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3. New Zealand's Jane Doe

Julia Tolmie

Julia Tolmie argues that Louise Nicholas' monumental effort to prosecute three police officers for sexual assaults committed against her, commencing when she was a girl, also achieved what Sean Dewart suggests Jane Doe's case did, by exposing abuse of power by police and generating a public demand for accountability. In contrast, however, Louise Nicholas' case was not informed by feminist analysis and she was not vindicated personally by the trial outcomes. Like Lucinda Vandervort who, later in this volume, explores the multiplicity of legal errors in another disastrous sexual assault prosecution involving a gang assault on an Aboriginal girl, Julia chronicles how police and prosecutorial errors played a significant role in the multiple retrials that the complainant endured and that finally produced the officers' acquittals. Louise Nicholas' bravery did, however, result in more women coming forward to identify these officers as perpetrators, and several related convictions ensued. Julia's discussion of the public inquiries and law reform proposals that the Louise Nicholas case prompted reminds us that legal wins and losses are only a starting point for feminist activism.

Jane Doe's protracted legal battle took place in Toronto, Canada, in the late 1980s to the late 1990s. On the other side of the world in the 2000s, New Zealand had its own Jane Doe. By briefly describing her journey and some of its outcomes, I also take the opportunity to honour those women whose costly stands for justice with respect to sexual violence make the law more habitable for all women. The woman I have dubbed "New Zealand's Jane Doe" is called Louise Nicholas¹ and her cases were not tort cases but criminal prosecutions against the police who were, *themselves*, her rapists.

I am, of course, drawing the connection between Jane Doe and Louise Nicholas very loosely. What was extraordinary about what Jane

1 For a full account of her experience, see Louise Nicholas & Philip Kitchin, *Louise Nicholas: My Story* (Auckland: Random House, 2007).

Doe did is that she succeeded in holding the police accountable with respect to what was standard policing, exposing it as illegally rooted in sexist assumptions and sloppiness. There is plenty of evidence that the New Zealand police force has an overly masculine culture, which operates in a sexist and frequently sloppy fashion when it comes to dealing with rape complaints. Jan Jordan ably exposes the degree to which sexist myths and assumptions are the norm amongst the New Zealand Police (even amongst those elite officers who are highly experienced in the area of sexual violence²). For example, the pervasive and inaccurate belief is that high proportions of sexual violence complaints are false; there are misinterpretations of victim behaviour because of stereotypes about how genuine victims act; and stereotypical definitions of rape prevail (for example, the drawing of a distinction between “real rapes” and cases that are not rape even though they might fit within the legal definition of rape, such cases being more in the nature of “non-consensual sex”³). Nonetheless, no one has taken the kind of litigation in New Zealand that Jane Doe took in Canada even though there have been obvious situations that have warranted such action. For example, Malcolm Rewa went on to rape twenty-six known women after the police chose to believe him instead of a young Maori female complainant who named him as her attacker in 1987.⁴

What Louise Nicholas did, by way of contrast, was to go after behaviour that no one would view as *standard* policing⁵ — police officers having sex, often in uniform, with women who were extremely vulnerable because of their age and, sometimes, past histories of abuse, and who were physically “compliant” but verbally expressing their unwillingness to participate. It is indicative perhaps of the difficulty in securing convictions in sexual violence cases that the prosecution failed to secure convictions in two of the three criminal trials in which Louise was the complainant,⁶ and in one of the two cases brought by other complainants against the same group of men for similar violations.

2 Jan Jordan, *The Word of a Woman? Police, Rape and Belief* (Hampshire: Palgrave MacMillan, 2004).

3 *Ibid* at 141.

4 *Ibid* at 192.

5 Having said this, one of the officers in question, Clint Rickards, had been promoted to a very senior level within the police force despite the fact that his employment records noted some aspects of this behaviour.

6 Ultimately there were no convictions with respect to the actual sexual assaults she had experienced. Instead, police officer John Dewar was convicted for his actions, which prevented the successful prosecution of those Nicholas had accused of sexually assaulting her.

Another point of difference between the trials involving Louise Nicholas as a complainant and Jane Doe's litigation is that the legal battle involved in the latter, but not in the former, was self-consciously shaped by a sophisticated feminist political framework. This reflects differences between the two women involved.⁷ It may also reflect subtle jurisprudential and political differences between the two jurisdictions in which these legal battles were played out. New Zealand does not have organisations like the Women's Legal Education and Action Fund [LEAF] and lacks a positive statement of equality for women in its constitution.⁸ Instead, there is simply a right to be free from discrimination on the grounds of sex.⁹ Early indications are that the New Zealand provision may have been used more often by men to challenge affirmative action measures for women on the basis that they do not treat men and women in exactly the same fashion, than to advance women's equality,¹⁰ although this has also arguably been a feature of the Canadian experience as well.¹¹ Nonetheless, it is possible to assert that New Zealand has yet to develop a sophisticated jurisprudence around gender equity issues, and that it lacks both the legal framework that might facilitate the development of such a jurisprudence, as well as resourced legal actors who might educate lawmakers and force their engagement with such issues.

