

Hon. Mark Speakman SC MP, NSW Attorney-General
NSW Law Reform Commission
c/o Ms Erin Gough, Policy Manager
Law Reform and Sentencing Council Secretariat
NSW Department of Justice
GPO Box 31 Sydney 2001

28 June 2018

Dear Mr Speakman

RE: Review of s 61HA of the Crimes Act 1900 (NSW)

We are writing to send you our submission to the Review of section 61HA of the *Crimes Act 1900* (NSW). Please find our submission enclosed.

While we are not opposed to the review, we wish to sound a note of caution given the very specific issues arising in the *Lazarus* decisions (*R v Lazarus* [2017] NSWCCA 279; *R v Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017; *R v Lazarus* [2017] NSWCCA 52) that precipitated the review. These issues included errors in directions regarding the law of consent in sexual assault given by the trial judge, her Honours Judge Huggett, and the findings of fact that the re-trial judge, her Honour Judge Tupman, was compelled to make because of the way the evidence unfolded on re-trial.

As such, we urge the Law Reform Commission to proceed with caution in recommending reforms to section 61HA. We note that the review of s61HA conducted by the *Department of Attorney-General and Justice* in October 2013 concluded that the policy objectives of section 61HA of the Act remain valid, that the section has ‘not resulted in a significant increase in sexual assault trials’, nor ‘a high level of technical challenges’.¹ In addition, and crucially, the section remains firmly supported by victims’ representatives.²

We would welcome the opportunity to consult further with the Commission regarding this important topic of law reform. Please find our contact details below.

Best wishes

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¹ NSW Department of Attorney-General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (Sydney 2013), 5.

² *Ibid.*

1. Whether s 61HA should be amended, including how the section could be simplified or modernized

Since reforms in 2007,³ section 61HA has provided the definition of consent that applies to the offences of sexual assault, aggravated sexual assault and aggravated sexual assault in company in Sections 61I, 61J and 61JA, *Crimes Act 1900* (NSW), respectively. As a result of these changes, as well as preceding changes to the definition of the offence, the law on sexual assault has been ‘codified’ in NSW.⁴

Consent plays a central role in the law of sexual assault. Consent functions as a part of the conduct element of the offence – the absence of victim’s consent is the circumstance that makes the conduct an offence – but it is the role of consent in the fault element of the offence – the defendant’s lack of belief in consent – that is the most controversial. Since the 1970s, in Australia and elsewhere, the emphasis has shifted from ‘resistance’ to ‘consent’,⁵ and in the recent period, toward the inclusion of an objective basis for determining belief in consent (broadly, around the reasonable basis for the defendant’s belief that the victim was consenting).⁶ The 2007 reforms in NSW reflect this change.

Section 61HA provides what has been called a ‘communicative model of consent’ in that it requires a person to have reasonable grounds for believing that another person consents to sexual intercourse with him or her, and requires the trier of fact to have regard to all the circumstances of the case (including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse).⁷ The purpose of the section is to send a clear message that a person having sex must be certain of the consent of the other party.

Broadly, it is our view that s61HA strikes the right balance in protection of the accused and fairness to him or her, consistent with the seriousness of the offence of sexual assault, on the one hand, and consideration of the victim via the objective element of the section (providing that ‘a person knows another person does not consent to sexual intercourse if the person has no reasonable grounds for believing that the other person consents’ in s61HA(3)(c)), which reflects the need for the criminal law to better respond to the experiences of victim/survivors. This section also serves an educative function in identifying acceptable standards in intimate relations.

We note that in 2013, the *NSW Department of Attorney-General and Justice* review of s61HA concluded that the policy objective of the statutory definition – ‘to give guidance as to what constitutes consent and to provide a more contemporary and appropriate definition than the common law definition’ – is satisfied.⁸

³ *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* (NSW).

⁴ David Brown et al., *Criminal Laws* 6th Ed. (Federation Press, 2015), 671.

⁵ See Julia Quilter ‘From Raptus to Rape: A History of the Requirements of Resistance and Injury’ (2015) 2 *Law & History*, 89-113.

