# *Sexual Experience and Reputation Evidence in Civil Proceedings: A Case for Reform*

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*A well-known defence tactic in cases where allegations of sexual misconduct are made is reliance on evidence about the complainant's sexual experience or reputation in sexual matters (SER evidence). This evidence can traumatise the complainant and perpetuate rape myths and biases in the decision-maker. To control this, Parliament has legislated to control the admissibility of SER evidence in all criminal sexual cases in s 44 of the Evidence Act 2006, and all civil sexual harassment proceedings in s 62(4) of the Human Rights Act 1993 and s 116 of the Employment Relations Act 2000. However, Parliament has failed to ensure that SER evidence is controlled in all other civil cases. This article begins by discussing New Zealand's current approach to controlling the admissibility of SER evidence. It then considers two major difficulties with this approach. First, there are many civil cases where a defendant can rely on SER evidence without any specific legislative control. Secondly, there are inconsistencies in the current approach. For example, the rules (or lack thereof) in civil and criminal cases are different, and those practical differences are inconsistent with the underlying policy for controlling SER evidence. This article proposes extending s 44 of the Evidence Act to apply in all civil cases. It then considers the primary arguments against reform before concluding that to legitimise the underlying policy, the proposed extension is necessary.*

## I INTRODUCTION

In late 2017, allegations of sexual harassment and assault began to dominate media outlets across the globe.[1] In the wake of a series of high-profile allegations, victims of sexual harassment and assault began speaking out

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1 Jessica Bennett "The 'Click' Moment: How the Weinstein Scandal Unleashed a Tsunami" *The New York Times* (online ed, New York, 5 November 2017).

at unprecedented rates in what has been dubbed "the Weinstein effect".[2] New Zealand has joined this conversation in full force. In the first few months of 2018, New Zealand's legal profession hit the media after several allegations involving sexual assault and harassment surfaced.[3] In March 2018, broadcaster Alison Mau launched #MeTooNZ, a journalistic investigation into sexual harassment and assault across New Zealand workplaces.[4] What was previously a "whisper network" of women discussing their experiences of sexual misconduct in private is quickly shifting into the public sphere.[5] As a result, New Zealand may start to see an increase in both criminal and civil proceedings involving allegations of sexual misconduct. Now is the time to review and assess the effectiveness of the laws in New Zealand that control the admissibility of evidence in such criminal and civil cases.[6]

A well-known defence tactic in cases where allegations of sexual misconduct are made is reliance on evidence about the complainant's sexual experience or reputation in sexual matters (SER evidence).[7] SER evidence can perpetuate rape myths and biases in the decision maker, often causing unfair prejudice against the complainant. The most prevalent rape myths that emerge include:[8]

1. the 'she asked for it' myth, comprised of the idea that the way a woman dresses or behaves is an invitation for sexual advances;
2. the 'no means yes' myth, holding close the notion that women have highly sexualised fantasies and that even if she does say *no*, it really means *yes*;
3. the 'she's a liar' myth, perpetuated by the belief that women are motivated by jealousy, guilt or embarrassment to make false allegations of sexual assault; and
4. the 'hue and cry' myth, flowing from the fallacy that if a woman does not immediately tell someone about the sexual abuse, it did not happen.

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2 Jodi Kantor and Megan Twohey "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades" *The New York Times* (online ed, New York, 5 October 2017); and "Police file investigations against Harvey Weinstein" *Newshub* (online ed, Auckland, 3 January 2018).

3 Kate Davenport "#timesup for the legal profession" *Newsroom* (online ed, Auckland, 5 March 2018). See also Sasha Borissenko and Melanie Reid "The summer interns and the law firm" *Newsroom* (online ed, Auckland, 21 February 2018).

4 Alison Mau "Nobody else launched a rigorous #metoo investigation – so I thought, bugger it, let's go" *Stuff* (online ed, New Zealand, 4 March 2018).

5 Tess McClure "A World of Harveys: New Zealand Women Talk About Sexual Harassment" (17 October 2017) VICE <www.vice.com>.

6 This article uses female pronouns because, historically, complainants have been predominantly female. But this article certainly recognises that men can be victims of myths, biases and sexual misconduct.

7 Elisabeth McDonald "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 Crim LJ 321 at 321.

8 J Taylor "Rape and Women's Credibility: Problems of Recantations and False Accusations in the Case of Cathleen Crowell Webb and Gary Dotson" (1987) 10 Harvard Women's LJ 59 at 75 as cited in Elisabeth McDonald "Gender Bias and the Law of Evidence: The Link Between Sexuality and Credibility" (1994) 24 VUWLR 175 at 177–181; and Elisabeth McDonald and Yvette Tinsley "Reforming the rules of evidence in cases of sexual offending: thoughts from Aotearoa/New Zealand" (2011) 15 E&P 311 at 326.

In an effort to eradicate these myths from legal proceedings, Parliament has enacted specific evidential rules to control the admissibility of SER evidence. Section 44 of the Evidence Act 2006 (EA) controls the admissibility of SER evidence in criminal sexual cases, and s 62(4) of the Human Rights Act 1993 (HRA) and s 116 of the Employment Relations Act 2000 (ERA) (the sexual harassment SER rules) control its admissibility in civil sexual harassment proceedings. However, the rules are different and, curiously, the test for admissibility in civil sexual harassment proceedings is stricter than the test in s 44 of the EA.[9]

Enacting these specific rules demonstrates Parliament's intention to ensure that SER evidence is not used inappropriately in proceedings. Despite this, Parliament has inexplicably allowed SER evidence to remain uncontrolled by a specific rule in all civil cases, save for sexual harassment claims. Clear examples of civil cases where the defendant may seek to rely on SER evidence about a complainant include professional disciplinary tribunal proceedings, tortious claims for assault and battery, Accident Compensation Corporation (ACC) appeals and defamation proceedings.

This article explores New Zealand's current approach to the admissibility of SER evidence. It considers the difficulties that arise from having a rule to control the admissibility of SER evidence in criminal sexual cases and civil sexual harassment cases, but no similar rule in any other civil proceeding. It explores the inconsistencies in the current approach and considers whether the underlying policies for controlling SER evidence are readily applicable in all civil cases. This article proposes extending s 44 of the EA to apply in all civil cases to fill the gap in New Zealand's current legislative approach.[10] Finally, it considers the primary arguments against reform before concluding that to legitimise the underlying policies of the current rules controlling SER evidence, the proposed extension of s 44 is necessary.[11]

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9 This article uses the term "admissibility" when discussing sexual harassment proceedings, even though the language used in the rules is "no account shall be taken" in accordance with the analysis in *Director of Human Rights Proceedings v Smith* (2004) 7 NZELC 97425 (HRRT) at [36].

10 The author's proposal to extend s 44 of the Evidence Act 2006 to all civil proceedings is currently being considered by the New Zealand Law Commission in its second statutory review of that Act. Recommendations to Government will be delivered in February 2019. Law Commission *Second Review of the Evidence Act 2006* (NZLC IP42, 2018) at [3.66]–[3.70]. The New Zealand Bar Association and New Zealand Law Society have both made submissions to the Law Commission in support of this proposed extension.

11 The technical aspects of the proposed reform (including the application of s 44 to courts and tribunals where the Evidence Act does not apply) and the current efficacy of s 44 are beyond the scope of this article.

## II CURRENT APPROACH TO SEXUAL EXPERIENCE AND REPUTATION EVIDENCE

### Current Rule in Criminal Sexual Cases

Section 44 of the EA controls the admissibility of SER evidence about a complainant in criminal sexual cases:[12]

> **44 Evidence of sexual experience of complainants in sexual cases**
>
> (1) In a sexual case, *no evidence* can be given and no question can be put to a witness relating directly or indirectly to the *sexual experience of the complainant with any person other than the defendant*, except with the permission of the Judge.
>
> (1A) Subsection (1) is subject to the requirements in section 44A.
>
> (2) In a sexual case, *no evidence* can be given and no question can be put to a witness that relates directly or indirectly to *the reputation of the complainant in sexual matters*.
>
> (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such *direct relevance* to the facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be *contrary to the interests of justice to exclude it.*
>
> (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1).
>
> (5) In a sexual case in which the defendant is charged as a party and cannot be convicted unless it is shown that another person committed a sexual offence against the complainant, subsection (1) does not apply to any evidence given, or any question put, that relates directly or indirectly to the sexual experience of the complainant with that other person.
>
> (6) This section does not authorise evidence to be given or any question to be put that could not be given or put apart from his section.

Section 44 only applies in criminal sexual cases, as defined in s 4(1) of the EA.[13] It does not apply in any civil case. Section 44(2) contains an absolute bar on admitting evidence about a complainant's reputation in sexual matters.

