Rape & Domestic Violence Services Australia

Submission to the NSW Law Reform Commission review of consent in relation to sexual offences

Rape & Domestic Violence Services Australia (R&DVSA)

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Domestic Violence NSW

Women's Domestic Violence Court Advocacy Service NSW Inc.

End Rape on Campus Australia

Youth Action

Wagga Women's Health Centre Inc.

Table of Contents

1. Background

1.1. Rape & Domestic Violence Services Australia (R&DVSA) thanks the NSW Law Reform Commission (NSWLRC) for the opportunity to contribute to the *Review of consent in relation to sexual offences.*

1.2. R&DVSA is a non government organisation that provides a range of counselling services to people who have experienced sexual, family or domestic violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have experienced or have been impacted by sexual violence and their professional or non-professional supporters; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers who are seeking to escape domestic or family violence.

1.3. In making this submission, we acknowledge the role played by R&DVSA in developing the current law dealing with consent in NSW through our participation as a member of the Criminal Justice Sexual Offence Taskforce ("the Taskforce"). The Taskforce was established in December 2004 to "advise the Attorney General on ways to improve the responsiveness of the criminal justice system to victims of sexual assault".[1] One of the key outcomes of the review was the introduction of s 61HA into the *Crimes Act 1900* (NSW) (the Crimes Act).

1.4. At the time of reform in 2007, R&DVSA expressed support for the key features of s 61HA. These include a statutory definition of consent based on 'free and voluntary' agreement; a list of circumstances that vitiate consent; and a partially objective fault element. In 2013, R&DVSA again expressed support for s 61HA in our submission to the Department of Attorney General and Justice's *Review of Consent Provisions for Sexual offences.*

1.5. However, over the past five years, it has become increasingly clear that s 61HA has failed to achieve its key policy objective to implement a communicative, or affirmative, model of consent. As such, R&DVSA now believes that further reforms are necessary to crystallise the ideal of communicative consent from policy into practice.

2. Language and terminology

2.1. In this submission, R&DVSA uses the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is designed to emphasise the violent nature of all sexual offences, and is not limited to those offences that involve physical force and/or injury.

2.2. R&DVSA uses the term *people who have experienced sexual violence* rather than the terms survivors or victims. This is in acknowledgement that, although experiences of violence are often very significant in a person's life, they nevertheless do not define that person.

2.3. R&DVSA uses gendered language when discussing sexual, family and domestic violence. This reflects the fact that sexual, family and domestic violence are perpetrated by men against women in the vast majority of cases. However, we acknowledge that women can also be perpetrators of these kinds of violence.

2.4. Some other key terms used throughout this submission are defined below:

2.4.1. *Communicative or affirmative consent* is characterised in the affirmative rather than the negative – as the positive act of communicating 'yes' rather than the mere

[1] NSW Attorney General's Department, *Responding to sexual assault: The way forward* (December 2005), iii.

absence of a communicated 'no'. The goal of this model is to displace the former legal standard that equates submission with consent, instituting in its place an affirmative model which obligates each party to communicate in order to reach a mutual agreement before engaging in sexual contact.

2.4.2. *Rape myths* are defined by Gerger et al as "descriptive or prescriptive beliefs about sexual aggression (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexually aggressive behaviour that men commit against women."[2]

2.4.3. *Victim-blaming attitudes* are beliefs that imply that the person who has experienced sexual violence was to blame, or partially to blame, for what happened, as a result of their choice to engage in behaviours deemed risky such as wearing particular clothes, consuming drugs or alcohol, behaving in a flirtatious way, or engaging in sex work.[3]

3. Overview

3.1. R&DVSA supports the theoretical underpinnings of the current law of consent As stated by the Department of Justice, s 61HA was designed to reflect "the increased equality in today's sexual relationships, and the dialogue that should take place between individuals prior to sexual intercourse to reach a necessary mutuality of understanding in relation to consent."[4] These principles align closely with the ideal of communicative, or affirmative, consent.

3.2. However, we are concerned that s 61HA has not operated as intended. In particular, the ideal of communicative consent has failed to translate from policy to practice.

3.3. In Section 6, R&DVSA makes recommendations for legislative reform. These recommendations are guided by two objectives: to provide a clearer endorsement of the communicative model of consent; and to better capture sexual violence that occurs within the context of family or domestic violence.

3.4. However, R&DVSA believes that to achieve these objectives, statutory reform must also be accompanied by more fundamental changes to the criminal justice system. This is because the implementation of consent law is significantly affected by factors beyond the drafting of legislation – most notably:

3.4.1. The personal attitudes, knowledge and expertise of legal actors; and

3.4.2. The availability of support services to assist people who have experienced sexual violence to access the criminal justice system.

3.5. As such, the remainder of our submission focuses on issues of practical application. In Section 8, we make the case for specialised sexual violence courts that bring together specialist legal actors and a coordinated system of support in order to facilitate a trauma response to sexual violence. In Section 9, we consider the suitability of juries as the fact-finder in sexual offence matters and raise several possible options for reform. Finally, in Section 10 we outline the need for broader community education, training and support for sexual assault services in order to support the implementation of legal reforms.

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[2] H. Gerger, H. Kley, G. Bohner, F. Siebler, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33(5) *Aggressive Behavior* 422, 423.
[3] Our Watch, *Reporting on Sexual Violence* (September 2014), 2.
[4] NSW Department of Attorney General and Justice, *Review of the Consent Provisions* (October 2013), 4.

4. Full list of recommendations

- **Recommendation 1:** A taskforce should be established to conduct a comprehensive review of the criminal justice response to complaints of sexual offences. The taskforce should comprise all relevant stakeholders including government and non-government agencies, legal actors, sexual assault service providers, academics and, if willing, those who have experienced sexual violence.

- **Recommendation 2:** Section 61HA should be amended in order to provide a clearer endorsement of the communicative model of consent.

- **Recommendation 3**: Section 61HA should be amended to better capture sexual violence within the context of family and domestic violence. This should be achieved by:
  a) Amending s 61HA(6)(b) to state that consent may be vitiated "if the person has sexual intercourse because of fear of harm of any type against the complainant, another person, an animal, or damage to property"; and
  b) Inserting a new provision to clarify that in circumstances of family or domestic violence, actual threats or coercive behaviour need not be immediately present in order for s 61HA(6)(b) to apply.

- **Recommendation 4**: A specialist sexual violence court should be established with the objective to bring together specialist personnel to facilitate a trauma approach that centres the needs of those who experience sexual violence, while upholding the accused's right to a fair trial.

- **Recommendation 5**: A specialist court should adopt a trauma approach that aims to facilitate healing and recovery.

- **Recommendation 6:** All personnel involved in sexual offence trials including judicial officers should be required to undertake thorough and ongoing training in relation to sexual, family and domestic violence. This training should cover:
  a) The dynamics, complexities and impacts of sexual violence, including sexual violence perpetrated within the context of domestic or family violence;
  b) The impacts and presentations of complex trauma;
  c) The principles of trauma practice;
  d) Cultural competency when working with Aboriginal and Torres Strait Islander people, people from a culturally and linguistically diverse (CALD) background, people with a disability, and lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people.

- **Recommendation 7:** Judicial officers presiding over sexual assault matters should be required to meet two preconditions before appointment:
  a) The judicial officer must meet the necessary education requirements, outlined in Recommendation 6; and
  b) The judicial officer must be considered a suitable person to deal with matters of sexual violence by reason of their training, experience and character.

- **Recommendation 8:** A specialist sexual violence prosecution unit should be established in NSW.

- **Recommendation 9:** A statutory time limit should be imposed to ensure that sexual offence trials are dealt with as speedily as possibly. To ensure effective implementation, this initiative should be supported by appropriate resources and guidelines for pro-active case management and a streamlined process.

- **Recommendation 10:** A specialist sexual violence court should provide a case managed, "wrap-around" system of support services that targets the specific needs of those who have experienced sexual violence and their families.

- **Recommendation 11**: A specialist sexual violence court should facilitate independent legal representation for complainants throughout the criminal justice process.

- **Recommendation 12:** All professionals working within a specialist sexual violence court must have access to a best practice vicarious trauma management program. This program should incorporate education, risk reduction, monitoring, early intervention and offsetting symptom strategies.

- **Recommendation 13:** Reforms should be implemented to address problems associated with the use of juries as the fact-finder in sexual violence matters. This may be achieved by eliminating the use of juries in sexual offence trials or by implementing reforms designed to improve juror decision-making.

- **Recommendation 14**: The NSWLRC should consider whether a specialist sexual violence court may facilitate alternative outcomes, such as referrals to behaviour change programs for defendants.

- **Recommendation 15**: If a system of specialist judges for sexual violence matters is adopted, the current model of jury trials should be replaced with judge-alone trials. However, this recommendation should not be implemented unless specialist judges are subject to eligibility and training requirements which guarantee their suitability to determine sexual violence matters (see Recommendations 6 and 7).

- **Recommendation 16:** If juries continue to operate as the fact-finder in sexual violence matters, reforms should be implemented to overcome the influence of rape myths and victim-blaming attitudes on juror decision-making. This may include improved processes in relation to jury selection, expert evidence and/or judicial direction.

- **Recommendation 17:** In conjunction with legislative reform, there should be broad community education around the realities of sexual violence and the law of consent in order to improve criminal justice outcomes and encourage ethical sexual practice.

- **Recommendation 18**: Trauma training should be provided to all professionals and community members who are likely to receive initial disclosures of sexual violence.

- **Recommendation 19**: Adequate funding should be allocated to sexual, family and domestic violence services which perform a critical role in supporting people who have experienced sexual violence to access safety, support, recovery and the criminal justice system.

- **Recommendation 20:** A model of case management should be developed to provide co-ordinated service delivery to adults who have experienced sexual violence.

5. The need for a broader inquiry

5.1. R&DVSA commends the Attorney General for recognising the inadequacy of the current criminal justice response to sexual violence. We agree there is an urgent need to improve the responsiveness of the criminal justice system to sexual violence. In particular, there is a need to improve the experience of those who have experienced sexual violence which continues to be characterised by uncertainty, delay, distress and, very commonly, re-traumatisation.

5.2. However, R&DVSA are concerned by the narrow purview of this review.

5.3. The implementation of consent law is significantly affected by procedural constraints, the knowledge and expertise of legal actors, and the accessibility of support services for those who have experienced sexual violence. Consent laws, while important, are only one piece of the puzzle.[5]

5.4. As such, R&DVSA recommends that an advisory taskforce be formed with a direction to undertake a full review of the criminal justice response to sexual offences, including:

5.4.1. All legislative and procedural matters relating to the prosecution of sexual offences;

5.4.2. Alternative justice models including specialist courts;

5.4.3. The provision of support services for people who have experienced sexual violence; and

5.4.4. Access to behaviour change programs for those at risk of sex offending.

5.5. The taskforce membership should reflect the diverse stakeholders who have an interest in the criminal justice response to sexual offences and include both government and non-government agencies, legal actors, sexual assault service providers, academics and, if willing, those who have experienced sexual violence. The inclusion of stakeholders is critical to ensure that legislative reform initiatives respond to the practical realities of the criminal justice process.

5.6. The taskforce should review national and international practices and evidence and put forward recommendations for a court model and laws that will improve the responsiveness of the NSW legal system to the needs of people who have experienced sexual violence.

5.7. We acknowledge that the establishment of a taskforce may demand additional resources beyond those currently available to the NSWLRC. A comprehensive consultation process will require significant investment in terms of staff, time and financial resources. As such, we recognise that creating a taskforce may delay the timeframe of the inquiry. This is unfortunate. However, given the poor record of legislative reform in this area (see Section 7), R&DVSA believes the additional costs involved in conducting a proper consultation process are both necessary and justified.

Recommendation 1: A taskforce should be established to conduct a comprehensive review of the criminal justice response to complaints of sexual offences. The taskforce should comprise all relevant stakeholders including government and non-government agencies, legal actors, sexual assault service providers, academics and, if willing, those who have experienced sexual violence.

[5] The limitations of legislative reform in the area of sexual violence are explored in Section 7.

6. Legislative amendments to s 61HA

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

6.1. Over the past decade, a consensus has emerged that sexual offence legislation should aim to promote the ideal of communicative consent, otherwise known as affirmative consent.

6.2. While NSW appears to have embraced this ideal in principle, R&DVSA believes that greater clarity in application could be achieved through legislative amendments.

Implementing the ideal of communicative consent

6.3. R&DVSA proposes that s 61HA should be reformed to provide a clearer endorsement of the communicative or affirmative model of consent.