⁶ David Brown et al., *Criminal Laws* 6th Ed. (Federation Press, 2015), 671

⁷ *Ibid.*, 22.

⁸ NSW Department of Attorney-General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (Sydney 2013), 8.

Changes to s61HA should be contemplated only if they will further this policy objective, and if there is a need to enhance the protections offered to victims at the same time as protecting the rights of those accused of sexual assault and related offences.

From public reporting and debate, two possible amendments to s61HA are:

1. *Change the definition of consent*: amend s61HA so that a person does not ‘freely and voluntarily agree’ to the sexual intercourse if they do not say or do anything to communicate (or indicate) consent. Such an amendment would bring NSW into line with Victoria and Tasmania. The laws in these jurisdictions provide for what is known colloquially as ‘enthusiastic consent’.⁹ We note that Tasmania only stipulates that failure to say no cannot be taken as evidence of agreement.¹⁰
2. *Clarify the law in relation to knowledge of consent in s61HA(3)(d)*: clarify the requirement in s 61HA(3)(d) that the ‘trier of fact must have regard to all the circumstances of the case: (d) including *any steps taken by the person* to ascertain whether the other person consents...’ (emphasis added).

We address each of these possible amendments in turn.

1. *Changing the definition of consent*:

At the outset, we note that changing the definition of consent to preclude the trier of fact from finding that consent is present in circumstances where the complainant does not say or do anything to communicate (or indicate) consent is unlikely to have made any difference to the outcome of the *Lazarus* case. In the *Lazarus* case, there was conflicting evidence on whether or not the victim did or said things to indicate consent. Ultimately the judge made a finding of fact that while the victim did not consent in her own mind,¹¹ she had done things that indicated consent¹², therefore such a provision would not have resulted in the conviction of the defendant.

We understand that the rationale for this change would be to rid the criminal law of what has been called the ‘presumption of consent’.¹³ That is, it would clarify the difference between consent and submission. As Professor Gail Mason and Mr James Monaghan say in their submission to this Commission, ‘it may focus the attention of the fact finder on whether there is evidence to support the presence of consent rather than evidence that supports the absence of dissent.’¹⁴

As a matter of principle, there are reasons to support this proposed change to the definition of consent. Whereas under the current law prosecutors are likely to be reluctant to proceed with

⁹ Michaela Whitbourn, ‘Enthusiastic yes! NSW announces review of sexual consent laws’ *Sydney Morning Herald*, 8 May 2018 <<https://www.smh.com.au/national/nsw/enthusiastic-yes-nsw-announces-review-of-sexual-consent-laws-20180508-p4zdyn.html>>

¹⁰ *Criminal Code Act 1924* (Tas), Schedule 1, s2A(2)(a).

¹¹ *R v Lazarus* (Unreported, District Court of New South Wales, Tupman DCJ, 4 May 2017 at pp. 30, 32, 40, 41, 70, 72, 73

¹² *Ibid*, pp. 34, 40.

¹³ Gail Mason and James Monaghan NSW Law Reform Commission: Review of Consent in Relation to Sexual Assault Offences, June 2018, 2; Bernadette McSherry, ‘Rape Law Reform in Victoria: Can Legislation Change Social Attitudes?’ (1993) 18(1) *Alternative Law Journal* 27.

¹⁴ Mason and Monaghan, 3.

a case where the victim has said or done nothing to indicate non-consent, the proposed change may encourage them to run such cases. The clarification of consent for the purposes of the conduct element as requiring a form of active assent would serve to underline the importance of seeking consensus in sexual encounters. A framework of positive agreement may also assist juries in understanding that inaction does not necessarily mean consent.¹⁵

Nevertheless, such an amendment will not alleviate many of the problems faced by complainants at trial as scrutiny will remain on their every word, gesture, action and omission at the time of the sexual intercourse. Moreover, even if such an amendment is made, the prosecution must still prove the requisite mental element.

Overall, we are not convinced that the definition of consent should be amended. We believe the focus of any reform should be knowledge of consent, as we now discuss.