Sections 44(1) and 44(3) together provide that sexual experience evidence about a complainant and any person other than the defendant is inadmissible, unless the evidence is so directly relevant that excluding it

12 Evidence Act, s 44 (emphasis added).

13 Section 4(1) of the Evidence Act defines a "sexual case" as a criminal proceeding where a person is charged with a sexual offence under ss 128–142A or 144A of the Crimes Act 1961, or "any other offence against the person of a sexual nature".

would be contrary to the interests of justice.[14] In that case, a judge may grant permission to admit it. Such permission is subject to the requirements of s 44A of the EA.[15] This is a formal process that requires a written application prior to the hearing.[16] Section 44A places the onus on the party seeking to admit the evidence to give notice of questions that will be asked and is an additional step required to admit this evidence in criminal sexual cases.[17]

The judicial discretion in s 44(3) to admit sexual experience evidence about the complainant and someone other than the defendant when it is directly relevant is an important feature of this rule. This captures situations where admitting sexual experience evidence is "far from being a character-blackening exercise of little relevance" and instead is "well justified in the overall interests of justice".[18]

For example, in *R v Duncan*, the Court of Appeal noted that evidence of sexual experience may be directly relevant in child abuse cases "to explore the possibility of fabrication to gain attention or through malice, or transferred attribution from actual offender to present accused".[19] The Court also considered it could be directly relevant in cases involving "habitual or false previous complaints".[20] The Court of Appeal recently confirmed that sexual experience evidence will meet the heightened direct relevance test "if it forms a crucial part of a narrative of the alleged offending".[21]

A contentious area engaging s 44 is when a defendant seeks to admit evidence of previous sexual misconduct allegations made by the complainant about someone other than the defendant, particularly when the defendant asserts that such allegations were fabricated.[22] This has led to judicial analysis of the relationship between the veracity rule in s 37 of the EA and the SER rule in s 44.[23] Section 37 applies in both criminal and civil proceedings, and is engaged when evidence is admitted to show a person's disposition to refrain from lying. Section 37(1) renders veracity evidence inadmissible unless it is "substantially helpful".

The Supreme Court in *Best v R* recently explained that s 37 does not remove the need for sexual experience evidence to be directly relevant under s 44, even if the evidence of a previous allegation is being introduced to show the complainant lacks veracity.[24] The result is that even if the previous allegation is proven to be false in the sense that the complainant made the complaint "despite knowing that she had actually consented", s 44 will be

14 Section 44(1) only controls sexual experience evidence about the complainant and any person other than the defendant; sexual experience evidence about the complainant and the defendant is not controlled by this rule.
15 Section 44(1A).
16 Sections 44A(2)–44A(5).
17 *Tautu v R* [2017] NZCA 219 at [24].
18 *R v Duncan* [1992] 1 NZLR 528 (CA) at 535.
19 At 535.
20 At 535.
21 *R v Tainui* [2008] NZCA 119 at [60] as cited in *K v R* [2017] NZCA 336 at [17].
22 The Court of Appeal has confirmed that s 44 will be engaged in these circumstances. *R v C* [2007] NZCA 439 at [23].
23 See, for example, *R v C*,[2007] NZCA 439; and *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.
24 *Best v R*, above n 23, at [56]–[58].

engaged.[25] Further, evidence of a prior false complaint may meet the "substantially helpful" test in s 37 but will still need to go through a separate and distinct analysis under s 44 to ensure it is directly relevant before it will be admissible.[26] This decision clarifies the approach and confirms that s 37 is not adequate to control the admissibility of sexual experience evidence; it must still pass the direct relevance test in s 44(3).

## Underlying Policy for the Current Rule in Criminal Sexual Cases

New Zealand's original rule for controlling SER evidence in criminal sexual cases was introduced by the Evidence Amendment Act 1977 as s 23A of the Evidence Act 1908.[27] Prior to this, SER evidence was considered relevant to the credibility of the complainant even if it had no relevance to the actual offence in question.[28] Section 44 of the EA largely mirrors its predecessor, but the complete ban on the admissibility of evidence about a complainant's reputation in sexual matters was introduced with s 44(2) of the EA and is a significant difference from s 23A of the Evidence Act 1908.[29]

There are two main policy objectives underlying s 44 of the EA and its predecessor: avoiding traumatising the complainant and encouraging cooperation with the legal system; and avoiding the use of otherwise irrelevant evidence to unfairly prejudice the decision maker against the complainant.

### *1 Avoiding Traumatising the Complainant and Encouraging Cooperation with the Legal System*

Reducing the trauma and humiliation faced by the complainant has always been an important underlying policy for controlling the admissibility of SER evidence. The Supreme Court in *B v R* confirmed that s 44 and similar "provisions are intended to reduce the humiliation and embarrassment faced by complainants" arising from questions about their sexual history.[30] In that case, Young J highlighted that:[31]

> The policies primarily underlying s 44 are that those who allege sexual offending should not be subject to humiliating cross-examination and that trials for sexual offences should not be derailed by collateral inquiries of little or no actual relevance into the complainant's sexual experiences.

The New Zealand Law Commission (NZLC) previously commented that the rule has long intended to protect the complainant in criminal sexual cases from "'unnecessarily intrusive questioning' about their previous sexual history".[32] Further, in the authoritative text on the EA, the authors note that case law on

25 At [59].
26 At [66].
27 Evidence Amendment Act 1977, s 2.
28 McDonald "Her Sexuality as Indicative of His Innocence", above n 7, at 321.
29 *B v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53]–[54].
30 At [53].
31 At [112].
32 Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [7.7].

s 44 highlights the "desirability of protecting the complainant from having to "re-live" earlier events of sexual abuse".[33]

These underlying policies also provide the basis for evidential rules like s 44 in other jurisdictions. At the second reading of the Crimes (Sexual Assault) Amendment Bill 1981 (NSW), which introduced a rule to control SER evidence about a complainant in criminal cases in New South Wales, discussion highlighted that:[34]

> At the present time many victims believe that the humiliation they would face as a witness in court outweighs all other considerations. I have every confidence that this provision will play a significant part in encouraging victims to report offences, and ensure that such victims will be treated justly and humanely by the judicial system.

Similarly, on Federal Rule of Evidence 412, which controls SER evidence in both criminal and civil cases involving allegations of sexual misconduct, the United States Advisory Committee noted:[35]

> The rule aims to safeguard the alleged victim against the invasion of privacy, [and] potential embarrassment … that is associated with public disclosure of intimate sexual details … the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

### 2 *Avoiding the Use of Otherwise Irrelevant Evidence to Unfairly Prejudice the Decision Maker Against the Complainant*

Another underlying policy for controlling the admissibility of SER evidence is to avoid the decision maker being unfairly prejudiced against the complainant by introducing otherwise irrelevant evidence about her sexual experiences. This is frequently referred to as a "character-blackening exercise" that inappropriately renders the claimant "unworthy of belief".[36]

The deliberate character-blackening of complainants was discussed by the Court of Appeal in *R v Clode*:[37]

> Section 44 of the Evidence Act (and its predecessors) were enacted to prevent the entirely reprehensible and inappropriate blackening of the characters of particularly women complainants by directly or indirectly "tarring" them in the eyes of the jury.

In *W v R*, the Court of Appeal applied *Clode* and reiterated that the jury should not be invited to "draw the inference that [the complainant] is promiscuous and so unworthy of belief, which is the very risk that s 44 is intended to

33 Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at 237.
34 (18 March 1981) NSWPD 4761.
35 United States Advisory Committee "Rule 412. Sex-Offense Cases: The Victim — Notes of Advisory Committee on Rules — 1994 Amendment" Legal Information Institute <www.law.cornell.edu>.
36 *W v R* [2012] NZCA 567 at [11]; and *R v Duncan,* above n 18, at 535.
37 *R v Clode* [2007] NZCA 447 at [24].

control".[38] In *Bull v The Queen*, the Australian High Court considered the erroneous chains of reasoning that are inappropriately relied on when SER evidence is introduced without specific legislative control:[39]

1. the decision maker might reason that the complainant is the type of person who is more likely to consent to the activity in question; or
2. the complainant is less "worthy of belief" than a complainant who does not have those characteristics or experiences.

In *B v R*, the New Zealand Supreme Court acknowledged such erroneous chains of reasoning. Young J went on to highlight that:[40]

> Generally and most importantly, the complainant's supposed interest in having sex on the other occasion cannot logically provide any support for the theory that she consented to have sex with the appellant on the night in question.

One of the fundamental purposes of the EA is to secure the "just determination of proceedings" through "providing for facts to be established by the application of logical rules".[41] Rules like s 44 help ensure that the decision maker is deciding based on facts and logical chains of reasoning, not on prejudice or illogical chains of reasoning.[42]

## Current Rules in Civil Sexual Harassment Cases

Sexual harassment claims are adjudicated in either the Employment Court or the Human Rights Review Tribunal (HRRT).[43] Section 44 of the EA does not apply to either of these fora because the EA only applies to the Supreme Court, Court of Appeal, High Court and District Court.[44] Even if the EA did apply, s 44 would not because these are civil proceedings.[45] However, as noted above, separate rules control the admissibility of SER evidence in civil sexual harassment cases.[46]

Section 62(4) of the HRA provides that "[w]here a person complains of sexual harassment, no account shall be taken of any evidence of the person's sexual experience or reputation." Similarly, s 116 of the ERA provides:

38 *W v R*, above n 36, at [11].
39 *Bull v The Queen* [2000] HCA 24, (2000) 201 CLR 443 at [53] as cited in *B v R*, above n 29, at [53].
40 *B v R*, above n 29, at [122(c)].
41 Evidence Act, s 6(a).
42 Mathew Downs (ed) *Cross on Evidence* (10th ed, LexisNexis, Wellington, 2017) at [EVA6.2] and [EVA8.2].
43 Human Rights Act 1993 [HRA], ss 62 and 92B; and Employment Relations Act 2000 [ERA], ss 108 and 187(1).
44 Evidence Act, ss 4(1) and 5. The District Court includes the Family Court and the Youth Court.
45 Sections 4(1) and 44.
46 HRA, s 62(4); and ERA, s 116.