6.4. Under the communicative model, consent is characterised in the affirmative rather than the negative – as the positive act of communicating 'yes' rather than the mere absence of a communicated 'no'.[6] The goal of this model is to displace the former legal standard that equated submission with consent, instituting in its place an affirmative model which obligates each party to communicate in order to reach a mutual agreement before engaging in sexual contact.[7]

6.5. To achieve this objective, the notion of consent must be redefined as an act of communication rather than a state of mind. As the Victorian Department of Justice and Regulation describe:

> Under the communicative model, consent is understood as not merely an internal state of mind or attitude (like willingness or acceptance) but also as permission that is given by one person to another. Therefore, it is something that needs to be communicated (by words or other conduct) by the person giving the consent to the person receiving it. By definition, on this model, an uncommunicated internal attitude is insufficient consent for the purposes of the law on rape and sexual assault.
>
> The relationship between the state of mind of consent and the communicative giving of consent can be very close. For example, it will often be the case that a person gives their consent to a sexual act to another person by communicating or indicating to that person that they have the relevant attitude or state of mind. In other words, in the right context, indicating one's attitude can itself be the giving of consent. But, on the communicative model, that indication is still a distinct and essential step for the giving of consent to the other person.
>
> Under the communicative model, consensual sex should, at a minimum, only take place where there has been communication and agreement between the parties.[8]

[6] E. Craig, 'Ten Years After Ewanchuk The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent' (2009) 13 *Canadian Criminal Law Review* 248, 250.
[7] W. Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27, 32.
[8] Victoria Department of Justice and Regulation, *Victoria's New Sexual Offence Laws: An Introduction*, Criminal Law Review (June 2015), 12.

The NSW model

6.6. In NSW, the ideal of communicative consent is reflected most obviously in the statutory definition of consent as 'free and voluntary agreement'.[9] We note this definition was endorsed in 2010 by the Australian Law Reform Commission (ALRC) and the NSWLRC on the basis that it "reinforc[es] both positive and communicative understandings of consent".[10]

6.7. However, it is widely acknowledged that a statutory definition of consent alone is incapable of bringing about the desired shift in legal practice.

6.8. As esteemed academic Dr Annie Cossins describes in her submission to this inquiry, this is because the notion of consent is "entirely contextual" – "a vessel that will be filled by the moral and cultural values of the fact-finder." Given that community standards of sexual behaviour are "nebulous and undefined," Dr Cossins argues that without explicit and detailed legislative guidance, any legal standard of consent based on the notion of free and voluntary agreement will vary radically from fact-finder to fact-finder.[11]

6.9. The key legal dilemma then is how to provide effective guidance to fact-finders to assist them to apply a consistent standard of consent that aligns with the communicative model.

6.10. In NSW, there are three key provisions which give meaning and expression to the ideal of communicative consent. These are:

6.10.1. Section 61HA(3)(c) which provides an objective fault element;

6.10.2. Section 61HA(3)(d) which requires the fact-finder to have regard to "any steps taken by the person to ascertain whether the other person consents to the sexual intercourse" when determining the issue of knowledge; and

6.10.3. Section 61HA(7) which stipulates that "[a] person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse".

6.11. R&DVSA are supportive of the principles underlying these provisions. However, we believe that their application has been flawed. As such, the ideal of affirmative consent has failed to translate from policy to practice.

6.12. Dr Cossins' submission provides a detailed analysis of two recent judge-alone trials which she states have undermined the implementation of s 61HA – these are the matters of *Lazarus*[12] and *XHR.*[13] Drawing on Dr Cossin's discussion, we provide a brief overview of our key concerns in relation to the application of s 61HA below.

<u>Section 61HA(3)(c)</u>

6.1. Section 61HA(3)(c) establishes a partially objective fault element for sexual offences. It was inserted in 2007 on the recommendation of the Taskforce.[14]

6.2. In principle, the reasonable belief standard encourages a person initiating sexual contact to take reasonable care to ensure that consent is present before proceeding. In this way, the

[9] *Crimes Act 1900* (NSW), s 61HA(2).
[10] Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010), 68.
[11] A. Cossins, *Submission to the NSW Law Reform Commission review of consent in relation to sexual offences* (Draft version shared with R&DVSA, 2018).
[12] *R v Lazarus* [2017] NSWCCA 279.
[13] *R v XHR* [2012] NSWCCA 247.
[14] NSW Attorney General's Department, above n 1, Recommendation 14.

objective standard is designed to contribute to sexual assault prevention efforts by supporting positive behavioural standards around ethical sexual practice.[15]

6.3. When the objective standard was first introduced, there was some pushback from conservative legal commentators. This criticism was based on a perception that objective fault was incompatible with the traditional principle of *mens rea*. However, it is now widely accepted that a person who holds a belief in consent without reasonable grounds is not "morally innocent," weighing the ease with which consent can be ascertained against the significant harm that may result from sexual assault.[16]

6.4. In his second reading speech, then NSW Attorney General, the Honourable John Hatzistergos stated:

> The subjective test is outdated. It reflects archaic views about sexual activity. It fails to ensure a reasonable standard of care is taken to ascertain a person is consenting before embarking on potentially damaging behaviour. An objective test is required to ensure the jury applies its common sense regarding current community standards.[17]

6.5. R&DVSA supports an objective standard of fault for sexual offences. However, we agree with Dr Cossins that this reform has done little to shift the focus of inquiry in practice.[18] This is because the notion of 'reasonableness' is a relative concept. Absent strict legislative guidance, determinations of *reasonable* belief in consent will be informed by the same socio-cultural scripts which have long-underpinned thinking about *honest* belief in consent. Overwhelmingly, these socio-cultural scripts reflect rape myths and victim-blaming attitudes. [19]

6.6. As Dr Cossins notes, there is "no legislative restriction that prevents rape myths and victim-blaming attitudes from being taken into account by fact-finders."[20] As such, fact-finders remain free to conclude that a complainant's style of dress, consumption of alcohol, flirtatious behaviour or lack of resistance constituted "reasonable grounds" for a belief in consent. Thus, as Munro states, "it is less than clear that [reasonable belief] will operate in practice to hold defendants to a higher level of accountability'.[21]

6.7. These concerns appear to be well founded. The judgments of *XHR*[22] and *Lazarus*[23] demonstrate that judicial officers continue to rely on rape myths when determining an objective standard of fault. In both matters, the trial judge found that a lack of resistance amounted to reasonable grounds for the defendant's belief in consent.[24] In other words, the judges relied on the outdated perception that submission equates to consent when determining the objective standard of "reasonableness".

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[15] W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, 'I Think it's Rape and I Think He Would be Found Not Guilty': Focus Group Perceptions of (un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social and Legal Studies* 611, 613.

[16] W. Larcombe, B. Fileborn, A. Powell, N. Hanley, N. Henry, 'Reforming the Legal Definition of Rape in Victoria - What Do Stakeholders Think?" (2015) 15(2) *Queensland University of Technology Law Review* 30, 35.

[17] J. Hatzistergos, Second Reading Speech on the Crimes Amendment (Consent — Sexual Assault Offences) Bill 2007, NSW Legislative Council, 7 November 2007.

[18] A. Cossins, above n 11.

[19] A. Cossins, above n 11; Larcombe et al, above n 15, 614.

[20] A. Cossins, above n 11.

[21] V. E. Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron Law Review* 923, 945.

[22] *R v XHR* [2012] NSWCCA 247.

[23] *R v Lazarus* [2017] NSWCCA 279.

[24] See A. Cossins, above n 11.

6.8. It is impossible to know with certainty how juries have interpreted this provision, since jurors are not required to provide reasons for their decisions. However, mock jury studies suggest that, like judges, jurors' determinations of 'reasonableness' are strongly influenced by victim-blaming attitudes. For example, in a 2009 mock jury study conducted by Ellison and Munro, jurors raised the following complainant behaviours as forming reasonable grounds for a belief in consent:

> … offering/accepting a lift, inviting a person into one's home, remaining in one another's company for a prolonged period, paying/receiving compliments, engaging in alcohol consumption, sharing a goodnight kiss, and embarking on tentative body contact such as brushing against one another.[25]

6.9. These measures of 'reasonableness' fall far short of the ideal of communicative consent and descend instead into the familiar terrain of victim-blaming culture.

6.10. Thus, R&DVSA are concerned that an objective standard of fault may not function in practice to raise the standard of defendant accountability.

Section 61HA(3)(d)

6.11. Section 61HA(3)(d) states that the fact-finder must have regard to 'any steps taken by the person to ascertain whether the other person consents to the sexual intercourse' when determining the issue of knowledge.

6.12. This provision was intended to draw attention to the importance of examining the accused's conduct in assessing the reasonableness of his beliefs, rather than focusing exclusively on the complainant's conduct.[26]

6.13. However, the judgements of *Lazarus*[27] and *XHR*[28] reveal two key problems in the application of s 61HA(3)(d).

6.14. First, these judgments demonstrate that s 61HA(3)(d) is easily overlooked by fact-finders, resulting in a misapplication of the law. In both cases, the trial judge erred by failing to have regard to 'any steps taken by the person to ascertain whether the other person consents to the sexual intercourse'.[29] Assuming that judges are less prone to misapplications of the law than jurors, it is likely that this error may have been replicated at a larger scale by juries.

6.15. Second, the judicial interpretations of s 61HA(3)(d) in these cases directly undermine the principles of communicative consent. In *XHR,* Beazley JA stated that s 61HA does not necessarily create any obligation on the accused to take steps to ascertain consent.[30] While s 61HA(3)(d) directs the fact-finder to consider 'any steps' taken by the accused, it does not establish any standard against which the fact-finder must weigh their behaviour. Thus, the fact-finder may dismiss this consideration as altogether irrelevant where they do not perceive that any steps were necessary in the circumstances. As Beazley JA stated:

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[25] L. Ellison and V. E. Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Jury Study' (2010) 13(4) *New Criminal Law Review* 781, 791. See also Larcombe et al, above n 15; H. M. Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials* (PhD Thesis, University of Tasmania, June 2012) 207.

[26] Describing an equivalent provision in Victoria: Victoria Department of Justice and Regulation, above n 8, 16.

[27] *R v Lazarus* [2017] NSWCCA 279.

[28] *R v XHR* [2012] NSWCCA 247.

[29] *R v Lazarus* [2017] NSWCCA 279 at [149] (Belllew J); *R v XHR* [2012] NSWCCA 247 at [65] (Beazley JA).

[30] *R v XHR* [2012] NSWCCA 247 at [62] (Beazley JA).

> The relevance of whether an accused person took any steps to ascertain consent is inextricably bound up with all the other factors in the case. ... *Thus, if the accused and complainant are in an ongoing relationship, the failure to take steps to ascertain consent may not be surprising and so may not be of any or much assistance in the fact finding task posited by s 61HA(3).* If the accused and complainant are in a relationship of service provider and client, the failure to take steps to ascertain consent may be and would likely be very relevant to the question of the accused person's knowledge. There are many factual situations in between these two, some much more nuanced than others.[31] [emphasis added]

6.16. In other words, the effect of section 61HA(3)(d) is merely to provide the fact-finder with the discretion to apply a standard of affirmative consent or not. In the opinion of R&DVSA, this does not go far enough.

6.17. Of further concern is the *Lazarus* judgement, in which the Court of Appeal interpreted s 61HA(3)(d) to include non-communicative 'steps' that entail only an internal and one-sided thought process by the accused.[32] As Bellew J stated:

> ... a "step" for the purposes of s. 61HA(3)(d) must involve the taking of some positive act. However, for that purpose a positive act does not necessarily have to be a physical one. *A positive act, and thus a "step" for the purposes of the section, extends to include a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives.*[33] [emphasis added]

6.18. This interpretation directly contradicts with the policy objective of this provision, which was to encourage "dialogue ... between individuals prior to sexual intercourse to reach a necessary mutuality of understanding in relation to consent."[34] As the Department has stated: 'a step ... necessarily involves communication with the other person.'[35] Steps that involve only an internal thought process, rather than any communication with the complainant, do not achieve the desired effect.

Section 61HA(7)

6.19. Section 61HA(7) provides that "[a] person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse".

6.20. While this provision was intended to support a communicative model of consent, R&VDSA believe that it may have had the opposite effect. This is because the provision fails to emphasise the need for a positive act of communicated consent. Instead, by specifically eliminating lack of *physical resistance* as an indicator of consent, the provision implies that lack of *verbal resistance* may in fact be sufficient to establish consent.

6.21. For all these reasons, R&DVSA believes that s 61HA has failed to fully displace the presumption that submission equates to consent. Thus, it has failed in practice to implement the ideal of communicative consent.

Proposals for reform

6.22. R&DVSA submits that s 61HA should be amended in order to provide a clearer endorsement of the communicative model of consent.

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[31] Ibid.
[32] *R v Lazarus* [2017] NSWCCA 279 at [147] (Bellew J).
[33] Ibid.
[34] NSW Department of Attorney General and Justice, above n 4, 4.
[35] NSW Department of Attorney General and Justice, above n 4, 22.

6.23. In this section, R&DVSA outlines a number of proposals for legislative reform designed to bring the ideal of communicative consent to fruition.

R&DVSA submits that:

6.24. The meaning of consent in s 61HA(2) should be amended to provide: "A person "consents" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse and communicates this agreement to the other person."