2. Clarify the law in relation to knowledge of consent under s 61HA(3)(d):

The possible amendments in relation to s61HA(3)(d) suggest that the word ‘steps’ should be interpreted to require a positive act on the part of the defendant.¹⁶ Some go so far as to suggest that the defendant be required to ask the complainant whether they consent.¹⁷ These proposals have arisen from the CCA’s interpretation of ‘steps’ in *R v Lazarus* to ‘include a person’s consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.’¹⁸ Assessing the value of these amendments requires some analysis of s61HA(3)(d).

As currently worded, s 61HA(3) requires the trier of fact, when considering whether they are satisfied beyond reasonable doubt (‘BRD’) that a defendant had knowledge of a lack of consent, to ‘have regard to all the circumstances of the case’. In this way, attention is placed more squarely on the actions and omissions of the accused, rather than just those of the complainant. By virtue of s61HA(3)(d), these circumstances include ‘any steps taken by the person to ascertain whether the other person consents’. A finding of fact that the defendant did not take any steps to ascertain consent does not necessarily mean that the defendant has knowledge of lack of consent. However, in practice it would be difficult for a defendant to raise a reasonable doubt about knowledge, or to raise evidence of reasonable grounds for a belief in the presence of consent, if they did not even undertake the internalised subjective ‘steps’ referred to by the CCA in *R v Lazarus*.¹⁹

It seems that there are two possible ways that s61HA(3)(d) might be amended. The first, and most minimal, would be to add the word ‘physical’ or ‘verbal’ to s61HA(3)(d) as follows²⁰:

‘For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

¹⁵ Mason and Monaghan, 3

¹⁶ Mason and Monaghan, 6

¹⁷ Mason and Monaghan, although it must be noted that Mason and Monaghan do not suggest that s61HA(3)(d) should be changed. Rather, their view is that the section accommodates such an interpretation (at 6), but they favour an interpretation that ‘steps’ requires positive action (at 7).

¹⁸ *R v Lazarus* [2017] NSWCCA 279, [147]

¹⁹ *R v Lazarus* [2017] NSWCCA 279, [147]

²⁰ Andrew Dyer, Submission to the NSW Law Reform Commission’s Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences, June 2018, 11

(d) including any *physical or verbal* steps taken by the person to ascertain whether the other person consents to the sexual intercourse' (emphasis added).

We are supportive of making these changes to this section.

A more extreme amendment would be akin to the Tasmanian provision, namely:

*'A mistaken belief by the accused as to the existence of consent is not honest and reasonable if the accused did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.'*²¹

We would caution strongly against this more extreme version and against adding a requirement that the accused person ask the victim whether they consent before reasonable grounds for a belief in the presence of consent may be established. We agree with Andrew Dyer's submission that such a change would make the offence of sexual assault one of absolute liability.²² This would be an unprecedented step for such a serious offence and would have the potential to result in unjust convictions.

Although Victoria has amended the definition of consent as set out above, its provision relating to knowledge of consent accords with the current NSW provision. To introduce a requirement that a defendant satisfy the tribunal of fact of the possibility that they asked the complainant whether they consented does not accord with an understanding of human sexual relations, and consequently would result in unfairness to accused persons. Innumerable instances of consensual sexual intercourse occur in the absence of words, and such instances are not morally problematic.

The potential for injustice would be compounded if the definition of consent was changed as suggested above to eliminate the possibility of consent where a complainant had said or done nothing to indicate consent.

We are aware that some commenters believe that such an amendment would serve as a tool for educating the public about respectful sexual relations. While the criminal law is increasingly used to educate the public about community values,²³ there is evidence that it is not an effective tool, particularly for offences that are impulsive or that occur in circumstances of high emotion.²⁴ Instead we urge that concurrent dialogue with the public be generated – one that challenges the sometimes presumed sexual rights of men in particular, that explicitly articulates modes of respectful communication and negotiation of sexual encounters, that recognises that human intimacy is not a delineated series of events, and that creates an understanding of other people's bodily and sexual autonomy.

At the same time, given the judicial errors made manifest in the various *Lazarus* proceedings, clarification of judicial directions is required. We suggest this issue should be considered by the Law Reform Commission.

²¹ *Criminal Code Act 1924* (Tas) s 14A(1)(c).

