ McNickle, 76.

⁸⁹ Lisa Featherstone, 'Women's Rights, Men's Rights, Human Rights,' 26.

⁹⁰ Christine Dann, *Up from Under Women's Liberation in New Zealand 1970-1985* (Wellington: Allen & Unwin: Port Nicholson Press, 1985), 132.

⁹¹ Ana Stevenson and Brigitte Lewis, "From Page to Meme: The Print and Digital Revolutions Against Gender Based Violence," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne: Monash University Publishing, 2019), 177, 181.

⁹² Carmen Daly, "Broadsheet collective," in *Women Together A History of Women's Organisations in New Zealand Ngā Rōpū Wāhine O te Motu*, ed. Anne Else (Wellington: Daphne Brasell Associates Press, 1993), 100.

1950-1960 showed that references to rape increased in frequency and explicitness in the period.⁹³ However, the striking departure of the 1970s was that for the first time women were writing their own stories about rape and violence in the public domain. Alongside sensationalised accounts of court cases, newspapers now included victims' own words.⁹⁴ Public attention to the issue of sexual violence and legal change reinforced one another. Barbara Brookes notes that through the Domestic Violence Act 1982 'domestic violence was brought out of the home and into the public arena,' marking a turning point in domestic violence advocacy.⁹⁵ Women's refuges and rape crisis centres, who had worked without public recognition for a number of years, were increasingly approached to talk about their work as well.⁹⁶

Feminist Service Organisations

Nancy Matthews argues that in the United States the anti-rape movement activism occurred as a network of services.⁹⁷ Women's refuges, shelters and rape crisis centres were developing globally in the 1970s. Rape crisis centres were beginning to be established internationally in Sydney in 1971, in Washington DC in 1972, Vancouver in 1973 and Dublin in 1977. Women's Aid, a charity to support women experiencing domestic violence was founded in 1974 in the UK.⁹⁸

⁹³ Heather Bauchop, 'The Public Image of Rape in New Zealand: A case study of two newspapers, 1950-1960' (Hons. diss., University of Otago, 1990), 24.

⁹⁴ Featherstone, 'Women's Rights, Men's Rights, Human Rights,' 25.

⁹⁵ Brookes, *A History of New Zealand Women*, 409-410.

⁹⁶ Toni McCallum, "National Collective of Independent Refuges 1981-," in *Women Together A History of Women's Organisations in New Zealand Ngā Rōpū Wāhine O te Motu*, ed. Anne Else (Wellington: Daphne Brasell Associates Press, 1993), 144. Stevenson and Lewis, 180.

⁹⁷ Matthews, pxi.

⁹⁸ See organisation websites for more information: Sydney <https://www.dvrcv.org.au/nsw-rape-crisis-centre>, DC <https://dcrcc.org/>, Vancouver <https://rapereliefshelter.bc.ca/>, Dublin <https://www.drcc.ie/>, Women's Aid UK <https://www.womensaid.org.uk/>.

In New Zealand, the first refuge was established in Christchurch in 1973, followed by a refuge established in Auckland two years later and then one in Dunedin, by Dunedin's Collective for Women, the following year.⁹⁹ By 1978 six women's refuges were established across the country.¹⁰⁰ Refuges provided safehouses, counselling and support groups for women and children affected by domestic violence.¹⁰¹ Where possible women's refuges enabled women to make their own choices about their healing and safety to encourage empowerment and independence.¹⁰² A National Collective of Independent Women's Refuges (NCIWR) was formed in 1981 to focus on collaboration between and public representation for the then fourteen refuges.¹⁰³ NCIWR was a channel for refuges to provide media statements and make government submissions, although they continued to do so as individual refuges also. Establishing a national collective was intended, in part, to give women's refuges a seat at the decision-making table and access to state funding.

The first Rape Crisis hotline in New Zealand was formed in Auckland in 1977 with an initial two night a week trial in Wellington in 1973.¹⁰⁴ Throughout the 1980s rape crisis centres were opening across the country, consisting of 35 groups by 1987.¹⁰⁵ Rape Crisis centres had a twofold aim: to support survivors and raise awareness of the problem of sexual violence publicly.¹⁰⁶ They did this through a 24/7 phonenumber, counselling, providing social workers for legal and medical processes and public advocacy. The spirit of the

⁹⁹ McCallum, 143. Dann, 129.

¹⁰⁰ Brookes, *A History of New Zealand Women*, 354.

¹⁰¹ McCallum, 142.

¹⁰² Ibid, 143. Dann, 130.

¹⁰³ Dann, 131.

¹⁰⁴ Ibid, 132. Brookes, 354.

¹⁰⁵ Brookes, *A History of New Zealand Women*, 409. Alexis Harvey and Mary Moon, 'National Collective of Rape Crisis and Related Groups Aotearoa, 1986-', in *Women Together 'A History of Women's Organisations in New Zealand Ngā Rōpū Wāhine O te Motu*, ed. Anne Else (Wellington: Daphne Brasell Associates Press, 1993), 147.

¹⁰⁶ Heather McDonald, 12-13.

organisation was 'a celebration of the strength of survivors of rape and sexual abuse' and pride 'to walk with them in their healing.'¹⁰⁷ Lesbians provided much of the initial energy for establishing rape crisis groups.¹⁰⁸ Lesbian feminists were particularly critical of male dominated structures and sought to create non-hierarchical spaces free from men.¹⁰⁹ Rape Crisis and Related Groups (RCRG) were connected together to form a national body in 1986.¹¹⁰

Feminist service organisations were one of the few sources of accurate information on the overlap between sexual and domestic violence. Featherstone identifies women's refuges and rape crisis centres' role in 'gathering quantitative data.'¹¹¹ In 1981, John and Doris Church, who ran Christchurch Battered Women's Support Group, published a book on suggested governmental changes that would improve the lives of women they had worked with. This was based on their experience of over five hundred calls they had received from women and girls that year.¹¹² From the outset they argued that people working with victims should be the ones asked by Parliament for policy advice. Their preface reads 'the great majority of the members of parliament had very little knowledge of the incidence of domestic violence, very little understanding of the kinds of injustices which are occurring during contested separations and very little idea of the degree of fear which many battered women have for their husbands.'¹¹³ John and Doris included a number of excerpts from interviews with women who attended their support group. These interviewees asked for the government to consider the issue from their perspectives. Sarah requested the government

¹⁰⁷ Harvey and Moon, 148.

¹⁰⁸ Ibid, 147.

¹⁰⁹ Vanderpyl, 109.

¹¹⁰ Ibid, 147.

¹¹¹ Featherstone, 'Women's Rights, Men's Rights, Human Rights,' 28.

¹¹² Church, 4.

¹¹³ Church, preface.

to 'please, please, give us the dignity and peace of mind of a safe and speedy separation and divorce.'¹¹⁴ Sylvia shared her experience of 'numerous rapes and assaults' and wrote 'please take people like me into account.'¹¹⁵ Mary contended that 'you have to live in a violent marriage before you can actually understand what goes on and the fear that one lives with.'¹¹⁶

Women's refuges were aware that domestic violence took many forms, often including sexual violence. A survey at Christchurch Battered Women's Shelter found that around 72 percent of wives had been raped and during the last year of their marriage it was a weekly or daily occurrence for one third of them.¹¹⁷ In their book John and Doris Church identified sexual assaults as the reason which 'very frequently drive the women from the marriage.'¹¹⁸ Their book highlights the failures of the separation and divorce system which supporters of retaining spousal immunity frequently touted as the appropriate remedy for marital abuse. For example, from the women who accessed their services, the average time between a wife considering separation and beginning the proceedings was 9-10 years.¹¹⁹ Clearly, women faced significant barriers preventing them from proceeding with separation.

What was to be the priority for these organisations was a source of tension between the women's refuges and rape crisis centres, within their national collectives and at a branch level. The first objective of Hawkes Bay Rape Crisis was to provide information and support for those who have been sexually abused. However, easing the trauma of victims was not a settled top priority across the NCIWR and RCRG collectives. Jane Vanderpyl has

¹¹⁴ "Sarah", Church, 6.

¹¹⁵ "Sylvia", Church, 6-7.

¹¹⁶ "Mary" Church, 10.

¹¹⁷ Cosslett, 35.

¹¹⁸ Church, 45.

¹¹⁹ Ibid, 4.

written about this debate in detail in her thesis 'Aspiring for Unity and Equality; dynamics of conflict and change in the 'by women for women' feminist service groups.' Vanderpyl argues that the political and service aims were not uniform among women's refuge and rape crisis centres. A political focus emphasised reorganising societal structures to represent feminist interests. As Christine Dann has argued in her book *Up From Under*, the democratic approach allowed refuges to operate 'as a kind of union for the victims of violence.'¹²⁰ A service focus emphasised helping empower individual women.¹²¹ Both can be considered a form of feminism.

The second objective stated in Hawkes Bay Rape Crisis' constitution was to 'promote a greater understanding within society of the nature, effects and causes of rape and sexual abuse.' Core to this objective was 'public education and consciousness raising.' Working for legal change, addressing the power imbalances, and initiating research, all came after public education and consciousness raising.¹²² Both women's refuges and rape crisis centres had education branches which ran internal and external programs. Heather McDonald's thesis on rape crisis services identified four types of prevention education activities; internal training for staff and volunteers, external training for professionals likely to work with victims (for example, police or medical practitioners), prevention programs in schools and general one-off public education programs (for example, church or student groups).¹²³ Some members felt focusing exclusively on services for victims, although necessary, would be treating the symptoms and not the cause of men's violence against women.¹²⁴ Although

¹²⁰ Dann, 130.

¹²¹ Vanderpyl, 283-284.

¹²² Constitution of Hawkes Bay Rape Crisis Centre Incorporated, 1983. Hawkes Bay Rape Crisis Centre Incorporated, 1983-1988, R8288063, AATJ W5584 20339 Box 369, 294248, Archives New Zealand, Wellington.

¹²³ Heather McDonald, 92.

¹²⁴ Vanderpyl 139.

there was disagreement about the appropriate division of attention between the service-oriented support for victims and the politically oriented transformation of society the two were not totally distinct fields of work. Speaking out about their experiences was one method to ease the trauma for some victims.¹²⁵ Conversely, understanding how survivors experienced pain brought additional meaning to the political discourse.¹²⁶ The overall goal to eliminate rape required a variety of strategies.

Vanderpyl concluded that the 'major tensions' over priorities was one example of a wider difficulty to 'deal with differences' between women.¹²⁷ Although feminist discourses of sexual violence were increasingly engaged with societal structures, questions of race or class were often left out. Feminist service organisations imagined a 'supposedly racially homogenous sisterhood.'¹²⁸ Rape crisis centres showed a 'lack of attention to the needs of Māori and Pacific women.'¹²⁹ In the Women's Refuge Movement it was not until 1988 that the concept of parallel development was included in the constitution. Over the course of the 1990s and early 2000s an increasing number of Kaupapa Māori organisations focused on sexual and family violence support were formed. Shakti Centres and Refuges began in Auckland in 1995 focused on providing culturally appropriate services for Asian, African and Middle Eastern Women. Two years later the Male Survivors of Sexual Abuse Trust was established to support men who experienced sexual violence and rape at a time that most specialist services catered only for women.¹³⁰

¹²⁵ O'Neill, "She asked for it," 155.

¹²⁶ Ibid, 15.

¹²⁷ Vanderpyl, 280.

¹²⁸ Naomi Simmonds, "Mana Wāhine: Decolonising politics," *Women's Studies Journal* 25, no.2 (2011): 17.

¹²⁹ Heather McDonald, 121.

¹³⁰ See organization websites for more information: <https://shaktiinternational.org/>, Male Survivors Aotearoa <https://malesurvivor.nz/>.