6.24.1. The purpose of this amendment is to clarify the key principle of communicative consent: that consent involves a communication of permission rather than merely an internal state of mind. As such, consensual sex must only take place where there has been some positive act of communication and agreement between the parties.[36]

6.25. The knowledge element in s 61HA(3) should be simplified to provide: "A person has knowledge that another person does not 'consent' to sexual contact if the person does not reasonably believe that the other person consents."

6.25.1. R&DVSA believes this simplified formulation is desirable on the basis of a consultation process conducted by the Victorian Department of Justice in 2014. Originally, the Consultation Paper contained three options for reform to the Victorian fault element. Option 2 most closely reflected the current approach in NSW and was selected by stakeholders as the most desirable approach. It provided two alternative fault elements: A knows that B is not consenting; and A does not believe on reasonable grounds that B is consenting.[37]

6.25.2. However, after further consultation, Option 2 was reformulated in order to enhance simplicity. The first fault element was removed because it was deemed unnecessary – knowing that the other person does not consent is a particular form of not believing on reasonable grounds that the other person consents. In addition, the phrase, 'believe on reasonable grounds' was amended to 'reasonably believe' because stakeholders expressed a preference for this wording.[38]

6.25.3. Given that these modifications were based on extensive consultation with key stakeholders, R&DVSA supports similar amendments being made to s 61HA(3).

6.26. Sections 61HA(3)(d) and (e) should be separated into a new section, rather than combined with the fault element. This provision should read: "Whether or not a person reasonably believes that another person is consenting to an act depends on the circumstances: a) including whether the person took reasonable steps to find out whether the other person consents but b) not including any self-induced intoxication of the person."

6.26.1. The separation of this provision into a new section is designed to bring greater attention to this requirement and thereby overcome the tendency of fact-finders to overlook the provision, as occurred in the *Lazarus* and *XHR* matters.

6.26.2. The shift in language from "any steps" to "reasonable steps" is intended to signal to the fact-finder that in the vast majority of cases, it will be reasonable for the

[36] Victoria Department of Justice and Regulation, above n 8, 12.
[37] Victoria Department of Justice, Review of Sexual Offences: Consultation Paper, Criminal Law Review (September 2013), Section 3.6.
[38] Victoria Department of Justice and Regulation, above n 8, 6-7.

defendant to take at least some steps to find out whether the other person consent.[39]

6.26.3. Finally, the replacement of "ascertain" with "find out" reflects the desirability of plain English legislation. It follows the language adopted in the 2014 Victorian reforms.[40]

6.27. A new consent-negating circumstance should be inserted into s 61HA(6) such that it may be established that a person does not consent to sexual intercourse where "the person does not say or do anything to indicate consent to the act."

6.27.1. This amendment reflects reforms made in Tasmanian in 2004[41] and Victorian in 2014.[42] It aims to give effect to the communicative model of consent, whereby consent is understood as an act of communication rather than merely a state of mind.

6.27.2. However, the placement of this provision in s 61HA(6)[43] rather than s 61HA(4)[44] reflects the fact that in very rare circumstances, consent may be established in the absence of a contemporaneous, positive act of consent. For example, within the context of an ongoing relationship, one party may have freely and voluntarily agreed to play a submissive role during sexual acts. In this context, consent may be established despite the fact that the person did not say or do anything to indicate consent to that particular sexual act. However, in this circumstance, the defendant must have taken steps to confirm that the other person consents. For example, they may have initiated a prior conversation about sexual boundaries, or established a safe word to ensure the complainant maintains a right to refuse sexual contact. It will never be sufficient for the defendant to merely assume consent on the basis of submission.

6.28. A new provision should be inserted after s 61HA(3) which states: "A person does not reasonably believe that the other person consents where a) the other person did not say or do anything to indicate consent; and b) they took no steps to find out whether the other person was consenting."

6.28.1. The purpose of this amendment is to overcome the unacceptable outcomes of the *XHR* and *Lazarus* matters. This provision recognises that in every circumstance that a complainant does not provide a clear, positive and unequivocal indication of consent, the defendant has an obligation to take at least some step to find out whether the other person consents. Where the defendant fails to take any such steps, they cannot have reasonable grounds for a belief in consent.

Recommendation 2: Section 61HA should be amended in order to provide a clearer endorsement of the communicative model of consent.

[39] We note that in *R v XHR* [2012] NSWCCA 247, Beazley JA at [51] already interpreted the provision as requiring the fact-finder to consider "the *reasonable steps* taken by the accused person to ascertain whether the complainant was consenting" [emphasis added].
[40] *Crimes Act 1958* (Vic), s 36A.
[41] *Criminal Code Act 1924* (Tas), s 2A(2)(a).
[42] *Crimes Act 1958* (Vic), s 36(2)(l).
[43] Section 61HA(6) contains a list of grounds on which consent *may* be vitiated.
[44] Section 61HA(5) contains a list of grounds on which consent *must* be vitiated.

Recognising sexual violence within the context of domestic or family violence

6.29. R&DVSA are concerned that the current definition of consent does not adequately capture sexual violence that occurs within the context of domestic or family violence.

6.30. This issue was considered by the ALRC and NSWLRC in their 2010 report 'Family Violence – A National Legal Response'. The Commissions recognised that proving lack of consent within the context of an intimate partner relationship is difficult.[45] This is because sexual violence by a partner or ex-partner does not conform to the 'real rape' template that dominates the popular imagination of sexual violence.

6.31. This difficulty is further compounded where there is a history of violence. In this context, sexual coercion may be experienced as the cumulative effect of a pattern of coercive and controlling behaviours.[46] As Carline and Easteal describe, women in violent relationships may be subject to a complex interplay of social coercion, interpersonal coercion, threat of physical force and physical force.[47] In addition, women may experience "[o]ther sources of duress" such as "the woman trying to keep the peace, and the man's threat to leave, withdraw his love or to cut off money."[48] Thus, determining consent in the context of violence requires a sophisticated analysis of dynamics of power, control and coercion.[49] This kind of analysis is difficult within a criminal justice system which is focused on isolated incidents, rather than patterns of behaviour.[50]

6.32. In response to this issue, the Commissions recommended that state legislation should recognise that consent may be vitiated "where a person submits because of fear of harm of any type against the complainant or another person".[51] The strength of this model is that it focuses on the effect on the complainant, rather than any specific act perpetrated by the defendant. In this way, the model creates room for the prosecution to establish that a complainant was fearful as the result of a pattern of coercive and controlling behaviour, without requiring the prosecution to prove any specific, causative act of coercion.

6.33. NSW has not taken up this recommendation and no such provision is included in s 61HA.

6.34. Instead, NSW legalisation includes an alternative provision that consent may be vitiated "if the person has sexual intercourse because of intimidatory or coercive conduct or other threat, that does not involve a threat of force."[52] The language of "intimidatory or coercive conduct" has some value in that it may direct the fact-finder to consider tactics of power and control that are common within domestic and family violence.

6.35. However, R&DVSA believes the NSW provision creates an excessively higher burden for the prosecution by requiring them to prove beyond reasonable doubt a specific incidence of "intimidatory or coercive conduct," as well as causation between this incident and the complainant's submission to sexual intercourse. This burden will be difficult to discharge where the complainant's fear did not result from any specific incident of coercion, but rather was the cumulative effect of months or years of abuse. For example, where a defendant has perpetrated financial abuse for several years, the complainant may

[45] ALRC and NSWLRC, above n 10, 1156.
[46] Ibid.
[47] A. Carline and P. Easteal, *Shades of Grey—Domestic and Sexual Violence against Women* (London: Routledge, 2014), 213.
[48] Ibid.
[49] J. White and P. Easteal, 'Feminist Jurisprudence, the Australian Legal System and Intimate Partner Sexual Violence: Fiction over Fact' (2016) 5(1) *Laws* 11, 17.
[50] ALRC and NSWLRC, above n 10, 1156.
[51] Ibid, Recommendation 25-5(c).
[52] *Crimes Act 1900* (NSW), s 61HA(6)(b).

reasonably fear that she will be subjected to further financial harm were she to refuse sexual intercourse. Actual threats or coercive behaviour need not be immediately present in order to affect the validity of her consent in these circumstances.[53]

6.36. As such, R&DVSA recommends that NSW adopt the model recommended by the Commission – focused on the complainant's fear rather than the defendant's conduct. However, we suggest the provision should be extended to better capture other common tactics of violence such as harm against animals or damage to property.[54] Thus, s 61HA(6)(b) should be replaced with a new provision that states:

> if the person has sexual intercourse because of fear of harm of any type against the complainant, another person, an animal, or damage to property.

6.37. In addition, R&DVSA recommends that a new provision be inserted to clarify that in circumstances of family or domestic violence, actual threats or coercive behaviour need not be immediately present in order for s 61HA(6)(b) to apply.

Recommendation 3: Section 61HA should be amended to better capture sexual violence within the context of family and domestic violence. This should be achieved by:

a) Amending s 61HA(6)(b) to state that consent may be vitiated "if the person has sexual intercourse because of fear of harm of any type against the complainant, another person, an animal, or damage to property"; and
b) Inserting a new provision to clarify that in circumstances of family or domestic violence, actual threats or coercive behaviour need not be immediately present in order for s 61HA(6)(b) to apply.

7. The limits of legislative reform

7.1. R&DVSA believes that legislative reform has limited capacity to achieve the desired shift in legal practice.[55]

7.2. This does not mean that legislative reform is futile. Rather, we recognise that legislative reform plays an important symbolic and educative function in shifting community standards around consent and sexual violence.[56]

7.3. However, in order to achieve a true shift in legal practice, R&DVSA submits that legislative reform must be accompanied by more fundamental changes to the criminal justice process. This reform must aim to improve the experience of those who have experienced the violence, by shifting the attitudes of legal actors and increasing support services available before, during and after accessing the criminal justice system.

7.4. According to Larcombe et al, the limits of legislative reform are evidenced by the trend of static or falling rates of conviction for sexual offences around the world. For several decades, there has been a concerted campaign of law reform designed to institute an affirmative standard of consent. This campaign has resulted in significant and fundamental changes to the law. For example, while originally perceived as an unacceptable departure from the principles of criminal law, an objective fault element has now been adopted in New Zealand, the UK and several Australian states including New South Wales. Despite this

[53] ALRC and NSWLRC, above n 10, 1156-1157, citing Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.
[54] ALRC and NSWLRC, above n 10, 1157.
[55] See for example, Larcombe, above n 7; Cockburn, above n 25; J. Stubbs (2003) 'Sexual assault, criminal justice and law and order' 14 *Women Against Violence* 14, 14; J. Temkin and B. Krahé, *Sexual assault and the justice gap: A question of attitude* (Oxford and Portland, Oregon: Hart Publishing, 2008).
[56] Stubbs, above n 55, 14.

apparent success, Larcombe says that law reform has had minimal impact on the outcome in sexual offence cases. Sexual offences remain under-reported, under-prosecuted and under-convicted.[57] Moreover, in many countries including the UK and Australia, conviction rates have actually fallen post-reform.[58] A significant factor contributing to this problem, Larcombe states, is "[t]he inability of statutory reform to displace from the criminal justice process rape myths and community attitudes that support or minimise violence against women".[59]

7.5. A similar argument has been presented by Temkin and Krahé who purport that the "justice gap" should be understood as "a question of attitude." They argue that statutory amendments alone will not be sufficient to address these attitudinal biases, and overcome the barriers experienced by the person who has experienced the violence when accessing justice.

7.6. Thus, R&DVSA believes that legislative amendments must also be accompanied by practical initiatives designed to ensure their effective implementation. As BenDor observed in 1974 in relation to the passage of the Michigan Criminal Sexual Conduct Bill, once legislative change is secured, "the real work of reform ha[s] just begun."[60]

The Tasmanian experience

7.7. The limits of legislative reform are confirmed by the reform experience in Tasmania.

7.8. In 2004, Tasmania introduced a suite of reforms "designed to ensure that the issue of consent to sexual conduct is evaluated according to standards of mutuality and reciprocity and that therefore, absence of consent can be established by adducing evidence that the complainant did nothing to indicate consent."[61]

7.9. However, evidence suggests that the reforms have not achieved this objective in practice.[62]

7.10. In her analysis, Cockburn argues that:

> [This] lack of success is not grounded in any inherent shortcomings of the legislative changes themselves, rather, it is chiefly due to an apparent reluctance of lawyers and judges to engage with the new concept of consent that the reforms have embodied. … This unwillingness seems, at least in part, to be engendered by a belief that those [the legislative intent] will be thwarted in any event by the predetermined attitude of the jury."[63]

7.11. Thus, Cockburn's analysis supports the need for broader reform measures to ensure that legislative reforms are implemented in accordance with the intentions of legislators and the broader community.

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[57] Larcombe, above n 7.

