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**ALL THINGS EQUAL?
GENDER DIFFERENCES IN THE SENTENCING OF GENDER-NEUTRAL
SEXUAL OFFENCES**

FEONA SAYLES*

I INTRODUCTION

The change to gender-neutral sexual offences is still relatively new in New Zealand. One of the impacts of the recent change is the question of how female sexual offenders should be sentenced.

The starting point for sentencing of sexual offences has depended on the nature of the physical activity, whether there has been repeated offending, the age of the victim, and the impact on the victim. The overall concern for sentencing is that punishment should correspond to the gravity of the offence. This is difficult to accurately assess in the situation of female offending as recognition of this type of offending is still in its infancy, so the full gravity of this type of offending is relatively unknown.

A lack of understanding as to the characteristics of the female offenders and of the impact on victims may have resulted in some discrepancies in sentencing. In recent cases involving females as sexual offenders there appears to be marked differences as to the way they have been sentenced compared to male offenders. Although the courts have appeared to endorse full equality of sentencing between genders there still appears to be subtle gender distinctions present.

This paper looks at the considerations that should be taken into account when sentencing and compares these to case examples of female and male sexual offender sentencing in

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order to identify inconsistencies. The characteristics of female sexual offending is also discussed in respect of sentencing.

II CONSIDERATIONS IN SENTENCING

Section 7 of the *Sentencing Act 2002* (New Zealand) outlines the general purposes associated with sentencing. These purposes include; holding a person accountable for harm, promoting a sense of responsibility within the offender, denunciation of the conduct, deterrence, protecting the community, provision for the interests of victims¹. Where it will be compatible these purposes should also reflect how sentencing can assist in offender rehabilitation².

The practical application of these purposes mean higher sentences may be required where there is evidence of repeat offending, so as to create a greater deterrence and protection for the community³. A lower sentence is allowed where the offender recognises the harm they have inflicted as this means the offender has acknowledged their responsibility for the offending. However even an offender who has shown remorse may encounter a higher sentence where the particular type of offending is such that public denunciation is required to deter others from similar conduct.

Although sentencing purposes allow for the provision of the interests of the victim, the desires of the victim as to an appropriate sentencing will not always be accommodated. For example where a victim asks for a sentencing that is either too harsh or too lenient, then other principles may override the wishes of the victim⁴. Also, while rehabilitation of

¹ Section 7(1) (a)-(g) Sentencing Act 2002 (NZ)

² Section 7 (1) (h)

³ For example refer to the comments in *R v Ward* [1976] 1 NZLR 588 (CA)

⁴ See *R v Tuiletufuga* 25/9/03, CA205/03

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the offender should be taken into account this should not alter the nature of the sentence if other factors dictate that a different sentence should be imposed⁵.

Section 8 provides for the principles of sentencing which includes; the gravity of offence, the seriousness of the offence, the need to be consistent with other cases, and maximum sentence for worst kind of offending. Equally also states least restrictive outcome (in terms of the offender's freedom) is appropriate and that the sentence should not be disproportionately severe⁶. These principles must be taken into account when considering the purposes of the sentencing contain in section 7 so that there is no conflict between the two sections.

The gravity of the offence which is sometimes referred to as the seriousness of the offence in other overseas literature⁷ considers two main areas. These are; the harm inflicted and the culpability of the offender. Culpability is often assessed in terms of aggravating/mitigating factors so will be discussed in regard to section 9 below. The harm inflicted usually focuses on the individual harm and in particular traditional notions regarding the physical harm to the victim as being more severe than emotional harm. For example, sexual connection is seen as "more physically intrusive"⁸ than sexual assault which is reflected in the maximum sentences for the two offences. Even where behavior is deemed to be part of the same offence (such as sexual connection) there has been some deviation in starting points according to the mode of penetration used⁹. The problem with assessing levels of gravity according to the amount of physical harm suffered is that sentencing may not accurately reflect the actual depth of harm suffered by victims.

⁵ *R v Barrett* [1999] 1 NZLR 146

⁶ Section 8 (a)-(j) Sentencing Act 2002 (NZ)

⁷ A Von Hirsch, "Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale" 74 *Journal of Criminal Law and Criminology* (1983) 209

⁸ Refer to the comments in *R v L* [2006] 3 NZLR 291

⁹ Despite the ruling in *R v Singh* [2003] BCL 85 that non-penile penetration should not be treated as being less serious than penile penetration sentences imposed after this case have still tended to reflect different starting point for non-penile penetration such as digital penetration.