Another source of division in the wider anti-rape movement was the extent to which their tactics should be confrontational. On ANZAC day 1978 a group of women from Auckland Women's Action Group laid a wreath to remember 'all the forgotten women. All those who died in battle. Those raped and mutilated.' Their action was met with strong opposition from the police.¹³¹ Probably the most famous example of confrontation took place in February 1984 when six women tied playwright Mervyn Thompson to a tree and painted 'rapist' on his car.¹³² Confrontational tactics were not very common in New Zealand and there were not any widely recorded instances of similar tactics specifically to end spousal immunity.¹³³ These initiatives had a role in the societal change of attitudes to rape and violence too. Confrontational tactics drew attention to the issue of rape and violence. Ending spousal immunity was achieved by a broad consensus of groups from country women's institutes to church groups, the Māori women's welfare league and rape crisis and women's refuge groups as well as individual activists who were unafraid of confrontation.¹³⁴ Women and men with divergent ideologies and backgrounds all reinforced the same message that an end to spousal immunity was necessary.

Marital rape was not a straightforward issue in feminist services organisations or the wider women's movement. The fact that marriage was a site of intense critique in feminist discourse did not always lend to sympathy and protection for women in violent marriages. Abused wives, particularly those who wanted to remain married, were vulnerable to be ostracised for their participation in a heavily critiqued structure. John and Doris Church considered the absence of protections for the victims of domestic violence who wanted to

¹³¹ Dann, 144.

¹³² Brookes, *A History of New Zealand Women*, 410.

¹³³ Dann, 135.

¹³⁴ Cosslett, 36.

remain married to be 'one of the most obvious and most unfortunate shortcomings of New Zealand law.'¹³⁵ Victims of marital rape who sought practical help had the potential to fall through the gaps in the two services. Russell argues that for women's refuges and rape crisis centres marital rape did not 'fit neatly into the definitions established for the clientele they are trying to help.'¹³⁶ Women who were married to their abusers were in unique circumstances. They could seek help at women's refuges or rape crisis centre's but often both were ill equipped for the specific needs of sexually abused wives.¹³⁷

Traditional marriage was symbolic of a gender order which feminists were seeking to disrupt however in doing so they sometimes dismissed the women who continued to live within it. These challenges reflected a wider division emerging between women who wanted freedom from domesticity and those who were 'committed to an ideal of family life.'¹³⁸ On either side of the debate, it was about women's personal lives and the types of relationships they wished to have with their families and with men. Feminist ideas had wide ranging repercussions. As Barbara Brookes argues, challenges to the family unit were 'not just about individual lifestyles – [but] over the future shape of New Zealand society.'¹³⁹

Not Exclusively Feminist

Not everyone involved in fighting for an end to spousal immunity identified with feminism. The anti-rape movement in New Zealand was, as Matthews writes, both 'distinct' and 'parallel' to the feminist movement.¹⁴⁰ Feminists were not the only interest group engaged

¹³⁵ Church, 20-21.

¹³⁶ Russell, pxxiii.

¹³⁷ Ibid.

¹³⁸ Brookes, *A History of New Zealand Women*, 349.

¹³⁹ Ibid.

¹⁴⁰ Matthews, pxi.

in this work, but they were perhaps the most prominent as they were both active and vocal.¹⁴¹ Churches and other charitable organisations had also been supporting women and children who had experienced violence for many decades prior to the establishment of women's refuges. Practical support offered by religious groups was influenced by religious views on the importance of family and marital stability.¹⁴² Although their underlying values were often quite different to feminist activists, religious groups nonetheless indicated their interest in reducing gender violence.¹⁴³ Neighbourhood support groups expressed concern for sexual assault and rape with a focus on safety, working closely with the police. There were people within the women's refuge movement and to a lesser extent, rape crisis centres, who would have refuted the label 'feminist service organisations.' Feminist activist Sandra Coney described feminist campaigns in the 1980s experiencing 'both a widening of the definition of a feminist issue and a change in tactics in favour of working within or alongside non-feminist groups.'¹⁴⁴

Not all women were feminists, but all women had to come to terms with the changing society for which feminist critique was a catalyst. In the words of Barbara Brookes 'the great majority of women, however, were neither fervent Pentecostal believers devoted to home and family nor radical feminist activists questioning heterosexism, and they had to negotiate their lives through a period of upheaval and challenging change.'¹⁴⁵ Feminist ideas destabilised many of the accepted understandings about women's place in society, marriage, sex and violence. Alternative definitions for rape, breaking the silence about

¹⁴¹ McNickle, 75.

¹⁴² Dann, 129.

¹⁴³ Of course, religious and feminist are not necessarily exclusive identities, and many religious women were also involved in feminist campaigns.

¹⁴⁴ Sandra Coney, 'Coalition Politics,' *Broadsheet* 92, September 1981, 26.

¹⁴⁵ Brookes, *A History of New Zealand Women*, 375.

women's personal experiences, service provision and awareness raising of the women's refuge and rape crisis movement among other feminist anti-rape initiatives, permeated out to a wider audience. In the case of spousal immunity many New Zealanders, inside and outside of Parliament, agreed with feminist critique that the principle was outdated and unacceptable.

Conclusion

Rape and sexual violence increasingly became a key issue of concern for feminist activists. Unlike campaigns for equal pay, access to legal abortion or access to childcare, criminalising marital rape was not the subject of any pronounced campaign in New Zealand.¹⁴⁶ Ending spousal immunity traversed beyond one group or ideology or action. Feminist involvement in ending spousal immunity can be loosely allocated to two interrelated strategies. Involvement in anti-rape and domestic violence activism was one, the wider discourse which redefined rape and critiqued marriage was another. These two strands were inseparable and non-exhaustive. Anti-rape and domestic violence activism were visible through public forms of protest, engagement with media and provision of services in refuges and rape crisis centres. This activism was underpinned by the development of feminist discourse on sexual violence and women's changing understanding of themselves. Feminist ideas, the sharing of personal stories and work of service organisations shifted understandings of rape and marriage, calling spousal immunity into question beyond their own circles. Combined, these feminist initiatives led to a re-examination of spousal immunity which resulted in the criminalisation of marital rape. In the words of Susan

¹⁴⁶Auckland Women's Liberation Pamphlet, 1970, Sandra Coney Papers 1944-: Newspaper Clippings, newsletters and flyers, 98-162-1/01, Alexander Turnbull Library, Wellington. Dann, 129.

Brownmiller, 'the last line of defence shall always be our female bodies and our female minds.'¹⁴⁷

¹⁴⁷ Brownmiller, 396.

Chapter Four

From Tinkering to Transformation?

Introduction

At the first reading of the Sexual Violence Legislation Bill in November 2019, Green MP and former women's refuge worker Jan Logie praised the bill as a marked shift in approaches to rape law reform 'from a tinkering to a transformation.'¹ This thesis has followed the evolution of spousal immunity in New Zealand from codification in the 1890s to repeal in the 1980s. I have argued that repeal of spousal immunity was a result of feminist activism. This chapter assesses whether repeal of spousal immunity marked a 'tinkering' or a 'transformation' in rape law reform and therefore a success for feminist activism. In this assessment, I consider the complex relationship between feminism and the state in relation to three key aims of the reform; to repeal spousal immunity, to protect and support women with violent husbands and to change attitudes towards marriage and rape. While the rape law reforms of 1985 did go some way to achieve these aims, there are significant limitations to their transformative potential. This evaluation will conclude with an appraisal of New Zealand's position in an international context and further developments in the twenty-first century including the Sexual Violence Legislation Bill.

The aims of the second wave feminist movement in New Zealand can be difficult to decipher as it was such a broad and divergent movement. This difficulty is certainly applicable to discerning the aims of those advocating for the criminalisation of marital rape. As has been explored in the previous chapter, the criminalisation of rape within marriage

¹ *New Zealand Parliamentary Debates*, House of Representatives, 14th November 2019.

was a meeting of feminist work on disrupting heterosexist marital structures and a range of anti-rape and domestic violence activists. Boundaries between feminist initiatives and other supporters of repeal were fluid rather than rigidly defined. Not all of these activists were expressly feminist in their intentions. There is, therefore, no definitive source which states the wider aims of those who advocated for the criminalisation of marital rape, however, common reasons and goals for supporting criminalisation can be identified. The criminalisation of marital rape could be considered the meeting point of somewhat disparate groups. Repeal of spousal immunity was the first, and in some cases the main, shared aim. For women who worked on battered wives' helplines and in shelters, protecting and supporting women from violent husbands was the second most important aim. For radical feminists and women's liberationists, transforming society was more crucial than addressing the needs of individuals.

All three aims closely align with leading feminist thinker bell hooks' definition of feminism as 'the movement to end sexism, sexual exploitation and sexual oppression.'² Under this definition hooks identifies a need to end racism, classism and colonialism as essential for feminism.³ Feminist theorist Charlotte Bunch, who spoke at the United Women's Convention in Hamilton in 1979, provides five questions to ask of any law reform in order to assess its impact on women's liberation.⁴

Does the reform materially improve the lives of women, and if so, which women and how many? Does it build an individual woman's self-respect, strength and confidence?

² bell hooks, *Feminism is for Everybody: Passionate Politics* (Cambridge, Massachusetts: South End Press, 2000), xiii.

³ hooks, xvi.

⁴ Sandra Coney, 'Coalition Politics,' *Broadsheet* 92, September 1981, 26.

Does it give women a sense of power strength and imagination as a group and help build structures for further change? Does it educate women politically, enhancing our ability to criticise and challenge the system into the future? Does it weaken the patriarchal control of society's institutions and help women gain power over them?⁵

Together, Bunch and hooks provide an intersectional framework that is conscious of the broad ways the law effects women in society and as individuals. This framework is useful for making an assessment on whether the criminalisation of marital rape was 'a tinkering' or 'a transformation.' Foundational to such a framework is a wider debate about the suitability of feminists engaging with the law to achieve their means. In other words, whether feminist transformation is ever possible within an inherently colonial and patriarchal system.

Feminist Entanglements with the Law

Across two issues of *Broadsheet* in 1985, feminist lawyer Ruth Charters conducted an evaluation of legal changes of the previous ten years in relation to women's independence. Considering the persistent legal shortcomings from property to reproductive rights Charters argued that to rely on the law to be an effective tool for women was 'a basic delusion.'⁶ She concluded that 'we must never lose sight of the fact that its wording enactment, enforcement, interpretation and application to women's lives is in the hands of the patriarchy.'⁷

⁵ Charlotte Bunch, 'The Reform Tool Kit', in *Building Feminist Theory: Essays from Quest: A Feminist Quarterly* (New York: Longman, 1981), 196-198.

⁶ Ruth Charters, "Letter of the Law: Part One," *Broadsheet* 131, July/August 1985, 12.

⁷ Ibid.

Internationally feminists were coming to similar conclusions. In her 1994 book on the anti-rape movement and the state Nancy Mathews opened with the question, 'is the state male?'⁸ Cultural historian Joanna Bourke answered this question clearly in her book *The History of Rape*, describing the law as 'male interests masquerading as human interests.' Due to the overwhelming masculinity of the law Bourke dismisses the capacity of 'piecemeal reforms' to create real change in society.⁹ Lisa Featherstone notes that Australian feminists were simultaneously concerned that the law permitted marital rape and distrusted legal institutions 'steeped in patriarchy.' Their caution was in part a desire not to create false hope that an institution which worked primarily for men's interests could provide solutions for vulnerable women.¹⁰

Closer to home, Mereana Pitman, a trainer and facilitator of family violence prevention programs in Aotearoa, spoke at a 1994 Wellington Conference titled 'Rape Ten Years Progress?' Pitman said that after decades of work in prevention and support 'I personally have no faith in a process that from the outset is about the agendas of others, is male dominated, and does not see any other way but the pākēha law.'¹¹ Statistics from the Women's Electoral Lobby 1984 manual confirm just how 'male dominated' it was, with only 37 women of the 277 individuals working on government justice committees.¹² Anti-violence activists internationally and in New Zealand expressed 'deep ambivalences'

⁸ Nancy Matthews, *Confronting Rape, The Feminist Anti-Rape Movement And The State* (New York: Routledge, 1994), 1.

⁹ Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Virago, 2007), 410.