[58] The trend of falling rates of conviction is supported inter-jurisdictional research by Daly and Bouhours which confirms that the number of convictions as a percentage of reported rapes as declined significantly over the past decades in Australia, Canada and England/Wales. Their analysis of 75 studies investigating the handling of sexual offences in common law jurisdictions reveals that conviction rates in Australia have declined from 16 to 11.5 per cent. K. Daly and B. Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39 *Crime and Justice* 565.

[59] Larcombe, above n 7, 32

[60] J BenDor, 'Justice after Rape: Legal Reform in Michigan', quoted in Cockburn, above n 25, 195.

[61] Cockburn, above n 25, 187.

[62] Ibid.

[63] Ibid 188.

8. Specialist sexual violence courts

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

TOR 3: The impact or potential impact of ... developments in law, policy and practice ... internationally, on the content and application of s 61HA

TOR 4: Any other matters that the NSW Law Reform Commission considers relevant.

The case for specialisation

8.1. R&DVSA submits that a specialised approach is necessary to respond to the distinctive features of sexual offences and improve the responsiveness of the criminal justice system to the needs of those who have experienced sexual violence.

8.2. Court specialisation involves "applying a specialist approach to a particular area of law, to be able to better address the complexities or sensitivities that area of law raises."[64] As the 2005 Criminal Justice Offences Taskforce report stated:

> Specialisation is considered desirable as it may lead to greater efficiency in the administration of justice, specialised knowledge, effective processing of cases, sharpening the skills of people concerned, consistency in decision making, specialists on the bench and in the legal profession.[65]

8.3. The specific goals of specialisation differ according to the subject matter. For example, specialist drug courts, mental health courts and Indigenous sentencing courts each aim to improve the responsiveness of the criminal justice system to the needs of perpetrators. They adopt a problem-solving approach that invokes the principles of therapeutic justice. [66] In contrast, specialist sexual violence courts seek to improve the responsiveness of the criminal justice system to the needs of the complainant. They would adopt a trauma approach while upholding the right of the accused to a fair trial.

What makes sexual violence 'special'?

8.4. R&DVSA believes that specialisation is necessary in order to respond to the distinct characteristics of sexual violence. As the New Zealand Law Commission (NZLC) state in their 2015 report, 'The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes':

> Sexual violence occurs in a number of contexts. ... In all its forms, however, it has certain defining characteristics that distinguish it from many other forms of criminal offending. The fundamental problem, in our view, is that the criminal justice system by and large fails to take account of those distinguishing characteristics.[67]

8.5. The NZLC provides an excellent discussion of six features of sexual violence that distinguish it from other types of offences.[68] These can be summarised as follows:

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[64] New Zealand Law Commission, 'The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes', NZLC R136 (December 2015), 12.
[65] NSW Attorney General's Department, above n 1, 146.
[66] Ibid 146.
[67] NZLC, above n 64, 23-25.
[68] Ibid 23.

8.5.1. Sexual violence usually occurs in private, without witnesses and often without evidence of physical harm or force. The consequent dearth of evidence makes it especially difficult to prove sexual offences to the criminal standard of proof.[69]

8.5.2. Sexual violence involves the violation of intimate physical and psychological boundaries. As a result, those who have experienced sexual violence may be especially reluctant to undergo invasive criminal justice processes that further violate their privacy, such as forensic medical examinations, police questioning and cross-examination.[70]

8.5.3. Sexual violence is most commonly perpetrated by someone known, such as an acquaintance, partner or ex-partner. The existence of a prior relationship creates additional barriers to accessing the criminal justice system – both psychological and practical.[71]

8.5.4. Sexual violence may result in complex psychological impacts. These impacts may reduce the capacity and willingness of people who have experienced sexual violence to access the criminal justice system. They may also lead legal actors, including police, prosecutors, judges and jurors, to form inaccurate judgments about the credibility of the complainant.[72]

8.5.5. Those who experience sexual violence often have distinct needs that are incompatible with the criminal trial process. This disjuncture is explored further in the section below, 'A trauma approach'.[73]

8.5.6. The experience of sexual violence is frequently misunderstood by people without training or education in the area, primarily due to the prevalence of rape myths.[74]

Rape myths are defined by Gerger et al as "descriptive or prescriptive beliefs about sexual aggression (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexually aggressive behaviour that men commit against women."[75]

Rape myths function to limit the public conception of what counts as "real rape". The popular image of "real rape" involves a surprise attack by an unknown, often armed, sexual deviant. It occurs in an isolated but public location and the person who experiences the violence sustains serious physical injury, either as a result of the violence or her efforts to resist the attack. However, in actuality, most sexual violence does not conform to this template. Rather, sexual violence is commonly perpetrated by a friend or partner, in private spaces including her home, without significant bodily injury.[76]

Rape myths also dictate the expected response to sexual violence. For example, those who experience sexual violence are widely expected to physically resist or struggle, yell to draw the attention of others, cut all contact with the perpetrator and immediately report the sexual violence. However, research shows that many freeze during violence out of shock or self-protection, may not immediately identify

[69] Ibid.
[70] Ibid 23-24.
[71] Ibid 24.
[72] Ibid.
[73] Ibid 24-25.
[74] Ibid 25.
[75] Gerger et al, above n 2, 423.
[76] Ellison and Munro, above n 25, 783.

the incident as sexual violence, and may not report the incident until weeks, months or years later.[77]

8.6. Thus, R&DVSA contends that specialisation is necessary to respond to the specific barriers faced by those who experience sexual violence when accessing justice.

The objectives of specialisation

8.7. R&DVSA believes that a specialist approach may improve the responsiveness of the criminal justice system to sexual offences in several ways. According to the Victorian Law Reform Commission's (VLRC) *Sexual Offences Final Report*, a specialist approach offers numerous advantages including:

8.7.1. "enabling recognition of the unique features of sexual offences cases and the difficulties faced by complainants in such cases;

8.7.2. providing an opportunity to develop case management procedures that are more sensitive to the needs of complainants;

8.7.3. making it easier to provide physical facilities (for example separate waiting rooms) and technology (for example closed circuit television) to ensure that complainants feel safe;

8.7.4. making it easier to identify barriers to participation in the criminal justice system by children, people with a cognitive impairment and people from Indigenous and non-English–speaking backgrounds, and to develop systems for meeting their needs;

8.7.5. reducing delays;

8.7.6. providing an opportunity to develop support services for complainants alongside the criminal justice process;

8.7.7. facilitating exchange of information and resources between agencies that support court users; and

8.7.8. symbolising the fact that sexual offences are taken seriously by the criminal law."[78]

8.8. For these reasons, R&DVSA believes that a specialist approach to sexual offences is desirable. As advocated by the NZLC, specialisation in the context of sexual violence should be guided by two key objectives:

8.8.1. to bring specialist judges and counsel together in a venue that enables robust fact-finding while reducing the risk of re traumatisation of the complainant as much as possible; and

8.8.2. to facilitate a coordinated and integrated approach among the various organisations and people who deal with complainants in sexual violence cases.[79]

Recommendation 4: A specialist sexual violence court should be established with the objective to bring together specialist personnel to facilitate a trauma approach that centres the needs of those who experience sexual violence, while upholding the accused's right to a fair trial.

[77] NZLC, above n 64, 25.
[78] Victorian Law Reform Commission, *Sexual Offences Final Report* (July 2004), 249-250.
[79] NZLC, above n 64, Recommendation 19.

What features should a specialist court include?

A trauma approach

8.9. R&DVSA believes that most critical feature of any specialised sexual violence court must be a trauma approach that centres the needs of the complainant, while upholding the accused's right to a fair trial.

8.10. Feminist scholarship has long recognised the criminal trial as analogous to a 'second rape' – a secondary trauma that inhibits rather than facilitates healing.[80] The NSWLRC have recognised that criminal trials for sexual offences are "particularly distressing" for complainants because of the nature of the crime, the role of consent with its focus on the credibility of the complainant, and the likelihood that the complainant and the accused knew each other before the alleged assault.[81]

8.11. As Judith Herman describes, "[t]he wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings":[82]

> Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative ... Indeed, if one sets out intentionally to design a system for proving symptoms of traumatic stress, it might look very much like a court of law.[83]

8.12. R&DVSA contends that a specialist sexual violence court must adopt a trauma approach that modifies traditional criminal trial processes in order to better meet the distinct needs of complainants.

8.13. At a minimum, a trauma approach should aim to ensure that the requirements of participation in the criminal trial do not actively exacerbate trauma by again compromising the complainant's autonomy, privacy and sense of security.[84] Re-traumatisation should not be accepted as the 'price' of seeking legal redress.[85] We acknowledge that the risk of re-traumatisation cannot be altogether eliminated. However, every effort should be made to reduce this risk as much as possible.

8.14. Ideally, though, a trauma approach should go further, actively seeking to meet the needs of those who have experienced sexual violence in a way that facilitates healing and recovery. This requires a shift in institutional attitudes and practices to ensure that complainants are treated with respect at every stage of the process and are assisted to access the information and support that they need in order to advance their recovery.[86]

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[80] N. Henry, A. Flynn and A. Powell, 'The Promise and Paradox of Justice: Rape Justice Beyond the Criminal Law' in N. Henry, A. Flynn and A. Powell (eds) *Rape Justice: Beyond the Criminal Law'* (Palgrave Macmillion: London, 2015) 1, 6.

[81] NSW Law Reform Commission, *Questioning of complainants by unrepresented accused in sexual offence trials*, Report 101 (June 2003), 10.

[82] J. L. Herman 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 574.

[83] Ibid.

[84] Larcombe, above n 7, 34.

[85] Ibid 35.

[86] Ibid 34, 40-42.

8.15. In the sections below, R&DVSA outlines seven features which we believe would contribute to a trauma response to sexual offences in a specialist court system:

8.15.1. Specialist judicial officers and court staff;

8.15.2. Specialist prosecutors;

8.15.3. A streamlined process;

8.15.4. Wrap-around support services;

8.15.5. Legal representation for complainants;

8.15.6. Vicarious trauma management; and

8.15.7. Referral of defendants to behaviour change programs.

Recommendation 5: A specialist court should adopt a trauma approach that aims to facilitate healing and recovery.

Specialist judicial officers and court staff

8.1. The implementation of sexual offence legislation is significantly affected by the personal attitudes, knowledge and expertise of judicial officers.[87] As such it is critical that judicial officers and are subject to appropriate selection criteria and training.

8.2. The need for specialist judicial officers is evidenced by the Tasmanian experience. In her analysis of the 2004 Tasmanian reforms, Cockburn argues that one of the key reasons why the reforms have not achieved their objectives is the "continuing attachment"[88] of judicial officers to the previous law of consent. Cockburn observes that judicial officers continue to explain the notion of consent according to the outdated definition predicated on capacity, and regularly fail to explain the current standard of affirmative free agreement.[89]

8.3. Specialisation may overcome these problems by encouraging the development of expertise in both substantive law and procedures relevant to sexual offences, including:

8.3.1. The rules of evidence which apply in sexual offence matters, such as those restricting questions about the complainant's sexual experience or reputation;

8.3.2. Provisions allowing for the use of alternative methods of giving evidence;

8.3.3. Dealing with child witnesses, for example determining competence and restricting cross-examination;

8.3.4. The distinctive jury directions that must be given in sexual offence trials.[90]

8.4. Thus, R&DVSA believes that specialist judicial officers and court staff are vital to ensuring that courts adopt a trauma approach.

Recommendation 6: All personnel involved in sexual offence trials including judicial officers should be required to undertake thorough and ongoing training in relation to sexual, family and domestic violence. This training should cover:

a) The dynamics, complexities and impacts of sexual violence, including sexual violence perpetrated within the context of domestic or family violence;
b) The impacts and presentations of complex trauma;
c) The principles of trauma practice;

[87] Ibid.
[88] Cockburn, above n 25, 196.
[89] Cockburn, above n 25, 196-197.
[90] VLRC, above n 78, 172.

d) Cultural competency when working with Aboriginal and Torres Strait Islander people, people from a culturally and linguistically diverse (CALD) background, people with a disability, and lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people.

Recommendation 7: Judicial officers presiding over sexual assault matters should be required to meet two preconditions before appointment:

a) The judicial officer must meet the necessary education requirements, outlined in Recommendation 6; and
b) The judicial officer must be considered a suitable person to deal with matters of sexual violence by reason of their training, experience and character.

Specialist prosecution units

8.5. R&DVSA believes that specialist prosecution units may also improve the responsiveness of the criminal justice system to sexual violence.