²² Andrew Dyer, Submission to the NSW Law Reform Commission's Review of Consent and Knowledge of Consent in Relation to Sexual Assault Offences, June 2018, 9.

²³ Drink-driving and non-fatal domestic violence are two examples.

²⁴ Mirko Bagaric and Richard Edney summarise the relevant empirical evidence in *Sentencing in Australia* (Lawbook Co, 4th ed, 2017) 181-209, see especially 187 and 197.

2. All relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system

We would like to focus on here on the procedural and evidentiary issues associated with s61HA.

The prosecution of Luke Lazarus failed because of the way the evidence unfolded. For this reason, had the law been changed as discussed above, it may not have changed the outcome of the case.

The complainant did not give evidence at the re-trial as permitted by s306B of the *Criminal Procedure Act 1986* (NSW), except to clarify some minor issues as permitted by s 306D. There were several portions of the complainant's evidence that required explanation. In the absence of an explanation, the judge was unable to be satisfied of the reliability of the complainant's evidence. For example, Judge Tupman said that on the CCTV footage:

'[t]he complainant points up towards the stairs where she has just come down. At trial she was never asked to explain why she did that, either at the first trial, nor was there an application by the Crown to clarify that evidence with her in the trial before me.'²⁵

The relevance of this evidence is that the Prosecution argued that 'in pointing up towards the dance floor, [the complainant] was pointing up towards her friend and the accused knew that.' The accused denied knowing why she pointed upstairs. In those circumstances the trial judge could not be satisfied BRD of the Prosecution's version of events.

See also the concessions made by the complainant, e.g., pp 30–1, 39. This portion of the evidence, and others like it,²⁶ suggest that prosecutors need specialised training on how to elicit evidence from complainants of sexual assault to ensure that there are no gaps in their evidence.

It also suggests that while s 306B of the *Criminal Procedure Act 1986* (NSW) was introduced to spare complainants the trauma of testifying on more than one occasion, the provision can preclude the strongest case from being put on re-trial.

Another factor that caused the prosecution to fail was the judge's analysis of the actions of the complainant. The main passages are on pages 31–35. E.g., at 33:

'At trial the complainant was not asked to explain why she agreed to stay, why she agreed to turn and face the fence, why she did not pull her undies up the second time the accused pulled them down and why she took no other action to leave...'

This portion of the judgment suggests a need for prosecutors and judges to be trained in the behavioural responses of victims during and following sexual assault and in particular regarding why sexual assault complainants may simply submit, or 'freeze', as it was put on 4 Corners.

²⁵ *R v Luke Andrew Lazarus* 4 May 2017, Tupman J, 26.

²⁶ See e.g., analysis of the complainant holding up her left hand, at *ibid* 27.

3. Sexual assault research and expert opinion

Shortcomings in questioning the complainant in the *Lazarus* case which led to a failure in eliciting relevant evidence that could explain and contextualise the complainant's behaviour, indicate the need for judicial notice of, or expert evidence to be led on how a victim of sexual assault may behave during, or following such assault.

The trier of fact must be furnished with all relevant evidence that will assist them to be satisfied that the behaviour of the complainant in the case before them *was in fact* a result of 'freezing' or similar response, and not because the complainant was consenting.

Relevance and use of research on behavioural responses of victims to sexual assault

Unlike many other trials of criminal allegations, in sexual assault trials there is often a shift in focus from the conduct of the accused to the conduct of the complainant, especially in cross-examination of the complainant.²⁷ Sexual assault cases typically also involve "word against word", with little to no other corroborating eyewitnesses or forensic evidence, and therefore the perceived credibility and consistency of the complainant is likely to influence verdicts.²⁸ Inferences will depend on the expectations and beliefs held by the court and jurors of how sexual attacks typically take place and how victims typically respond;²⁹ research suggests that these are very often incorrect or incomplete.³⁰ These incorrect beliefs or misunderstandings can nevertheless form a crime schema that the trier of fact can use to inform fact-finding and attributions of blame.³¹ Defence lawyers often seek to initiate or perpetuate myths about rape, and studies show that prosecutors and judges on the whole insufficiently challenge these.³²