¹⁰ Lisa Featherstone, "'That's What Being a Woman Is For': Opposition To Marital Rape Law Reform In Late Twentieth Century Australia," *Gender & History* 29, no.1 (2017): 97.

¹¹ Mereana Pitman, 'Rape: The Maori Experience,' in *Rape Ten year's progress? An interdisciplinary conference*, ed. Juliet Broadmore, Carol Shand and Tania Warburton (Wellington: Department of Justice, 1996), 46.

¹² Statistics from 1984 manual of statutory and allied organisations. Records, Women's Electoral Lobby Records, 2000-092-2/1 (MS-Group-0894), 203-265-7/4, Alexander Turnbull Library, Wellington.

towards cooperation with a violent and misogynist legal system.¹³ As is reflected in Mereana's comments in New Zealand this ambivalence and distrust was even stronger for Māori women who were twice as likely to experience sexual violence.¹⁴

Despite these fears, feminist groups continue to lobby for legal reform as one tool in their goal of creating a more equal society. As Australian legal scholar Ngarie Naffine has charted in her book on rape and the criminal law, 'feminists have devoted much energy to the task of making rape laws better for women.' Naffine described feminist efforts for legal change as 'in one sense highly successful' and on the other hand 'generally fail to fulfil their promise.'¹⁵ Anti-rape activists engaged in a process of 'legal mobilisation,' which included adapting their demands to fit legal concepts and language.¹⁶ A fine line was toed between maintaining the dignity of feminist knowledge and women's lived experiences, while moulding the information to be understood and accepted by the state. This was a reciprocal exchange. Female politicians on both sides of the aisle were amicable to the contributions of feminist organisations, which at times proved influential to their political decisions. Jacqui Theobald and Suellen Murray write about domestic violence activism in Australia as one such example. They describe 'the enshrinement of feminist principles' in Victoria's state

¹³ Featherstone, "That's What Being A Woman Is For," 98. Featherstone, "Criminalising the Husband and the Home: Marital Rape Law Reform 1976-1994," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne : Monash University Publishing, 2019), 89.

¹⁴ Elisabeth McDonald and Rachel Souness, "From 'Real Rape' to Real Justice in New Zealand Aotearoa: The Reform Project," in *From 'Real Rape' to Real Justice: Prosecuting Rape in New Zealand*, ed. Elisabeth McDonald and Yvette Tinsley (Wellington: Victoria University Press, 2011), 46.

Te Toiora Mata Tauherenga report of the Taskforce for Action on Sexual Violence : incorporating the views of Te Ohaakii a Hine-National Network Ending Sexual Violence Together / Taskforce for Action on Sexual Violence (Wellington: Ministry Of Justice, 2009), Snapshot.

¹⁵ Ngarie Naffine, 'A Struggle Over Meaning: A Feminist Commentary on Rape Law Reform,' *The Australian and New Zealand Journal of Criminology* 27, no.1 (1994): 100.

¹⁶ Rose Corrigan, *Up Against a Wall: Rape Reform and the failure of success*, (New York: New York University Press, 2013), 1.

government and policy as a key achievement of working with the state.¹⁷ Theobald and Murray affirm this success while recognising that government change took place incrementally and public perceptions, where they have shifted, have been especially slow. Although there is agreement among feminist legal scholars that reforming the legal system has a long way to go, there is disagreement on how much hope feminist activists should have in law reform.

Despite the limitations of the legal system, it is the principal form of governance and social control in New Zealand and is not something which feminists can afford to opt out of completely. The stakes are too high when the change that is desired is safety and justice for vulnerable women. In the context of rape law reform, Mary Heath and Ngaire Naffine have put it poignantly: 'To abandon the attempt to create a law of rape that might be useful for women is to abandon women to the rapists and to leave law reform in the hands of the state.' Instead, they propose dividing activist efforts inside and outside of the legal institution is necessary: 'We feminists must therefore work to improve the law of rape while retaining an awareness of its poor fit with the lives of women. This requires imagination.'¹⁸

Evaluating Success within the Law

Ten years after the Rape Law Reform (No.2 Bill) was introduced Warren Young, author of *the Rape Study Research Reports*, reflected that unfortunately 'no systematic evaluation' of

¹⁷ Jacqui Theobald and Suellen Murray, "Domestic Violence Activism in Victoria, 1974-2016," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson (Melbourne : Monash University Publishing, 2019), 208, 211, 221.

¹⁸ Mary Heath and Ngaire Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law Reform,' *Australian Feminist Law Journal* 3, (1994): 51.

the impact of the reforms had taken place.¹⁹ Nonetheless he reported confidently that repeal of spousal immunity was ‘a significant reform which has had real impact in practise.’²⁰ These ‘real impacts’ include: setting new social expectations through the law, broadening the charge of rape and offering legal recourse for those who have been raped within marriage.

During the drafting stage of the Rape Law Reform Bill (No.2) advocates for repeal emphasised the need for the words of the law to set moral standards for society. Speaking to the *Dominion* newspaper in April 1984 Warren Young was quoted as saying ‘Parliament has a responsibility to tell us what rape means.’²¹ As the Mental Health Foundation argued in its submission ‘it may be the change would be primarily symbolic, it is important nevertheless.’²² Irrespective of the difficulties of enforcement, criminalisation was still favoured as a ‘symbolic expression of society’s disapproval.’²³ At the introduction of the Sexual Violence Legislation Bill, the most significant reform to the laws of sexual violence since 1985, Jan Logie reflected on the importance of expressing social understandings about consent in the law. Speaking as Under-secretary for sexual and family violence Logie reminded the house ‘Just because I’m married to someone, it doesn’t mean they get access to my body without consent.’²⁴ Legislation should demonstrate, she argued, in a nod to the previous work of the Rape Law Reform Bill (No.2), that ‘consent is required every time.’

¹⁹ Warren Young, ‘Rape in New Zealand 1985-1995,’ in *Rape Ten year’s progress? An interdisciplinary conference*, ed. Juliet Broadmore, Carol Shand and Tania Warburton (Wellington: Department of Justice, 1996) 11.

²⁰ *Ibid*, 13.

²¹ ‘Few Prosecutions expected,’ *The Dominion* 12th April 1984. Miscellaneous Papers, Sonja Margaret Loveday Davies, 1923-2005: Papers MS-Group-0285, 2005-093-261, Alexander Turnbull, Wellington.

²² NZ Mental health foundation submission, February 1984, and Gisborne Rape Crisis Centre submission, February 1984, ‘Rape Law Reform Bill’ Submissions [part 1] in Sir Michael Cullen Political Papers, MS-2686/163, Hocken Library, University of Otago, Dunedin.

²³ Warren Young, ‘Rape Study Vol.1 A Discussion of Law and Practice’ (Wellington: Department of Justice February 1983), 120.

²⁴ *New Zealand Parliamentary Debates*, House of Representatives, 14th November 2019.

Gradually anti-rape advocates have called for broader legal definitions of rape and sexual violence. Recognition of rape within marriage was one of the early examples of the broadening definitions under the law. The law in New Zealand now includes a wider ambit of unwanted physical acts under the charge of unlawful sexual connection.²⁵ Unlawful sexual connection by coercion was also introduced in the Rape Law Reform (No.2) as a new offence. Any person, regardless of sex or relationship to the complainant, could be charged with unlawful sexual connection. Criminologist Rosemary Barrington called this broadening 'necessary progress.' 'Has the law gone too far?' Barrington asked in the *New Zealand Law Journal* in 1986. While a broader legal definition of sexual abuse takes time to be accepted, Barrington concludes 'the law has certainly not gone too far.'²⁶

Recent developments in technology have radically shifted the landscape of sexual harm in the twenty first century. The Harmful Digital Communications Act 2015 has been introduced to include sending explicit pictures of someone else without their consent or editing someone's face onto an explicit image.²⁷ All of these reforms move closer to sexual abuse being more widely understood, but as Barrington wrote of the 1985 reforms 'it is uncertain whether the change will actually make a great deal of difference to the practical application of the law.'²⁸

Young cited 'a number of prosecutions for sexual violation' and marital rape as being perceived equally serious to other circumstances in the eyes of the courts.²⁹ Young was correct that since 1985 New Zealand has not made any legislative distinction between the

²⁵ Naffine, 'A Struggle Over Meaning,' 103.

²⁶ Rosemary Barrington, 'Standing in the shoes of the rape victim: Has the law gone too far?' *New Zealand Law Journal* (1986): 409.

²⁷ *Harmful Digital Communications Act* 2015.

²⁸ Barrington, 410.

²⁹ Young, 'Rape in New Zealand: 1985-1995,' 13.

law of rape within or outside of marriage. In some cases, the opposite has occurred. For example, in 1993 the *Hutt News* reported that some police systems did not allow for the relationship between the offender and complainant to be recorded.³⁰ Without a specific offence it is hard to trace the exact numbers of cases and convictions of marital rape in the criminal justice system. Regardless, 'a number of prosecutions for sexual violation' within marriage does not seem like much when thirty years after reform 1 out of 3 sexual offences are committed by a current partner.³¹ Victims of partner violence are still the least likely to report to the police, which suggests that recognition of marital rape in the broader charge was not the only barrier for women to speak about violence in their homes.³²

Rape law reform was limited in its success by persistent barriers to women coming forward to the police and their complaints proceeding to the courts. The 'police rape lottery' is how criminologist Jan Jordan has described the process of reporting a rape allegation to the police. The chance that complainants receive adequate care is dependent on the police officers they speak to, or 'being lucky.'³³ Stranger rape is consistently the most likely to be reported to the police despite strangers making up only 11 percent of perpetrators. If a weapon is used or physical harm takes place the likelihood of reporting increases.³⁴ Psychologists Patricia Mahoney and Linda Williams have argued that rape is not

³⁰ 'Rape by acquaintances figures are increasing,' *Hutt News*, 26th August 1993, Miscellaneous Papers, Sonja Margaret Loveday Davies, 1923-2005: Papers MS-Group-0285, 2005-093-261, Alexander Turnbull, Wellington.

³¹ Te Toiora Mata Tauherenga report of the Taskforce for Action on Sexual Violence : incorporating the views of Te Ohaakii a Hine-National Network Ending Sexual Violence Together / Taskforce for Action on Sexual Violence, (Wellington: Ministry of Justice, 2009) 1.

³² Ibid.

³³ Jan Jordan, 'Worlds Apart? Women rape and the police reporting process,' *The British Journal of Criminology* 41, no. 4 (September 2001): 700.

³⁴ Jan Jordan, 'Here we go round the review-go-round: rape investigation and prosecution – are things getting worse not better,' *Journal of Sexual Aggression* 17, no.3 (November 2011): 237.

often understood in a marital context instead victims look for 'classic rape' traits.³⁵ 'Classic rape' is similar to Elisabeth McDonald and Rachel Souness' concept of 'real rape' and requires the presence of a number of stereotypes about rape such as physical violence, a stranger (often at night-time) and severe psychological consequences. Rape myths do not only affect the police. Juries, judges, court reporters and lawyers are also significantly influenced by assumptions about 'real rape' circumstances. McDonald and Souness argue that in cases which fall outside of this narrow perception of rape 'the woman is less likely to receive support, will have less contact with the prosecutor and it will be rare for there to be a conviction.'³⁶ For example, women who have experienced rape or sexual assault where alcohol was involved are quickly dismissed within the justice system. Police are more likely to believe reports and a conviction is more likely to take place the more closely a case aligns with 'classic rape' or 'real rape' traits.³⁷

Victims of marital rape, particularly when there has been no physical violence, do not match the stereotypes of 'real rape.' The circumstances of marital and family sexual abuse are 'fundamentally different' to those of acquaintance or stranger rape.³⁸ Therefore, cases of marital rape continue to be dismissed within the criminal justice system. A search of case law records since 1985 indicates that in the ten years following reform very few cases of marital rape were heard in the New Zealand district and high courts. In almost all of the accessible cases the facts include the husband and wife being separated or divorced and

³⁵ Patricia Mahoney and Linda Williams, "Sexual Assault in Marriage: Prevalence, Consequences and Treatment of Wife Rape," in *Partner Violence*, ed. Jana L. Jasinski and Linda M. Williams (Thousand Oaks, California: Sage, 1998), 126.