8.6. Specialisation of prosecution units offers similar advantages to the specialisation of judicial officers, including:

8.6.1. Improved skills in implementing trauma practices, including communicating sensitively with those who have experienced sexual violence;

8.6.2. Improved understanding of the substantive law and procedures relevant to sexual offence matters;

8.6.3. Greater consistency in the exercise of prosecutorial discretion; and

8.6.4. Enhanced expertise in preparing and presenting the Crown's case, which may lead to a rise in conviction rates.[91]

8.7. The need for specialist prosecution units is evidenced by the Tasmanian experience. In her analysis of the 2004 Tasmanian reforms, Cockburn argues that one of the key reasons why implementation has been flawed is prosecutors' failure to embrace the new legislative framework in the way they construct and present case theories[92]. Under the new legislation, prosecutors have an opportunity to neutralise juror prejudices by crafting case theories that rest on evidence of an absence of communicated consent, or a failure by the accused to take steps to ascertain consent.[93] However, Cockburn suggests this opportunity is routinely overlooked by prosecutors, who continue to present cases theories which appeal to stereotypical views regarding sexual violence.[94]

8.8. R&DVSA believes that specialist prosecutors may be better positioned to devise trial strategies, anticipate defences, prepare complainants and develop effective cross-examination and arguments that promote an evidence-based and trauma approach to sexual violence.[95]

8.9. In Victoria, a Specialist Sex Offences Unit (SSOU) was established in 2007 to provide a best-practice approach to the prosecution of sexual offences in Victoria. Under the Victorian model, Crown Prosecutors, solicitors and advocates are co-located and work as a team in the same unit. Specialised training is also provided to members of the private bar who

[91] P. Parkinson, *Specialist Prosecution Units and Courts: A Review of the Literature*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse (March 2016).
[92] Cockburn, above n 25, 193.
[93] Ibid.
[94] Ibid.
[95] C. Mallios and T. Meisner, 'Educating Juries in Sexual Assault Cases: Part 1: Using Voir Dire to Eliminate Jury Bias' (2010) 2*The Prosecutors' Newsletter on Violence Against Women* 1, 1.

prosecute most sex offences. Where possible, the same solicitor is allocated to handle the matter throughout the proceedings.[96]

8.10. The primary purpose of the SSOU was to minimise the trauma or distress experienced by complainants. In addition, it was anticipated that the specialised unit would improve the rate of conviction, ensure greater consistency, enable collection and analysis of statistics on sex offences, and allow the Office of Public Prosecutions to engage in the development of legislation, policy and court processes relating to sex offences.

8.11. A 2011 evaluation found that the specialised prosecution unit had been successful in increasing the level of support that complainants experienced both before and during the court process.[97] The evaluation reported the following outcomes, summarised by Professor Parkinson in his 2016 report 'Specialist Prosecution Units and Courts: A Review of the Literature':

8.11.1. The specialist model had supported significant internal and inter-agency training and advice to police and other government-based victim support services.

8.11.2. The specialist unit was supported by all the professionals interviewed, including police.

8.11.3. Across the life of the reforms, the average time taken to list a sex offence trial from the time the case was first received by the Office of Public Prosecutions declined by 32%, from 469.5 days in 2005/06 to 317.3 days in 2009/10. This occurred despite continual and substantial increases in the number of new sex offence matters received.

8.11.4. The establishment of the SSOU was recognised by all stakeholders as a significant reform which had made a real difference to the experience of victim survivors and the quality of sexual assault prosecutions.[98]

Recommendation 8: A specialist sexual violence prosecution unit should be established in NSW.

A streamlined process

8.12. It is widely recognised that excessive delay in criminal justice processes can have a significant impact on access to justice. This principle is recognised in the legal maxim, 'Justice delayed is justice denied.'

8.13. The impact of delay may be especially acute in the context of sexual violence. As discussed in detail by the NZLC, delay may have a disproportionately negative impact in sexual violence matters due to the distinct characteristics of sexual violence. Specifically:

8.13.1. Delay may worsen the **psychological impact** of sexual violence on the complainant, by forcing the complainant to engage with traumatic memories in a way that is counterproductive to their process of recovery.[99]

8.13.2. Given that sexual violence is commonly perpetrated by someone known to the complainant, delay may have an especially negative impact on the **domestic and social circumstances of a complainant**.[100]

[96] Parkinson, above n 91, 33.
[97] Parkinson, above n 91, 34, citing Success Works, *Sexual assault reform strategy: Final evaluation report* (Melbourne: Department of Justice (Vic), 2011), 64–69, 78.
[98] Ibid.
[99] NZLC, above n 64, 63-64.
[100] NZLC, above n 64, 64.

8.13.3. Delay may also worsen the (already poor) **prospects of conviction** by weakening the credibility of the complainant's testimony, which is often the determinative piece of evidence in sexual violence matters.[101]

8.14. Thus, it is critical that sexual violence matters are dealt with through a streamlined process that minimises delays.

8.15. R&DVSA recognises that there are already specific practice directions designed to improve case management of sexual assault trials. The most important of these is *District Court Criminal Practice Note 6* which provides that where possible, sexual assault trials are to be listed within four months of the committal date and no later than six months from the date of committal. Pursuant to this practice note, sexual assault trials are also given listing priority over all other cases except those where an accused person is in custody solely on some other charge.[102]

8.16. However, R&DVSA are concerned that despite these directions, sexual offence trials continue to be subject to excessive delay. Anecdotal evidence suggests that the average time between the date of the offence and the date of trial is over two years.[103]

8.17. In Victoria, a statutory time limit applies to the period between filing of the indictment or committal for trial and the date of the trial itself. While non-sexual offences must take place within 12 months, sexual offences must be listed within three months of indictment. Unfortunately, a 2011 evaluation of this strategy found that timelines are "virtually never complied with in relation to matters involving adult complainants." [104] This is unsurprising given that a statutory requirement alone does not increase courts' resource capacity to prioritise these cases.

8.18. Despite this poor evaluation, R&DVSA supports the implementation of a statutory time limit in NSW. This is because we believe that a legislative time limit may have a greater impact within the context of a properly-resourced specialist court. The value of legislative time limit is to provide a clear signal to criminal justice actors and the community that all reasonable efforts must be made to dispose of sexual assault trials as speedily as possible.[105]

8.19. R&DVSA submits that a specialist court model may facilitate the implementation of a legislative time limit by allowing for pro-active case management and a streamlined process.

Recommendation 9: A statutory time limit should be imposed to ensure that sexual offence trials are dealt with as speedily as possibly. To ensure effective implementation, this initiative should be supported by appropriate resources and guidelines for pro-active case management and a streamlined process.

[101] Ibid.
[102] District Court Criminal Practice Note 6 – Sexual Assault Case List, http://www.districtcourt.justice.nsw.gov.au/Documents/Practice%20Note%20-%20Sexual%20Assault%20Case%20List.pdf.
[103] See for example, Anonymous, 'How the justice system lets sexual assault victims down', ABC News Online, 3 September 2016, http://www.abc.net.au/news/2016-09-02/brock-turner-justice-system-sexual-assault-victims/7801784.
[104] NZLC, above n 64, 66, citing Department of Justice, *Sexual Assault Reform Strategy – Final Evaluation Report* (Department of Justice, Melbourne, 2011), 7.
[105] NZLC, above n 64, 67.

Wrap-around support services

8.20. Effective support is a necessary precondition for those who have experienced sexual violence to access the criminal justice system. This may include practical, therapeutic, medical and legal support, received both directly after the act of sexual violence and on an ongoing basis.[106]

8.21. R&VDSA submit that a specialist court model may facilitate a case managed approach to service delivery that ensures community and government agencies "wrap-around" the complainant in order to address their specific needs.

Recommendation 10: A specialist sexual violence court should provide a case managed, "wrap-around" system of support services that targets the specific needs of those who have experienced sexual violence and their families.

Legal representation for complainants

8.1. R&DVSA believes that legal representation should be provided for sexual violence complainants throughout the criminal justice process.

8.2. In Judith Herman's research, sexual violence complainants commonly reported that the "single greatest shock" when accessing the criminal justice system was "just how little they mattered" in the process.[107] She states that complainants typically experienced ''their marginal role in the justice system as a humiliation only too reminiscent of the original crime."[108] Noting the essential role played by victims in sexual violence prosecutions, Herman argues that a reconceptualisation of their role is essential to the interests of justice. She asks: ''what justice might look like if victims were protagonists, rather than peripheral actors, in the dialectic of criminal law." [109]

8.3. The Victorian Law Reform Commission (VLRC) made similar comments in their 2016 report on the role of victims of crime in the criminal trial process. They recognised that law reform has now established a "profound and significant" place for victims in the criminal justice process, but that a "significant disparity" remains between their role as provided for in legislation and their experience in practice. As such, VLRC concluded that the role of victims must be reconceptualised, noting that this was possible without adversely impacting on the rights of the defendant of usurping prosecutorial independence.[110]

8.4. The VLRC recognised that the prosecution is unable to assist victims to assert substantive rights, where this would conflict with their duty to act impartially. Moreover, they highlighted the current absence of any designated legal service that victims may use to obtain their own legal representation. As such, the VLRC recommended that the Government fund a dedicated legal service for victims of violent indictable crimes to assert substantive legal entitlements in connection with the trial process and human rights and, in exceptional circumstances, to protect vulnerable individuals.[111]

[106] Ibid 7.
[107] Herman, above n 82, 581.
[108] Herman, above n 82, 582.
[109] Herman, above n 82, 579.
[110] Victorian Law Reform Commission, *The role of victims of crime in the criminal trial process*, Report 34, 2016, cited in Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I-II* (2017), 205-206.
[111] Ibid 208.

8.5. Many submissions to the Royal Commission into Child Sexual Abuse also expressed support for providing victims of sexual violence with independent legal representation.[112] Prominent supporters of this proposal included the South Australian Commissioner for Victim's Rights, Mr Michael O'Connor, the Victorian Victims of Crime Commissioner, Greg Davies, and the ACT Victims of Crime Commissioner, John Hinchey.[113]

8.6. Mr O'Connell provided three key arguments in support of victim's representation:

8.6.1. "Fundamental justice requires that judicial officers hear from victims when their rights are likely to be affected by a decision of the court.

8.6.2. Research suggests that giving victims a voice appears to contribute to victims' having higher levels of confidence in the system.

8.6.3. There is precedent for legal representation: victims in the United States are able to participate in criminal proceedings to assert their entitlements under the federal Crime Victims' Rights Act 2004."[114]

8.7. Moreover, Mr O'Connell found that legal representation for complainants had contributed to an important cultural shift that had improved responsiveness of the criminal justice system to the needs of victims:

> The presence of victims' lawyers has, in my view, increased attention to victims' rights by police officers, prosecutors, magistrates and judges – and defence counsel.[115]

8.8. While the Royal Commission into Institutional Responses to Child Sexual Abuse did not make any final recommendations about legal representation for victims,[116] R&DVSA believe that stakeholders overwhelmingly support this proposal.

8.9. We recognise that Legal Aid NSW currently provides a publicly funded service to represent victims in relation to the sexual assault communications privilege. However, we believe this service should be extended to ensure that complainants have access to legal representation throughout the criminal justice process.

Recommendation 11: A specialist sexual violence court should facilitate independent legal representation for complainants throughout the criminal justice process.

Vicarious trauma management

8.10. Several stakeholders have suggested that a specialised court for sexual violence matters may increase the risk of vicarious trauma for professionals working within this system.[117] R&DVSA agrees this risk is real and significant and must be directly addressed if a specialist sexual violence court is adopted.

8.11. Vicarious trauma describes the negative psychological impacts experienced by people not directly affected by traumatic events but nevertheless exposed to them in some way.[118]

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[112] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I-II* (2017), 218.
[113] Ibid 220-222.
[114] Ibid 220.
[115] Ibid.
[116] Ibid 226.
[117] See for example, NSW Attorney General's Department, above n 1, 170; VLRC, above n 78, 175.
[118] R&DVSA's understanding of vicarious trauma is influenced by the work of Charles Figley, Laurie Pearlman and Zoe Morrison among others. See for example, C. R. Figley, 'Compassion fatigue as secondary traumatic stress disorder: An overview' in C.R. Figley (Ed.) *Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized* (New York, NY: Brunner/Mazel, 1995); L. A. Pearlman, 'Self-care

Vicarious trauma is common amongst professionals working with people who have experienced sexual violence.

8.12. R&VDSA holds the view that the most reliable predictor of whether or not a person will experience vicarious trauma is their exposure to traumatic material.[119] Given that any work within a specialist sexual violence court will inevitably involve significant contact with traumatic material, vicarious trauma should be understood as a work, health and safety risk within this environment.

8.13. Although the risk of vicarious trauma cannot be altogether eliminated, research suggests that vicarious trauma effects may be ameliorated if proactively addressed at an organisational level.[120] This requires a comprehensive program of strategies aimed to provide support at both an individual and organisational level.

8.14. On the basis of extensive research and clinical expertise, R&DVSA have developed a best practice Vicarious Trauma Management Program that has been implemented internally for over ten years. The program has also been implemented externally through training and consultation undertaken with other organisations and individuals working with people who have experienced, or are at risk of experiencing, trauma. In 2007, the program won the WorkCover NSW Safety Work Award for its approach.