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Whitney¹⁰ argues that if the ability of the victim to readjust is a measure of the degree of actual harm suffered, then the use of physical harm to determine gravity may not be an accurate measure. The reason for this is that victims of sexual attacks where there was little or no physical violence have reported just as much difficulty in readjusting¹¹. This could mean that emotional harm should be treated equally to physical harm when considering the gravity of the offending.

The seriousness of the offence is often dictated by parliament as to what maximum sentences should be. This provides a comment as to how the representatives of the people view the type of offending and what is appropriate sentencing for the most severe forms of that type of offending. This type of influence can be seen in *R v A* [1994] 2 NZLR 129 where it was stated that any penalty imposed should reflect parliament's desire to increase sentencing. This comment was a reflection on the 'tariff' system which the courts use in order to allocate appropriate sentences for different types of offending, depending on the high/low sentences available for a particular offence. Although the use of tariff has been debated¹², it does appear that in New Zealand courts that an informal tariff or starting point is common.

The need to be consistent with other cases is usually achieved through the use of the tariff (or starting point) for similar offending¹³. There are two views as to how this system should work. First there is the view that the starting point should be determined by a generalisation of the offence without consideration of any aggravating or mitigating factors. For example non-penile penetration compared to penile penetration, regardless of whether violence or threats were used in the situations. The final sentence is then reached after consideration of the aggravating and mitigating factors. The second view is that the starting point should be reached by a generalisation of the offence with the inclusion of

¹⁰ Karen Whitney, "The Seriousness of the Offence: Proportionality in Sentencing Sexual Offenders in Western Australia" [1996] MurUEJL 8

¹¹ *ibid*, para 20

¹² *R v Tranter* (CA 486/03, CA 36/04, 14 June 2004) disputed the use of tariffs for sexual offending, yet there appears little practical difference in reality as to 'starting points' and a 'tariff'.

¹³ Refer to the comments in *R v Mako* [2000] 2 NZLR 170 at 187.

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aggravating or mitigating factors as to the offence, but then the final sentence should take account of aggravating and mitigating factors associated with the offender. It appears that most New Zealand courts have now adopted the second view¹⁴. Whichever approach is used there is still the potential problem of a lack of adequate recognition of non-physical aggravating factors.

The aggravating and mitigating factors that are to be taken into consideration are detailed in section 9¹⁵. Aggravating factors include: violence or weapon (actual/threatened), unlawful entry, extent of harm¹⁶, cruelty, position of trust, victim particularly vulnerable, “hate crime”, premeditation, and previous convictions¹⁷. This list includes aspects that allow for non-traditional harm to be considered but it appears the length of time added due to emotional harm is less than time added due to traditional harm (for example a breach of trust compared to physical violence used)¹⁸.

Mitigating factors include: Age of offender, guilty plea, victim conduct, limited involvement, diminished capacity, remorse, and good character¹⁹. These factors recognise that certain offender characteristics may limit the ability of the offender to acknowledge the harm created or limit the ability of the offender to act differently. For example, if the offender suffers from some form of mental impairment this may reduce the sentence

¹⁴ This approach was referred to in *R v Taueki* [2005] 3 NZLR 372 and has been adopted by later cases.

¹⁵ Sentencing Act 2002

¹⁶ In the context of sexual offences, Charlotte Brown argues that rape and other sexual crimes should be considered as hate crimes against women. This argument has merit when considering that hate crimes are included as an aggravating factor due to the impact on not just an individual but also the sub-group within the community to which they belong. As commented by Charlotte Brown that sexual offences create fear within women in general that they may also fall victim to an attack. See Charlotte Brown “Legislating Against Hate Crime In New Zealand: The Need To Recognise Gender-Based Violence” [2004] VUWLRev 24.

¹⁷ Section 9 (1) Sentencing Act 2002 (NZ)

¹⁸ Karen Whitney, “The Seriousness of the Offence: Proportionality in Sentencing Sexual Offenders in Western Australia” [1996] MurUEJL 8. See also AP Simester and DI Simester “Analysing Sexual Offence Sentences: An Empirical Approach” (1990) 23 *Australian and New Zealand Journal of Criminology* 269

¹⁹ Section 9 (2) Sentencing Act 2002 (NZ)

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imposed – unless it is shown that the impairment is such that it increases the risk of re-offending²⁰. As commented in *R v Abraham* (1993) 10 CRNZ 446 (CA), at p 449;

‘[The] ... inability to appreciate the consequences of the offender’s actions and to exercise independent self-control, especially when that is combined with evidence of a continuing disorder and of drug dependency which is likely to exacerbate it and increase the risk of re-offending, may require the sentencer, in the interests of the public at large, to put aside thoughts of discounting the penalty which the offence would otherwise warrant.’