> **116 Special provision where sexual harassment alleged**
>
> Where a personal grievance involves allegations of sexual harassment, no account may be taken of any evidence of the complainant's sexual experience or reputation.

There is no substantive commentary in the parliamentary debates of these provisions. Similarly, there has since been very little judicial consideration of how they work in practice. Only one case has substantively considered s 62(4) of the HRA and offers guidance on its interpretation: *Director of Human Rights Proceedings v Smith*.[47] In this case, the complainant alleged that a fellow employee had sexually harassed her. The allegations involved the defendant persuading the complainant:[48]

> … to accompany him to his home, where he imposed himself upon her … restrain[ed] her, kiss[ed] her and ultimately forc[ed] her to hit his bottom while he masturbated himself to ejaculation in her presence.

In a sexual harassment claim the plaintiff must prove the defendant's conduct was "unwelcome or offensive".[49] In *Smith,* the defendant argued that the complainant consented to the conduct in question and "did not find his behaviour unwelcome or offensive".[50] This case engaged s 62(4) of the HRA because the defendant sought to admit evidence of alleged previous consensual sexual experiences between himself and the complainant, to support his assertion that the conduct on the day in question was consensual.[51]

On a plain reading of s 62(4), the provision not only excluded the evidence proposed by the defendant, but also evidence comprising the sexual harassment claim itself. Because this was unworkable, the HRRT conducted a textual and purposive interpretation of s 62(4), eliciting four guiding principles:[52]

1. the words "no account shall be taken of" are intended to have the same effect as the "rule of inadmissibility";[53]
2. a literal reading of s 62(4) is unworkable as this would remove the contents of the sexual harassment claim itself;[54]
3. the correct interpretation of s 62(4) is that evidence of sexual experiences *between the complainant and defendant* is inadmissible unless it is so directly relevant to the subject of the claim, the facts in issue, "or the issue of the appropriate compensation that it would be contrary to the interests of justice to exclude it";[55] and

47 *Smith*, above n 9.
48 At [13].
49 HRA, s 62(2)(a).
50 *Smith*, above n 9, at [14].
51 At [15].
52 Because the language of s 116 of the ERA substantively mirrors s 62(4) of the HRA, it is likely that the interpretation of s 62(4) of the HRA proposed by the Human Rights Review Tribunal in *Smith* also applies to s 116 of the ERA.
53 *Smith*, above n 9, at [36(a)].
54 At [36(d)].
55 At [60].

4. the policies underlying s 62(4) are identical to those underlying the SER evidence rules in criminal sexual cases.[56]

When reading in a direct relevance test for evidence about sexual experiences between the complainant and the defendant, the HRRT analysed the then governing legislation for criminal sexual cases (s 23A of the Evidence Act 1908) and the proposed reform by the NZLC.[57] The HRRT concluded that:[58]

> With respect we think that the approach that Parliament must be taken to have intended in this context *is encapsulated within a paraphrase of the Law Commission's proposal [to amend s 23A of the Evidence Act 1908],* — ie, in a sexual harassment case under s 62 of the Human Rights Act 1993 no evidence can be taken into account and no question can be put to a witness relating directly or indirectly to the *sexual experience of the complainant with the defendant* unless the evidence relates directly to the acts, events or circumstances which constitute the events that are at issue, or is of such direct relevance to the facts in issue in the proceeding or the issue of the appropriate compensation, that it would be contrary to the interests of justice to exclude it.

In *Smith*, the HRRT read a direct relevance test into s 62(4) only in relation to sexual experiences between the defendant and the complainant.[59] Under the current approach, sexual experience evidence about the complainant and any person other than the defendant will always be inadmissible.[60] The HRRT's conclusion demonstrates the relationship it saw between what is now s 44 of the EA and the sexual harassment SER rules. This approach mirrored the proposal for reform to the rule at that time in criminal sexual cases.[61] Importantly, the proposal for reform by the NZLC was not enacted. As the law currently stands, s 44 does not control evidence of sexual experiences between the complainant and the defendant. Self-evidently, despite the shared underlying policy and practical similarities, there are discernible differences between the application of s 44 and the sexual harassment SER rules.[62]

**Summary**

The key aspects of New Zealand's current approach to SER evidence are:

1. In criminal sexual cases and civil sexual harassment proceedings, evidence of the "reputation of the complainant in sexual matters" is always inadmissible.[63]
2. In criminal sexual cases, evidence of the complainant's sexual experience "with *any person other than the defendant*" is inadmissible "except with permission of the judge". The judge will only grant

56 At [36(e)] and [37].
57 At [53]–[57].
58 At [60] (emphasis added).
59 At [36(b)].
60 HRA, s 62(4); and ERA, s 116.
61 *Smith*, above n 9, at [60].
62 The similarities and differences between the rules will be fully considered in Part III.
63 Evidence Act, s 44(2); HRA, s 62(4); and ERA, s 116.

permission if it meets the heightened direct relevance test in s 44(3), following an application that complies with s 44A.[64]

3. In criminal sexual cases, s 44 does not apply to any evidence about the complainant's sexual experiences *with the defendant*.[65]
4. In civil sexual harassment proceedings, evidence of the complainant's sexual experience with *any person other than the defendant* may not be taken into account (which has the same meaning as inadmissibility).[66]
5. In civil sexual harassment proceedings, evidence of the complainant's previous sexual experience *with the defendant* will be inadmissible unless the evidence is so directly relevant to the subject of the claim, the facts in issue, "or the issue of the appropriate compensation, that it would be contrary to the interests of justice to exclude it".[67]
6. The underlying policies of s 44 of the EA and the sexual harassment SER rules are the same, namely to avoid unfairly prejudicing the decision maker against the complainant and to protect the complainant from a humiliating and traumatic experience in court.[68]
7. In all civil cases other than sexual harassment proceedings, no specific legislative rule regulates SER evidence.

The sexual harassment SER rules demonstrate Parliament's acceptance that SER evidence can be just as damaging in civil cases as in criminal cases. Despite this, in any civil proceeding other than a sexual harassment proceeding, no specific rule controls SER evidence.

## III DIFFICULTIES WITH THE CURRENT APPROACH

There are two major difficulties with New Zealand's current approach to the admissibility of SER evidence. First, in several types of civil proceedings SER evidence is admissible without any specific legislative control. Secondly, there are inconsistencies in the current approach. These include that the rules (or lack thereof) in civil and criminal cases are different, and those practical differences are inconsistent with the underlying policy for controlling SER evidence.

### Unregulated Civil Cases

The first major difficulty with the current approach is the absence of control over SER evidence in all civil proceedings that are not sexual harassment claims. This section considers the following four types of civil proceedings where SER evidence about a complainant may arise:

64 Evidence Act, ss 44(1), 44(1A) and 44(3).
65 Section 44(1).
66 HRA, s 62(4); ERA, s 116; and *Smith,* above n 9, at [36(a)].
67 HRA, s 62(4); ERA, s 116; and *Smith,* above n 9, at [60].
68 *B v R,* above n 29, at [53]; *Clode*, above n 37, at [24]; and *Smith*, above n 9, at [36(e)].

1. professional disciplinary tribunal proceedings;
2. tortious assault and battery claims;
3. ACC appeals; and
4. defamation proceedings.

This section considers each in turn to show that these civil cases can feature similar allegations of sexual misconduct, and issues of credibility and consent, as in criminal sexual cases. Despite this, SER evidence about a complainant can be admitted without any specific legislative control.