8.15. The R&DVSA program includes five key components: education, risk reduction, monitoring, early intervention and offsetting symptoms:

8.15.1. **Education** includes strategies to ensure that workers are aware of the risk of vicarious trauma and have the knowledge and skills necessary to identify it early in themselves and in their subordinate staff. Education is critical to establishing a culture in which staff feel as though they can discuss vicarious trauma impacts without fear that it will impact their performance appraisal.

8.15.2. **Risk reduction** includes strategies to ensure that vicarious trauma symptoms do not escalate to become maximal impact symptoms. This may include strategies to encourage ongoing communication with peers through opportunities to debrief, varying workers' caseloads and facilitating trauma-free areas and activities.

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for trauma therapists: Ameliorating vicarious traumatisation' in B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researcher, and educators* (2nd ed., Lutherville, MD: Sidran Press, 1995); Z. Morrison, 'Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field', *Australian Centre for the Study of Sexual Assault Wrap* (Melbourne: Australian Institute of Family Studies, 2007), 4.

[119] Some literature suggests that individual differences can predict whether a person will experience vicarious trauma symptoms, such as a person's previous trauma history, age, gender, social support, education, and coping styles. However, there is a significant body of research which shows that exposure to traumatic material is the only variable that reliably and significantly predicts vicarious trauma. See, for example: N. Kassam-Adams, 'The risks of treating sexual trauma: Stress and secondary trauma in psychotherapists' in B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researchers, and educators* (2nd ed.,Lutherville, MD: The Sidran Press, 1995); M. D. Salston and C. R. Figley, 'Secondary traumatic stress effects of working with survivors of criminal victimisation' (2003) 16(2) *Journal of Traumatic Stress* 167; L. J. Schauben, and P. A. Frazier 'Vicarious trauma: The effects on female counsellors of working with sexual abuse survivors' (1995) 19 *Psychology of Women Quarterly* 49.

[120] M. S. Cerney, 'Treating the "heroic treaters"' in C. R. Figley (Ed.), *Compassion Fatigue* (New York: Brunner/Mazel 1995); B. S. Sansbury, K. Graves, and W. Scott 'Managing traumatic stress responses among clinicians: Individual and organizational tools for self-care' (2015) 17(2) *Trauma* 114; L. Sexton 'Vicarious traumatisation of counsellors and effects on their workplace' (1999) 27(3) *British Journal of Guidance and Counselling* 393.

8.15.3. **Monitoring** involves regular monitoring strategies designed to provide a reflection of the severity and type of vicarious trauma symptoms present for individual workers and the collective workforce. This may be achieved through psychometric testing, monitoring associated factors such as unplanned absence and retention rates, and comprehensive supervision practices.

8.15.4. **Early intervention** includes the use of strategies to intervene in vicarious traumatisation immediately upon the discovery of symptoms. This may include making on-call counselling support available for professionals who notice vicarious trauma impacts.

8.15.5. **Offsetting symptoms** involves longer term proactive strategies that seek to offset the particular symptoms that each individual is most likely to experience. This may involve developing individual self-care plans with staff and providing financial support for activities that may offset vicarious trauma symptoms.

8.16. R&DVSA acknowledges that implementing a vicarious trauma management program will inevitably involve significant up-front expenditure. However, our experience shows that a proactive approach has the capacity to reduce both human and financial costs over time.

8.17. Where vicarious trauma is not managed proactively, there are likely to be serious and long-term impacts on:

- Employees' physical and mental wellbeing
- Employee work performance
- Collegial relationships
- Workplace culture
- Staff attrition rates
- Unplanned absences from the workplace and
- Worker compensation claims.

8.18. An internal analysis of R&DVSA's Vicarious Trauma Management Program found a significant reduction in these organisational costs. After ten years of implementation, the percentage of sick leave entitlements taken by R&DVSA staff had dropped by 50 per cent. The number of workers compensation claims had also reduced from approximately one claim per year to none over a period of ten years.

8.19. Overall, R&DVSA estimates that our organisation has saved approximately $250,000 per year through the implementation of our VT Management Program. These savings were achieved as a result of lowered insurance premiums, fewer insurance claims, and reduced costs associated with sick leave, staff attrition and responding to maximal VT impacts.

8.20. Thus, R&DVSA suggests that the risk of vicarious trauma within a specialist sexual violence court can be appropriately managed through the implementation of a comprehensive and pro-active vicarious trauma management program.

Recommendation 12: All professionals working within a specialist sexual violence court must have access to a best practice vicarious trauma management program. This program should incorporate education, risk reduction, monitoring, early intervention and offsetting symptom strategies. If the jury system continues to operate in sexual violence matters, jurors should also be given access to a comprehensive program of vicarious trauma management.

Referral of defendants to behaviour change programs

8.21. R&DVSA suggests that a specialist sexual violence court may create opportunities for specialist judges to refer defendants to behaviour change programs, and thereby contribute to primary prevention efforts.

8.22. Referrals to a behaviour change program could be invoked as an alternative sentencing option to be used in combination with more traditional criminal outcomes. Alternatively, referrals could be used as a diversionary mechanism in circumstances where the defendant is not convicted, but the offence is established on the balance of probabilities.

8.23. R&DVSA recognises that there are significant complexities involved in altering the outcomes of criminal justice proceedings. As such, we do not make any specific recommendation about how this model might function.

8.24. However, we believe that a specialised sexual violence court may lay the necessary foundations to move towards a model of specialised outcomes for sexual offences, that better respond to the distinct justice needs of complainants and the broader community in relation to this type of offending.[121]

Recommendation 13: The NSWLRC should consider whether a specialist sexual violence court may facilitate alternative outcomes, such as referrals to behaviour change programs for defendants.

9. The fact-finder

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

TOR 3: Sexual assault research and expert opinion

9.1. In this section, we consider the suitability of juries as the fact-finder in sexual violence cases.

9.2. R&DVSA recognises that trial by jury is a pivotal feature of our criminal justice system. Juries perform many valuable functions including:

9.2.1. Representing community values in the criminal justice system;

9.2.2. Safeguarding against arbitrary or oppressive government; and

9.2.3. Promoting public confidence and understanding of the criminal justice system.[122]

9.3. Nonetheless, it is widely accepted that the interests of justice do not require trial by jury in every case. In fact, only about 3% of criminal trials in NSW are conducted with a jury. [123]

9.4. R&DVSA supports the continued operation of juries in other kinds of criminal trials in NSW. However, we contend that juries may be inappropriate in sexual violence matters, given the distinctive characteristics of this form of offending.

[121] For discussion of the distinct justice needs of complainants, see for example: NZLC, above n 64, Chapter 7; N. Henry, A. Flynn and A. Powell, *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillion: London, 2015).
[122] See, for example, NZLC, above n 64, 109-10; NSW Law Reform Commission, *Jury Directions*, Report 136 (November 2012), 3.
[123] NSWLRC, above n 122, 4-5.

Juries in sexual assault trials

9.5. R&DVSA holds serious concerns about the suitability of juries as the fact-finder in sexual offence matters.

9.6. This issue was considered in detail by the New Zealand Law Commission (NZLC) in their 2015 report, 'The Justice Response to Victims of Sexual Violence'. In Chapter 6, the Commission identified two key problems with relying on juries as fact-finders in sexual violence cases: the decision-making problem and the harm problem. The Commission concluded that "[t]he nature of sexual violence is such that, as a form of criminal offending, it is not well-suited to fact-finding by a jury compromised of 12 laypersons."[124]

9.7. While noting the "possible gains that may come from removal of the jury," the Commission did not make any final recommendation to change the fact-finder in sexual violence cases.[125] However, it appears their cautious conclusion was influenced by the entrenched position of the right to jury trials in the New Zealand *Bill of Rights Act 1900.*[126] We note that this complication does not exist in NSW. Nonetheless, the Commission did recommend that further consideration be given to this issue when developing a model of specialist courts.[127]

9.8. In this section, R&DVSA builds on the NZLRC's discussion to explore four key issues related to the use of juries in sexual offence matters:

9.8.1. **The decision-making problem**: Juries lack the necessary expertise to make accurate and informed decisions about the credibility of sexual violence allegations.

9.8.2. **The harm problem**: The presence of a jury may have a harmful impact on the complainant and increase the risks of re-traumatisation.

9.8.3. **The transparency problem**: The lack of transparency around juror decision-making means that misapplications of the law may go unchallenged.

9.8.4. **The problem of vicarious trauma**: Jurors who sit in sexual violence matters are at significant risk of vicarious trauma.

The decision-making problem

9.1. R&DVSA are concerned that jurors are not well positioned to make accurate and informed evaluations about the credibility of sexual violence complaints.

9.2. Concerns about the accuracy of jury decision-making are not specific to sexual violence matters.[128] Critics of the jury system have long questioned the capacity of laypeople to negotiate the complexities of the modern criminal trial.[129] However, R&DVSA believes that there are several distinct characteristics about sexual violence matters that mean the risk of poor decision-making is heightened in these matters.

<u>The prevalence of rape myths</u>

9.3. First, "the field of sexual violence is one that is commonly misunderstood by people without training or education in the area."[130] R&DVSA recognises that juries are not

[124] NZLC, above n 64, 9.
[125] Ibid 116-117.
[126] Ibid 110.
[127] Ibid 117.
[128] NSWLRC, above n 122, 4.
[129] Ibid.
[130] NZLC, above n 64, 111.

intended to be experts. Rather, their function is to apply combined common sense and life experience to ascertain the facts in a criminal case.[131] However, as the NZLC states:

> ... this function is inhibited when applied to an area of human conduct that is frequently subject to misconceptions and misunderstandings. As such, the role of fact-finder might be better filled by someone with prior training and education in the particularities of sexual violence.[132]

9.4. The reason why sexual violence is more likely to be subject to misconceptions than other types of crime is the prevalence of "rape myths". As discussed in paragraph 8.5.6, rape myths promote a narrow conception of what constitutes "real rape" and of the expected response of those who have experienced the sexual violence. Individual complaints that depart from this prescribed template are less likely to be accepted by jurors as genuine. As a result, rape myths "deny, downplay or justify" most complaints of sexual violence and thereby reduce the likelihood that genuine complaints will result in conviction.[133]

9.5. Research shows that jurors commonly rely on ignorant or biased assumptions when determining guilt in sexual violence matters.[134] For example, a 2007 study conducted by the Australian Institute of Criminology revealed that:

> pre-existing juror attitudes about sexual assault not only influence their judgements about the credibility of the complainant and guilt of the accused, but also influence judgements *more than the facts of the case presented* and the manner in which the testimony is given.[135] [emphasis added]

9.6. Two studies conducted by Ellison and Munro in 2009 also demonstrate the dominant influence of rape myths on juror deliberations. In assessing the credibility of an "acquaintance rape", Ellison and Munro found that jurors commonly relied on the perception that acquaintance rapes arise because of "miscommunication" and that responsibility for avoiding such miscommunication lies asymmetrically with the woman[136]. Jurors also exhibited a widespread belief that false rape allegations are common.[137]

9.7. In addition, Ellison and Munro found that "common reactions to rape lie outside the knowledge and experience of the average juror".[138] Their study showed that jurors often drew negative inferences from a complainant's failure to appear obviously distressed while testifying, to report the offence immediately or to fight back physically during the course of the assault – despite the fact that these are common responses among genuine victims of sexual violence.[139] These misconceptions were encouraged by defence lawyers who had a

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[131] Ibid.
[132] Ibid.
[133] Gerger et al, above n 2, 423.
[134] See, for example, Larcombe, above n 7, 32; L. Ellison and V. Munro, 'Of "Normal Sex" and "real rape": Exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18 *Social Legal Studies* 291; N. Taylor, 'Juror attitudes and biases in sexual assault cases', *Trends and Issues in Crime and Criminal Justice No 344* (Canberra: Australian Institute of Criminology, 2007); Temkin and Krahé, above n 55; N. Taylor and J. Joudo, 'The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: An experimental study', *Research and Public Policy Series No 68* (Canberra: Australian Institute of Criminology, 2005).
[135] Taylor, above n 134, 2.
[136] Ellison and Munro, above n 25, 792.
[137] Ibid 798.
[138] L. Ellison and V. Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *The British Journal of Criminology* 363, 363.
[139] Ibid.

tendency to portray the ordinary responses of sexual offence complainants as unusual or abnormal in order to discredit complainant testimony.[140]

9.8. Even where legislation sets a clear standard of communicated consent, widespread juror acceptance of rape myths may still serve to undermine legislative intent. For example, Cockburn found that in Tasmania, juries adopted a standard of communicated consent that reflected victim-blaming attitudes and as such, was "not very demanding".[141] For example, jurors were apparently satisfied that consent had been communicated in cases where the complainant moved over in bed, accepted a lift home with the defendant, or failed to resist the defendant's overtures with sufficient force.[142]

9.9. We acknowledge that issues of juror bias and prejudice exist across all criminal trials. The common response to such concerns is that the jury system is capable of overcoming outlier prejudicial views through the strength of collective decision-making processes. For example, where one juror holds "strongly sexist" ideas, research suggests that juries will generally be capable of overriding this outlier perspective.[143] However, R&DVSA believes the situation is different in relation to sexual violence matters. This is because prejudicial views about sexual violence constitute a dominant, rather than an outlier, perspective. Juries cannot be expected to override the influence of "rape myths" so long as these views remain the popular conception of sexual violence.[144]

The CSI effect

9.10. R&DVSA are concerned that jurors' capacity to make accurate and informed decisions in sexual violence matters is further impacted by the "CSI effect". The CSI effect describes a phenomenon that has emerged as a result of the influence of crime television shows, whereby jurors are increasingly reluctant to convict in absence of hard scientific evidence.[145]

9.11. This trend is especially problematic in the context of sexual violence. As the NZLC state:

> While "hard" evidence can quite legitimately be expected to make a case more robust, that has ramifications for sexual violence cases where there is often no conclusive evidence of physical harm or injury resulting from the incident.[146]

9.12. R&DVSA are concerned that jurors may be influenced to acquit even where the elements of a sexual offence have been made out, because of their apprehension to convict in absence of "hard" evidence. This tendency is less likely among judicial officers who have more experience in weighing other forms of evidence.