What both Jane Doe and Louise Nicholas have in common, however, is their remarkable courage and tenacity in using the legal system

- 7 Compare the accounts in *Louise Nicholas: My Story*, *supra* note 1 and Jane Doe, *The Story of Jane Doe* (Toronto: Random House, 2003).
- 8 This difference may not be as significant as it first appears. Article 15(1) commences with a positive statement of equality — “Every individual is equal before and under the law” — before going on to define equality in terms of non-discrimination: “... and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, discrimination based ... on sex”). See Paul Rishworth *et al*, *The New Zealand Bill of Rights* (Melbourne, Australia: Oxford University Press, 2003) at 366–67.
- 9 Section 19(1) of the *Bill of Rights Act 1990* (NZ) does not contain an affirmative statement of equality. It simply says, “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993” (which includes sex). *The New Zealand Bill of Rights*, *ibid* at 375–93. See the discussion in Regina Graycar & Jenny Morgan, *The Hidden Gender of Law*, 2d ed (Sydney: The Federation Press, 2002) at 28–55.
- 10 Caroline Morris, “Remember the Ladies: A Feminist Perspective on Bills of Rights” (2002) 33/34 *VUWLR* 451.
- 11 See, for example, *The Hidden Gender of Law*, *supra* note 9 at 35–36. See also Gwen Brodsky & Shelagh Day, *Canadian Charter of Rights and Freedoms: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

to demand justice and accountability from the police force/officers for the role that it/they played in their violent victimizations. In addition, the public fallout from both these cases has been a demand for accountability on the part of the police force and an attempted overhaul of police behaviour afterwards.

AN ACCOUNT OF WHAT HAPPENED IN NEW ZEALAND

Louise Nicholas' trauma began when she was thirteen in the 1980s. She claims that she was regularly raped by a police officer, Sam Brown,¹² stationed in her rural town. She complained to the other officer stationed there (Trevor Clayton), who was a family friend, and says that she was also subsequently raped once by him. In addition, she was indecently assaulted several times by Bob Schollum, another officer. The school guidance counsellor, in whom Louise Nicholas confided, told her mother who, in turn, complained to Trevor Clayton. Her mother discovered that everyone involved denied that anything had happened and that no one would believe her or her daughter instead of a police officer.

The family moved to Rotorua and, five years later, when Nicholas was eighteen, she began to be visited regularly alone at home by Brad Shipton and Clint Rickards, in their police uniforms, for sex. She had only briefly met them once before they first showed up at her house. She would tell them that she did not want to have sex with them, but they would go ahead anyway. On one occasion, she claims that she was offered a lift when she was walking home from work by Bob Schollum and was then taken to a house where she was raped by Schollum, Shipton, Rickards, and a fourth man. On this occasion, she was also raped using a police baton. When Shipton's journals were seized by Operation Austin¹³ years later, it became apparent that Shipton had information about her and where she was living before she had even met him. It was obvious from this that her details had been passed on to these officers from someone else as a person whom they could sexually abuse.

In 1992, Nicholas laid a formal complaint. Chief Detective Inspector John Dewar was assigned to her case and arrested and charged Brown, who by that stage had left the police. Dewar did nothing about her allegations against Schollum, Shipton, and Rickards and, in fact, advised

12 Not his real name because of a suppression order.

13 This was the name given to the police team responsible for investigating and prosecuting the recent historic sexual assault complaints made against the police, beginning with those made by Louise Nicholas.

her against making a statement about those officers and did not inform their superiors about her complaint. It later transpired that Dewar had taken over the handling of Nicholas' complaint at the request of Shipton. Dewar acted as a close friend and confidante to Nicholas throughout his dealings with her, while at the same time, it appeared, managing the case so that Brown would be acquitted and the other officers would not be charged.

A depositions hearing¹⁴ took place. At the time, rape victims were not obliged to give oral evidence at depositions, but Dewar told Nicholas that she was so obliged. The result was that she was grilled by an experienced QC about information that no one except her family, Dewar, and the original officer she had been interviewed by, knew about.¹⁵ This included information about the baton rape and some false allegations that she had made to the guidance counsellor years before (she had made these allegations at the time because they seemed more believable to her than the truth of what was happening to her). The result of Dewar's advice at this point is that allegations of other incidents that had not been prosecuted, and the earlier lies that she had told, were put on public record and were therefore available to be brought up in the subsequent trial. She had also been through her first gruelling court experience.

The case then went to trial *three* times. The first two times the trial was aborted because Dewar, spontaneously and without any prompting, gave hearsay evidence. This was a "remarkable" mistake for a senior and experienced police officer to make once, let alone twice.¹⁶ By the the third trial, all the advantages that Nicholas had had in the first two rounds had dissipated. At the first trial, the judge had ruled that evidence of the other unprosecuted rape allegations that Nicholas had made were not allowed in evidence, but that was not the ruling in the two subsequent trials, with the result that these allegations were used to diminish her credibility. By the third trial, Nicholas was also heavily pregnant and her testimony, which had been given before two times in trial and once in deposition, was flat and unemotional. In the third trial also, to her surprise, Rickards, Schollum, and Shipton were called to

14 A depositions hearing is a preliminary hearing in which the court decides whether or not there is enough of a case to go to trial.

15 It later transpired that the notebook from the first police officer, whom she had spoken to when she first complained, had gone missing and had fallen into the hands of the defence.