Research indicates that victims may respond in multiple ways to a sexual attack, and that one such response which is not uncommon, is to "freeze".³³ In one study involving 440 victim statements it was found that in 121 cases, no victim resistance was evident, though in about half of these cases the victim was incapacitated to some degree.³⁴ Another study reported that only 20 to 25 percent of women use forceful physical resistance in response to rape situations.³⁵ A further study found over 80 different behaviours of victims in response to a sexual attack by a stranger, and that 8 percent of female victims froze, 40 percent of victims did not report struggling, and over half of victims did not seek help through verbal means

²⁷ Annie Cossins, 'Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England' (2013) 17 *The International Journal of Evidence & Proof* 74, 79-81.

²⁸ Cossins (2013) 82.

²⁹ Kerri L Pickel and Rachel H Gentry 'Mock jurors' expectations regarding the psychological harm experienced by rape victims as a function of rape prototypicality (2017) 23(3) *Psychology, Crime & Law* 254-256.

³⁰ Cossins (2013) 87, 95, 97.

³¹ Pickel and Gentry (2017) 256.

³² Jennifer Temkin, Jacqueline M Gray, and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2018) 13(2) *Feminist Criminology* 205, 222; Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7(4) *Feminist Criminology* 298, 317.

³³ Fiona Mason and Zoe Lodrick, 'Psychological consequences of sexual assault' (2013) 27 *Best Practice & Research Clinical Obstetrics and Gynaecology* 27, 29.

³⁴ Andy Feist, Jane Ashe, Jane Lawrence, Duncan McPhee and Rachel Wilson, 'Investigating and detecting recorded offences of rape' (Home Office Online Report 18/07, 2007) 20-1.

³⁵ Sarah E Ullman, 'A 10-Year Update Of "Review and Critique of Empirical Studies of Rape Avoidance"' (2007) 34(3) *Criminal Justice and Behavior* 411, 413.

such as shouting or screaming.³⁶ Evidence is that victims are often afraid that struggle or resistance will lead to their injury or death, and/or are affected by a “paralyzing effect of fear” which inhibits their ability to shout, move or flee.³⁷ Where the sexual attacker is an intimate partner, there are further reasons why resistance may not occur, including feeling a duty to submit, a desire to protect children, a knowledge from past experience that resistance was futile, or a lack of preparedness psychologically or physically to fight.³⁸

However, there is a prevailing belief in the community that non-consenting participants in sexual activity will naturally undertake resistance, and the misapprehension that non-resistance to sexual advances is “closely tied” with consent and sexual willingness.³⁹ Ellison and Munro in their research studied mock juries in mini-trial scenarios and found that there was an “unshakeable” commitment to the belief that victims would normally respond to a sexual attack with physical struggle.⁴⁰ Freeze responses by victims to the sexual encounter often undermined the credibility of the victim, especially where the sexual attacker was previously known to them.⁴¹ There was also an expectation that a “genuine” freeze reaction would be accompanied by internal or vaginal trauma, fuelled by beliefs that freeze responses rigidify pelvic muscles or that intercourse without trauma is evidence of the woman’s arousal.⁴² A victim who froze due to fear and shock and then made a prompt complaint to the police was also often viewed as exhibiting an abnormally rapid change in behaviour.⁴³

These findings are consistent with other research studies showing that a complainant’s lack of physical resistance to a sexual attack undermines the perceived validity of their complaint, in particular their non-consent, and that resistance is a “key concern” in a jury’s decision-making.⁴⁴ Victims who do not resist are blamed the most, though there are moderating variables including decision-maker characteristics, victim characteristics and victim-perpetrator relationship.⁴⁵ Indeed, Sleath and Woodhams found that university student

³⁶ Jessica Woodhams, Clive R Hollin, Ray Bull and Claire Cooke, ‘Behavior Displayed by Female Victims During Rapes Committed by Lone and Multiple Perpetrators’ (2011) 18(3) *Psychology, Public Policy, and Law* 415, 433, 443-4.

³⁷ Temkin, Gray and Barrett (2018) 211.

³⁸ Ullman (2007) 419.