³⁶ Elisabeth McDonald and Rachel Souness, "From 'Real Rape' to Real Justice in New Zealand Aotearoa: The Reform Project," in *From 'Real Rape' to Real Justice: Prosecuting Rape in New Zealand*, ed. Elisabeth McDonald and Yvette Tinsley (Wellington: Victoria University Press, 2011), 42.

³⁷ *Ibid*, 31, 42.

³⁸ Andy Kaladelfos, "Uncovering a Hidden Offence: Social and Legal Histories of Familial Sexual Abuse," in *Gender Violence in Australia: Historical Perspectives*, ed. Alana Piper and Ana Stevenson, 63-77 (Melbourne: Monash University Publishing, 2019), 77.

physical violence or the presence of a weapon.³⁹ The narrow scope of successful cases demonstrates the enduring harm of the myth that a victim's choices or the consequences a victim experiences determines whether or not a rape has occurred. For women who have been assaulted by their husbands, stereotypes about 'nagging' or 'vindictive' wives are still used to justify assaults. Another difference is the particular difficulties of corroborating evidence between two partners.⁴⁰ Spouses were not legally considered a 'competent or compellable witness for prosecution or defence' until section 5 of the Evidence Act 1908 was repealed in 2006.⁴¹ Another spousal privilege, historically linked to the idea that husband and wife were one legal person, had been removed.

Given all of these challenges it is unsurprising that the Ministry for Women's Affairs report 'Responding to Sexual Violence: Attrition in the New Zealand Justice System' found that just eight percent of the reported cases where the offender was a current partner or boyfriend resulted in conviction. Across all reported cases of sexual violence (n=1995) dealt with in the criminal justice system between 2005 and 2007 the conviction rate was 13 percent.⁴² Despite the definition of rape being continually broadened, convictions rates for rape have dropped two percent in the twenty first century compared to the 15 percent rate in the 1981 *Rape Study*.⁴³ In the words of Elisabeth McDonald 'so much has been done but so little has changed.'⁴⁴

³⁹ *A v M* High Court Auckland 7/5/1991.

R v N CA99/87 [1987] 2 NZLR 268.

R v Jai Ram CA 90/95 [1995].

⁴⁰ Naffine, 'A Struggle Over Meaning,' 41.

⁴¹ *Evidence Act* 1908, 5.

⁴² Sue Triggs, Elaine Mossman, Jan Jordan, and Venezia Kingi, *Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System* (Wellington, Ministry of Woman's Affairs, 2009), executive summary pviii.

⁴³ Ibid, 59. Jan Jordan, 'Here We Go Round the Review-Go-Round: Rape Investigation and Prosecution – Are Things Getting Worse Not Better,' *Journal of Sexual Aggression* 17, no.3 (November 2011): 238.

⁴⁴ *New Zealand Parliamentary Debates*, House of Representatives, 14th November 2019.

Inclusive of those that were not reported to authorities just 5 percent of the rapes reported in the *New Zealand Women's Weekly* 1981 Questionnaire resulted in conviction.⁴⁵ Research shows that currently in New Zealand '24 percent of women, 6 percent of men' and 'almost one in two trans people experience sexual violence in their lifetimes.'⁴⁶ Still the vast majority, estimated at 90 percent, of sexual assaults are not officially reported.⁴⁷ Such figures contextualise the words of Minister of Justice, Andrew Little, that 'sexual violence affects many New Zealanders, many more than the number of convictions.'⁴⁸ Considering the picture of low reporting and convictions overall and the specific barriers in the context of marital violence, it is clear that despite criminalisation only a tiny fraction of marital rape results in a conviction. The aim of criminalisation was achieved, but this did not often equate to justice in the form of rape convictions as some feminist had hoped.

Unintended Consequences?

In the previous chapter I detailed how feminist activism influenced rape law reform. The impact of engaging with the legal system on feminist activism must also be considered. Law and society scholar Rose Corrigan's research on the impact of legal reform on the anti-rape movement, suggests that 'the very success of feminist groups in transforming rape law in turn transformed these groups.'⁴⁹ Her book *The Failure of Success* examines the effect that interactions with the law had on the anti-rape movement. Corrigan argues that in the twenty-first century rape crisis centres are left 'standing alone' as a result of previous

⁴⁵ Auckland Rape Crisis Centre, Rape Symposium Paper, September 1982, 9/80, Jennifer Daphne Rowan, 1949-: Papers relating to women's issues, Submissions on changes to Rape Laws 9/75-9/83, MS-Papers-11269-33, Alexander Turnbull Library, Wellington.

⁴⁶ *New Zealand Parliamentary Debates*, House of Representatives, 14th November 2019.

⁴⁷ McDonald and Souness, 31.

⁴⁸ *New Zealand Parliamentary Debates*, House of Representatives, 14th November 2019

⁴⁹ Corrigan, 20.

conflicts between ‘feminist visions for change and the legal tools they employed.’⁵⁰

Crucially, when feminist service organisations chose to work with the state they require the support of a broader feminist movement in order to defend and maintain their perspective.⁵¹ In order to be representative this feminist perspective must be diverse and inclusive.

Failure to engage with the broad feminist movement can lead to some unintended consequences when interacting with the law. Rose Corrigan considers one of the ‘failures of success’ for anti-rape advocates was their role in ‘expanding the power of the state in ways that reinforce racist and classist practices which incarcerate, bully and propose individual solutions for large scale cultural problems.’⁵² Feminist advocacy on bringing justice to survivors of rape could be co-opted and used by the government to justify an increasingly carceral state, which was racist in its operation. Māori experience acute challenges in a monocultural justice system. These challenges have only been consolidated by the failure of Pākehā feminists of the 1980s to account for issues of race in their advocacy.

Māori are ‘substantially over-represented’ as perpetrators as well as victims of sexual and family violence.⁵³ Judges overseeing criminal cases in the 1970s were seven times more likely to find Māori men and nine times more likely to find Māori women guilty than their non-Māori counterparts.⁵⁴ Sexual violence cases were no exception. The *New Zealand Women’s Weekly* 1981 survey found of 365 perpetrators 50.95 percent were Caucasian.⁵⁵ White men did not often fit the stereotypes of sexually deviant due to ideas

⁵⁰ Ibid, 7.

⁵¹ Matthews, 166.

⁵² Corrigan, 3.

⁵³ Denise Lievore and Pat Mayhew, *The Scale and Nature of Family Violence in New Zealand: A review and Evaluation of Knowledge* (Wellington, Ministry of Social Development, 2007), 11.

⁵⁴ Donna Awatere, ‘Maori Sovereignty,’ *Broadsheet* 100, June 1982, 41.

⁵⁵ Auckland Rape Crisis Centre, Rape Symposium Paper.

about their respectability. International research overwhelmingly shows that rapes are more likely than not to be perpetrated by someone of the same ethnicity as the victim. Of cases reported to the police between 2007-2008, the ethnic group of the victim matched the offender in just under two thirds of cases.⁵⁶ Racial disparity in the prison population has persisted to the present day. Department of Corrections statistics show that in September 2020 Māori comprised of 52.9 percent of the prison population (n=9078), compared to 16.7 percent of the overall population.⁵⁷ Feminist activism on marital rape was by no means the creator of a racist justice system. Reforms, that feminists argued for, have been another avenue where a European legal system has applied the law in an inherently unequal way. In the words of leading Māori and feminist advocate Donna Awatere ‘While the system of justice in this country operates under white rule to the advantage of white people, every Maori is a political prisoner.’⁵⁸ For as long as tikanga Māori perspectives on sexual violence continue to be marginalised in criminal law, this inequality will remain.

A rigid pākehā criminal justice system fails to accommodate for Māori understandings of sexual violence.⁵⁹ Leonie Pihama’s research on whānau violence suggests a number of distinctive interlinked characteristics not currently accounted for in the justice system. Firstly, acts of whānau violence are ‘considered to be acts of both individual and collective violence.’ Secondly, whānau violence is not only physical, it also has cultural, spiritual and collective impact.⁶⁰ Thirdly, whānau violence is ‘intergenerational and impacts

⁵⁶ Triggs, Mossman, Jordan, and Kingi, 23.

⁵⁷ Department of Corrections, ‘Prison Facts and Statistics – March 2020.’ Accessed February 2020 https://www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/prison_stats_march_2020.

⁵⁸ Awatere, 41.

⁵⁹ Pitman, 46.

Leonie Pihama, Rihi Te Nana, Ngaropi Cameron, Cheryl Smith, John Reid, and Kim Southey, ‘Māori Cultural Definitions of Sexual Violence,’ *Sexual Abuse in Australia and New Zealand: An interdisciplinary Journal* 7, no.1 (2016): 44.

⁶⁰ Ibid, 48.

on the entire whakapapa.’⁶¹ Mereana Pitman argues relationships are so significant in tikanga Māori that sexual violence can be seen as ‘transgressing the mana...of not only the victim but also the abuser and his people.’⁶² In te ao Māori sexual violation is therefore much more than a physical violation of an individual woman, it is a violation of the hauora of ‘past and future generations,’ of the whole whānau, hapū or iwi.⁶³ Historian Jacqueline O’Neill has called intimate partner violence ‘universal and transhistorical.’⁶⁴ The impacts of sexual violence have reverberated throughout New Zealand history affecting generations of families, past, present and future. Considering violence through the lens of tikanga Māori a ‘number of prosecutions for sexual violation’ is a wholly inadequate response to such an issue.

Similarly a criminal justice approach, addressing only the individual victim and perpetrator, is insufficient from a wider Pasifika perspective which recognises sexual violence as ‘a serious breach of human relationships.’⁶⁵ Michael Ligaliga’s PhD research asks the question ‘Are there aspects of *faa Samoa* that contribute to domestic violence?’⁶⁶ Ligaliga identifies three ‘tightly interlocked’ themes which influence domestic violence in Samoan culture, which are the *aiga* or families, *nuu/matai* or village/chief and *ekalesia* or church.⁶⁷ Considering the communal nature of these themes Ligaliga names individualism as ‘the greatest limitation’ of applying western theories of domestic violence to the Pacific.⁶⁸

⁶¹ Ibid, 44.

⁶² Pitman, 45.

⁶³ Pihama, 45.

⁶⁴ Jacqueline O’Neill, ‘Men’s Violence Against Wives and Partners: The State and Women’s Experience, 1960-1984,’ (PhD Thesis, Massey University, 2011), 2.

⁶⁵ Ministry for Women’s Affairs, *Restoring soul, Active interventions for adult victim/survivors of sexual violence*, (Wellington, Ministry of Women’s Affairs, 2009), 55.

⁶⁶ Michael Ligaliga, ‘*Faa Samoa*: Peacebuilder or Peacebreaker? Understanding Samoa’s Domestic Violence Problem: A Peace and Conflict Perspective’ (PhD Thesis, University of Otago, 2018), 48.

⁶⁷ Ibid, 124-125, 148.

⁶⁸ Ibid, 48.

Culturally competent approaches to prevention and healing for Pasifika involves an inclusive view of those affected ('all relational connections') and forgiveness as 'a collective effort.'⁶⁹

The Samoan mindset underpinning this, Ligaliga suggests, is that 'when one makes a mistake, everyone has contributed in some way to that mistake,' positions sexual violence as an issue which requires wider community and even societal transformation to address.⁷⁰

One lesson which can be learnt from the women's liberation movement of the 1970s and 1980s is the necessity of a gender and race conscious approach. Interaction and cooperation with the law only heightens the need for such a consciousness due to the racial inequality and monoculturalism of the justice system. Otherwise, feminists can fall into the trap of 'reproducing the same racist structures.'⁷¹ From the discussion of interracial sexual violence cases in the 1860s to the representations of rape in the *Truth* and *The New Zealand Herald* in the 1960s, race was consistently a key influence on public perceptions and responses to rape.⁷² Race therefore remains an essential element for anti-rape activism to consider in each aspect of their work. As Donna Awatere has written 'economic and racial privileges cannot be separated from sexual power.'⁷³

Domestic Violence Legislation

Domestic violence was another area where significant feminist energy was dedicated towards law reform. This is an area of continuity between first and second wave feminism.