16 *Louise Nicholas: My Story*, *supra* note 1 at 91.

testify. They testified that they had had sex with her, but there was no baton and the sex was consensual. This evidence, which undermined Nicholas completely, was called by the Crown on Dewar's advice. The result of the third trial, at which Dewar testified without giving hearsay evidence, was that Brown was acquitted. He received name suppression, more than \$20,000 in costs against the police, and the benefit of double jeopardy, meaning that he could never be tried for these crimes again.

The judge awarding costs to Brown said that it was astonishing that Schollum, Shipton, and Rickards had not been investigated or prosecuted, given the serious allegations against them:

Such disclosures should have triggered alarm bells that would have permanently silenced Big Ben. Even more surprising than the failure to record is the officer's deliberate advice to the complainant not to make a statement about her allegations against these officers. That a then non-serving officer is pursued with vigour and the allegations against currently serving police officers are not recorded and the complainant advised not to make a statement ... supported an argument that Brown "was a sacrificial offering."¹⁷

The police investigated Dewar, who got Nicholas to sign a statement that he had drafted saying that she was pleased with how he had investigated and responded to her complaints.¹⁸ Dewar was subject to some minor disciplinary action and transferred.

These things remained until 1998, when a journalist started putting together a story about these events. This story broke in January of 2004. Once the story became public, other women came forward with accounts of their experiences at the hands of these three men, and other police officers, when they were young and/or otherwise vulnerable.¹⁹

¹⁷ *Ibid* at 93.

¹⁸ "As a senior policeman with 21 years experience, he knew he shouldn't be talking to a key internal inquiry witness, let alone taking a statement from her" (*ibid* at 112).

¹⁹ For example, one woman claimed to have had a relationship with Shipton, and eventually an abortion as a result of this relationship. On the day of her termination, she said that Rickards showed up in uniform, knowing that she had just had an abortion, demanding sex. She gave him oral sex and he left. Another woman said she was fifteen and on a work experience program at the police station when Schollum seduced her. She was alarmed when, while having sex with Schollum, Shipton entered the room and she was told he was going to join in. She said no and asked him to leave, but Shipton watched while Schollum continued to have sex with her. Another woman said that she had had consensual sex with the men in question with a baton. She said that, although at the time she thought it was consensual, she later realized that

Some of the women had been bullied and intimidated into dropping their complaints.²⁰ Criminal charges were pursued by some of the women who came forward. For example, Waikato Police Commander Kelvin Powell was charged with the rape of another police officer in the 1980s. The alleged offence took place after the complainant's twenty-first birthday celebrations. She said she had not complained at the time because she knew what happened to rape complainants in the witness stand, "especially ones who had been drinking." She also thought a complaint would end her career, which had only just begun. The defendant in this case was acquitted.

In late 2005, investigators conducted an audit of police computer systems as part of a probe into police culture sparked by a string of damaging controversies around the police in 2004, including the historical rape charges being laid against longstanding and senior current and former officers.²¹ The result of the audit was that 327 staff members were found to have around five thousand pornographic images stored on their computers, taking up to 20 percent of the police computer storage capacity. As a consequence of this audit, disciplinary and criminal investigations were conducted against individual officers.

Ultimately, there were three criminal trials involving Shipton and Schollum (now ex-police officers), and in two of these cases Rickards was also charged. The first involved a woman who had been living in Australia and read about Louise Nicholas while she was back in

she had been manipulated. She said that one of her reasons for coming forward publicly with her story was that people did not believe Nicholas' baton allegations. She requested anonymity, but was named in the media and three months later committed suicide.

- 20 One woman, for example, whom Shipton knew had been sexually abused as a child, said she received frequent visits from him demanding sex. She went to the police station to complain and was in the waiting room alone when another officer came and told her that he knew why she was there and to get out. She fled the station and changed addresses several times afterwards.
- 21 See Julia Tolmie, "Police Negligence in Domestic Violence Cases and the Canadian Case of Mooney: What Should Have Happened, and Could it Happen in New Zealand?" [2006] NZ Rev 243 at 249–51. For example, other scandals included the negligent handling of a 111 call by a young woman, Iraena Asher, who has not been seen since the night she called the police asking for help. The number of cases in which the police did not log, did not record accurately, or did not respond promptly or efficiently to emergency calls resulted in an independent review of the police call centre and sixty-one recommendations for improvement. See Michael Corboy *et al*, *Communications Centres Service Centre Independent External Review: final report* (New Zealand Police, 11 May 2005).

New Zealand for a holiday.²² Two of the men involved — Shipton and Schollum — had been party to her rape by a group of men in Mount Maunganui in 1989, which also involved violating her with a police baton. She contacted the police and supplied the names of four of the five men who she said had assaulted her. The four conceded that sex had taken place,²³ but said that it was consensual. They were found guilty of rape, but were acquitted on the charges involving the violation with a baton. Subsequently, one of these men was then able to successfully appeal the rape charges and plead guilty instead to abduction.²⁴

In March of 2006, Louise Nicholas was the complainant in a trial that involved Rickards, Schollum, and Shipton.²⁵ The public was not permitted to know that Shipton and Schollum were already serving sentences for the rape of another woman. The three men admitted sex (although not with a police baton), but said that it was consensual. They were acquitted of all twenty charges against them.