It should be noted that while alcohol use is not to be considered a mitigating factor, alcoholism may be considered in regard to how treatment and rehabilitation will reduce the risk of re-offending.

The mitigating factors also reward offenders who accept responsibility and show remorse²¹ which links to the general purposes of sentencing contained in s7 that provide for sentencing that promotes a sense of responsibility within the offender. This reward is governed by the timing and nature of the responsibility/remorse²². For example, a guilty plea as mitigation will depend on whether the plea is entered early (so as to lessen the impact on the victim) and how strong the prosecution case is (less time or no time is deducted in situations where the accused has an “un-winnable” case)²³. This is also true for demonstrating remorse – less time is deducted if the remorse is shown after conviction compared to after an early plea of guilty (in particular it has been commented that statements such as “the offender has accepted the verdict” should be taken as just being a token sign of remorse). More time is removed in situation where the offender has

²⁰ This factor is also considered in light of how the offender may respond to treatment for the impairment.

²¹ Refer to *R v Ridout* 19/9/02, CA120/02.

²² *R v Mako* [2000] 2 NZLR 170

²³ *R v Mako* *ibid*

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self-reported the offending²⁴. The list is not exhaustive so other factors such as whether the offender suffered from prior sexual abuse may be taken into consideration – although the discount given for this is often little in comparison to other factors and may not be taken into account where the offender knew that the conduct was wrong²⁵.

A study conducted in 1990 by Simester & Simester concluded that it was possible to accurately assess the length of sentences through the use of a sentencing model²⁶. While the accuracy and desirability of such a model could be debated, the study did produce some interesting insights as to how the courts treated different factors related to sexual offending when sentencing offenders. The age of the offender and the age of the victim were shown to be important factors in decreasing or increasing sentences respectively²⁷. The study noted that emotional harm and the use of violence had a small influence, possibly because the courts considered this to be inherent in all cases of sexual offending.²⁸ As a result, it was only where the most serious violence had been used that sentence lengths appeared altered. Where the victim was male the offender received a lesser sentence.

The value in using Simester (despite the age of the study) is that it demonstrates a New Zealand approach to sentencing, which makes a comparison to New Zealand cases easier to achieve. There have been few other New Zealand Studies done, with the exception of Jeffries et al (2003)²⁹ that looked at sentences differences between genders. The results of the Simester study reflect those of other overseas studies and of recent commentary

²⁴ For example in *R v Sanday* 22 TCL 30/9 the offender received a substantial reduction due to voluntarily going to the police and confessing, without this action it is unlikely he would have been identified as the offender.

²⁵ Refer to *R v Accused* (CA307/92) (1992) 9 CRNZ 301 (CA).

²⁶ AP Simester and DI Simester “Analysing Sexual Offence Sentences: An Empirical Approach” (1990) 23 *Australian and New Zealand Journal of Criminology* 269

²⁷ *ibid*, 273

²⁸ *ibid*, 274

²⁹ Jeffries, Samantha; Fletcher, Garth J.O.; Newbold, Greg. ‘Pathways To Sex-Based Differentiation In Criminal Court Sentencing’, *Criminology*, May 2003, Vol. 41 Issue 2, p329-353, 25p, 3

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relating to and contained within New Zealand sentencing. For example Rye et al (2006)³⁰ concluded in a recent study that male victims were seen as more responsible and less vulnerable. Since vulnerability of the victim is a factor in sentencing this may account for a lesser sentence when the victim is male. The young age of the victim as a factor in favour of harsher sentencing for sexual offences has been recently confirmed in the case of *R v Peachey* (CA 92/01, 17 July 2001, Gault, Pankhurst and Potter JJ).