Evidential rules

9.13. R&DVSA believes that accurate decision-making in sexual violence matters is further impeded by evidential rules that require juries to be insulated from certain kinds of evidence, most notably tendency and coincidence evidence.

[140] Ibid.
[141] Cockburn, above n 25, 207.
[142] Ibid.
[143] NZLC, above n 64, 111-112.
[144] Ibid.
[145] NSWLRC, above n 122, 80.
[146] NZLC, above n 64, 112.

9.14. These types of evidence are not excluded on the basis that they are not relevant. Rather, they are excluded because of concerns that juries may regard this evidence as "*too* relevant", thereby resulting in unfair prejudice to the accused.[147]

9.15. In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse found that such concerns were unfounded. Moreover, the Royal Commission found that excluding tendency and coincidence may have the inverse effect, by creating unfair prejudice to complainants of sexual violence. This is because tendency and coincidence evidence will often have a high probative value in relation to sexual offences since these are typically 'word against word' cases. Thus, excluding these types of evidence means that it will be difficult for prosecutors to establish sexual offences to the criminal standard.[148]

9.16. In light of these findings, the Royal Commission recommended that laws governing the tendency and coincidence evidence be amended in order to facilitate greater admissibility.[149] However, this recommendation was limited to child sexual abuse offences because of their limited Terms of Reference. [150] Thus, at this stage there is no suggestion that evidential rules will be amended in relation to sexual offences more broadly.

9.17. Without reform to the rules of tendency and coincidence, R&DVSA are concerned that juries may not have access to the kinds of evidence necessary to make accurate decisions about sexual violence.

The impact on attrition rates

9.18. The impact of juror attitudes, and perceived juror attitudes, extends beyond the trial outcome. They also have an impact at every point in the process leading to a trial.

9.19. Public perceptions of sexual violence may influence those who have experienced violence in their assessment of whether their experience of unwanted sexual contact amounts to a criminal transgression. They may influence the decision about whether to make a complaint, since women may be reluctant to report where they believe that the prospects of conviction are low. Importantly, they may also influence the decisions of police and prosecutors who act as gatekeepers to the justice system, either because of their personal biases or their tendency to pre-empt jury bias when assessing the prospects of successful prosecution.[151]

9.20. Research shows that a case will be less likely to progress to trial where decision-makers anticipate that a jury will view the matter unfavourably – for example, because the facts depart from the "real rape" template, because there is a lack of "hard" evidence, or because key evidence is likely to be excluded by evidential rules.[152] However, the exclusion of these cases from the public forum of a criminal trial further reinforces the original bias.

[147] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III - VI* (2017), 417.
[148] Ibid 633-634.
[149] Ibid 634, Recommendation 44.
[150] Ibid 591.
[151] See for example, Temkin and Krahé, above n 55, 178; Larcombe, above n 7, 32; Cockburn, above n 25, 189.
[152] Larcombe, above n 7, 32; Taylor, above n 134.

The harm problem

9.1. Another key problem is that the presence of a jury may amplify the harm experienced by sexual violence complainants when accessing the criminal justice system.[153] This is because:

9.1.1. The need for a complainant to divulge details about their experience of sexual violence to a panel of twelve peers is likely to cause more distress to a complainant than the requirement to give evidence to a single judge.[154]

9.1.2. The presence of a jury may incentivise defence lawyers to behave in ways that cause excessive harm to complainants, by drawing on rape myths to encourage juror misconceptions about sexual violence or adopting cross-examination techniques that amplify the "theatre" of the criminal trial.[155]

9.1.3. Jury trials result in additional delay as a result of the need to apply complex evidential rules. As discussed above, research shows that excessive delay in sexual violence cases may have negative impacts on the complainant's psychological wellbeing, on their domestic and social circumstances, and on the evidence itself.[156]

9.1.4. Where the accused is acquitted, the complainant's experience of hearing this verdict from a jury is likely to be more distressing than when presented by a judge. This is because a judge has greater capacity to apply principles of trauma practice throughout the trial. They may build a relationship of trust and confidence, acknowledge the impacts experienced by the complainant, and offer transparent and nuanced reasons for their decision that emphasise the legal complexities at play. In contrast, a jury has no capacity to build rapport with the complainant or to explain the reasons for their decision. Without this context, a jury's announcement of 'not guilty' may be heard by the complainant as 'we do not believe you'.

The transparency problem

9.1. As noted above, juries are not required to provide reasons for their decision. R&DVSA believes that this lack of transparency has several problematic implications in the context of sexual violence matters.

9.2. First, without transparency, it is impossible to detect misapplications of the law. While this critique applies to all criminal matters, it is especially pertinent to sexual violence cases given the increased tendency in these cases for fact-finders to make decisions with reference to extra-legal factors. For example, had the *Lazarus* appeal been decided by a jury, there would be no way of knowing that an error of law had occurred.

9.3. Second, there is significant public interest in understanding the reasons why sexual violence cases result either in conviction or acquittal. Despite sustained reform efforts over several decades, conviction rates for sexual offences have remained stubbornly low.[157] Thus, insight into the application of consent law is essential to inform future legislative reform.

[153] NZLC, above n 64, 113.
[154] Ibid.
[155] Ibid.
[156] NZLC, above n 64, 63-64.
[157] Larcombe, above n 7, Daly and Bouhours, above n 58.

9.4. Finally, as discussed above, the lack of transparency around juror decision-making may increase the risk of complainant re-traumatisation. This is because a verdict of acquittal from a jury may be heard by the complainant as a judgment of disbelief.

The problem of vicarious trauma

9.5. R&DVSA are concerned that the requirement to sit on sexual violence cases may cause jurors to experience stress or even vicarious trauma.

9.6. Vicarious trauma describes the negative psychological impacts experienced by people not directly affected by traumatic events but nevertheless exposed to them in some way. Vicarious trauma is common amongst family members and friends of those who have experienced sexual assault and amongst professionals working with people who have experienced trauma.[158]

9.7. A recent study found that approximately 70% of jurors in Australia experience some form of stress as a result of their experience. [159] The primary sources of juror stress include the routine aspects of jury duty, such as the disruption to jurors' daily lives, factors relating to the complexity of the evidence, elements of the decision-making task itself (the 'burden of justice'), and the secrecy imposed on deliberations.[160] However, studies show that exposure to victim accounts of suffering and gruesome evidence may increase the risk of juror stress.[161]

9.8. One 2009 British study found jurors who sat on "traumatic" trials (including murder, kidnapping and aggravated sexual assault) were at a higher risk of vicarious trauma.[162] Jurors in these trials experienced nearly three times as many PTSD-related symptoms as those in non-traumatic trials.[163] Common symptoms included restless sleep, sadness, feeling isolated, headaches, waking at night, and feeling tense all the time.[164] Notably, the study also found that "[w]omen as a group appear to be more vulnerable than men, especially when the trial touches upon a past traumatic event that has been personally experienced."[165]

9.9. These findings are concerning when applied to sexual violence trials, given the significant possibility that jurors may have been personally exposed to sexual violence. According to the 2016 Personal Safety Survey, one in five women (18% or 1.7 million) and one in twenty men (4.7% or 428,000) had experienced sexual violence.[166] In addition, one in two women had experienced sexual harassment (53% or 5 million).[167] Thus, most random selections of 12 jurors would include at least one person with personal exposure to sexual violence.

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[158] See section titled 'Vicarious trauma management' above.

[159] Louise Maher, 'Emotional toll of jury duty revealed by jurors sitting in judgment at criminal trials', ABC News Online, 13 July 2017, http://www.abc.net.au/news/2017-07-13/jurors-reveal-emotion-toll-of-jury-duty/8701348.

[160] J Goodman-Delahunty et al, 'Practices, policies and procedures that influence juror satisfaction in Australia', *Research and public policy series No. 87* (Canberra: Australian Institute of Criminology, 2009), 3-4.

[161] Ibid 5.

[162] N. Robertson, G. Davies and A. Nettleingham, 'Vicarious Traumatisation as a Consequence of Jury Service' (2009) 48(1) *The Howard Journal* 1.

[163] Ibid 4.

[164] Ibid 8.

[165] Ibid 9.

[166] Australian Bureau of Statistics, *Personal Safety Survey 2016*, Catalogue Number 4906.0, released 8 November 2017, http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0.

[167] Ibid.

9.10. This risk is heightened in comparison to other traumatic criminal trials. For example, the homicide rate in Australia in 2013-14 was only one in 100,000 people.[168] Thus, while it is possible that jurors may have personal experience of homicide, the chance is far smaller.

9.11. During the process of empanelment, the trial judge calls upon members of the panel to apply to be excused if they cannot bring an impartial consideration to the case.[169] Anecdotal evidence suggests that women who have experienced sexual violence commonly excuse themselves in sexual violence matters, in order to shield themselves from the risk of vicarious trauma.

9.12. This practice presents two problematic implications. First, some jurors may find it difficult to apply for exclusion where the process requires them to raise their personal experience of trauma within the intimidating environment of an open court. A 2007 report on juror satisfaction in Australia found this problem could be reduced by allowing jurors to provide a reason for exclusion via a confidential note dealt with privately by the judge.[170]

9.13. Second, R&DVSA are concerned that excluding jurors with personal experience of sexual violence trials may skew the representativeness of juries in these trials. This is especially problematic considering that certain groups are more likely to experience sexual violence, including Indigenous women, young women, pregnant women, women separating from their partners, women with disability and women experiencing financial hardship.[171] The result may be that sexual violence trials are determined by those groups who are least affected by the issue.

Recommendation 14: Reforms should be implemented to address problems associated with the use of juries as the fact-finder in sexual violence matters. This may be achieved by eliminating the use of juries in sexual offence trials or by implementing reforms designed to improve juror decision-making.

The case for judge-only trials

9.14. Above, we proposed that juries may not be the appropriate fact-finder in sexual offence matters because of distinct characteristics which relate to sexual offences. In this section, we consider whether judge-only trials may represent a desirable alternative.

9.15. Certainly, we acknowledge that generalist judges are no less susceptible to inaccurate social world knowledge about sexual violence than are jurors.[172] Generalist judges commonly replicate the same outdated attitudes and assumptions expressed through juror decision-making. However, R&DVSA believes that a system of ***specialist judges*** has the capacity to overcome several of the problems associated with juries.

9.16. In the table below, we briefly outline the ways that a system of specialist judge-only trials for sexual violence matters may address each of the four problems identified above.

The problem	The advantages of specialist judge-only trials
The decision-making problem	• Specialist judges could be provided with ongoing training and education in order to overcome the impact of "rape myths" and ensure decision-making is based on accurate and up-to-date social science research. It is more

[168] W Bryant and S. Bricknell, 'Homicide in Australia 2012–13 to 2013–14', *National Homicide Monitoring Program*, Statistical Reports no. 2 (Canberra: Australian Institute of Criminology, 2017).
[169] *Jury Act 1977* (NSW), s 38(7)(b).
[170] Goodman-Delahunty et al, above n 160, 102.
[171] Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia, 2018', Cat. No. FDV 2 (Canberra: Australian Institute of Health and Welfare, 2018).
[172] NZLC, above n 64, 115.

	feasible to provide ongoing and in-depth training to a limited pool of judges than to do so afresh for each jury empanelled on a sexual violence case. [173] • Judges may be less prone to the CSI effect since they are more experienced and less apprehensive about the evaluation of "soft" forms of evidence. • Judges may have greater capacity to handle complex tendency and coincidence evidence without prejudice, which often has a high probative value in sexual violence matters.[174]
The harm problem	• Specialist judges could be selected on the basis of their suitability to deal with matters of sexual violence.[175] • Specialist judges could be provided with ongoing training in relation to trauma practice. • Judges are required to provide reasons for their decision. This may mitigate the risk of harm to the complainant by enhancing transparency, certainty, sensitivity and acknowledgement of the complainant's experience.
The transparency problem	• The requirement for judges to provide reasons for their decisions means that misapplications of the law are more likely to be identified and challenged. • Greater transparency in the way the law is applied means that future law reform efforts may be informed by actual practice.
The problem of vicarious trauma	• Judges could self-exclude from specialist sexual violence roles where they have been personally impacted by sexual violence and may be at greater risk of vicarious traumatisation. • Specialist judges could be provided with access to a best practice vicarious trauma management program. Ensuring that judges access comprehensive support is more feasible than providing this kind of support to jurors.