In February of 2007, there was a third trial involving another woman with respect to the same three men.²⁶ The prosecution had tried to have this complainant's case heard with Louise Nicholas' case, because of the factual similarities between the two, but had been unsuccessful.²⁷ The complainant had had a sexual relationship with Shipton in the mid 1980s. She said that, during this time, Schollum, Shipton, and Rickards once took her to a house, handcuffed her, and violated her with a bottle. She did not contact the police about this incident. Instead, the police found her while investigating Nicholas' complaint when they called her number in Shipton's phone book. Next to her name and number Shipton had written the words "milk bottle." In a devastating pretrial ruling, the judge held that the note of her name and number with the

22 See the account in *Louise Nicholas: My Story*, *supra* note 1 at 155–57.

23 There were tapes recording the men's conversation about the day in question, which were damaging for the defence although not completely incriminating. The Crown offered the defendants the choice that, either they conceded that group sex had taken place, or the tapes would be admitted.

24 He was able to appeal and to obtain a retrial on the basis of the testimony of two witnesses, who were subsequently charged with perverting the course of justice because of allegations that they had fabricated their testimony in this case. He was not re-tried; he pleaded guilty to abduction in exchange for having the rape charges dropped.

25 *Louise Nicholas: My Story*, *supra* note 1 at 197–202.

26 *Ibid* at 214–17.

27 The New Zealand Court of Appeal overturned the trial judge's decision to hear the cases together on the basis that this created a risk of prejudice to the accused (*ibid* at 177).

words “milk bottle” written next to it was not admissible in evidence because the violation took place in 1984 and the notebook was dated 1986. This meant that any link was “‘speculative’ and would seriously prejudice Shipton’s right to a fair trial.”²⁸ Moreover, recent complainant evidence was not admitted on the basis that the then sixteen-year-old had had a chance to tell her mother before speaking to her best friend.²⁹ She had therefore not complained of the assault at the first reasonably available opportunity.³⁰ The result of this case was that all three men were found not guilty of all charges.

There was public outrage after the three verdicts were delivered and all of the information about the cases came to light. Effectively, three women had independently made similar allegations of pre-planned group rape, including violation with objects, by serving police officers, largely the same men, while they were teenagers in the same geographical location during the same period of time. Only two of the men had been convicted, and only with respect to one complainant. None of the men had been held accountable for a single object violation.

In May of 2007, Dewar was tried with respect to four charges of “attempting to obstruct, prevent, pervert or defeat the course of justice” related to his behaviour in suppressing Nicholas’ sexual assault complaints, manipulating her during the police review, and giving inadmissible hearsay evidence at the Brown trials. He was found guilty.

Media attention in New Zealand focussed again on the issue of sexual violence when, in January of 2008, another high profile New Zealander — Tea Ropati (a former rugby league star) — was acquitted of six offences, including rape and unlawful sexual connection. On this occasion, the media was less sympathetic to the complainant. Much was made of her alcohol and drug use and the police came under some public criticism for even prosecuting Mr Ropati. The day after his acquittal, Ropati’s lawyer, Gary Gottlieb QC, was reported as suggesting that the prosecution was irresponsible and that the trial process is “bloody PC” and “so anti-male it’s not funny.”³¹

²⁸ *Ibid* at 215.

²⁹ “I wondered just how many 16 year olds would really want to tell their mother that they have been violated by a bottle by serving police officers” (*ibid* at 215).

³⁰ Ted Thomas, “Was Eve Merely Framed; Or Was She Forsaken?” [1994] NZLJ 368; *R v H*, [1997] 1 NZLR 673, per Thomas J. But see section 35 of the *Evidence Act 2006* (NZ). Julia Tolmie, “Women and the Criminal Justice System” in Julia Tolmie & Warren Brookbanks, eds, *Criminal Justice in New Zealand* (LexisNexis, 2007) 295 at 316–17.

³¹ Andrew Koubaridis & Alanah Eriksen, “Ropati Lawyer Hits at Police” *New Zealand Herald* (1 February 2008) A1. Mr Gottlieb also made the implausible suggestion that the complainant alleged rape because she was embarrassed by what had happened.

In spite of these remarks, Mr Ropati's acquittal was yet another illustration of how difficult it is to achieve convictions in New Zealand cases involving sexual violence. The evidence in the case seemed particularly solid. The complainant was so drunk that she was unconscious at the time that the offence took place — which means that, by definition, she was not consenting to sexual activity — and it seems implausible that the defendant did not know this to be the case.³² Certainly, even if he was so obtuse that he did not notice that she was unconscious at the time and believed she was consenting, it is difficult to see how he had reasonable grounds for his belief, which must be demonstrated in New Zealand if the *mens rea* for sexual violation is to be negated.³³ The defendant's intoxication has never been accepted in criminal law as an excuse for failing to meet a negligence standard.³⁴ The victim had physical trauma to her genital and anal area and there was actual security video footage of Mr Ropati being sexual with her at some point earlier in the evening while she was clearly fading in and out of consciousness.³⁵

Interestingly, Mr Ropati was permitted during the course of the trial to introduce testimony from high-profile, long-standing *male* friends to the effect that he was always respectful of women in his social dealings with them and this testimony was uncritically covered by the media. Aside from being irrelevant to what took place on the night in question, this testimony was incredible. Even in Mr Ropati's version of events, an argument four months into his marriage resulted in his departure from the matrimonial home to be sexual with a stranger whom he had picked up in a bar. It is impossible to tell how influential this testimony was in the minds of the jurors, although it is clear that Ropati's acquittal was not straightforward, as it took twelve hours in deliberation.