### *1 Professional Disciplinary Tribunal Proceedings*

In New Zealand, disciplinary tribunals regulate various professions. These include, but are not limited to, the Health Practitioners Disciplinary Tribunal (HPDT), the Lawyers and Conveyancers Tribunal and the Real Estates Agents Authority.[69] This section focuses on the HPDT because the governing legislation confirms that "sexual" cases are being brought,[70] and the HPDT has decided several cases where the facts and issues in dispute create a foundation where SER evidence may be relied on by a defendant.[71]

#### (a) Health Practitioners Disciplinary Tribunal

The Health Practitioners Competence Assurance Act 2003 (HPCAA) operates "to protect the health and safety of members of the public by … ensur[ing] that health practitioners are competent and fit to practice their professions".[72] The HPCAA establishes the HPDT and provides that the Tribunal will hear and determine charges brought under the HPCAA.[73] HPDT proceedings are civil and regulatory in nature.[74]

#### (b) Rules of Evidence in the HPDT

As previously mentioned, the EA does not apply in any tribunal in New Zealand.[75] However, cl 6(5) of the HPCAA provides that "[t]he Evidence Act 1908 applies to the Tribunal in the same manner as if the Tribunal were a court within the meaning of that Act".[76] While cl 6(5) refers to the now repealed Evidence Act 1908, this appears to be a legislative oversight and the provision

69 Health Practitioners Competence Assurance Act 2003; Lawyers and Conveyancers Act 2006; and Real Estate Agents Act 2008.
70 Health Practitioners Competence Assurance Act, s 97(1)(a).
71 Two pertinent examples are *Professional Conduct Committee v Heron* HPDT Auckland 768/Med15/317P, 19 February 2016; and *Professional Conduct Committee v Nuttall* HPDT Wellington 8/Med04/03P, 18 April 2005.
72 Health Practitioners Competence Assurance Act, s 3(1).
73 Sections 84–85.
74 See Director of Proceedings "Frequently asked questions — What is the Health Practitioners Disciplinary Tribunal?" Health and Disability Commissioner <www.hdc.org.nz>.
75 Evidence Act, ss 4(1) and 5.
76 Health Practitioners Competence Assurance Act, sch 1, cl 6(5).

should refer to the EA.[77] Clause 6(5) is expressly subject to cls 6(1)–6(3), which provide that the HPDT can receive any evidence whether or not it would be admissible in a court.[78]

(c) Civil Sexual Cases Heard in the HPDT

At the time of writing this article, there are 52 publicly available HPDT decisions concerning allegations of inappropriate sexual misconduct and/or sexual assault.[79] These decisions make up approximately 15 per cent of the decided and published cases on the HPDT website.[80] In addition, Parliament expressly acknowledges in the HPCAA that allegations of a sexual nature are being made. Section 97 provides that when evidence being given by a witness "relates to or involves a sexual matter", the witness may give the evidence in private if they wish to do so.[81] Additionally, s 98 prohibits publication of the complainant's name in "sexual cases".[82] Both rules restrict the harm faced by a complainant who gives evidence in the HPDT in a civil sexual case. However, neither controls the use of SER evidence about the complainant.

One example of an HPDT case where SER evidence could arise is *Professional Conduct Committee v Heron*.[83] Dr Heron was charged by the Medical Council of New Zealand under s 100(1)(b) of the HPCAA for behaving in a way likely to discredit the profession.[84] Here, the complainant was 15 years old and Dr Heron was 64 years old.[85] The allegations included that he massaged and licked the complainant's feet before "insist[ing] on reciprocation with extreme reluctance on her part",[86] spent the night alone in a hotel room with her,[87] took inappropriate photographs of her in swimwear "showing down her cleavage"[88] and, after insisting she get a spray tan, walked in on her naked while she was being tanned.[89] Evidential disagreements arose and the case turned on a credibility assessment between the complainant's version of events and Dr Heron's.[90] Ultimately, the HPDT preferred the complainant's evidence.[91]

*Heron* relates to this discussion because the issues decided by the HPDT and the type of evidence introduced largely mirrored a criminal sexual case. While it is not possible to know whether SER evidence was introduced in this case, on the facts, it easily could have been. This is particularly so given

77 *Professional Conduct Committee v Walker* HPDT Hamilton 752/Nur15/321P, 8 January 2016 at [42].
78 Health Practitioners Competence Assurance Act, sch 1, cls 6(1)–6(6).
79 New Zealand Health Practitioners Disciplinary Tribunal "Decisions" <www.hpdt.org.nz>.
80 New Zealand Health Practitioners Disciplinary Tribunal, above n 79.
81 Health Practitioners Competence Assurance Act, s 97.
82 Section 98.
83 *Heron*, above n 71.
84 At [2.1].
85 At [105].
86 At [22] and [137].
87 At [142]–[143].
88 At [122].
89 At [125].
90 At [38]–[39].
91 At [41] and [277].

the defendant's theory: that the complainant fabricated the offending because "she had a history of being dramatic" and that her version of events was less credible because she did not immediately ask for help or try to leave at the time of the alleged sexual misconduct.[92] Both assertions invite the HPDT to reason based on the 'she's a liar' and 'hue and cry' rape myths. Historically, in the criminal context, SER evidence has been relied on in support of these erroneous chains of reasoning.[93] In the HPDT, there is no evidential rule to control SER evidence about a complainant, despite HPDT cases arising where the defendant may rely on such evidence.

### *2 Tortious Assault and Battery Cases*

SER evidence may also arise and will be admissible without any specific legislative control in tortious claims for assault and battery arising from sexual misconduct. In New Zealand, unlike many comparable jurisdictions, the ACC regime prevents tort claims for personal injury compensation.[94] However, it is still possible to sue in tort for exemplary damages.[95] Exemplary damages punish and deter conduct,[96] and are frequently sought by persons who have been sexually assaulted in place of compensatory damages excluded by the ACC regime.[97] For example, in *A v M (No 2)* the plaintiff received $20,000 in exemplary damages in a civil claim for assault and battery arising from rape.[98] Similarly, in *H v R* the plaintiff received $20,000 in exemplary damages, having proven sexual abuse suffered as a child in a tortious claim.[99]

While no civil tortious cases arising from sexual misconduct have explicitly discussed s 44 of the EA, the High Court has contemplated transposing non-disclosure principles from criminal cases to civil cases based on the underlying policy of rules like s 44.[100] In *M v L*, the plaintiffs sought exemplary damages for sexual abuse. The defendants applied to inspect therapy session records between the plaintiffs and their sexual abuse counsellors, submitting that the documents were central to credibility issues.[101] The plaintiffs referred the presiding Judge to overseas commentators who made what Giles J described as a "compelling case" for non-disclosure of counselling records in criminal sexual assault trials.[102]

92 At [38.1], [38.2] and [39.5].
93 McDonald "Her Sexuality as Indicative of His Innocence", above n 7, at 321–323.
94 Accident Compensation Act 2001, s 317.
95 Section 319(1). See also *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [88]–[89].
96 At [19].
97 See, for example, *A v M (No 2)* [1991] 3 NZLR 254 (HC); *H v R* [1996] 1 NZLR 299 (HC); *Daniels v Thompson* [1998] 3 NZLR 22 (CA); and *J v J* [2013] NZHC 1512.
98 *A v M (No 2)*, above n 97, at 254.
99 *H v R*, above n 97, at 309.
100 *M v L* [1997] 3 NZLR 424 (HC) at 437.
101 At 424–425.
102 At 436.

Giles J noted of the commentary that:[103]

> Although not exclusively, the general thesis advanced [was] that the defence use of such records is ordinarily directed at discrediting the complainant in sexual offence prosecutions to show that the complainant is *unreliable or morally unworthy*.

His Honour went on to note the progressive limitation of questions available to defence counsel when cross-examining a complainant in a criminal sexual case and highlighted:[104]

> To its great credit, our Parliament has put in place measures which remove certain chauvinistic beliefs as to women's unreliability, dishonesty and moral standards from exploration in a criminal trial.

However, in concluding that the records would be admissible, Giles J highlighted that he would not extend the underlying policies of "rape shield" rules from criminal cases to a civil case because:[105]

1. the parallel between criminal sexual proceedings "brought in the public interest" and private civil proceedings was not immediately clear;
2. at the time of this decision, only a few jurisdictions had enacted "rape shield" provisions in criminal cases; and
3. the real issue to which evidence of a complainant's sexual experience is introduced in criminal sexual cases is "consent on the occasion or not", whereas in civil proceedings "where different issues are being explored, the same cannot be said".

There are three points to make in response to Giles J's reasoning. First, his Honour's assertion that the need to protect complainants in civil cases is lessened because there is little parallel between criminal proceedings brought in the public interest and civil proceedings is tenuous. It is in the public interest to deter those who sexually assault others from repeating that conduct and exemplary damages pursued in civil cases serve that purpose.[106] Secondly, in the 20 years since this decision, most comparable jurisdictions have legislated to control the admissibility of SER evidence in criminal sexual cases,[107] with a small number of jurisdictions creating rules to control SER evidence in

103 At 436 (emphasis added).

104 At 437.

105 At 437. Rules controlling sexual experience or reputation evidence, including s 44 of the Evidence Act, are sometimes referred to as "rape shield" provisions as discussed in Elisabeth McDonald "From 'Real Rape' to Real Justice? Reflections on the Efficacy of More Than 35 Years of Feminism, Activism and Law Reform" (2014) 45 VUWLR 487 at 490.

106 Patrick J Hines "Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings" (2013) 86 Notre Dame L Rev 879 at 892; and *Couch v Attorney-General*, above n 95, at [19].