⁶⁹ Ibid, 51.

⁷⁰ Ibid, 43.

⁷¹ Nicola Gavey, *Just Sex?: The Cultural Scaffolding of Rape*, 2nd ed (London: Routledge, 2018), 27.

⁷² Heather Bauchop, 'The Public Image of Rape in New Zealand: A case study of two newspapers, 1950-1960' (Hons. diss., University of Otago, 1990), 24, 58. Angela Wanhalla, 'Interracial Sexual Violence in 1860s New Zealand,' *New Zealand Journal of History* 45, no. 1 (2011): 80.

⁷³ Quoted in Leah Whiu, 'A Maori Woman's Experience of Feminist Legal Education in Aotearoa,' *Waikato Law Review* 8, no. 2(1994):161-169.

The first major sign of success was the passing of the Domestic Proceedings Act 1968 and the subsequent reform of the Matrimonial Property Act in 1976. Financial support for sole parents in the form of the Domestic Purposes Benefit was introduced in 1973. Previously, money had been a barrier for many women wanting to leave violent husbands. O'Neill has called the Domestic Purpose Benefit the 'most significant reform for a woman's capacity to resist a husband's or partner's violence.'⁷⁴ The Domestic Protection Act 1982 'brought together most of the civil-remedies' to domestic violence under one law. De facto relationships were also included under the act.⁷⁵ Similar to the Rape Law Reform Act the legislation provided a signal that domestic violence was a problem which all political parties in Parliament sought to take seriously.⁷⁶

Jacqueline O'Neill's study of intimate partner violence and the state concluded that the Domestic Protection Act 1982 'promised great changes, [but] was tempered in practice.'⁷⁷ O'Neill said the Act failed to 'challenge the structural imbalance in marriages and relationships.'⁷⁸ The central tension between the state's desire to improve the lives of women as individuals and failure to address structural issues of inequality persisted.⁷⁹ Amending criminal law is only one part of the story. As O'Neill has argued 'while women had greater freedom and legal support to leave oppressive relationships, this did not mean they could escape violent or abusive men altogether.'⁸⁰ This reflects Diana Russell's point that if

⁷⁴ O'Neill, 'Men's Violence Against Wives and Partners,' 363.

⁷⁵ W.R. Atkin, Diana Sleek, Vivienne Ullrich, 'Domestic Protection Act 1982,' VUWLR, 1984.

⁷⁶ O'Neill 'Men's Violence Against Wives and Partners,' 340, 359.

⁷⁷ Ibid, 368.

⁷⁸ Ibid., 359.

⁷⁹ Ibid., 364.

⁸⁰ Ibid., 360.

every woman who had been raped reported it to the police, the problem of wife rape would not be solved.⁸¹

Evaluating Success Beyond the Law: Protecting Women

Changing the law to include marital rape was also about protecting vulnerable women from violent husbands. In April 2020, Stuff New Zealand published *The Homicide Report* which analysed the details of the 126 people in New Zealand who died in suspicious or homicidal circumstances in 2019. Of the 27 women killed by homicide, close to half were killed by their partners or ex partners.⁸² Twelve women who the government, law, police and local community failed to protect. Journalists Blair Ensor, Edward Gay and Andy Fyers wrote ‘the nation consistently outranks other developed countries when it comes to family violence, particularly intimate partner violence and child abuse.’⁸³ Diana Russell, leading researcher on marital rape, has emphasised ‘wife rape is not a problem that will ever be solved by turning to the law.’⁸⁴ Solving the problem of marital rape requires protecting women in their homes and communities when the law is not involved. Lifting the shame for women to tell their stories, adequate funding for support services and meeting the specific needs of victims of intimate partner violence and rape were all aspects of protection that feminist activists engaged in with varying levels of success.

⁸¹ Diana Russell, *Rape in Marriage* (Bloomington and Indianapolis: Indiana University Press, 1982), 25.

⁸² Andy Fyers and Blair Ensor, ‘The Homicide Report,’ *Stuff*, 2019. Accessed March 2021, <https://interactives.stuff.co.nz/the-homicide-report/>

⁸³ Blair Ensor, Edward Gay and Andy Fyers, ‘The Homicide Report: 2019 the worst year for intimate partner homicide in a decade,’ *Stuff*, 2nd April 2020. Accessed March 2021 <https://www.stuff.co.nz/national/crime/120413867/the-homicide-report-2019-the-worst-year-for-intimate-partner-homicide-in-a-decade>

⁸⁴ Russell, 26.

Empowering women to speak about their experiences of sexual violence, and creating spaces for them to do so, was one of the successes of the campaign to criminalise marital rape. Experiences of marital rape were previously suppressed from public discourse through notions of privacy. Victims often held significant shame regarding their experiences. Sara Ahmed, feminist writer and independent scholar, provides many definitions for feminism including 'how we pick each other up.'⁸⁵ Anti-rape and domestic violence activism was a movement where women at all different stages of the healing process picked one another up by amplifying and affirming the many experiences of rape and violence they had endured. The horrendous ubiquity of the violence allowed a small amount of safety for women who did share their stories, comforted in the knowledge that they were not alone. There are still many stories left unheard, and some that will never be spoken.

Feminist activism led to more formal support organisations also in the form of rape crisis centres and women's refuges. The extent to which these organisations could provide necessary services to protect and support women who had experienced violence was dependent on funding available to them. Funding for women's refuge and rape crisis centres has been characterised by its instability. In a media statement on March 10th, 1993, Labour MP Sonja Davies criticised the National Government for having 'frozen funding to women's refuges for a third year in a row.'⁸⁶ The same year Whangarei Women's Refuge wrote to the Governor General Catherine Tizard making the point 'every week in 1992 2624 beds in refuges were occupied, more than the total in three major hospitals yet our budget is so much less.'⁸⁷ A 2009 Ministry for Women Report, *Restoring Soul: effective*

⁸⁵ Sara Ahmed, *Living a Feminist Life* (North Carolina: Duke University Press, 2017), 1.

⁸⁶ Sonja Davies, media statement, 10th March 1993, Family Violence, Sonja Margaret Loveday Davies, 1923-2005; Papers, 2005-093-194 (MS-Group-0285), Alexander Turnbull Library, Wellington.

⁸⁷ Whangarei Women's Refuge letter to Ms Tizard, 7 July 1993. Family Violence, Sonja Margaret Loveday Davies, 1923-2005; Papers, 2005-093-194 (MS-Group-0285), Alexander Turnbull Library, Wellington.

interventions for adult victim/survivors of sexual violence, surveyed sexual and domestic violence services and found the sector is 'under-funded, staff underpaid and a lot of work is done on a voluntary basis.'⁸⁸ Specialist sexual violence centres were impacted most acutely, with 96 percent naming funding as a restriction on their capacity to meet the community's needs. Women's refuges appear in a slightly better position with 73 percent naming funding as a restriction.⁸⁹ Training, staff expertise and staff numbers were also identified as prominent restrictions for both specialist sexual violence services and women's refuges.⁹⁰ Māori, alongside migrant and refugee communities, Pacific people, men and sex workers, 'may have the most difficulty in having their needs met.'⁹¹

Māori services, which aim to support the whole whānau have particular resource needs beyond what is currently available in the sexual violence sector. Viewing sexual violence as a collective issue and not an individual issue necessitates a broader approach, inviting more people into the healing process.⁹² To do this more counsellors trained in Kaupapa Māori approaches are needed as well as better interagency collaboration, and increased funding.⁹³ By naming sexual violence as intergenerational tikanga Māori also acknowledges the generational trauma which, as Leonie Pihama has reflected, will take generations 'to repair and unlearn.'⁹⁴ Sara Ahmed has written, 'when you become a feminist...what you aim to bring to an end some do not recognise as existing.'⁹⁵ Tikanga Māori perspectives bring to light to the issues 'some do not recognise as existing.' To

⁸⁸ *Restoring Soul*, 51.

⁸⁹ *Ibid.*, 52.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, 56.

⁹² Pihama, 56.

⁹³ *Restoring soul*, 53.

⁹⁴ Pihama, 44.

⁹⁵ Ahmed, 6.

provide healing in the hollistic sense, feminist service organisations must adequately resource solutions to these issues such as intergenerational trauma, and the impact on the wider whānau.

Often the most visible urgent need is dealing with the harm caused by individual incidences of domestic and or sexual violence. In the letter from Whangarei Women's Refuge to the Governor General they disclosed that 'the bulk of refuge time is taken up with crisis intervention.' Crucially this left prevention education, community work and follow up work without resources which the refuge warned unless addressed 'the cycle of violence will continue and increase in scope and severity.'⁹⁶ This response was foreshadowed somewhat by W.R. Atkin, Diana Sleek and Vivienne Ullrich in their analysis of the Domestic Protection Act of 1982. Their article in the *Victoria University Law Review* read 'another area where government could be more active is funding women's refuges, counselling and educational organisations, funding not only to pick up the pieces but also to research and prevent the causes of such violence.'⁹⁷ The following year, Auckland Rape Crisis advised that education in schools, self-defence lessons, adequate alternative housing, equal pay and promotions for women in the workplace were all helpful preventative measures in addition to funding rape crisis centres.⁹⁸ Funding solutions to the root causes of sexual violence is linked to a significant economic benefit. The New Zealand Treasury estimated that sexual violence costs the country \$1.2b each year, which makes sexual assault 'the most costly incident per crime by far.'⁹⁹ Funding support services beyond crisis work minimises what is

⁹⁶ Whangarei Women's Refuge letter to Ms Tizard.

⁹⁷ Atkin, Sleek, and Ullrich.

⁹⁸ Auckland Rape Crisis submission, 17th June 1983. Submissions on the changes to Rape Laws 9/1-9/13, MS-Papers-11269-28, Jennifer Daphne Rowan, 1949-: Papers relating to women's issues, Alexander Turnbull Library.

⁹⁹ *Restoring Soul*, 3.

currently ‘a waste of human potential both in an economic sense and in a personal sense.’¹⁰⁰

Record investment in domestic and sexual violence services formed one part of the New Zealand government’s response to COVID-19. A total of \$202 million over the next four years was assigned in the budget for maintaining essential operations that have seen increased demand since the national lockdown period in March to May 2020.¹⁰¹ This announcement was an unprecedented step for organisations who have historically suffered from chronic underfunding. However, government funding has always come with conditions attached. Jane Vanderpyl’s work with feminist service groups informed her PhD research on the changes to women’s refuges and rape crisis centres in their first thirty years. She has closely examined the effect that accepting government funding had on feminist service organisations. Funding led to pressure to cooperate with government forms of bureaucracy and professionalism.¹⁰² For feminist service organisations being viewed as within or the same as the welfare state was a major concern.¹⁰³

Dividing the funding between women’s refuges and rape crisis centres suggests a separation in their work. From the establishment of rape crisis centres and women’s refuges there has been a pattern of clearly distinguishing their service as respectively addressing sexual or domestic violence. Russell’s research on marital rape indicates that between one third and one half of domestic violence victims had also been raped. For many of these

¹⁰⁰ ‘Why women should be liberated.’ Sandra Coney, 1944-: Newspaper clippings and files. Alexander Turnbull Library, Wellington.

¹⁰¹ Eleanor Ainge Roy, ‘New Zealand domestic violence services to get \$200m as lockdown takes its toll’, *The Guardian*, 11 May 2020. <https://www.theguardian.com/world/2020/may/11/new-zealand-domestic-violence-services-to-get-200m-as-lockdown-takes-toll>

¹⁰² Jane Vanderpyl, ‘Aspiring for unity and equality: Dynamics of conflict and change in the ‘by women for women’ feminist service groups, Aotearoa/New Zealand’ (PhD Thesis, University of Auckland, 2004), 179.