**III CASE EXAMPLES OF SENTENCING OF SEXUAL OFFENDERS: IDENTIFYING
INCONSISTENCIES**

There have been several studies and reviews of sentencing that have considered gender bias in sentencing³¹. Many of these studies have concluded that women do receive lighter sentences compared to men. Some of these findings may be attributed to the nature of offending that is common to each gender – generally men are convicted for more serious crimes so as a whole will receive higher sentences. Also, men are more likely to have serious prior offending, which can influence sentencing³². This last factor has been shown to be a strong influence in the decision to imprison, and the length of the sentence. This was confirmed in a recent New Zealand study³³, which also commented that sex differences as to variables such as this did not fully account for the differences in sentence lengths between men and women. Differences in the length of sentence have

³⁰ B. J. Rye & Sarah A. Grazier & Corinne S. Enright, 'The Case of the Guilty Victim: The Effects of Gender of Victim and Gender of Perpetrator on Attributions of Blame and Responsibility' *Sex Roles* (2006) 54: 639–649

³¹ For example see S. Fernando Rodriguez, Theodore R. Curry, & Gang Lee, 'Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?' (2006) *Social Science Quarterly*, Volume 87, Number 2, June. Ilene H. Nagel & Barry L. Johnson, 'The Role Of Gender In A Structured Sentencing System: Equal Treatment, Policy Choices, And The Sentencing Of Female Offenders Under The United States Sentencing Guidelines', (1994) *The Journal Of Criminal Law & Criminology* Vol. 85, No. 1. Jeffries, Samantha; Fletcher, Garth J.O.; Newbold, Greg. 'Pathways To Sex-Based Differentiation In Criminal Court Sentencing', *Criminology*, May 2003, Vol. 41 Issue 2, p329-353, 25p, 3

³² S. Fernando Rodriguez, Theodore R. Curry, & Gang Lee, 'Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?' (2006) *Social Science Quarterly*, Volume 87, Number 2, June

³³ Jeffries, Samantha; Fletcher, Garth J.O.; Newbold, Greg. 'Pathways To Sex-Based Differentiation In Criminal Court Sentencing', *Criminology*, May 2003, Vol. 41 Issue 2, p329-353, 25p, 3

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been found in other studies, even when the decision to incarcerate has been similar between the two genders³⁴. One explanation for this may be that in many jurisdictions the decision to incarcerate is a requirement by statute, but the length of sentence is still at the discretion of the court. When the court is able to exercise discretion, there is a tendency to favour women.

To illustrate how this discretion may influence sexual offending sentencing, the following comparison examines sentence length of a few cases involving sexual offending. The offenders have similar criminal histories and the nature of the offending has the same level of seriousness.³⁵ These comparisons are limited by the number of cases considered and the number of factors considered so cannot produce generalisations as to sentencing. Instead the comparisons are intended to provoke discussion as to whether sentencing guidelines from previous cases are being used consistently with both genders or whether there are subtle gender differences occur in the sentencing of sexual offenders.

In comparing *R v Brinkley* (CA302/99) and *Manukau*³⁶ to *R v M* [2000] 2 NZLR 60 there appears to be a number of unexplained differences in the length of sentence (refer to table One). First, if it is correct that the age of the victim is an important factor, then it would seem that Brinkley should have had a greater addition in sentence compared to “M” since the victim in Brinkley was only 7 years old while the victim in “M” was 15.

The main difference between Brinkley and “M” appears to be that in “M” the offending was considered to be premeditated – yet was this enough to justify a sentence of 6 months more? This is especially considering that “M” had a good character while Brinkley appear to have a bad character. Also, the sentence in “M” has been denounced in later

³⁴ S. Fernando Rodriguez, Theodore R. Curry, & Gang Lee, ‘Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?’ (2006) *Social Science Quarterly*, Volume 87, Number 2, June

³⁵ Also all cases are post 1993 so as to take into account the increase in maximum sentences for this type of sexual offending. This point was noted in *Police v Hillman* (2006) that older sentences for sexual offences may not be reliable due to increases in penalties.

³⁶ *R v M* (High Court, Auckland, T 023309, 30 January 2003, Williams J)

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cases to be the lowest end of the sentencing scale³⁷. If “M” is the lowest end, then what is to be made of Brinkley? Some of the differences may be attributed to a higher start point for “M” (possibly 4 years³⁸) compared to a lower start point for Brinkley (no mention of a starting point). The support for this idea is seen in when comparing *Manukau* to “M”.