107 See, for example, Youth Justice and Criminal Evidence Act 1999 (UK), s 41; Criminal Procedure Act 1986 (NSW), s 293; Evidence Act 1958 (Vic), s 37A; Evidence Act 2001 (Tas), s 194M; Criminal Code RSC 1985 c C-46, s 276(1); Federal Rules of Evidence 28 USC § 412; and Kentucky Rules of Evidence 412(a), KY Rev Stat § 422A.

select civil proceedings.[108] Indeed, at the time of this decision, New Zealand already had an evidential rule to control SER evidence in civil sexual harassment proceedings.[109] This concern is less relevant today than it was in 1997. Thirdly, and most importantly, Giles J's contention that the issues in civil cases are always different from those in criminal sexual cases is incorrect. Like criminal sexual cases, civil cases can also turn on issues of consent and credibility.[110]

*J v J* illustrates a civil tortious case involving allegations of sexual abuse that turned on credibility.[111] In the High Court, the defendant denied the sexual offending and the trial turned on credibility (much like a criminal sexual case, with the trial even being described as a "she said, he said" situation).[112] Ultimately, the Court preferred the complainant's evidence and awarded her $75,000 in exemplary damages.[113] The damages were upheld on appeal.[114]

Like *Heron* in the HPDT, it is impossible to know whether SER evidence was relied on in *J v J*. However, based on the facts and key issues, SER evidence could have been admissible without any specific legislative control. If the facts and issues are similar in criminal sexual cases and tortious assault and battery claims, it follows that similar evidence can and will be relied on by the defendant. Despite this, there is no evidential rule to control the admissibility of SER evidence in civil assault and battery claims.

### *3 ACC Appeals*

SER evidence may also arise in ACC appeals. As noted, New Zealand's ACC regime prohibits tort claims for personal injury compensation.[115] However, instead of suing for exemplary damages in tort, a complainant who has suffered a mental injury arising from sexual offending may pursue compensation under s 21 of the Accident Compensation Act 2001 (ACA). Section 21 provides cover for mental injury caused by certain criminal acts if the injury is suffered after 1 April 2002, is caused by an act performed by another person and that act falls within a list of offences outlined in Schedule 3 of the ACA. Every offence listed in Schedule 3 is sexual in nature, and it is irrelevant whether anyone has been charged or convicted of the offending in question.[116]

When a claim is made under s 21, ACC may deny compensation if it considers the complainant had a pre-existing mental injury from a previous

108 See, for example, HRA, s 62(4); ERA, s 116; Federal Rules of Evidence 28 USC § 412; Kentucky Rules of Evidence 412(a), KY Rev Stat § 422A; Hawaii Rules of Evidence 412(d), HI Rev Stat § 626; Illinois Code of Civil Procedure 735 ILCS 5/8-2801; and Wis Stat § 901.08(2).

109 Labour Relations Act 1987, s 221(c).

110 See, for example, *Smith*, above n 9 (consent); *Heron*, above n 71 (credibility); and *J v J*, above n 97 (credibility).

111 *J v J*, above n 97.

112 At [77].

113 At [209].

114 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [110].

115 Accident Compensation Act, s 317.

116 Section 21(5).

sexual assault. When ACC denies a claim, the applicant may appeal to the District Court.[117] The appeal will be "dealt with in accordance with the District Court Rules" as modified by the ACA.[118] The District Court may admit any evidence, even when it would be inadmissible in an ordinary court proceeding.[119] Section 44 of the EA will not apply because this will be a civil proceeding.[120] An appeal of this kind occurred in *Graham-Clarke v Accident Compensation Corporation*.[121] In this case, Ms Graham-Clarke appealed against ACC declining cover for a mental injury arising out of a sexual assault that occurred in 2010.[122] ACC investigated and referred the appellant to a psychiatrist for assessment. The psychiatrist elicited details about several previous sexual assaults suffered by Ms Graham-Clarke dating back to childhood. She had been treated for psychological difficulties resulting from this historical sexual abuse from early childhood until December 2001.[123] This sexual experience evidence was admitted without any specific legislative control.

The District Court accepted that there was an undisputed history of sexual abuse and held that she had suffered multiple mental injuries capable of falling within s 21 of the ACA.[124] However, the key issue was whether Ms Graham-Clarke could prove "the mental injury was suffered after 1 April 2002 and that it was caused by the sexual abuse" in 2010.[125] Ultimately, the Court held (based largely on expert evidence) that it was impossible to "disentangle" the mental injury suffered by the appellant from sexual abuse prior to 1 April 2002 and the current mental injury.[126] As a result, the Court denied any compensation for the 2010 sexual assault.[127] *Graham-Clarke* clearly illustrates a New Zealand court admitting sexual experience evidence in a civil proceeding without any specific legislative control.[128]

### *4 Defamation Proceedings*

The final category of unregulated cases considered in this article is defamation proceedings. Because defamation cases are civil, s 44 of the EA does not apply even if the claim involves allegations of sexual misconduct.[129]

In defamation cases involving allegations of sexual misconduct a defendant may wish to rely on SER evidence. For example, in December 2017 college student Monique Green sued American rap star Nelly in defamation

117 Section 149(1).
118 Section 150.
119 Section 156(1).
120 Evidence Act, ss 4(1), 5 and 44.
121 *Graham-Clarke v Accident Compensation Corporation* [2016] NZACC 292.
122 At [1]–[2].
123 At [3]–[5].
124 At [13].
125 At [14].
126 At [20].
127 At [23].
128 This case raises issues of causation and loss that are considered below in Part IV.
129 Evidence Act, ss 4(1) and 44.

after he claimed that the rape allegations she made against him were false.[130] She alleges that he defamed her by claiming she was "'motivated by greed'" to fabricate the allegations.[131] If this case were tried in New Zealand, there would be no legislative rule to control the admissibility of SER evidence about the complainant. In such a case, which would turn on credibility regarding allegations of sexual misconduct (much like a tortious claim for assault and battery), the evidence relied on and cross-examination of the complainant could be very similar to that in a criminal sexual case.

New Zealand also has a recent history of defamation proceedings arising from allegations of sexual misconduct. In 2016, the High Court released its decision in *Williams v Craig*. This case arose when Mr Williams made statements about Mr Craig regarding a recently settled sexual harassment claim against Mr Craig made by his former press secretary, Ms MacGregor.[132] Hypothetically, if Mr Craig had tried to introduce sexual experience evidence about the complainant and himself in the sexual harassment proceeding, it would only have been admissible if directly relevant.[133] Additionally, no sexual experience evidence about the complainant and anyone other than the defendant would have been admissible in the sexual harassment proceeding (nor would any evidence about the complainant's reputation in sexual matters).[134]

However, in the defamation proceedings, Ms MacGregor was required to give evidence that she described as "'highly personal and highly distressing'".[135] Hypothetically, SER evidence about her could have been admitted without any specific legislative control. Both cases are civil and arise from the same allegations of sexual misconduct. However, SER evidence will be treated differently. Because defamation claims can involve allegations of sexual misconduct and issues of credibility, respondents could rely on SER evidence. This SER evidence would be admissible without any specific legislative control.

## Inconsistency

Alongside the many civil cases where SER evidence is unregulated, the second major difficulty with New Zealand's current approach to SER evidence is that it is inconsistent in two key ways. First, the rules (or lack thereof) controlling SER evidence are inconsistent between criminal sexual cases, civil sexual harassment cases and all other civil cases. Secondly, these practical differences are inconsistent with the underlying policy behind the current rules controlling SER evidence. This section explores each of these inconsistencies in turn.

130 "Nelly accuser sues rapper for defamation" *BBC News* (online ed, London, 21 December 2017).
131 "Rapper Nelly sued for claiming rape allegation was false" *The Telegraph* (online ed, London, 21 December 2017).
132 *Williams v Craig* [2016] NZHC 2496, [2016] NZAR 1569 at [2] and [33].
133 See *Smith,* above n 9, at [60].
134 ERA, s 116; and HRA, s 62(4).
135 "Rachel MacGregor counter-sues Colin Craig for defamation" *Stuff* (online ed, New Zealand, 20 June 2017).

### *1 Practical Inconsistencies*

Despite the shared underlying policy and similar objectives, on review of the parliamentary debates during the enactment of the sexual harassment SER rules there is no reference to s 23A of the Evidence Act 1908. This was the governing legislation at the time Parliament drafted both the ERA and the HRA. Curiously, there is also no reference to s 23A of the Evidence Act 1908 during the drafting of s 221(c) of the Labour Relations Act 1987 (from where the current wording in the HRA and ERA originated). It is unclear why Parliament decided to create unique rules to control the admissibility of SER evidence in civil sexual harassment proceedings without cross-referencing the direct relevance test already set out in s 23A of the Evidence Act 1908. It is also unclear why Parliament decided to create strict rules for the admissibility of SER evidence in criminal sexual cases and civil sexual harassment proceedings, while leaving all other civil cases unregulated.

There are similarities between s 44 of the EA and the sexual harassment SER rules, namely that they all:

1. control the admissibility of SER evidence;[136]
2. contain a complete bar on evidence of the complainant's reputation in sexual matters;[137] and
3. were intended to protect complainants from an unnecessarily humiliating experience in court and remove inappropriate chains of reasoning that unfairly prejudice the decision maker against the complainant.[138]

However, as alluded to above, there are discernible differences. Following the HRRT's interpretation in *Smith,* unlike s 44 of the EA, the sexual harassment SER rules:[139]

1. exclude all evidence about previous sexual experiences between the complainant and any person other than the defendant, with no judicial discretion to admit this evidence; and
2. control evidence about sexual experiences between the complainant and the defendant, ensuring that it is inadmissible unless it is of "such direct relevance" to the facts comprising the substance of the claim, "the facts in issue in the proceeding" or the "appropriate compensation" that it would be "contrary to the interests of justice to exclude it".