¹⁰³ *Ibid*, 180.

women often the circumstances of repeated assaults by the same offender led to specific psychological and social consequences. Compared to victims of domestic violence who had not been raped they were more likely to experience more serious physical violence (more severe and frequent aggression), significantly lower self-esteem, higher paranoia, anxiety and risk of sexually transmitted infections. These women were also at greater risk of being killed by their husbands.¹⁰⁴ Speaking in support for the Sexual Violence Legislation Bill in November 2019, National MP Paula Bennett reflected on learning from sector leaders the different responses required to deal with domestic and sexual violence. She said, 'like many, previously, I had run them together.'¹⁰⁵ Perhaps one of the biggest challenges to protect victims of joint domestic and sexual violence is for them to find specific and trained support for their circumstances in women's refuges, rape crisis centres and other organisations.

Conflicting values within and between women's refuge and rape crisis centres has been detrimental to their capacity to work together on solutions for women at the intersections of their work. Doris and John Church, founders of a battered women's support group in Christchurch in the 1980s, provide useful insights into the ideological nature of the conflict. Doris and John Church wrote in 'The future of the refuge in NZ' that the majority of women's refuges were more interested in 'the struggle against male oppression in all facets of society' than 'developing services for battered women.' For two years, Doris and John Church claim, they tried to persuade others in the refuge movement not to abandon women in need of help for 'the political aims of the extremist fringe of the feminist movement.'¹⁰⁶

¹⁰⁴ Russell, pxxxviii-xxix.

¹⁰⁵ *Parliamentary Debates*, 14th November 2019.

¹⁰⁶ Doris Church and John Church, 'The future of refuge in NZ' (Christchurch: Battered Women's Support Group, 1985), 2.

On this challenge, and the other ongoing challenges for feminist service organisations there is still a long way to go. In part, the 'responsibility to protect and defend the lives, dignity, autonomy and equality of individuals and communities threatened and harmed by sexual violence' is a government responsibility.¹⁰⁷ However, as feminists have argued, truly transforming society cannot come from those in power alone. The wider public have agency in shifting norms and attitudes irrespective of whether these are reflected in government policy.

Evaluating Success Beyond the Law: Transformation of Society

Sara Ahmed's *Living a Feminist Life* describes the need for feminists to do 'feminist housework.' 'Feminist housework does not simply clean and maintain a house. Feminist housework aims to transform the house, to rebuild the master's residence.'¹⁰⁸ Repealing spousal immunity was akin to cleaning the house but cleaning a house that has inequality built in is not enough. In order to rebuild the master's residence an overhaul of how marriage and rape are understood is required. National MP Ruth Richardson spoke of the Rape Law Reform Bill as 'only a prelude to radical change in community attitudes that must accompany the reform.'¹⁰⁹ Transforming attitudes about marriage, and how marriage is practised is a much bigger project which is both difficult and slow. Nonetheless, major changes to marital patterns and practises have taken place since the criminalisation of marital rape. In the words of Donna Awatere 'Change is hard but not impossible.'¹¹⁰

¹⁰⁷ Corrigan, 262.

¹⁰⁸ Ahmed, 7.

¹⁰⁹ *New Zealand Parliamentary Debates*, House of Representatives, 13th December 1983, 4.

¹¹⁰ Awatere, 42.

As a result of feminist activism women approached marriage with an increasingly critical lens. New Zealand feminist writer Margot Roth articulated the sentiment well, saying ‘there are worst states than being unmarried and obviously for some people being married is one of them.’¹¹¹ Historian Barbara Brookes describes the later twentieth century in New Zealand as continuing a pattern of ‘women who aspired to lives that were different from those of their mothers.’¹¹² One 23 year old woman included in her submission to the Rape Law Reform Bill that despite being in a long term relationship ‘I firmly never intend to marry.’¹¹³ Another submission, from the East Coast Bays branch of the Labour Party acknowledged the ways which marriage has already changed. Hierarchical and possessive views of marriage, they argued, were ‘hardly in keeping with the 1980s.’¹¹⁴

For young women, marriage was less often the ‘essential goal in life.’¹¹⁵ Women were more likely to enter paid employment and push back against the culture of being confined to the domestic realm. As O’Neill has argued ‘any protection against men’s violence towards wives and partners was only as good as women’s alternatives to legal or de facto marriage’ and ‘access to financial and social power.’¹¹⁶ De facto partnerships and no-fault divorce were more prevalent and became increasingly normalised from the 1980s. Offering a men’s perspective of domestic violence B de Riddler pointed out marriage was

¹¹¹ Margot Roth, *Roll on the Revolution...but not till after Xmas!* (Auckland: Women’s Studies Association, 2016), 41.

¹¹² Barbara Brookes, *A History of New Zealand Women* (Wellington, NZ: Bridget Williams Books, 2016), 224.

¹¹³ N J Gavey submission, 8th February 1984, Jennifer Daphne Rowan, 1949-: Papers related to women’s issues, Submissions on changes to Rape Laws, 9/14-9/30, MS-Papers-11269-29, Alexander Turnbull Library, Wellington.

¹¹⁴ East Coast Bays Labour Party submission, 14th February 1984 Jennifer Daphne Rowan, 1949-: Papers relating to women’s issues, Submissions on changes to Rape Laws 9/167-9/180, MS-Papers-11269-37, Alexander Turnbull Library, Wellington.

¹¹⁵ Roth, *Roll on the Revolution*, 41.

¹¹⁶ O’Neill, ‘Men’s Violence Against Wives and Partners,’ 364, 374.

‘good for men but bad for women, in terms of physical and mental health.’¹¹⁷ By 2017, the number of marriages taking place reduced nearly a quarter of their 1970 rate from 45 to 11 per 1000 people per year.¹¹⁸ Average age at marriage increased 7.3 years from 21.7 to 29 years in the same period.¹¹⁹ These patterns have only become more pronounced in the twenty-first century. While not all of these changes relate to greater recognition of men’s violence against their wives, it is at least one part of the story.

Christian churches, long criticised by feminists as a cornerstone of patriarchal teaching, evolved to demonstrate a greater diversity of views on marriage. Although conservative Catholics, evangelical and fundamentalist protestants continued to ‘participate centrally in moral panics against feminism’ many Christians were outspoken in promoting egalitarianism in marriage.¹²⁰ Methodist and Presbyterian churches Joint Public Questions committee illustrated the obsolete nature of using the bible to justify a husband’s strength over his wife by pointing out the bible was used in similar ways to justify slavery.¹²¹ Ecumenical Protestant body the National Council of Churches declared the political significance of justice and rights for women as a priority ‘no government can now ignore.’¹²²

¹¹⁷ B de Riddler, ‘Domestic Violence: A Mens Perspective,’ Domestic Violence Misc. Papers and Correspondence, ABVR 7761 W5063 Box 14, Archives New Zealand, Wellington, p2.

¹¹⁸ Chris Brickell, “A Short History of Same-sex Marriage in New Zealand,” *Sexualities* 23, no.8 (2020): 1417-1433. Note: this doesn’t include de facto relationships.

¹¹⁹ Caroline Dryden, *Being Married, Doing Gender: A critical analysis of gender relationships in marriage* (London: Routledge, 1999), 3.

‘Marriages, Civil Unions and Divorces: Year Ended December 2018,’ 3rd May 2018, *Stats NZ*.

<https://www.stats.govt.nz/information-releases/marriages-civil-unions-and-divorces-year-ended-december-2018>.

¹²⁰ Craig Young, “Queers versus the New Zealand Christian Right in New Zealand, 1985-1998,” in *Queer in Aotearoa New Zealand*, ed. Lynne Alice and Lynne Star (Palmerston North: Dunmore Press, 2004), 50.

¹²¹ Joint Methodist Presbyterian public questions committee, ‘Rape Law Reform Bill’ Submissions [part 2] in Sir Michael Cullen Political Papers, MS-2686/164, Hocken Library, University of Otago, Dunedin.

¹²² Media Release, Church & Society Commission, National Council of Churches in New Zealand, 21 December 1984, National Council of Churches in New Zealand: Further records, Church & Society Commission – Media Releases and Submissions, 90-387-15/2, Alexander Turnbull Library, Wellington.

Whether or not churches adapted their views on marriage, secularisation led to a declining influence of the churches on the personal lives and choices of a majority of New Zealanders.

Marriage remains a significant social institution in New Zealand society despite having moved some distance from its religious origins. In 2019, 19,071 marriages and civil ceremonies took place and people who choose not to marry or to end their marriages still face stigma.¹²³ Eliminating marriage altogether is unlikely, so the work for feminists remains to rebuild the structure of heterosexual marriage into an institution where power is distributed equally between husband and wife.

Margot Roth has described how social change can precede legislative change when it comes to marriage. Roth writes, 'parenting or the ideology of equal marital responsibility has gradually become accepted as fact, then turned into a form of reality through social policy.'¹²⁴ Marriage for same-sex couples in New Zealand is one example of this. Marriage equality was supported by a clear majority (63 percent) of New Zealanders in 2013 when the bill was debated in Parliament.¹²⁵ Although for many gay liberationists 'exclusive coupledness was the least revolutionary option' the opportunity to marry someone of the same sex brought 'security, commitment, social inclusion and equality' to all.¹²⁶ Marriage in New Zealand is no longer confined to the binary roles of husband and wife and instead is defined in law as 'the union of two people regardless of their sex, sexual orientation or gender identity.'¹²⁷ Extending marriage beyond cis-gendered heterosexuality can be understood as a challenge to the traditional marital roles. In other ways positioning

¹²³ 'Marriages, civil unions and divorce: Year Ended December 2019,' 5th May 2020, *Stats NZ*.
<https://www.stats.govt.nz/information-releases/marriages-civil-unions-and-divorces-year-ended-december-2019>.

¹²⁴ Margot Roth, 'Inventing the Family,' *Broadsheet* 135, December 1985, 17.

¹²⁵ Brickell, 1427.

¹²⁶ *Ibid*, 1428-29.

¹²⁷ *Marriage Act* 1955, 2(1).

marriage as a key to social normalcy affirmed the importance of marriage rather than, as many feminists and gay liberationists advocated, deconstructed it altogether.

Obstacles in the context of eliminating sexual violence include normalised sexual practises and gender roles. Psychologist Nicola Gavey's book *Just Sex* conceptualised a revolutionary way of understanding the impact of social norms in relation to sexual violence. Gavey refers to the 'cultural scaffolding of rape' where layers of normalised behaviours build on one another to provide 'not only a social pattern for coercive sexuality but also a convenient smoke screen for rationalising rape (within heterosexual relationships in particular) as simply just sex.'¹²⁸ Sexual pressure in marriage is an example of one such normalised behaviour that contributes to the 'cultural scaffolding of rape' and remains an obstacle to the elimination of sexual violence.¹²⁹ Feminist redefinition of rape was breaking new ground by emphasising rape as a crime of power not of sex. However, in order to address the ways power imbalances can cause harmful sexual norms, sex and sexuality cannot be removed from the conversation entirely.¹³⁰ British feminist magazine *spare rib* encouraged feminists to ask the question 'why it is so difficult to distinguish between rape and consensual sexual intercourse?' in their 1982 piece 'Rape in Marriage: Make it a Crime.'¹³¹ Barriers to gender equality in sexual relationships need to be addressed in order to move towards a society free from sexual violence. Rose Corrigan's warning to rape crisis centres in the US context can also be applied to New Zealand. Corrigan argues without a

¹²⁸ Gavey, 70.

¹²⁹ Ibid, 178.

¹³⁰ Jacqueline O'Neill, "'She asked for it': A Textual Analysis of the Re-negotiation of the Meaning of Rape in the 1970s-1980s' (MA Thesis, Massey University, 2006), 157.