Table One

| Name of case | Sex of offender | Sex of victim | Age of Victim | Type of sexual offence | Mitigating variables | Aggravating variables | Neutral variables | Sentence (start point) |
|---------------------|-----------------|---------------|---------------|------------------------|---|---|------------------------------------|---------------------------|
| <i>R v Brinkley</i> | Female | Female | 7 years | Oral penetration | No prior convictions One off incident Prior victimisation | Not good Character Age of Victim Abuse of trust | Offender drinking | 2.5 years (not mentioned) |
| <i>R v M</i> | Male | Female | 15 years | digital penetration | no gratification No prior convictions Good character | Abuse of trust Considered to be premeditated | Offender drinking Token Remorse | 3 years (4 years) |
| <i>Manukau</i> | Female | Male | 14 years | Oral penetration | No prior convictions Prior victimisation | Repeat offending Increased vulnerability | Offender drinking Token remorse | 2.5 years (3.5 years) |

³⁷ For example see *Police v Hillman* (HC, Auckland, CRI-2006-404-000378, Dec 18 2006, MacKenzie J)

³⁸ Reference had been made by the sentencing judge to *R v Jackson* (1997) 14 CRNZ 569 as dictating a starting point of 4 years, but had viewed that case as being more serious. On appeal it was considered that the offending was on a more serious level, so it is likely that the start point from *R v Jackson* was used.

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| | | | | | | | | |
|-----------------|--------|--------|-------------|------------------------|--|---|--|---|
| | | | | | | of victim Abuse of trust | Had previously committed sexual offence of incest | |
| <i>R v Pori</i> | Male | Female | 9 years | digital penetration | Prior victimisation Full remorse One off incident | Prior convictions for sexual offences Abuse of trust Age of victim | | 6 years (4.5 years) |
| <i>R v L</i> | Female | Male | 15 years | intercourse | No prior convictions Good Character Prior victimisation | abuse of trust repeat offending aggression | | 5.5 years (5-6years, increased on appeal to 7- 8 years) |

Manukau was sentenced to 2.5 years imprisonment. Start point for this type of offending was considered to be 3.5 years and the end result was a 2.5 year sentence. Both cases (Manukau and “M”) were after the increase in maximum sentencing so there is no likelihood of differences occurring due to that factor. The wording of the relevant sections of the time would mean both offences came within the same section³⁹ and therefore came within the same sentencing maximums. Both offences contained the same ingredients of intrusive physical invasion and both victims were of a similar age. The difference in starting points appears to only be attributed to gender differences. This could be an example of the observation made by Simester & Simester⁴⁰ that male victims

³⁹ The offending of Manukau would have come within s128 (5)(b) and the offending within “M” would have come within s128 (5)(a).

⁴⁰ AP Simester and DI Simester “Analysing Sexual Offence Sentences: An Empirical Approach” (1990) 23 *Australian and New Zealand Journal of Criminology* 269

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are perceived to have suffered a less invasion than female victims, in which case the gender of the victim is creating sentencing differences.

Next, there is the consideration of how mitigating and aggravating factors were treated.. As to aggravating features, in *Manukau* it was stated that the abuse of trust was the most serious of the aggravating features. This had also been a factor highlighted in *R v M*, so there is no inconsistency there. However, in *R v M* much was made of the fact that the offending was premeditated and repeat offending as “M” had touched the victim with a foam rubber glove on the thigh the previous night. In *Manukau* the offender had tried to increase the vulnerability of the victim through the use of alcohol which could show a level of premeditation, also the offender had previously offended against the victim by masturbating him but this did not seem to attract the same level of concern. If an offender has repeated their offending this is a factor that should be taken into account as part of the purposes of sentencing which require the courts should seek to use sentences to deter offending and protect the community. *Manukau* was a repeat offender as regards to the victim (and as to her 14 years of committing incest which is discussed below) so should have attracted a higher sentence compared to “M”.

The impact of repeat offending on sentencing can be seen in *R v Pori* (HC, Auckland, CR1 2006-004-712 1, 8 December 2006, Keane J) where the final sentence was 6 years. This sentence was arrived at by reducing the sentence by 18 months for the mitigating factors mentioned in Table One, and was increased by one year due to the age of the victim and the abuse of trust. The sentence was further increased by another two years due to prior offending. The prior offending was serious – there had been previous convictions – so it may be unfair to compare this to *Manukau*, yet this does show that prior offending is a matter that should increase sentencing and so should have contributed to the final sentence in *Manukau*.