³⁹ Benjamin Hine and Anthony Murphy, ‘The impact of victim-perpetrator relationship, reputation and initial point of resistance on officers’ responsibility and authenticity ratings towards hypothetical rape cases’ (2017) 49 *Journal of Criminal Justice* 1, 4.

⁴⁰ Louise Ellison and Vanessa E Munro, ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009a) 49(2) *The British Journal of Criminology* 202, 206.

⁴¹ Ellison and Munro (2009a) 207.

⁴² Ellison and Munro (2009a) 207.

⁴³ Ellison and Munro (2009a) 210.

⁴⁴ Regina A Schuller, Blake M McKimmie, Barbara M Masser and Marc A Klippenstine, ‘Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes’ (2010) 13(3) *New Criminal Law Review: An International and Interdisciplinary Journal* 759, 776; Sokratis Dinos, Nina Burrowes, Karen Hammond and Christina Cunliffe, ‘A systematic review of juries’ assessment of rape victims: Do rape myths impact on juror decision-making?’ (2015) 43 *International Journal of Law, Crime and Justice* 36, 46; Blake M McKimmie, Barbara M Masser and Renata Bongiorno, ‘What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant are Perceived’ (2014) 29(12) *Journal of Interpersonal Violence* 2273, 2295-6 but see Calvin M Sims, Nora E Noel and Stephen A Maisto, ‘Rape blame as a function of alcohol presence and resistance type’ (2007) 32 *Addictive Behaviors* 2766, 2773.

⁴⁵ Madeleine van der Bruggen and Amy Grubb, ‘A review of the literature relating to rape victim blaming: An analysis of the impact of observer and victim characteristics on attribution of blame in rape cases’ (2014) 19 *Aggression and Violent Behavior* 523, 525-6.

expectations of the behaviours of victims of stranger rape were “significantly different” to the average occurrence of all 30 behaviours examined in empirical research.⁴⁶

Stereotypical representations of rape as an outdoor crime committed by a stranger who uses violence to overpower his victim are important in moulding perceptions of a “normal” incidence of sexual violence in jury populations that can be at odds with research findings.⁴⁷

The use of expert evidence on the responses of victims of sexual assault

Although statements of opinion are generally inadmissible in trials, expert witnesses may sometimes provide opinions where they will enable the trier of fact to draw inferences not otherwise apparent to them, and so assist the fact-finding or decision-making process.⁴⁸ Section 79 of the *Uniform Evidence Acts* makes such provision.

The effect of expert evidence on juror perceptions of sexual violence is equivocal. In a study for example, undertaken by Ellison and Munro jurors were found to be “generally unreceptive” to expert testimony or judicial instruction that victims may freeze or dissociate during sexual attacks rather than resist: informed jurors generally expressed similar beliefs to uninformed jurors.⁴⁹ This was especially so where an attack was committed by a stranger, at the victim’s home, or without physical injury being occasioned.⁵⁰ However, expert evidence in relation to the complainant’s courtroom demeanour and any delay in reporting led to shifts in assessment.⁵¹

Nevertheless, expert evidence and judicial directions on rape myths may also serve other purposes including public recognition of such falsehoods, and reduction in shame and feelings of responsibility on the part of the victim.⁵²

In NSW the *Evidence Act* does not address the admissibility of expert evidence related to the behaviour of victims of sexual assault generally. Provision however is explicitly made regarding the admissibility of evidence pertaining to “the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences.” (79(2)(b)(ii)) This provision permits for evidence to be adduced regarding behavioural responses of victims of child sexual assault during, and/or following such abuse. This provision has been understood as providing a means through which “counterintuitive” evidence can be presented to the court and trier of fact, and as a vehicle to “educate” jurors and dispel possible misconceptions regarding the behavioural responses of victims of child sexual offences. Accordingly, this evidence is admitted on the basis that it is relevant to the

⁴⁶ Emma Sleath and Jessica Woodhams, ‘Expectations about victim and offender behaviour during stranger rape’ (2014) 20(8) *Psychology, Crime & Law* 798, 812.

⁴⁷ Stevenson (2011) 121; McKimmie, Masser and Bongiorno (2014) 2275; Genevieve F Waterhouse, Ali Reynolds and Vincent Egan, ‘Myths and legends: The reality of rape offences reported to a UK police force’ (2016) 8 *The European Journal of Psychology Applied to Legal Context* 1, 3.