¹³¹ "Rape in Marriage: Make it A Crime," *spare Rib* 126, (January 1983): 31.

focus on the transformation of society, we are resigned to ‘managing rather than eliminating rape.’¹³²

This thesis has argued that feminist activists in the 1980s did transform society in a number of ways. Rape became politicised from the 1970s and remains highly politicised in the 2020s.¹³³ Nicola Gavey considers rape to be ‘in many ways still tolerated by our society but no longer without fierce contestation.’¹³⁴ At the time of writing this chapter a thirty-three-year-old woman, Sarah Everard was murdered by a police officer while walking home in London. In response, ‘Reclaim These Streets,’ a growing woman led movement, organised vigils in thirty-two locations across the UK. ‘Reclaim These Streets’ aimed to provide an outlet for the ‘collective grief, outrage and sadness’ sparked by Sarah’s death ‘but also for all women who feel unsafe, who go missing from our streets and who face violence every day.’¹³⁵ Margot Roth wrote that despite the struggle being far from over ‘the story of the struggle so far is a remarkable undertaking, an example of women together at their collective best.’¹³⁶

Feminist knowledge cultivated in the 1980s has been formative in future directions for sexual violence. For example, it is now well known among police and legal professionals that acquaintance assaults are more frequent than stranger assaults. There is also hope in campaigns like the White Ribbon where men are encouraged to take the lead in challenging the traditional social scripts which normalise violence against women. After the murder of

¹³² Corrigan, 249.

¹³³ Gavey, 49.

¹³⁴ Ibid, 17.

¹³⁵ Molly Blackall and Libby Brooks, ‘Reclaim These Streets: Sarah Everard vigil evolves into virtual and doorstep protests,’ *The Guardian*, 13th March 2021. <https://www.theguardian.com/uk-news/2021/mar/13/reclaim-these-streets-sarah-everard-vigil-evolves-into-virtual-and-doorstep-protests>
See also: <https://reclaimthesestreets.com/> and @ReclaimTS on Twitter.

¹³⁶ Roth, *Roll on the Revolution*, 174.

British tourist Grace Millane in Auckland in December 2018 White Ribbon Manager Rob McCann wrote an article published by *Stuff* titled 'Kiwis we need to do better.' Although the headline was addressing all Kiwis, McCann made it clear the onus was on Kiwi men. He writes 'we must examine and undermine the attitudes and behaviours that enable the kind of toxic masculinity that drove the killer.' 'Healthy masculinity' meant rejecting 'unhelpful stereotypes and unspoken rules about what it is to be a boy or a man.'¹³⁷ Similarly, in her book *Rape: A History from 1860 to Present* historian Joanna Bourke suggests the next step to ensuring sexual violence is no longer inevitable is 'a new politics of masculinity.'¹³⁸ Feminist activism in the 1980s articulated and challenged gendered expectations for women, promising liberation from the ways which they felt trapped by patriarchy. Such liberation can only be fully realised when men are equally committed to challenging and subverting the stereotypes and social norms which they are also trapped by.

Contemporary Situation in New Zealand

New Zealand's legal system was built on colonial British values, legislative process and institutions. Spousal immunity became a part of New Zealand law as a British import with the codification of criminal law in 1893 Marital rape was first recognised in UK law in the case of *R v R* [1991].¹³⁹ Unlike New Zealand, criminalising marital rape in the UK occurred through court judgements rather than legislative reform. In *R v R* the English House of Lords had to decide whether there was any basis for the principle that marriage gave 'implied consent' and whether 'assuming that that principle at one time existed it still represents the

¹³⁷ Rob McCann, 'Grace Millane: In the wake of her murder kiwis need to do better,' *Stuff*, 21st Feb 2020. <https://www.stuff.co.nz/national/crime/119635938/grace-millane-in-the-wake-of-her-murder-kiwis-need-to-do-better>

¹³⁸ Joanna Bourke, *Rape: A History from 1860 to the Present* (London: Virago, 2007), Preface.

¹³⁹ *R v R* [1991] UKHL 12.

law.’¹⁴⁰ Socio-cultural change was presented as the main argument in favour of ‘removing the common law fiction’ of spousal immunity. In the majority opinion Lord Lane found spousal immunity to be ‘quite unacceptable,’ ‘repugnant and illogical’ in modern times. Common law, he said ‘needed to evolve appropriately.’ He agreed with his Scottish colleague Lord Emslie that ‘the status of woman, and particularly of married women, has changed out of all recognition.’¹⁴¹ However, abolition of spousal immunity was acknowledged as ‘a task for the legislature and not for the courts.’¹⁴² In order not to ‘trespass on the province of Parliament’ the House of Lords reasoned that criminalising marital rape was ‘not the creation of a new offence’ and therefore they had a responsibility to amend the common law appropriately for the modern context.¹⁴³

New Zealand Parliament had a similar discussion on socio-cultural change and modernity ten years prior. Perhaps one aspect of urgency for New Zealand was a national ambition to be a ‘better Britain.’ Early in the colonial government this ambition related to a place where white families could own land and live without poverty or other British social ills. By the 1980s this ambition was more closely linked to being seen as a humane, progressive and modern democracy. Hutt Valley Rape Counselling Network spoke of this ambition in their submission, ‘that the ability to be forward and enlightened thinkers has not died with our forebears.’¹⁴⁴ There was perhaps some pride in preceding the UK in abolishing such an inhumane and outdated clause as spousal immunity. Lord Lane noted New Zealand’s position on spousal immunity in the decision of *R v R*. This shows that English

¹⁴⁰ Full judgement text accessible through British and Irish Legal Information Institute.
<https://www.bailii.org/uk/cases/UKHL/1991/12.html>

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Hutt Valley Rape Counselling Network submission, ‘Rape Law Reform Bill’ Submissions [part 3] in Sir Michael Cullen Political Papers, MS-2686/165, Hocken Library, University of Otago, Dunedin.

law was aware, at least to some extent, of reforms happening in New Zealand. English and New Zealand legal systems remained connected with legal ideas travelling in both directions.

Since 1985, there have been repeated attempts from members of parliament, especially female MPs, to show leadership in responding to sexual and family violence. The story of Louise Nicholas, who spoke out in 2004 about the rape and abuse she experienced by members of the New Zealand Police, stirred further calls for action. Nicholas' story and her chronic mistreatment during the trial was a catalyst for the work which Elisabeth McDonald and Yvette Tinsley led as part of the 'Real Justice' Project. Geoffrey Palmer, as former Minister for Justice, introduced McDonald and Tinsley's book with the acknowledgement 'New Zealand is not performing well in this area of the law. The challenge of how to do better is a formidable one.'¹⁴⁵ Palmer also offered a promise that regarding this 'troublesome corner of the law'...'change is likely to follow.'¹⁴⁶ In 2015, 14 female MPs were removed from Parliament for 'flouting the rules of the chamber.' In response to Prime Minister John Key's statement that they, as members of the opposition, were 'backing the rapists' each stood to say that 'as a victim of sexual assault I take personal offence' and then asked for an apology.¹⁴⁷ One by one they fired what Susan Brownmiller called 'retaliatory shots' at a culture that minimises and dismisses the impact of sexual violence.¹⁴⁸

More recently, in 2018 New Zealand made international headlines for pioneering paid leave for victims of domestic violence, with similar provisions currently only present in

¹⁴⁵ Geoffrey Palmer, "Foreword," in *From 'Real Rape' to Real Justice: Prosecuting Rape in New Zealand*, ed. Elisabeth McDonald and Yvette Tinsley (Wellington: Victoria University Press, 2011), 1.

¹⁴⁶ *Ibid.*, 2.

¹⁴⁷ Eleanor Ainge Roy, 'New Zealand female MPs thrown out of parliament after disclosing sexual assaults,' *The Guardian*, 11th November 2015. <https://www.theguardian.com/world/2015/nov/11/new-zealand-female-mps-mass-walkout-pm-rapists-comment>

¹⁴⁸ Susan Brownmiller, *Against Our Will* (New York: Simon and Shuster, 1975), 396.

the Philippines and parts of Canada. The following year, Minister of Justice Andrew Little introduced the Sexual Violence Legislation Bill in November 2019. This bill aimed to reduce the trauma victims experienced from the court system through amendments to the Evidence Act 2006, the Victims Rights Act 2002 and the Criminal Procedure Act 2011. Chris Penk, the member for Helensville, warned the house it was necessary to consider the 'benefit and cost,' emphasising the importance of 'ensuring that every person has a fair trial.'¹⁴⁹ The words of Chris Penk are a reminder of the endurance of Lord Justice Hale's idea that rape is 'an accusation easy to be made and hard to be proved.' Until this day no government has made any attempt to apologise to victims of marital violence for the historic failure to protect them and the role the law played in legitimising the abuse they experienced. After 35 years of progress and fighting against the words of Sara Ahmed resonate:

We can be shattered by what we come up against.

And then we come up against it again.

We can be exhausted by what we come up against.

And then we come up against it again.¹⁵⁰

Conclusion

The question as to whether criminalisation marked 'a tinkering' or 'transformation' is therefore complex and in places contradictory. Although statistics suggest that only a fraction of women who experience sexual and domestic violence access legal remedies, the fact the law now reflects that such behaviour is unacceptable in marriage is certainly progress. For the women and families who do find resolution in the justice system, this can

¹⁴⁹ *New Zealand Parliamentary Debates, House of Representatives*, 14 November 2019.

¹⁵⁰ Ahmed, 163.

be transformative in their own lives. However, for systemic transformation on the issue of intimate partner violence diverse and multifaceted resolutions are required: resolutions inside the law which recognise and affirm Māori and Pasifika perspectives, and resolutions beyond the law which protect women from harm and address gender inequality more widely.

Conclusion

Spousal immunity was an English legal import that was comprehensively protected in the patriarchal colonial context of New Zealand. Until 1985 New Zealand's legal system played a crucial role in authorising marital rape. Legal principles were considered a source of morality and stability in the colonial New Zealand context and were influential in establishing and regulating social norms. According to the law rape could not occur in marriage. Access to legal remedy was limited to situations where women could file an assault charge or divorce proceedings, both of which were conditional. For many women, their financial circumstances or social isolation limited their legal options further.

After decades of legal authorisation for marital rape, the repeal of spousal immunity was characterised by consensus. Far from the anticipated controversy, surprising agreement existed among the vast majority of researchers, the public and eventually parliamentarians that spousal immunity should be abolished. Politicians sought to reform rape laws urgently and vocally, which had 'remained virtually unchanged...since last century.'¹⁵¹

By reforming rape laws politicians were not leading change, they were responding to change. Feminist action and knowledge are at the centre of the pressure which led to legislative change. Feminist initiatives included a critique of the existing marital structure, widening the definition of rape, and the establishment of feminist service organisations. Feminist services organisations such as, women's refuges and rape crisis centres, were established to support victims of rape and violence, educate the community and advocate for reform. Feminist ideas and service organisations reached far beyond those who identified as feminist, exerting a broad influence. Marriage was reconsidered as a site of

¹⁵¹ *New Zealand Parliamentary Debates*, House of Representatives, 13th December 1983, 4800.

unequal gender relations. Domestic labour, economic inequality and sexual expectations were all scrutinised through feminist discourses. A transformation in how rape was understood and talked about took place. Public discourses of rape re-oriented away from legal frameworks towards the real experiences which many women shared. Marital rape was talked about more openly and this public discussion was directly related to the political campaign to repeal spousal immunity. Michelle Arrow has called this process 'public intimacy.'¹⁵² Feminist campaigns since have continued this approach of expressing personal stories to showcase how individual lives are affected by the law.

Some initiatives led to easily traceable results, such as organising protests or conducting research. The results of consciousness raising and shifting understandings are harder to trace. Changing how New Zealanders understood marriage, sex and violence has undoubtedly many more flow on effects than are easily discernible. What is clear, is that shifting understandings is a crucial part of the pivotal role feminist initiatives played in the re-examination of spousal immunity.