These differences are significant. The first difference, the absence of judicial discretion, is problematic. Even with the interpretation proposed in *Smith,* there is still no judicial discretion to admit evidence about sexual experiences between *the complainant and any person other than the defendant*.[140] This

136 Evidence Act, s 44; HRA, s 62(4); and ERA, s 116.
137 Evidence Act, s 44(2); HRA, s 62(4); and ERA, s 116.
138 *B v R*, above n 29, at [53]; *Clode*, above n 37, at [24]; and *Smith*, above n 9, at [36(e)].
139 *Smith*, above n 9, at [54] and [60].
140 At [60]. Note that the Human Rights Review Tribunal decision in *Smith* is not binding. It is, of course, undesirable to have legislative rules that are unworkable on a plain reading with little authoritative guidance on their application.

may cause an injustice if a defendant is denied the opportunity to introduce directly relevant evidence about the complainant's sexual experiences with someone other than himself (such as idiosyncratically identical previous false complaints of sexual misconduct).[141]

There is debate regarding the judicial discretion in s 44 of the EA and whether it requires reform (for example, from a direct relevance test to a category-based exclusionary provision).[142] Whether the current judicial discretion in s 44 requires reform is beyond the scope of this article. However, it is contended that some type of judicial discretion is required in an exclusionary rule like s 44 and the sexual harassment SER rules. Support for this view was put concisely by the Canadian Supreme Court in *Seaboyer v Her Majesty The Queen*.[143] When discussing a provision controlling SER evidence that contained no judicial discretion, the Court noted that:[144]

> In achieving its purpose — the abolition of outmoded, sexist-based use of sexual conduct evidence — it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial.

The New Zealand Supreme Court in *B v R* highlighted the comments of the Canadian Supreme Court in *Seaboyer*, approving the need for judicial discretion in a rule controlling SER evidence in criminal sexual cases.[145] It appears the sexual harassment SER rules go too far in achieving their purpose and would benefit from some form of judicial discretion.

The second difference, the inability of s 44 of the EA to control sexual experience evidence about the complainant and the defendant, is also problematic. Without straying beyond the scope of this article, it is contended that s 44 should apply to sexual experience evidence about the complainant and the defendant (in the way that the sexual harassment SER rules do).[146]

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141 A type of sexual experience evidence expressly noted in *R v Duncan*, above n 18, at 535 whereby its admission may be "well justified in the overall interests of justice".

142 See, for example, Scott Optican "Comment: Elisabeth McDonald and Yvette Tinsley 'Evidence Issues'" (2011) 17 Canta LR 160 at 162–163; and Elisabeth McDonald and Yvette Tinsley "Evidence Issues" (2011) 17 Canta LR 123 at 140.

143 *Seaboyer v Her Majesty The Queen* [1991] 2 SCR 577.

144 At 582.

145 *B v R*, above n 29, at [54].

146 The Law Commission considered extending s 44 to apply to sexual experience evidence about the complainant and the defendant in Law Commission *The 2013 Review of the Evidence Act*, above n 32, at [7.13]–[7.22]. However, it did not support extending the rule on the basis that in most cases where there are previous sexual experiences between the complaint and the defendant, this evidence will "almost inevitably … be relevant". Notably, however, the Law Commission did not refer to the existing rules for civil sexual harassment proceedings that do extend to this type of evidence. These rules implicitly accept that this evidence is not always relevant. The Law Commission is currently revisiting the question of extending s 44 to apply to sexual experience evidence about the complainant and defendant. Law Commission *Second Review of the Evidence Act 2006*, above n 10, at [3.34]–[3.42].

(a) Practical Illustration

The following hypothetical illustrates the practical inconsistencies in New Zealand's approach to SER evidence. In doing so, it demonstrates that the humiliation of the complainant, the admissibility of sexual experience evidence, the risk of unfairly prejudicing the decision maker against the complainant and the risk of unfairly denying the defendant the opportunity to present an effective defence can differ depending on the type of proceeding.

The facts of the hypothetical are simple: a female employee is working late in the office when her employer sexually assaults her. Three legal options are available for the complainant. She can:

1. file a sexual harassment claim against her employer (Option One);
2. press criminal charges for indecent assault against her employer (Option Two); or
3. sue her employer in a civil claim for assault and battery (Option Three).

In all three options, the defendant will be successful (either in escaping liability or obtaining an acquittal) if the defendant can prove that the complainant consented to the conduct in question.[147] For the purposes of this hypothetical, the defendant's theory of the case in each option is that the complainant consented and that her version of events is not credible.

The defendant wants to admit the following evidence as allegedly relevant to consent or credibility:

1. that the *defendant* and the *complainant* have a history of previous consensual sexual experience (Evidence A);
2. that the complainant has a history of sexual experiences with *previous employers or other employees in the workplace* (Evidence B); or
3. that the complainant has made previous allegations of sexual misconduct *about someone other than the defendant* that are idiosyncratically identical to this allegation, and have been proven to have been false (in that the complainant was aware she consented at the time she made the previous allegations) (Evidence C).[148]

Option One: In the sexual harassment proceeding, the sexual harassment SER rules will apply and the EA will not. In this civil case, the defendant could only admit Evidence A if it was so directly relevant to the subject of the claim, the facts in issue, or the issue of the appropriate compensation that it would be contrary to the interests of justice to exclude it.[149] However, Evidence B and Evidence C will always be inadmissible because both relate to sexual experience evidence *between the complainant and someone other than the defendant*.[150]

147 HRA, s 62(2)(a); *R v Aylwin* [2007] NZCA 458 at [35]; and *S v G* [1995] 3 NZLR 681 (CA) at 687–688.

148 The evidence would still need to be tested through s 37 of the Evidence Act (where it applies) because it goes to the complainant's veracity.

149 *Smith*, above n 9, at [60].

150 HRA, s 62(4); ERA, s 116; and *Smith*, above n 9, at [60].

Option Two: In the criminal prosecution for indecent assault, s 44 of the EA will apply.[151] The defendant could admit Evidence A without any specific legislative control. This is because s 44 does not apply to sexual experience evidence *between the complainant and the defendant*.[152] However, unlike Option One, Evidence B and Evidence C will not always be inadmissible. Evidence B and Evidence C relate to sexual experience evidence *between the complainant and someone other than the defendant*. Therefore, each will be inadmissible *unless* they are so directly relevant that it would be contrary to the interests of justice to exclude it.[153]

Option Three: In the civil claim for assault and battery, neither s 44 of the EA or the sexual harassment SER rules will apply. As a result, the defendant could admit Evidence A, Evidence B and Evidence C without any specific legislative control.

Despite the core issues of consent to sexual conduct and credibility being identical, the admissibility of Evidence A, Evidence B and Evidence C varies between each option. Evidence A is only controlled by a heightened direct relevance test in Option One, unlike Option Two and Option Three where it will always be admissible without any specific legislative control. Evidence B and Evidence C are always inadmissible in Option One, but are always admissible in Option Three. Option Two is the only option where Evidence B and Evidence C are controlled by a heightened direct relevance test. This hypothetical demonstrates two primary concerns:

1. in sexual harassment proceedings, the defendant may be denied a fair trial because directly relevant evidence may be automatically excluded; and
2. in all other civil cases, the complainant may be unfairly prejudiced and be put through a humiliating experience in court by the unregulated admission of SER evidence.

Having s 44 of the EA apply to all three options would render the most satisfactory outcome because it would allow for directly relevant evidence to be admitted to establish the truth, while protecting the complainant. The practical inconsistencies in the current approach are apparent; the following section demonstrates that these inconsistencies cannot logically be explained given the underlying policies for controlling the admissibility of SER evidence.

### *2 Policy Inconsistencies*

This article has explored several types of civil proceedings where SER evidence may arise and can be admitted without any specific legislative control. The hypothetical Options above show the practical discrepancies in the current approach are inconsistent with the policy underlying the current rules controlling SER evidence. In each Option, the complainant would face

151 Evidence Act, ss 4(1) and 44.
152 Section 44(1).
153 Sections 44(1) and 44(3).

three very different experiences in court depending on the type of case. In Option Three, the defendant could introduce sexual experience evidence about the complainant and invite the decision maker to reason that consent with someone else on a previous occasion lends support for consent with the defendant on a different occasion. The Supreme Court made explicitly clear in *B v R* that this line of reasoning is unacceptable in criminal sexual cases;[154] it should not be permitted in civil cases.