Recommendation 15: If a system of specialist judges for sexual violence matters is adopted, the current model of jury trials should be replaced with judge-alone trials. However, this recommendation should not be implemented unless specialist judges are subject to eligibility and training requirements which guarantee their suitability to determine sexual violence matters (see Recommendations 6 and 7).

Improving jury decision-making

9.17. In the circumstance that juries continue to operate as the fact-finder in sexual violence matters, R&DVSA submits that enhanced safeguards must be put in place to overcome the influence of rape myths and victim-blaming attitudes on juror decision-making.

[173] Ibid.

[174] In *R v Abrahamson* (1994) 63 SASR 139, the Court found that "The principle that a judge should exclude evidence, the prejudicial effect of which outweighs its probative force, can have very little part to play in a trial by Judge alone. The rule is designed to protect juries from exposure to prejudicial material which has but little probative force. The learned judge in this case was quite able to discard any prejudicial effect of evidence of this kind and to focus on such probative weight as he considered that it properly bore. In my opinion, therefore, the evidence was properly admitted." Cited in P. Krisenthal, 'Judge Alone Trials in NSW Practical Considerations' (2015) *Criminal CPD Paper,* 16-17.

[175] This requirement is akin to the eligibility requirement for family court judges in s 22 of the *Family Law Act 1975* (Cth).

9.18. In this section, we consider two mechanisms that may assist in overcoming juror decision-making problems. They are:

9.18.1. Jury selection; or

9.18.2. Improving information for jurors.

9.19. We note these mechanisms are unlikely to address the other three problems associated with jury-decision making: the harm problem, the transparency problem and the problem of vicarious trauma. For this reason, we submit that specialist judge-only trials are a more desirable reform option.

Jury selection

9.20. One way that jury bias may be overcome is through jury selection. Currently, parties in NSW have the right to challenge jurors under Pt 6 of the Jury Act 1977 (NSW). However, parties are required to make this determination on the basis of juror appearance alone. As such, parties tend to exercise their challenges on the basis of superficial indicators such as "gender, age, skin colour, ethnic facial features, facial expressions, dress, posture and gait."[176]

9.21. However, a considerable body of research shows that the impact of superficial demographic features on juror verdicts is minimal.[177] On this basis, a 1994 report on the jury system stated, "for a system of challenge to operate in a more logical and scientific manner, more information on prospective jurors needs to be available to the challenger".[178]

9.22. In the United States, attorneys receive more information on prospective jurors and are also entitled to submit questions to potential jurors about their values and beliefs in a "voir dire" before they exercise their challenges.[179] Some commentators suggest this process may be effective at eliminating juror bias in sexual violence matters, by allowing parties to challenge jurors who exhibit high levels of "rape myth" acceptance.[180]

9.23. R&DVSA have some concerns about the use of voir dire as a mechanism to eliminate juror bias. We note:

9.23.1. Studies show that jurors may be reluctant to disclose biased perspectives in response to questions posed to elicit their attitudes, but still exhibit these views during juror deliberation;[181]

9.23.2. The voir dire approach is "aimed at selecting or deselecting jurors more favourable to one party, rather than impartial triers of fact."[182]

9.23.3. Misconceptions about sexual violence are so widely held that any attempt to quarantine these views through jury selection may be unrealistic.

9.24. Nonetheless, we remain open to the possibility that jury bias may be reduced through a more thorough process of jury selection.

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[176] J. Horan and J. Goodman-Delahunty, 'Challenging the peremptory challenge system in Australia' (2010) 34 *Crim LJ* 167, 181.
[177] Ibid.
[178] M. Findlay et al, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994), 176.
[179] Mallios and Meisner, above n 95.
[180] Ibid.
[181] G. E. Mize, 'Be Cautious of the Quiet Ones' (2003) 10 Voir Dire 2; Ellison and Munro, above n 25.
[182] Horan and Goodman-Delahunty, above n 176.

Improving information for jurors

9.25. An alternative approach that may improve juror decision-making is to provide jurors with greater assistance to understand the dynamics of sexual violence and trauma responses to sexual violence.

9.26. The main two reform options designed to enhance information available to jurors are:

9.26.1. Expert evidence; and

9.26.2. Judicial direction.

9.27. In 2006, the UK made reforms designed to enhance prosecutors' capacity to adduce general expert witness testimony in sexual violence matters. The Home Office encapsulated the goal of such reforms as follows:

> The aim of the 'general expert evidence' is to dispel myths and stereotypes concerning how a victim should behave, and help a judge and jury understand the normal and varied reactions of such victims. … Effectively, it 'levels the playing field between the prosecution and defence' by providing an alternative explanation to the defence's assertions.[183]

9.28. In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse considered this issue in relation to child sexual abuse trials. The Commission recognised that addressing laypeople's reliance on misconceptions about child sexual abuse would "not only enhance the public's faith in the criminal justice system" but would also "promote justice for victims in ways that are not presently possible."[184] R&DVSA believes these same objectives should apply to adult sexual assault trials.

9.29. The Royal Commission cited research by Cossins and Goodman-Delanhunty that found that juror misconceptions about child sexual abuse were "substantially reduced" by both expert evidence and judicial directions. [185]

9.30. Research suggests these findings may also apply to adult sexual violence cases. For example, in their 2009 mock jury study, Ellison and Munro found that both expert evidence and judicial direction had the capacity to reduce juror misconceptions about what constitutes a "credible" complainant response to sexual violence.[186]

9.31. Thus, R&DVSA recommends that the NSWLRC consider reforms designed to facilitate greater use of expert evidence and/or judicial direction in order to overcome jury misconceptions about sexual violence. In particular, jurors may be provided with information about the dynamics and prevalence of various types of sexual violence, the prevalence of false complaints of sexual violence, and the diverse responses to sexual violence. The aim should be to provide jurors with "an accurate social and psychological context in which to evaluate behaviour that might otherwise be found incomprehensible or counterintuitive".[187]

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[183] UK Home Office, 'Consultation Paper: Convicting Rapists and Protecting Victims: Justice for Victims of Rape' (2006), http://webarchive.nationalarchives.gov.uk/20080222081951/http://www.cjsonline.gov.uk/the_cjs/whats_new/news-3299.html.

[184] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts VI - X* (2017), 149.

[185] Ibid 154.

[186] Ellison and Munro, above n 138.

[187] Ibid 365.

Recommendation 16: If juries continue to operate as the fact-finder in sexual violence matters, reforms should be implemented to overcome the influence of rape myths and victim-blaming attitudes on juror decision-making. This may include improved processes in relation to jury selection, expert evidence and/or judicial direction.

10. Beyond the trial

10.1. R&DVSA proposes that any reforms to the criminal justice system must be supported by broader reforms designed to improve the community response to sexual violence.

Community education

10.2. Broad community education about the realities of sexual violence and the law of consent is critical both to improve criminal justice outcomes and to prevent the occurrence of sexual violence in the first place.

10.3. In their 2010 report on family violence, the ALRC and NSWLRC stated, "legislation alone is too blunt a tool to effectively inform community understandings, attitudes and beliefs about appropriate sexual interactions".[188] For this reason, they recommended "that law reform driven by communicative understandings of consent should be supported by community education".[189] For example, they proposed that education and training about myths, facts and law in relation to sexual assault could be delivered to school students, teachers, parents and carers, social workers, guidance officers, nurses, doctors, police recruits and journalists.[190]

10.4. R&DVSA strongly support this proposal. We believe that community education is vital if legislative reform is to shift community standards and encourage ethical sexual practice.

10.5. Community education about legislative reform measures is also critical to increasing rates of reporting. This is because community perceptions of the criminal justice response to sexual violence may influence victims' decisions about whether to report sexual assaults to police or access support services.[191] For example, research shows that a person who has experienced sexual violence will be less likely to report where they fear their account may not be believed or treated seriously by authorities, that the events would not meet the criminal standard, or that their chance of "finding fairness" in the justice system is poor.[192] In order to improve public confidence in the legal system, it is critical that legislative reforms are communicated to the public.

Recommendation 17: In conjunction with legislative reform, there should be broad community education around the realities of sexual violence and the law of consent in order to improve criminal justice outcomes and encourage ethical sexual practice.

Training and education for first responders

10.6. Evidence shows that the response received by a person who has experienced sexual violence to their first disclosure of sexual violence often has a profound impact on both

[188] ALRC and NSWLRC, above n 10, 1150.
[189] Ibid.
[190] Ibid.
[191] Larcombe et al, above n 15, 613.
[192] Ibid.

their prospects of recovery and their decision about whether to engage with the criminal justice system or not.[193]

10.7. Those who receive a safe and supportive response are more likely to seek further assistance from medical and counselling service and to report to police. On the other hand, those who receive an inappropriate, inadequate, or counter-productive response may be dissuaded from seeking support or further reporting the incident. They may also minimise or repress the experience as a way of dealing with the trauma of the assault.[194]

10.8. As such, it is critical that all professionals and community members who are likely to receive initial disclosures of sexual violence ('first responders') receive trauma training to equip them with skills to manage a disclosure of sexual assault appropriately.

Recommendation 18: Trauma training should be provided to all professionals and community members who are likely to receive initial disclosures of sexual violence.

Support for support services

10.9. The sexual violence support sector is essential to supporting those who have experienced sexual violence to access safety, support, recovery and the criminal justice system.

10.10. As discussed above, effective support is often a necessary precondition for a person to be willing and able to access the criminal justice system. This includes practical, therapeutic, medical and legal support, received both directly after the act of sexual violence and on an ongoing basis.[195]

10.11. R&DVSA welcomes the recent commitment by the NSW Government to invest over $200 million over four years for sexual assault responses across the Health, Justice and FACS clusters to respond to and support those who have experienced sexual assault and children with sexually-harmful behaviours.[196]

10.12. However, R&DVSA believes that funding for sexual assault services remains inadequate. For example, while the NSW Government has committed $20.9 million to NSW Health sexual assault services,[197] this figure is significantly lower than the $26 million allocated to sexual assault services in Victoria.[198]

10.13. Moreover, R&DVSA are concerned about the inadequacy of funding to family and domestic violence services in NSW. As noted above, sexual violence is commonly perpetrated within the context of domestic and family violence so there is a significant overlap between these issues. In the 2018 budget, NSW committed to invest more than $390 million over four years to specialist domestic violence initiatives across Government.[199] While this investment is significant, it falls far short of the Victorian government's 2017 allocation of

[193] Larcombe, above n 7, 40.
[194] C. Ahrens, 'Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape' (2006) 38(3–4) *American Journal of Community Psychology* 263.
[195] NZLC, above n 64, 7.
[196] NSW Government, ' Sexual Assault: 2018-19 NSW Budget', 19 June 2018, https://www.facs.nsw.gov.au/__data/assets/pdf_file/0004/591394/FACS000C1_BUDGET_SexualAssault_2018_Final_WEB.pdf.
[197] Ibid.
[198] Victorian Minister for Families and Children, 'Increasing Support for Sexual Assault Victim-Survivors', 15 March 2018, https://www.premier.vic.gov.au/increasing-support-for-sexual-assault-victim-survivors/.
[199] NSW Government, 'Supporting the State's Most Vulnerable', Media Release, 19 June 2018, https://www.budget.nsw.gov.au/sites/default/files/2018-06/Goward%20-%20Supporting%20the%20States%20most%20vulnerable.pdf.

$1.9 billion to address family violence by implementing the recommendations of the Royal Commission into Family Violence. [200]

10.14. R&DVSA urges the NSW government to follow Victoria's lead and commit to fund a future free from sexual, family and domestic violence.

10.15. In addition, R&DVSA recommends that renewed attention be given to the development of case management services to provide co-ordinated service delivery to adults who have experienced sexual assault. This recommendation was made by the NSW Criminal Justice Sexual Offence Taskforce in 2005.

Recommendation 19: Adequate funding should be allocated to sexual, family and domestic violence services which perform a critical role in supporting those who have experienced sexual violence to access safety, support, recovery and the criminal justice system.

Recommendation 20: A model of case management should be developed to provide co-ordinated service delivery to adults who have experienced sexual violence.

[200] Jane Cowan, 'Victorian Budget: 'Brilliant' $1.9b family violence package will save lives, advocates say', ABC News Online, 2 May 2017, http://www.abc.net.au/news/2017-05-02/victorian-budget-family-violence-funding-will-save-lives/8489648.