Public discourse and action on sexual violence received a spike in attention in 1980s. Legal reform was considered overdue in a climate of significant social upheaval. Membership of groups in the National Collective of Independent Women's Refuges and Rape Crisis and Related Groups were at their height in the late 1980s. Attention on rape law reform has experienced waves of intense interest since, particularly in relation to high profile cases such as Louise Nicholas (2007) and Grace Millane (2020). Internationally the

¹⁵² Michelle Arrow, *The Seventies* (Sydney: New South Wales Publishing, 2019), 7.

growth of the #metoo movement has led to sustained increase in interest in sexual violence issues more broadly from October 2017.¹⁵³

Grassroots driven political change is relatively accessible in a small country like New Zealand where feminist activists had the 'levers of power' within reach.¹⁵⁴ Feminist involvement with the criminalisation of marital rape aimed to: repeal spousal immunity, protect and support women with violent husbands and change attitudes towards marriage and rape. Anne Else and Rosslyn Noonan, writing in 1993, considered 'virtually all instances of legal discrimination' had been removed and the public attitudes had 'begun to alter.'¹⁵⁵ Still they conclude that the business of feminism remained unfinished.¹⁵⁶ Feminist involvement in the criminalisation of marital rape is similarly unfinished. Due to the unintended consequences, it was also imperfect. I agree with Jacqueline O'Neill's argument that the state was more willing to remedy sexual violence on an individual rather than societal level.¹⁵⁷ Feminist transformation within a patriarchal colonial legal institution has significant limitations.

The relationship between law and society is reciprocal, flowing back and forth in dynamic ways. Spousal rape is a legal issue with significant social meaning. Spousal immunity and the later repeal had personal consequences for individual people. It also had effects in wider society, constituting what is and is not acceptable behaviour in marriage.

¹⁵³ Grace Millar, 'Women's Lives, Feminism and the *New Zealand Journal of History*,' *New Zealand Journal of History* 52, no.2 (2018): 145.

¹⁵⁴ Anne Else and Rosslyn Noonan, "Unfinished Business," in *Heading Nowhere in a Navy Blue Suit and Other Tales from the Feminist Revolution*, ed. Sue Kedgley and Mary Varnham (Wellington: Daphne Brasell Associates Press, 1993), 202.

¹⁵⁵ *Ibid*, 197.

¹⁵⁶ *Ibid*.

¹⁵⁷ Jacqueline O'Neill, 'Men's Violence Against Wives and Partners: The State and Women's Experience, 1960-1984,' (PhD Thesis, Massey University, 2011), 364.

For these reasons the legal principle of spousal immunity is not unrelated to its wider role in normalising violence in marriage. Repeal of spousal immunity gave women access to legal remedy and signalled to New Zealand society rape could occur within marriage. Despite the limitations I have acknowledged, the criminalisation of marital rape was a necessary and worthy campaign for New Zealand feminists.

I have emphasised throughout this thesis that although the criminalisation of marital rape was a political process it was influenced by social change. I draw this distinction for purposes of clarity between actions taking place in Parliament with actions taking place outside of Parliament. Parliamentary actions related to the capacity of elected officials to amend legal statutes and assign state funding. Outside of Parliament, processes of social change relate to writing submissions, consciousness raising, sharing personal experiences, front line services and much more. Of course, both of these aspects of the criminalisation of marital rape were political. Anti-rape and sexual violence campaigns were part of a wider story of feminist assertion that ‘the personal is political.’ The criminalisation of marital rape is an example of the importance of broadening our understanding of what constitutes political New Zealand history.

Charlotte Macdonald considered the women’s movement in New Zealand as having recognisable areas of ‘continuity and contrast.’¹⁵⁸ Advocating for ‘protection from harmful male sexuality’ is one area that is a connecting thread irrespective of time period. Attitudes towards sexuality, home and family which inform this advocacy on the other hand have been reconfigured many times over.¹⁵⁹ The knowledge formed in the 1980s continues to

¹⁵⁸ Charlotte Macdonald, *The Vote, the Pill and the Demon Drink: A History of Feminist Writing in New Zealand 1869-1993*, (Wellington: Bridget Williams Books, 1993), 7. Accessed March 2021

<http://thevotethepillandthedemondrink.bwb.co.nz/>

¹⁵⁹ Ibid.

have an impact today in the ongoing work of reforming the rape laws in New Zealand. Second wave feminist knowledge informs and is adapted by new insights from the next generation of feminist activists. Feminist activists today are still working to achieve the inherited goals: to reform rape law to improve victims' rights and more accurately reflect the reality of sexual violence, to protect women from violence and to eliminate harmful perceptions of violence, marriage and sex.

What is remembered, recorded and reported about sexual violence is likely to be a fraction of the many experiences considered too insignificant, shameful or risky to ever be shared in any form. The true scale and shape of the violence cannot really be known while these pockets of silence remain. Victims might never share what has happened to them. This should be their choice. Archives can also contribute to these pockets of silence by restricting material that relates to rape. Partially these restrictions are intended to safeguard the reputation of the institutions the archives represent. For example, accessing archival material for my research was more tightly controlled in November 2020 than in July 2020 and this was perhaps related to developments in the Royal Commission Inquiry into Abuse in Care.¹⁶⁰ I also wondered if pockets of silence in the archives were partially intended to protect the reader from traumatic material. I have learnt while doing this research the importance of selecting and sharing material sensitively. I have been conscious of limiting particularly disturbing or detailed descriptions of specific sexual violations. Marital rape is a confronting topic. There is much in it which is distressing. It seemed important to strike a balance between the harrowing nature of the topic and presenting research that people could safely engage with.

¹⁶⁰See: <https://www.abuseincare.org.nz/> for information about the inquiry.

Christine Dann described violence against women as ‘a many headed monster with remarkable powers of regeneration.’¹⁶¹ Sexual violence could be given the same description. As Dann has argued ‘there’s no point in drying today’s tears without giving thought to stopping tomorrows.’¹⁶² Scholarship from a broad range of disciplines, psychology, criminology, gender/women’s studies and legal studies, can all contribute to weakening this monster. Contributions from these fields present an opportunity to engage in interdisciplinary study and better understand sexual violence in New Zealand history. Further historical work is still needed. Historical work connects past, present and future. Historians recognise patterns of change and continuity overtime. Historians investigate causes and consequences of beliefs, behaviours and institutions. Addressing the issue of sexual violence would benefit from all of these contributions.

There is significant scope for further study into sexual violence. Many topics have not yet been explored and I highlight only a couple. According to research from the ‘Thursdays in Black’ movement, 89 percent of women and 55 percent of men experience sexual harassment while studying at university in New Zealand.¹⁶³ Rates of sexual harassment for students with disabilities, Māori and Pacifica students and queer students are even higher. Tertiary institutions are one of the highest risk settings for sexual violence.¹⁶⁴ Historical research into the causes of this crisis is necessary if we are to develop policy and practice that is evidence based.

¹⁶¹ Christine Dann, *Up from Under Women and Liberation in New Zealand 1970-1985* (Wellington: Bridget Williams Books, 2015), 139, <http://upfromunder.bwb.co.nz/> Accessed March 2021.

¹⁶² Ibid, 134.

¹⁶³ Thursdays in Black Aotearoa New Zealand, “‘In Our Own Words’: Student Experiences of Sexual Violence Prior to and During Tertiary Education,” (Wellington: Thursdays in Black, 2017), 9.

¹⁶⁴ Ibid.

While there has been limited work on intimate partner violence against women in heterosexual relationships almost no research exists which explores intimate partner violence in lesbian and gay relationships. Men and people of other genders as victims of sexual violence have received no serious attention in New Zealand historiography. Study into this area would only enhance historical research on violence against women.

A 1982 survey of 930 San Francisco women found that 14 percent of married women or formerly married women had been raped by their husbands at least once.¹⁶⁵ A 2004 study in New Zealand surveyed 1,309 women in Auckland, and 1,360 women in Waikato.¹⁶⁶ In Auckland, 14.1 percent of 'ever-partnered' women had experienced sexual violence by an intimate partner at least once in their lives. In Waikato, 19.9 percent of 'ever-partnered' women had experienced sexual violence by an intimate partner.¹⁶⁷ These different studies, 22 years and 10,000 kilometres apart, provide similar results. Between one in seven and one in five women experience sexual violence perpetrated by a partner. As Diana Russell wrote in 1982 'in other words, we all know women who have been raped by their husbands.'¹⁶⁸ Spousal rape, like all forms of sexual violence, is not inevitable. Feminist activists in 1980s New Zealand knew this and saw legal change as one step towards societal transformation, but not the only one. We can continue to challenge rape myths, bring private troubles into public discourse, raise each other's consciousness and restructure marriage to be an equal partnership.

¹⁶⁵ Diana Russell, *Rape in Marriage*, (Bloomington and Indianapolis: Indiana University Press, 1982), 2.

¹⁶⁶ See also Nicola Gavey and Jade Farley, 'Reframing Sexual Violence as "Sexual Harm" in New Zealand Policy: A Critique,' *Sexual Violence Policy in New Zealand*, (2020), 230-231.

¹⁶⁷ Janet Fanslow and Elizabeth Robinson, 'Violence Against Women in New Zealand: Prevalence and Health Consequences,' *The New Zealand Medical Journal* 117, no.1206 (2004): 5.

¹⁶⁸ Russell, 2.

All of these actions bring us closer to a society without rape and violence; a society where legal systems robustly do not condone rape in any circumstances; and a society where women are equal and free citizens, irrespective of marital status. Such a society is part of the feminist legacy of the criminalisation of marital rape.

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Washington DC Rape Crisis Centre <https://dcrcc.org/>

Vancouver Rape Relief Shelter <https://rapereliefshelter.bc.ca/>

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Appendix: Legislation Table

Title/Year:	Year	Relevant Provisions
English Laws Act	1858	Laws of England in force in New Zealand as of 14 th January 1840.
Married Women's Property Protection Act	1860	Married women, deserted by their husbands, may maintain their own property and earnings as though <i>feme sole</i> . Can be reversed if husband returns.
Divorce and Matrimonial Causes Act	1867	A husband may petition for a divorce on the grounds of adultery and a wife may petition on the grounds of incestuous adultery, bigamy with adultery, rape, sodomy, bestiality or adultery coupled with cruelty.
Married Women's Property Protection Act	1870	Extends 1860 Act, to include a right to own property and earnings for married women subjected by their husband to cruelty, adultery, drunkenness or failure to provide.
Married Women's Property Act	1884	Married women entitled to own separate property and earnings. Treated as <i>feme sole</i> with respect to contracts, damages and bankruptcy laws.
Criminal Code Act	1893	Defines rape as the act of a male person over 14 years having carnal knowledge of a women who is not his wife without her consent, or with consent obtained by false representations or threats.
Divorce Act	1898	Extends 1867 Act to include, adultery, five years desertion, refusal to cohabit and a 7+ year prison sentence for attempted murder of the petitioner, as grounds for any married person to petition for a divorce. May also petition due to drunkenness and husband's failure to support the family or wife's neglect of domestic duties.
Crimes Act	1908	Maintains the definition of rape from the Criminal Code 1893.
Evidence Act	1908	Spouses shall not be a competent or compellable witness at any proceeding in connection with the offence.
Crimes Act	1961	No man shall be convicted of rape of his wife, unless at the time of intercourse, a divorce or nullity, or separation order exists.
Matrimonial Proceedings Act	1963	Replaced previous divorce legislation. Extended authority of the court to direct the ownership of property and furniture during or after a divorce.
Social Security Amendment Act	1973	Introduced Domestic Purposes Benefit, a social security payment. Available to women living alone who are unable to maintain themselves.
Property (Relationship) Act*	1976	Just division of matrimonial property between the spouses when their marriage ends by separation or divorce.

Family Proceedings Act*	1980	Irreconcilable breakdown of marriage became the only necessary grounds for divorce, applied for by either party. Repealed Matrimonial Proceedings Act.
Family Court Act	1980	Established family courts as a division of the district courts, to determine proceedings under Acts relating to family relationships, including those in this table marked by a *.
Domestic Protection Act	1982	A man or woman living together may apply for an order restraining the other party from violence. A man or woman who are/have been married or have lived together who do not live together at the time may apply for a non-molestation order.
Domestic Violence Act*	1995	A person who has been in a domestic relationship with another person may apply to the Court for a protection order where the respondent is using/has used domestic violence against the applicant or the applicant's children.