⁴⁸ Holly Hill, ‘Rape Myths and the Use of Expert Psychological Evidence’ (2014) 45(3) *Victoria University of Wellington Law Review* 471, 475.

⁴⁹ Louise Ellison and Vanessa E Munro, ‘Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009b) 49 *The British Journal of Criminology* 363, 372.

⁵⁰ Ellison and Munro (2009b) 372.

⁵¹ Ellison and Munro (2009b) 374.

⁵² Jennifer Temkin, ‘“And Always Keep A-hold of Nurse, for Fear of Finding Something Worse”: Challenging Rape Myths in the Courtroom’ (2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 710, 732-3.

trier of fact properly assessing all the evidence in a case and “serves the purpose of ‘neutralis[ing] the effect of unjustified assumptions about how victims of sexual abuse are likely to behave’”.⁵³

Precedent for the admissibility of similar evidence in the case of adult victims of sexual assault is limited. In 2014, an Australian Capital Territory court accepted as admissible the evidence of an expert on medical and forensic sexual health, that sought to inform the court of the prevalence and mechanisms of the freeze response to a sexual attack.⁵⁴ In 2004, the Victorian Law Reform Commission recommended that the *Evidence Act 1958* (Vic) be amended to clarify that expert evidence about sexual assault is admissible, including evidence on its nature and dynamics, and evidence on social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted.⁵⁵ The Commission found that such expert evidence was rarely led and/or found inadmissible, as firstly it was often perceived as not relevant, and secondly sexual behaviour has traditionally been perceived as within common knowledge and a matter about which ordinary people can form a sound judgement without assistance.⁵⁶ It was the tendency for juries to be influenced by their own experience and attitudes including misapprehensions about sexual assault that led the Commission to recommend the clarification. In 2015, the New Zealand Law Reform Commission considered that the use of expert psychological evidence to address misconceptions in sexual violence cases should not be “ruled out”, but should be assessed on a “case-by-case basis according to whether there is someone who is well-placed to do this and whether the prosecution thinks it is required”.⁵⁷ The Commission was not aware however, of any cases where expert evidence was adduced where the complainant was an adult.⁵⁸

The potential utility of amending the evidence legislation to specifically address admissibility of expert evidence related to the behavioural responses of victims of sexual assault generally should be carefully considered by the Law Reform Commission.

⁵³ Holly Hill, ‘Rape Myths and the Use of Expert Psychological Evidence’ (2014) 45(3) *Victoria University of Wellington Law Review* 471, 477.

⁵⁴ <https://www.canberratimes.com.au/opinion/jury-convicted-by-expert-evidence-on-freeze-fright-response-in-rape-victims-20140406-zqrkd.html>; <https://www.canberratimes.com.au/national/act/fright-freeze-precedent-will-change-consent-in-act-rape-trials-20140406-3673r.html>

⁵⁵ Victorian Law Reform Commission, *Sexual Offences: Final Report* (July 2004) 406.

⁵⁶ Victorian Law Reform Commission (2004) 403.

⁵⁷ New Zealand Law Reform Commission, *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Report 136, 2015) 119-20.

⁵⁸ New Zealand Law Reform Commission (2015) 119.

4. The impact or potential impact of relevant case law and developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia, and internationally, on the content and application of s 61HA

In broad terms, developments in consent law, policy and practice in Australia, and in comparable common law jurisdictions, all point in the direction of enhanced accommodation of the principle of sexual autonomy and the protection of victim/survivors. As in NSW, this imperative has resulted in the inclusion of a positive definition of consent, and the provision of an objective fault element in the *mens rea* sexual offences. These are positive changes that mark the modernisation of the law of sexual assault.