As to mitigating factors, both *Brinkley* and *Manukau* claimed to have suffered prior sexual victimisation. This can be a factor in reducing sentence if it reduces the culpability

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of the offender. When looking at the comments in *Pori* with regard to the offender having suffered from sexual abuse as a child compared to the comments in *Manukau* it is difficult not to conclude some gender bias. In both cases there does appear to be credit awarded to the offender, but in *Manukau* this was very expressly stated with constant references to Manukau being a 'victim herself'. The difficulty with this is the sexual abuse that was referred to consisted of Manukau living with her half brother for 15 years from the age of 15 to the age of 30. This is different to the type of abuse reported by Pori who had been forcibly victimised as a very young child. It also means that while Manukau had no previous convictions she had in fact been committing the offence of incest for a long period of time⁴¹, so should have been taken into account as evidence of repeat offending.

Remorse is another mitigating factor - when it is shown to be 'full remorse' (for example a guilty plea). Token remorse should not result in a reduction of sentence and a lack of remorse may increase the sentence given. If this is correct then "M" should have been provided with at least some greater reduction in sentence compared to Brinkley. Even if the court had considered "M" to not show full remorse he still had still made some effort to acknowledge the harm whilst Brinkely showed no remorse. A further point of interest is that in *R v M* the Court stated that alcoholism was not to be included as a mitigating factor. In *Manukau* the Court commented that counsel for the accused had 'properly' drawn attention to the offender's alcoholism as part of mitigation.

In a recent decision (*R v L* [2006] 3 NZLR 291) the idea that gender should play a role in altering sentence patterns was strongly criticised by the Court of Appeal in New Zealand. At the first instance of sentencing the starting point had been fixed at between 5-6 years compared to the usual 7-8 years for a contested rape with no aggravating features. This

⁴¹ Section 130 Crimes Act 1963 (NZ) states that incest includes sexual intercourse with a half brother/sister. Any person over the age of 16 can be liable to a term of imprisonment of up to 10 years. If the other party consents then they will be an accomplice to the offence and can be charged. By all accounts Manukau was a consenting partner.

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lower start point was attributed to cases involving female sexual offenders and the need to be consistent with those cases. In particular the High Court stated;

"[24] I can see no logical reason why an eight-year starting point should not be adopted in this case and, indeed, that this should be increased to take into account the aggravating factors which I have referred to and, in particular, the gross breach of trust.

[25] I am, however, required to take into account the requirement to achieve consistency in sentencing. The sentences in *Herbert*, *Matthews* and *Shaskey* all indicate a starting point, including aggravating factors, of between five and six years' imprisonment.

[27] The decisions in *Matthews* and *Shaskey* as I say, all provide a starting point of between five and six years. I find it difficult to reconcile these with the decision in *Herbert*, but it may be that the Court has tacitly at least accepted that, where what amounts to rape of a female occurs in relation to a male, the lack of actual physical invasion may justify a lesser level of sentencing. Be that as it may, I consider that, an appropriate starting point, taking into account aggravating features, is six years' imprisonment."⁴²

The Court of Appeal dismissed this starting point by stating that consistency in sentencing should be consistency with all forms of similar offending – regardless of the gender of the offender. The Court then placed the starting point as being between 7-8 years. The final sentence was 5.5 years. The express declaration that sentencing must be gender neutral should mean this case has marked the end of gender differences in sentencing. However, a closer inspection of the decision indicates that gender distinctions may still exist.

In this case there had been serious aggravating factors such as an abuse of trust, repeat offending and aggression. If prior cases involving male offenders were to be used to guide increases in sentencing then these factors should have increased the sentence by at least two years⁴³. This would make the sentence 9-10 years. Since the final sentence was

⁴² *R v L* [2006] 3 NZLR 291, at paras [24] - [25] and para [27]

⁴³ In *Pori* prior offending alone had increased the sentence by 2 years, so the other factors of abuse of trust and age of the victim contributed to one year. In *R v M* the fact there had been a prior incident and an abuse of trust had led to an increase in starting point from 2.5 years to 4 years. In neither of these cases had the

5.5 years the mitigating factors managed to reduce the sentence by 3.5-4.5 years. Previous cases involving both male and female offenders do not indicate that the mitigating factors present were sufficient to have created this kind of reduction⁴⁴. This could indicate that either the aggravating factors were not considered as serious as when performed by a male offender, or that the mitigating factors were treated more favorably. Either way this could mean that although a major component of gender differences in sentencing has been eliminated through the acceptance of similar start point, gender distinctions in sentencing will continue to feature in a more subtle form.