Subjecting herself to the humiliating public scrutiny and speculation that accompanied the trial hardly seems like something that someone who was "embarrassed" would put themselves through. Andrew Koubardis, "Case 'absolute rubbish' say supporters, as Ropati freed" *New Zealand Herald* (31 January 2008); TV3 News Story, "Police defend decision to prosecute Ropati," online: www.nzherald.co.nz.

32 Sections 128, 128A(3) and (4) of the *Crimes Act 1961* (NZ).

33 In other words, New Zealand effectively has a negligence standard of *mens rea* for sexual violation (rape or unlawful sexual connection). Sections 128(2) and (3) of the *Crimes Act 1961* (NZ) define the *mens rea* for sexual violation as being "without believing on reasonable grounds that person B [the complainant] consents to the connection."

34 See *R v Clarke*, [1992] 1 NZLR 147.

35 Catherine Masters, Joanna Hunkin & David Eames, "Dicing with Drink" *New Zealand Herald* (2 February 2008) B1.

THE FALL OUT

Aside from the cases that were actually won and lost, what were the consequences of Louise Nicholas' courageous actions? One could look at the media coverage of and the jury decision in the *Ropati* case and conclude that not much progress had been made in educating the public, the legal profession, or the judiciary about the gendered realities of sexual violence or the difficulty of prosecuting sexual offences, in spite of the public anger that followed the acquittals in her case. And I think that is a fair comment. However, the consequences of her public stand are still unfolding.

Clint Rickards will never be the New Zealand Police Commissioner.³⁶ He was stood down on full pay when the story first broke and resigned years later once the criminal trials were complete, but before his police disciplinary hearing was held.³⁷ Although he has been acquitted of all criminal charges, it is clear that public opinion has condemned his actions.³⁸

Furthermore, as a direct consequence of Louise Nicholas' stand, there have been a significant number of public inquiries and research projects covering a wide range of issues surrounding sexual violence. The first was a Commission of Inquiry into Police Conduct, headed by

36 He was, at the time the scandal erupted, the Auckland Central Police Commander. He was also Assistant Police Commissioner and considered next in line for the penultimate job of Police Commissioner.

37 Patrick Glover, "\$19M bill to taxpayer for police sex scandal" *New Zealand Herald* (27 November 2008) online: www.nzherald.co.nz. Rickards engaged in an angry outburst outside the court after the last verdict was handed down in which he attacked the Operation Austin investigation as a "shambles" and said that Shipton and Schollum were good friends of his who should not be in prison for rape. Had he kept quiet at this point, the police would have been in an embarrassing position regarding his employment status because Rickards had been repeatedly promoted in spite of his employment record that stated he had had sex with teenagers as an acting officer. The police were therefore unable to use this behaviour as grounds for terminating his employment. Once he had been acquitted of rape charges, there may have been no grounds for terminating his employment or demoting him.

38 While he was suspended on full pay, he completed a law degree and applied to the Auckland District Law Society to become a practising lawyer. They passed his application on to the New Zealand Law Society who eventually held that he was a "fit and proper person" to practice law. During the public debate surrounding this decision, the *New Zealand Herald* polled its readers to find that 89 percent felt that he should not be admitted. See Craig Borley, "Rickards Faces Hurdle to Become Lawyer" *New Zealand Herald* (2 September 2008) online: www.nzherald.co.nz.

Dame Margaret Bazley,³⁹ which released its report in April of 2007.⁴⁰ The commission found 313 complaints of sexual assault made against 222 police officers from 1979 to 2005. It made sixty wide-reaching recommendations for the reform of police practises and processes around the sexual conduct of individual officers, as well as their handling of sexual violence cases.⁴¹

The report has a number of strengths. One of these is the recognition that the problems experienced by women such as Louise Nicholas go beyond the issue of individual “bad apples” in the police force and involve the culture of the force itself.⁴² Implicitly, it is recognized in the report that phenomena like the amount of pornography passing through police computers during work time cannot be severed from the