There is no logical explanation for why Parliament has decided that erroneous chains of reasoning grounded in rape myths are inappropriate in criminal sexual cases and civil sexual harassment proceedings, but has not made the same decision for all other civil cases. As noted above, one of the fundamental purposes of the EA is for "facts to be established by the application of logical rules".[155] However, it is illogical to only apply s 44 of the EA to criminal sexual cases when the underlying policies are applicable to all civil cases. Civil cases can be susceptible to the use of SER evidence in a way that unfairly prejudices the decision maker while humiliating and traumatising the complainant. Parliament has accepted this since enacting the civil sexual harassment SER rules in 1987.[156] Reform is required to ensure that SER evidence is controlled in all proceedings where allegations of sexual misconduct arise. The following section proposes such reform.

## IV PROPOSAL FOR REFORM: A BALANCED RULE FOR BOTH CIVIL AND CRIMINAL CASES

### Proposal for Reform

Considering the difficulties in New Zealand's current approach to the admissibility of SER evidence, s 44 of the EA should be extended to apply in both criminal and civil cases. This reform will address many of the difficulties identified in Part III and will achieve consistency, both in mirroring the rules and effecting the underlying policy. Additionally, the sexual harassment SER rules should be amended to reflect a direct application of s 44 of the EA. This would include the retention of the direct relevance test in s 44(3) and would ensure that s 44 was applicable in civil sexual harassment proceedings without extending the application of the entire EA. This would also address the problems identified in Part III by providing judicial discretion and clear legislative guidance on the application of the rules in civil sexual harassment proceedings.

It is acknowledged that this proposal will not directly affect the professional disciplinary tribunals because the EA does not apply to any tribunal in New Zealand.[157] However, because the tribunals use the EA as a

154 *B v R*, above n 29, at [122(c)].
155 Evidence Act, s 6(a).
156 Labour Relations Act, s 221(c).
157 Evidence Act, ss 4(1) and 5.

strong guide, even with no further reform than extending s 44 to all civil cases where the EA applies, it is more likely that tribunals will import the fundamental framework of a civil rule into their civil cases.[158]

## Arguments against Reform

This section considers five arguments against extending s 44 of the EA to civil cases. All arguments against reform are outweighed by the underlying policy for controlling SER evidence, coupled with the retention of judicial discretion and the heightened direct relevance test in ss 44(1) and 44(3).

### *1 Additional Relevancy Consideration: Causation and Loss*

One argument against reform is that an exclusionary rule for SER evidence may be unfair in civil cases. Unlike criminal sexual cases where sexual experience evidence is only relevant to guilt (the criminal equivalent of civil liability), in civil cases sexual experience evidence can be relevant to issues of causation and loss in addition to liability. There is concern that because sexual experience evidence is arguably twice as relevant in civil cases, it should not be strictly controlled.[159]

On reviewing cases from the United States where there is a rule to control the admissibility of SER evidence in civil cases, one academic notes that sexual experience evidence has been admitted in civil cases as relevant to causation and loss for two reasons:[160]

> First, to show that because of previous consensual experiences with third parties, any nonconsensual contact of a similar nature will be less offensive. Second, courts allow evidence of previous sexual trauma to show existing mental injury not caused by the defendant.

Decisions based on the first chain of reasoning cannot be acceptable. As discussed, this is the type of rape myth perpetuation that s 44 of the EA attempts to remove. Extending s 44 to all civil cases will ensure this line of reasoning is not relied on inappropriately. The second line of reasoning is illustrated by the United States decision in *Barnes v Barnes*, where the plaintiff received exemplary damages after she successfully sued her father for rape.[161] Despite there being no specific rule to control the admissibility of SER evidence, the trial Judge ordered the exclusion of evidence that the plaintiff had been previously sexually abused by someone other than the defendant because the evidence was more prejudicial than probative.[162] However, on appeal, the Supreme Court held that excluding the evidence was inappropriate because it was relevant to issues of causation and loss, and "the

158 See, for example, Health Practitioners Competence Assurance Act, sch 1, cl 6(5); Real Estate Agents Act, s 88(4); and Lawyers and Conveyancers Act, s 151(4).
159 Hines, above n 106, at 897.
160 At 899.
161 *Barnes v Barnes* 603 NE 2d 1337 (Ind 1992) at 1339.
162 At [2].

defendant should be allowed to inquire about other possible sources of the plaintiff's mental injury".[163] The Supreme Court went on to highlight that "actual sexual conduct [of the plaintiff] is highly relevant to the issue of damages".[164] Whether the specific evidence in *Barnes* was relevant to causation and loss is highly questionable. However, the case illustrates the argument that SER evidence should not be strictly controlled in civil cases because it could be relevant to causation and loss.

In the New Zealand context, it could be argued that extending s 44 of the EA would cause difficulties for ACC in cases like *Graham-Clarke* (discussed above) because it might not have access to all pre-existing mental injuries if all sexual experience evidence were excluded.[165] However, this article's proposal mitigates this concern by retaining the judicial discretion and heightened direct relevance test in ss 44(1) and 44(3) of the EA. By ensuring that judicial discretion is available for sexual experience evidence to be admitted when it is directly relevant, there can be no concern that evidence directly relevant to causation and loss will be excluded.

Admittedly, in ACC cases like *Graham-Clarke*, evidence of previous sexual abuse that caused an existing mental injury may be directly relevant on many occasions. Section 21 of the ACA requires that the mental injury for which cover is sought was caused after 1 April 2002 and ACC arguably needs to know about pre-existing mental injury to assess whether the complainant is entitled to cover. However, applying s 44 to civil cases would ensure that courts do not rely on erroneous chains of reasoning and only evidence directly relevant to the amount of harm or loss suffered by the complainant is admissible.

### *2 Voluntary Participation by the Plaintiff*

Another argument against the proposed reform is that a plaintiff in a civil proceeding is less deserving of protection from the airing of her sexual history. This is alleged because unlike criminal prosecutions brought in the public interest, the plaintiff in a civil proceeding has voluntarily participated and in that sense, has put herself "on trial".[166]

In *Barnes*, the Supreme Court held that one reason why sexual experience evidence was admissible was because the plaintiff voluntarily participated in the proceedings.[167] Similarly in *M v L*, Giles J appeared to believe that the underlying policies of the "rape shield" rules are lessened in civil cases because civil cases are "a more private matter initiated by the complainant".[168] Curiously, his Honour did not acknowledge that at the time *M v L* was decided there had been a rule controlling SER evidence in civil

163 Hines, above n 106, at 894.
164 *Barnes*, above n 161, at [9].
165 *Graham-Clarke*, above n 121.
166 *M v L*, above n 100, at 437; and *Barnes*, above n 161, at [3].
167 *Barnes*, above n 161, at [3].
168 *M v L*, above n 100, at 437.

sexual harassment cases for ten years.[169] In civil sexual harassment proceedings, the complainant has initiated and voluntarily participated. Despite this, Parliament has created even more restrictive rules for SER evidence than are present in s 44 of the EA for criminal sexual cases. It is difficult to explain this other than to say that a complainant in a civil sexual harassment claim is more akin to a victim in a criminal sexual case and therefore worthier of protection than a plaintiff in a civil tortious claim for exemplary damages arising from sexual assault. This is clearly an unacceptable position.

Further, while it is technically correct that a plaintiff in a civil case has voluntarily participated, the complainant should still be afforded the same protection as a complainant in a criminal sexual case because the underlying policies of s 44 of the EA are readily applicable. It is contrary to the principles of fair litigation to leave unfairly prejudicial evidence uncontrolled simply because a party has chosen to exercise their rights to access the courts.[170]

Finally, it is notable that complainants in professional disciplinary tribunal cases involving allegations of sexual misconduct have not put themselves on trial. They give evidence at the request of a regulatory body to maintain the integrity of those professions. Without offering them at least the same protection available in criminal sexual cases and civil sexual harassment proceedings, complainants may be less likely to accept a request to give evidence in these tribunals.

### *3 Existing Rules Already Sufficient*

Another argument against extending s 44 of the EA to civil cases could be that there are existing rules in the EA that can appropriately control SER evidence in civil cases.[171] This section considers whether ss 7, 8 or 37 of the EA are fit for this purpose.

#### (a) Relevance and Prejudice Rules (ss 7–8)

Pursuant to s 7 of the EA, all admissible evidence must be relevant. This means evidence must have "a tendency to prove or disprove anything that is of consequence to the determination of the proceeding"; this is a low threshold.[172] In addition to being relevant, pursuant to s 8 of the EA the probative value of the evidence must outweigh any unfairly prejudicial effect it may have on the proceeding (put another way, on the decision maker).[173]

When considering whether these rules can appropriately control SER evidence in civil cases, it is helpful to remember that, historically, in the criminal context, these rules have been insufficient:[174]

169 Labour Relations Act, s 221(c).
170 See Hines, above n 106, at 894.
171 This subsection only addresses civil cases where the Evidence Act applies.
172 Evidence Act, s 7(3); and *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [7]–[8].
173 *New Zealand Police v Orica* [2016] NZDC 3530 at [35].
174 McDonald and Tinsley "Evidence Issues", above n 142, at 139.

> The admission of sexual history evidence has traditionally not been appropriately controlled in the absence of a specific rule. That is, subjecting the evidence to a relevance requirement, has not been sufficient to prevent the admission of irrelevant and highly prejudicial sexual history evidence.