Developments in Australian law are broadly consistent with international developments. For example, in England and Wales, which reformed the law in 2003 but has retained the offence of rape, the fault element is A's lack of reasonable belief in B's consent, and a reasonable belief in consent is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.⁵⁹ As this suggests, the fact finder must have regard to the steps (if any) the defendant took to determine that there was consent.⁶⁰ These provisions informed the amendment to the law in NSW that resulted in s61HA.⁶¹ In addition, the definition of consent in NSW is broadly similar to the definitions in Canada, New Zealand and England and Wales.⁶²

We note that, while there was some opposition to the introduction of s61HA in 2007,⁶³ the general absence of appeals on directions on consent in the time since then (with the exception of *Lazarus*) is a very positive sign of the appropriateness and indeed the success of this provision.

⁵⁹ *Sexual Offences Act 2003* (England and Wales), s1.

⁶⁰ Jennifer Temkin and Andrew Ashworth 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' (2004) *Criminal Law Review* 328.

⁶¹ See Ian Dobinson and Lesley Townsley 'Sexual assault law reform in New South Wales: Issues of consent and objective fault' (2008) 32 *Criminal Law Journal* 152, 153-4.

⁶² *Ibid.*

⁶³ See NSW Department of Attorney-General and Justice, *Review of the Consent Provisions for Sexual Assault Offences in the Crimes Act 1900* (Sydney 2013).

5. Any other matters that the NSW Law Reform Commission considers relevant

We wish to encourage the Law Commission to acknowledge the gendered nature of sexual violence: we acknowledge that while men are also victimised, it is important to note that it is predominately women who are victim/survivors of sexual assault. This means that attitudes to women, stereotypes and gendered norms about relations between intimate partners are informing the legal processes around sexual assault.

As a result of feminist and activist efforts, Australian criminal jurisdictions are now leading the way in progressive law reform of sexual assault. Since the 1970s, what was then the offence of rape and rape law reform has been the site of ongoing feminist agitation around criminal laws, pre-trial and prosecution processes, including improving police practices, removing barriers to successful prosecution and enhancing punishment. As a result of successive waves of law reform on matters such as questions at trial about victims' prior sexual history, the definition of what is now the offence of sexual assault (away from the sex-specific offence of rape which focused on violence),⁶⁴ sexual assault law has been modernised.⁶⁵

As discussed above, the 2007 reforms introducing s61HA into the *Crimes Act 1900* represented the most profound change to the law in NSW. The introduction of an objective basis for determining belief in consent, coinciding the introduction of a positive definition of consent (as 'free and voluntary'), has been a very positive change, operating to reduce the scope for some of the discriminatory stereotypes and misogynistic myths about women's sexuality that have animated the most egregious aspects of this area of criminal law.⁶⁶ At this point when further reform is being considered, it is important to recall that these reforms were intended to better accommodate women's experiences of sexual assault – that they did not consent to sex – in trial outcomes.

Major issues around justice for women remain; these include empirical evidence that women victim/survivors feel they are on trial, that they do not feel their voices are heard at trial, and the disadvantages women with disabilities, and women of colour and Indigenous women have in achieving justice following sexual assault.⁶⁷ Addressing these issues goes well beyond law reform, requiring substantive change in policing and other practices, and additional resources for community legal centres and rape crisis centres.

While beyond the scope of this reference, it is vital to keep the complexities of this issue – and the lived reality of victimisation – firmly in mind in the process of reforming the law.

⁶⁴ Royal Commission on Human Relationships, *Final Report* (Canberra, 1977), Part VII, 227- 231. The Royal Commission argued for an understanding of rape as an offence of violence, rather than a sexual offence, and made recommendations for reform of the law to reduce the significance of consent and align rape with non-sexual assaults.

⁶⁵ See eg Julia Quilter, 'Re-framing the rape trial: Insights from critical theory about the limitations of legislative reform' *Australian Feminist Law Journal* 35(1) (2011): 23-56.

⁶⁶ See for discussion Ngaire Naffine, *Feminism and Criminology* (Allen and Unwin, 1987).

⁶⁷ See eg Jennifer Keilty and Georgina Connelly 'Making a statement: An exploratory study of barriers facing women with an intellectual disability when making a statement about sexual assault to police' (2001) 16(2) *Disability & Society* 273-291; Natalie Taylor, Judy Putt, and Toni Makkai 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia' (2007) *Trends & Issues in Crime & Criminal Justice* 345.