IV REASONS FOR APPARENT SENTENCING DIFFERENCE DUE TO GENDER

In looking at the above cases it would appear that sentencing differences occur due to prior sexual abuse and mental impairment being treated as a more forceful mitigating factor when the offender is female and that harm is viewed in a traditional fashion which sees violation of female victims as more intrusive compared to male victims. However, it would be dangerous to make generalisations as to why it appears that female sexual offender cases are treated differently to male sex offender cases based on the small comparison of cases previously mentioned. As such, the following observations discuss whether these possible reasons are compatible with research on female sexual offenders and sentencing guidelines.

The current study of females as criminal sexual offenders is still very much in its infancy. Studies did not occur until the late 1980s and the studies that have been conducted since this time have provided limited information due to a number of difficulties in accurately obtaining consistent data. This problem has in part been due to low numbers of

offender used aggression. So at the very least 1.5-2 years for the aggravating factors would have been expected.

⁴⁴ In *Manukau* there had been similar mitigating factors and less aggravating factors which only led to a one year reduction in sentence from the starting point. In *R v L* there was a 1.5-2 year reduction from the starting point. Also in *Pori* there were more mitigating factors, yet these factors only decreased sentence by 18 months.

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reported/convicted offending⁴⁵, which has meant that any samples have generally been too small to establish valid findings. The lack of reported abuse has been attributed to an adherence to traditional roles of women as nurturers which leads to a social denial of activities such as female sexual offending. Perversely, this traditional role can also increase opportunities for offending⁴⁶. Another difficulty for previous research is the nature of the sample groups may have created biased results. For example the studies that have been conducted using clinical samples may unduly magnify findings of mental illness, as this is the condition for which they are being treated for.⁴⁷

Having stated these weaknesses, the studies do provide insight into possible characteristics of some female sex offenders. These characteristics include the fact that offenders have often suffered from sexual victimisation and appear to suffer from a number of mental illnesses⁴⁸. They also have a greater likelihood of coming from dysfunctional families⁴⁹. These types of offenders are also more likely to know their victim prior to the abuse, and usually resort to manipulation rather than force to perpetrate the offending. Some of these characteristics have tended to be treated in favour of a female accused by the New Zealand courts, but it is arguable that these factors should not be treated as mitigating factors and instead in some circumstances should be regarded as factors that increase the risk of further offending and as evidence of a taking a lack of responsibility for offending.

⁴⁵ Jill Johansson-Love & William Fremouw, "A critique of the female sexual perpetrator research" *Aggression and Violent Behavior* 11 (2006) 12–26

⁴⁶ For example it was noted by Finklehor that in day care abuse 40% of the offenders were women. Finklehor D. (1979) *Sexually victimized children*. New York: Free Press. See also Ryan (1991)

⁴⁷ Vandiver, M & Kercher, G. (2004) "offender and Victim characteristics of Registered Female Sexual Offenders in Texas: A Proposed typology of Female Sexual Offenders", *Sexual Abuse: A Journal of Research and Treatment*, Vol 16, No 2.

⁴⁸ Mathews, R., Matthews, J. K., & Speltz, K. (1989). *Female sexual offenders: An exploratory study*. Orwell, VT: Safer Society Press. See also Green, A., & Kaplan, M. S. (1994). Psychiatric impairment and childhood victimization experiences in female child molesters. *Journal of American Academy of Child and Adolescent Psychiatry*, 33(7), 954–961.

⁴⁹ *ibid*

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For example, prior sexual victimisation is a factor in reducing sentence when it has the power to reduce culpability of the offender. Culpability is not reduced when the offender knows that their abuse is wrongful.⁵⁰ It has been suggested that results of prior sexual victimisation of offenders may be exaggerated as some offenders may make up or exaggerate claims in order to gain sentencing leniency for such disclosures⁵¹. This could indicate these offenders claiming prior abuse are aware their actions are wrongful and are using non-existent or non-consequential abuse to attract sympathy for their situation. This means that the courts in sentencing should seek outside confirmation of claims of abuse where possible.

Where it is shown that prior abuse did occur the court should consider how the prior abuse has influenced the behaviour of the offender – has it resulted in the accused being unable to recognise the abuse as harmful⁵² or is it being used as justification for abuse. If the abuse is being used to attract sympathy or as a justification then there is difficulty in accepting the abuse as a factor in decreasing sentence. For example if an offender is saying that she *suffered* abuse this is a clear indication that the offender knows the conduct complained of leads to suffering and is therefore aware it is wrong, so if the offender is found guilty of the conduct the prior sexual abuse should not attract a reduction in sentence.