As established in Part III, several types of civil proceedings can feature similar allegations of sexual misconduct and issues of consent and credibility as in criminal sexual cases. These facts and issues give rise to situations where SER evidence may be admitted by the defendant as allegedly relevant. It follows that if ss 7 and 8 cannot control the admission of SER evidence appropriately in criminal sexual cases, they will be insufficient in civil cases considering similar facts and issues.

It could also be said that ss 7–8 will be less effective at controlling the admission of SER evidence in civil cases than criminal cases because the decision maker is different. A review of New Zealand's case law demonstrates that most criminal sexual cases are determined by a jury, while most civil cases are determined by a judge-alone trial. As the NZLC highlights, there is a long-standing belief that judges are less susceptible to unfairly prejudicial reasoning than a jury because of a judge's expertise.[175] There appears to be support for the assertion that prejudicial evidence (like SER evidence) is less likely to be excluded as unfairly prejudicial in a judge-alone case than in a case determined by a jury because of this belief.[176]

(b) Veracity Rule (s 37)

It may also be said that s 37 of the EA (the veracity rule) can appropriately control the admissibility of SER evidence in civil cases. By way of reminder, s 37 is engaged when evidence is admitted to show a person's disposition to refrain from lying. As a preliminary point, SER evidence is not always introduced as relevant to the veracity of the complainant and when it is used for a different purpose, it will not engage s 37 nor will s 37 control it. However, when it is introduced directly to veracity (for example, previous habitual false allegations of sexual abuse to show the complainant has a disposition to lie about sexual abuse), s 37 will be inadequate to appropriately control this evidence. This is because the Supreme Court has recently decided in criminal sexual cases that even when sexual experience evidence is introduced directly to the veracity of the complainant, s 37 does not prevent the obligation for the sexual experience evidence to go through s 44.[177] If s 37 cannot appropriately control the admissibility of sexual experience evidence in criminal sexual cases, it will not be able to appropriately control it in civil cases.

175 Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [296].

176 For judicial commentary to this effect, see *Otimi v R* [2012] NZCA 216 at [31]; *R v Peck* [2015] NZHC 2278 at [33]; and *Liu v NZ Police* [2017] NZHC 1319 at [22].

177 *Best v R*, above n 23, at [59].

*4 Judge vs Jury: Lower Risk of Unfair Prejudice?*

Briefly alluded to, another argument against the proposed reform could be that SER evidence does not need to be strictly controlled in civil cases because a civil judge-alone proceeding is less likely to be unfairly prejudiced than a criminal jury trial, due to the judge's expertise and knowledge.[178] While this topic is not considered in any depth because the literature is too extensive for the scope of this article, there are three points that can briefly be made in response.

First, even if SER evidence does not have an unfairly prejudicial effect on a judge-alone proceeding, this only gratifies one of the underlying policies of s 44 of the EA; it does nothing to protect the complainant from a humiliating and traumatic experience. Secondly, s 44 currently applies in judge-alone criminal sexual cases, as outlined in s 44A(5).[179] Parliament has already accepted that SER evidence should be strictly controlled in criminal sexual cases by a specific rule, even when the trial is judge-alone. There is no reason why a civil judge-alone case should be different.

Thirdly, there are compelling arguments to be made that judge-alone proceedings are capable of being unfairly prejudiced. There are veracity and propensity exclusionary rules operating in civil proceedings, demonstrating an effort to avoid evidence having an unfairly prejudicial effect on a judge-alone proceeding.[180]

Additionally, judge-alone trials do exclude evidence as unfairly prejudicial when a specific legislative rule is in place. As Venning J highlighted in *Hamilton v R* when declining to admit propensity evidence about the defendant:[181]

> Even though Mr Hamilton faces a Judge alone trial … the admission of the evidence may tend to colour the Judge's consideration of Mr Hamilton's case so that the Judge may, without intending to, give disproportionate weight to the propensity evidence.

In a civil case involving allegations of sexual misconduct, the admissibility decision of Chisholm J in *J v J* strongly supports the assertion that a judge-alone proceeding is susceptible to intuitive bias and unfair prejudice.[182] Here, Chisholm J admitted "counter-intuitive" evidence "normally intended to correct erroneous beliefs about historic sexual assault and sexual abuse against children that jurors in criminal trials might otherwise hold".[183] This evidence was expert evidence intended to explain that a delay in reporting sexual abuse was common.[184] Despite this being a civil case with no jury, Chisholm J was satisfied that the reasons for its admissibility in a criminal trial were "equally

178 Law Commission *Evidence Law: Character and Credibility*, above n 175, at [296].
179 Evidence Act, s 44A(5)(b).
180 Sections 37 and 40.
181 *Hamilton v R* [2013] NZHC 3101 at [34].
182 *J v J*, above n 97, at [71].
183 At [70].
184 At [185]–[189].

applicable in [a] Judge alone trial".[185] This admissibility decision was upheld on appeal.[186] Because the underlying policy for controlling SER in criminal sexual cases before jurors is equally applicable to a judge-alone civil trial, as Chisholm J found in *J v J* in relation to counter-intuitive evidence, s 44 of the EA should be extended.

As a final and key point, civil defamation proceedings can be determined by a jury.[187] Any argument that s 44 does not need to apply in civil cases because the decision maker is a judge, not a jury, is disposed of in these cases.

### *5 Comparable Jurisdictions*

Mentioned only briefly, it could be argued that because specific legislative rules controlling SER evidence in civil proceedings have not been enacted in the United Kingdom, Australia or Canada, New Zealand should not enact them either. However, the United States (which has a very well-developed jurisprudence of evidence law) has adopted such a provision at the federal level and some individual States have also extended their SER rules to civil proceedings.[188] In the United States, Federal Rule of Evidence 412 controls the admissibility of SER evidence in both civil and criminal cases.[189] In its commentary on Rule 412, the Advisory Committee noted that "[t]he reason for extending the rule to all criminal cases is obvious" and went on to say:[190]

> The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward … *do not* disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief.

New Zealand has had rules controlling SER evidence in criminal sexual cases since 1977 and in civil sexual harassment cases since 1987.[191] Despite many other comparable jurisdictions not yet enacting a specific legislative rule to control SER evidence in all civil cases, this is an opportunity for New Zealand to lead by example. The mere fact that this reform may be a step ahead of some other jurisdictions does not provide a convincing argument against reform.

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185 At [71] (emphasis added).
186 *Jay v Jay*, above n 114, at [60].
187 Defamation Act 1992, s 52.
188 See, for example, Federal Rules of Evidence 28 USC § 412; Kentucky Rules of Evidence 412(a), KY Rev Stat § 422A; Hawaii Rules of Evidence 412(d), HI Rev Stat § 626; Illinois Code of Civil Procedure 735 ILCS 5/8-2801; and Wis Stat § 901.08(2).
189 Federal Rules of Evidence 28 USC § 412; and Kentucky Rules of Evidence 412(a), KY Rev Stat § 422A.
190 United States Advisory Committee, above n 35 (emphasis added).
191 Evidence Amendment Act, s 2; and Labour Relations Act, s 221(c).

## V CONCLUSION

As established throughout this article, Parliament has made a concerted effort to control the admissibility of SER evidence in criminal sexual cases and civil sexual harassment proceedings, but has failed to control this evidence in all other civil proceedings.

This article has traversed in detail the major difficulties with New Zealand's current approach to the admissibility of SER evidence. First, the current rules (or lack thereof) are inconsistent between criminal sexual cases, civil sexual harassment proceedings and all other civil cases. Under the current approach, there are several civil cases where SER evidence may arise, including professional disciplinary tribunal proceedings, tortious assault and battery cases, ACC appeals and defamation proceedings. Despite this, in all civil cases other than sexual harassment proceedings, SER evidence can be admitted without any specific legislative control. Secondly, these practical differences are inconsistent with the underlying policy of the current rules controlling the admissibility of SER evidence. It is illogical to afford protection to complainants in civil sexual harassment proceedings but not to complainants in civil tortious claims for assault and battery arising from sexual misconduct.

Extending s 44 of the EA to all civil cases will address many of the difficulties identified in this article, both in mirroring the current rules controlling SER evidence and effecting the underlying policy of those rules. Additionally, amending the sexual harassment SER rules will ensure that those provisions feature the balanced rule in s 44 of the EA coupled with the retention of judicial discretion.

The arguments against reform identified in Part IV do not tip the scales in favour of the status quo. Any tangible concerns are mitigated by retaining judicial discretion to allow for the admissibility of sexual experience evidence when it is so directly relevant that it would be contrary to the interests of justice to exclude it. An overarching argument against reform could be that the inappropriate use of SER evidence in civil cases will arise so infrequently in New Zealand (for example, when compared with the United States where it is possible to sue in tort for personal injury arising from sexual misconduct) that it is not necessary to reform the law. In response, even if the number of times that SER evidence is used improperly in civil proceedings in New Zealand pales in comparison to other jurisdictions, the law should not stand idle if an injustice occurs even just once.