- 39 Information about the links to the “Mr. Asia” drug syndicate that Dame Bazley’s husband, Steve Bazley, had during the 1970s and 1980s was released to the media during the Commission of Inquiry. Dame Bazley’s lawyer alleged that Clint Rickards, Brad Shipton, and Bob Schollum had hired a private investigator to attempt to discredit her role as head of the Commission of Inquiry. The claim was denied by Rickards’ lawyer, Arnold Karen. See “Police Conduct Inquiry into Bazleys Haunted by Past” *Sunday Star Times* (15 April 2009) online: www.sundaystartimes.co.nz.
- 40 Honourable James Robertson & Dame Margaret Bazley, *Report of the Commission of Inquiry into Police Conduct* (3 April 2007).
- 41 Including rationalizing police policies, developing a code of conduct for sworn officers, developing guidelines on inappropriate sexual conduct towards members of the public (which include a prohibition on police entering into sexual relationships with a person over whom they are in a position of authority or where there is a power differential), developing police email and computer use policies, improving staff training, making complaint processes more transparent, improving practises for ensuring investigations are independent, management assurance, setting up early warning systems and data bases for staff engaging in inappropriate behaviour, improving community feedback and initiatives through groups of community leaders, and improving the practises of the police complaints authority by, for example, making its processes more accessible and transparent, seeking regular feedback, and reducing backlog.
- 42 *Report of the Commission of Inquiry into Police Conduct*, *supra* note 40 at 283–99. Features of police culture generally included a strong bonding among colleagues, a male orientated culture, certain attitudes towards the use of alcohol, and dual standards with respect to on-duty and off-duty behaviour. Inappropriate attitudes that were part of police culture were identified as attitudes that reflected stereotyped views of complainants of sexual assault and raised general doubts about whether police officers may have been prejudiced in their approach to complaints; evidence of a culture of skepticism in dealing with the complainants of sexual assault; evidence of other officers condoning or turning a blind eye to sexual activity of an inappropriate nature by police officers and their associates; evidence that when senior police officers came to investigate complaints they were confronted with a wall of silence from the colleagues of the officers against whom complaints had been made.

attitudes of the police to cases involving sexual violence, for example.⁴³ The report recommends, amongst other things, that the police:

increase the numbers of women and those from ethnic minority groups in the police force in order to promote a diverse organizational culture that reflects the community it serves and to enhance the effective and impartial investigation of complaints alleging sexual assault by members of the police.⁴⁴

It suggests that the States Services Commissioner carry out an independent annual “health of the organization” audit of police culture for at least the next ten years, particularly looking at whether the organization provides a safe work environment for female staff and staff from minority groups.⁴⁵ In addition, the report recommends that the police seek to strengthen community groups that support sexual assault complainants by actively seeking consistent government funding for these groups.⁴⁶ This will have the dual effect of strengthening women’s groups working in the field of sexual violence (which currently are hampered in their efforts by the precarious nature of their funding and therefore the amount of effort needed to continuously apply for funding so that they can stay afloat), as well as the police force’s relationship with such groups.

In spite of the strengths of the report, it could be said that one of its major weaknesses is that responsibility is placed on the police force *itself* to implement the majority of the changes.⁴⁷ Given that the police commissioner, in his apology to the New Zealand public after the re-

43 The connection is implicit rather than explicit. See *Report of the Commission of Inquiry into Police Conduct*, *supra* note 40 at 11, 21, 256–58.

44 *Ibid* at 22.

45 *Ibid*.

46 *Ibid* at 17: “The New Zealand Police should initiate co-operative action with the relevant Government agencies to seek more consistent Government funding for the support groups involved in assisting the investigation of sexual assault complaints by assisting and supporting complainants.”

47 The Commissioner of Police is currently working through the recommendations of the Commission of Inquiry into Police Conduct and making quarterly reports on the implementation of these recommendations. So far, the police have taken measures like introducing a new New Zealand Police Code of Conduct and forming the New Zealand Police Adult Sexual Assault — Core Reference Group, a body of subject matter experts who will focus on the police role in responding to sexual assault. See *Fourth Quarterly Report on the Implementation of Recommendations by the Ministry of Justice and the Independent Police Conduct Authority as of 31 March 2008*.

lease of the report, implied that the issue was one of renegade officers,⁴⁸ it is questionable whether there will be the necessary institutional commitment by the police to the scale of the changes identified as needed. It therefore remains to be seen if the response of the police will be one of “impression management” — a phrase coined by the judge who decided Jane Doe’s claim of sex discrimination — as opposed to a serious commitment to a change in police culture around the issue of sexual violence.⁴⁹

In May of 2008, the Law Commission released its review of the law concerning the extent to which a jury in a criminal trial is made aware of the prior convictions of an accused person and allegations of similar offending on their part.⁵⁰ The commission received this reference as a result of public anger about the fact that the jury had not been permitted to know that Schollum and Shipton had been convicted of similar offences with respect to another complainant when they were tried for sexual offences with respect to Nicholas and the third complainant. Significantly, although the commission’s response to its particular terms of reference was disappointingly conservative,⁵¹ it expressed strong dis-

48 After the report was released, the Commissioner of Police at the time, Howard Broad, said, “I find it difficult to express in words my feelings about these people for they have caused immeasurable damage to a number of New Zealanders that they had sworn to protect. I unreservedly and unequivocally apologise to the women who were caught up in the actions of *those few officers* [emphasis mine]. I acknowledge the hurt and harm that’s been done and the grief that’s been caused to you, your families and supporters. To the women of New Zealand I say: I have been disgusted and sickened, as you will be, by the behaviour put before the Commission of Inquiry in many of the files that covered some 25 years of our recent history” (3 April 2007) online <<http://www.police.govt.nz>> (last accessed 27 July 2009).

49 See *The Story of Jane Doe*, *supra* note 7 at Chapter 30 at 301.

50 *Disclosure to Court of Defendants Previous Convictions, Similar Offending and Bad Character* (NZLC R103), Wellington, New Zealand.