In the situation where prior sexual abuse has resulted in cognitive distortions as to appropriate sexual behaviour this may be allowed as a mitigating factor – but this should be balanced against sentencing factors such as taking responsibility and the need to protect the community from further harm. Offenders with these distortions often deny their

⁵⁰ Refer to *R v Accused* (CA307/92) (1992) 9 CRNZ 301 (CA).

⁵¹ Vandiver, M & Kercher, G. (2004) “offender and Victim characteristics of Registered Female Sexual Offenders in Texas: A Proposed typology of Female Sexual Offenders”, *Sexual Abuse: A Journal of Research and Treatment*, Vol 16, No 2. see also Jill Johansson-Love & William Fremouw, “A critique of the female sexual perpetrator research” *Aggression and Violent Behavior* 11 (2006) 12–26

⁵² Refer to Allen, C.M. *Women and men who sexually abuse children: A comparative analysis*. Orwell, (1991), VT: Safer Society Press and to Mary E. Fromuth, & Victoria E. Conn, ‘Hidden perpetrators: Sexual molestation in a nonclinical sample of college women’, *Journal of Interpersonal Violence*, (1997) 12(3), 456– 465.

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offending; this refusal to take responsibility can increase the risk of re-offending. Particularly where the offender increases the impairment by taking drugs or alcohol, as it appears had occurred in the previous cases mentioned. In this situation the sentiments expressed in *R v Abraham* and should be taken into consideration in sentencing female offenders, meaning there should be little or no credit given for these 'mitigating' factors in reducing sentence⁵³.

With regard to the harm inflicted by female offenders, there seems to be support for the view that male victims may suffer just as greater impact as their female counterparts⁵⁴. Female offending is more likely to involve a breach of trust due to the victims being of a younger average age to male offending victims and because female offenders more frequently have some relationship to the victim⁵⁵. These factors also mean that the offending is less likely to be physically violent but, as mentioned previously⁵⁶, the absence of physical violence does not necessarily lessen the degree of harm suffered by the individual. Since research indicates victims of female offending are subject to equal harm the courts should place a higher level gravity for this type of offence than has been previously given. In some respect the decision in *R v L* has achieved this by stating that the start points should be the same for male and female offenders, but this needs to be carried further so that the harm is taken more seriously when considering aggravating features.

⁵³ This is especially considering that there are a few (if any) treatment programmes designed for female sexual offenders so the chances of the offender being 'cured' of the motivators causing the behaviour is reduced compared to male offenders who are able to attend well established programmes. Sentencing guidelines state that a sentence should be the least restrictive so as to assist the offender in their rehabilitation (Section 8 Sentencing Act 2002), but until there are greater advances in treatment programmes for female offenders courts should treat this allowance with caution.

⁵⁴ Margaret Rudin et al, "Characteristics of Child Sexual Abuse Victims According to Perpetrator Gender" (1995) *Child Abuse & Neglect*, Vol 19 8 963-973

⁵⁵ *ibid*

⁵⁶ Karen Whitney, "The Seriousness of the Offence: Proportionality in Sentencing Sexual Offenders in Western Australia" [1996] *MurUEJL* 8

V CONCLUSION

Female offenders are not traditional sexual offenders. This is evidenced by the comments in decided cases and by the lack of reliable data on this type of offending. This lack of 'tradition' has appeared to have created some difficulties in the courts assessing appropriate sentences for these offenders. Some of these difficulties seem to occur due to the stereotyping of females as being less capable of intentional harm. Since female sexual offenders are not traditional it is suggested that these social stereotypes are not applicable. While this paper has focused mainly on gender differences that favour female offenders it is also possible that some stereotyping may also work against female offenders. In either situation there is a need for greater understanding as to how these offenders operate and how the offending impacts on society in general as well as individual victims.

There is also a need to have a greater understanding as to what differences there are between male and female sexual offenders so as to correctly attribute how their characteristics should fit into the sentencing guidelines. Although this paper has criticised gender differences in sentencing, it would not be desirable to completely disregard characteristics associated with a particular gender of sexual offender if this would lead to an under/over estimation of culpability. Instead the goal for sentencing should be achieving equality through recognition of how these differences actually do work in creating risk of offending.