51 The commission recommended no legal changes on the basis that, although the law on the admissibility of previous convictions that applied prior to 1 August 2007 was unduly restrictive, the *Evidence Act 2006* possibly changed the law. It was proposed that the commission should monitor the case law implementing the new provisions in order to assess whether further legal reform was needed, and report back to the government by the end of February 2010. The Right Honourable EW Thomas argued in his submission to the commission (“Submissions to the Law Commission in Response to the Issues Paper: ‘Disclosure to Court of Defendants Previous Convictions, Similar Offending and Bad Character’” 11 February 2008) that there are compelling reasons to treat sexual offences differently and to inform the jury of the defendant’s convictions for similar offending in such cases. These reasons include the facts that the credibility of the complainant is a central issue in such cases, that the evidence often comes down to the complainant’s word against the defendant’s because such offending generally occurs in private, and the need for fairness to the complainant as

quiet about the role of the adversarial process in sexual violence cases even though this issue did not form part of its original terms of reference. It noted the low reporting⁵² and conviction rates⁵³ for sexual offences, as well as the brutalizing nature of the trial process as experienced by sexual assault victims, and expressed the opinion that there could be value in investigating whether the adversarial system should be modified or replaced with some alternative model for sex offences.⁵⁴

Perhaps the most important work, however, is being currently undertaken by a Taskforce for Action on Sexual Violence⁵⁵ set up in July of 2007 to lead and coordinate multi-agency action on sexual violence. The taskforce brings together a number of government agencies and community groups to address both problematic *societal beliefs and attitudes* about sexual violence, as well as *legislative and procedural* barriers to the reporting, prosecution, and conviction respecting crimes of sexual violence.⁵⁶ Te Ohaakii a Hine-National Network Ending Sexual Violence Together is a taskforce member and represents seventy to eighty of the organizations, individuals, and academic experts working in the sexual violence sector, including, pleasingly, Jan Jordan whose work I referred to earlier.

A number of organizations affiliated with the taskforce have begun the process of public consultation with respect to various briefs around issues of sexual violence. In August of 2008, the Ministry of Justice released a discussion document, *Improvements to Sexual Violence Legislation in New Zealand*, seeking public submissions on possible changes

well as to the accused, particularly when considering the severe impact of the offence on the complainant, the impact of the trial itself on the complainant, and the impact of an acquittal on the complainant, coupled with the difficulty in getting complainants to report such crimes and in successfully prosecuting such cases.

52 In New Zealand the rate is as low as 12 percent. See A Morris & J Reilly, in collaboration with S Berry & R Ransom, *New Zealand National Survey of Crime Victims 2001* (Wellington: Ministry of Justice, 2003) at 99.

53 See Tolmie, "Women and the Criminal Justice System" *supra* note 30 at 295, 314–15.

54 *Disclosure to Court of Defendants Previous Convictions, Similar Offending and Bad Character*, *supra* note 50 at v-vi.

55 The taskforce will support the Sexual Violence Ministerial Group. The ministerial group consists of the Minister of Justice; Minister of Women's Affairs; Minister of Police; Minister for ACC; and Minister for Maori Affairs. Representatives from these ministries and other key groups have membership on the taskforce.

56 The six key priority areas of the taskforce are prevention, early intervention, recovery and support services, treatment and management of offenders, system responses to sexual offending, and system responses to victims.

to improve the way in which the criminal justice system deals with sexual violence. Public opinion is invited on three possible revisions of the law. First, it is proposed to include a positive definition of what amounts to consent to sexual activity, as well as requiring that, when determining whether the accused had reasonable grounds to believe that the complainant consented to sexual activity, the court must have regard to any steps the accused may have taken to ascertain whether the complainant was consenting.⁵⁷ Second, it is proposed to extend the “rape shield laws” to cover evidence about previous sexual experience between the complainant and the accused.⁵⁸ Third, opinion is sought on whether the adversarial system of justice is the best system for sexual assault cases, and whether prosecutors and judges should handle sexual assault cases differently from other cases.⁵⁹

In 2008, the Ministry for Women's Affairs, in partnership with the Ministry of Justice and the New Zealand Police, commenced a two-year research project aimed at improving support services for survivors of sexual abuse.⁶⁰

It is a little too soon to comment on the effects of all of the work undertaken in response to Louise Nicholas' public stand. Although some of this work has been completed, most of it is still in progress and it remains to be seen what the outcome of the different research and con-

57 In New Zealand, for sexual connection to constitute sexual assault, it must have taken place without the complainant's consent and it must be established that the accused “did not believe on reasonable grounds that the complainant consented to the sexual connection” (Section 128 of the *Crimes Act 1961*, (NZ)). Complainants say that the focus on the reasonableness of the defendant's belief in their consent puts intense inquiry on their behaviour rather than keeping the focus on the defendant's behaviour. The proposed law changes are to remind the jury that consent is not a default option and to shift the jury focus back to the accused.

58 In New Zealand, the law currently is that no evidence can be given, or question asked, relating to the complainant's sexual experience with any person other than the defendant, except with the permission of the judge. No evidence can be given, or question asked, on the reputation of the complainant in sexual matters (Section 44 of the *Evidence Act 2006*, (NZ)).

59 Alternative options include inquisitorial justice, restorative justice (where appropriate), specialist support people, coordinated and tailored multi-agency responses, specialized police responses, specialist courts, and specialized Crown prosecution units.

60 Ministry of Women's Affairs, *Restoring Soul: Effective Contraventions for Adult Victim/Survivors of Sexual Violence* (Wellington: Ministry of Women's Affairs, 2009). The project has four work streams: a literature review on best practises for agencies that respond to survivors of sexual abuse; a study of sexual violence attrition in New Zealand; an environmental scan of systems and agencies available to survivors; and interviews with survivors to determine how they seek help and cope with their experiences.

sultation processes will be. Since this work began, there has also been a change of government in New Zealand and it is not yet clear whether the new conservative government will have the same commitment as the previous government to addressing the chronically low levels of reporting, prosecution, and conviction in New Zealand cases of sexual violence.⁶¹

CONCLUSION

As I noted in the introduction to this chapter, Jane Doe's litigation was more radical than anything that occurred in New Zealand in Louise Nicholas' trials and those of associated complainants. The immediate outcomes of the various legal actions taken in New Zealand have been a great deal less positive than those in Canada. The best that can be hoped for now is that the less immediate outcomes — the results of the various investigations that have taken place in response to Louise Nicholas' public stand — will make a real and lasting difference to the experience of complainants of sexual assault in the New Zealand criminal justice system, as well as the prosecution's success in securing convictions in deserving cases.

My own view is that many of the proposed reforms may make some difference to the experience of complainants in sexual violence cases traversing the justice system (which is a very good thing), but are unlikely to make an enormous difference to the difficulties experienced in securing convictions in these types of cases. This is because the most significant reforms needed are not so much legal reforms but reforms in the attitudes and perceptions of society, as manifested in the decisions of the New Zealand police, lawyers, judges, and juries in these types of cases.

61 Note that the new Minister of Justice has referred the issue of whether or not an inquisitorial model should be adopted for sexual violence cases to the New Zealand Law Commission and has indicated that he is considering making the other changes based on the Ministry of Justice's original Discussion Paper as part of a tougher stance on law and order. See Simon Power, "The Criminal Justice System: Reform is Coming," online: <<http://www.behive.govt.nz>> (last accessed 27 July 2009). What is problematic is that it is not clear from his speech whether the current minister actually has a grasp of what the current law is, or what the original proposals for reform were. For example, the speech proposes to make "evidence about previous sexual relationships between the complainant and any person inadmissible without prior agreement of the judge." The original proposal that this suggestion is borrowed from is, as noted above, a proposal to extend the existing ban on evidence of the complainant's previous sexual relationships to the relationship between the complainant and the defendant.

First, there appears to be a perception that certain sexual violations, because of the manner and context in which they take place, are not really rapes, *even when they fit within the legal definition of rape or sexual assault*. Even if the victim is believed (and victims may struggle with credibility in such cases, particularly where they are intoxicated or have had a prior relationship with the defendant), it is perceived that she may have felt violated and she may *even* have failed to consent, but what occurred was more in the nature of “non-consensual sex” or “consensual but unwanted sex” than rape. It was a travesty of justice in my opinion, for example, that Tea Ropati was not convicted on the evidence that was apparently available in that case and the clear wording of section 128 of the *Crimes Act 1961* (NZ). What this means is that there are types of male sexual behaviour and male obtuseness to which we do not want, as a community, to apply the label “criminal,” even though such behaviours appear to fall within the definitions of criminal law. The result of protecting male obtuseness in certain social situations as “normal” or non-deviant or understandable, particularly when the victim was vulnerable because of her level of intoxication, is to put the burden and cost of managing predatory male sexuality on the women exposed to it, rather than on the men who engage in it. This is a more pressing issue than further reforms to the current criminal laws.⁶² Another more pressing issue is the kinds of credibility issues⁶³ that women struggle with in cases of sexual assault, particularly because these cases hinge on the credibility of the complainant.

Second, an attitude change is also needed in the New Zealand judiciary (with some notable exceptions). The strong emphasis given to the due process rights of the defendant in sexual violence cases places many unreal and overzealous obstacles in the way of the jury fully and fairly appraising the facts when determining the verdict, as demonstrated by the Louise Nicholas and companion trials. A move towards

62 Although the introduction of a positive definition of consent, and a mandated inquiry into what the defendant did to actually secure the consent of the victim, might shift more of the jury focus onto the defendant's responsibility for ensuring that he actually has his partner's consent before proceeding with sex, it is unlikely to change fundamental community attitudes, manifest in jury decisions, which appear to balk at viewing certain forms of predatory male sexual behaviour as criminal.

63 However, it is true that the extension of the rape shield laws to cover evidence of a prior relationship between the complainant and the defendant may be of assistance in bolstering the complainant's credibility in some cases. Note also the criticisms offered by EW Thomas in “Submissions to the Ministry of Justice Taskforce for Action on Sexual Violence” (2007, copy on file with author) at 23–24.

a more flexible and open model of justice might go some way towards preventing the harm that is done when, in the interests of avoiding the conviction of one innocent man, nine guilty men walk free to continue preying on the community.⁶⁴

64 It is often said (usually in the context of discussing the burden and standards of proof in criminal trials) that it is better for nine guilty men to walk free than for one innocent man to be convicted.

