GOOD REASONS FOR GAGGING THE ACCUSED

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The admissibility of evidence of past sexual history in New South Wales is governed by s 409B of the *Crimes Act* 1900 (NSW). This provision is unique in Australia in that it replaces an inclusionary discretion with an exclusionary rule subject to specified exceptions. The background to the rule, the cases which have interpreted it, and the current proposals to modify it are examined. The analysis draws upon feminist theory and therapeutic jurisprudence to argue that, although certain amendments to s 409B should be considered, the substance of the rule should be retained.

I. INTRODUCTION

MR KINTOMINAS: If somebody in this Courtroom ... came up and put his hand around my mouth and in effect silenced me so that I could not put my client's point of view ... the man in the back of the Court would hardly think that was fair. Indeed, this is ... the effect section 409B can have in particular cases. It gags the defence counsel.

McHUGH J: Sometimes you can even gag the accused and it can be a fair trial... In fact, ... quite recently there was a murder trial where the accused was not allowed to be in the courtroom but was downstairs in the cells.

MR KINTOMINAS: There may have been particularly good reasons for that, your Honour.

McHUGH J: Exactly.[1]

In sexual assault trials in New South Wales an accused may sometimes be gagged, by s 409B,[2] when counsel attempts to explore the past sexual history of

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1 Transcript of proceedings on 9 September 1997 in *Grills v R, PJE v R* (reported at (1996) 70 ALJR 905) at 4

2 *Crimes Act* 1900 (NSW)

the accusing witness. Defence counsel argue that this is an unjustifiable interference with the right of the accused to present a full defence. As McHugh J points out, however, there may be good reasons for gagging the accused. It is argued here that there are good reasons for the provision controlling evidence of past sexual history, that these good reasons were recognised by the legislature when enacting s 409B and that, despite problems, proposals to alter the provision need careful consideration.

In the last 20 years provisions altering the common laws of evidence governing rape trials were adopted in every Australian jurisdiction. The common law previously made rape trials notorious sources of additional trauma for victims of sexual assault.[3] Recent reports suggest that such trials still produce substantial trauma, either because the reforms have not been implemented or because they have been ineffective.[4]

All *rape shield* legislative provisions raise, in a particularly acute form, the problem of how courts are to balance the rights of the witness with the rights of the accused. The New South Wales provision is unique in Australia in that it attempted to establish an exclusionary rule which is subject to exceptions. The courts responded by broadly interpreting these exceptions. More recently, judicial suggestion encouraged attempts to invoke the power of the court to stay proceedings on the basis that s 409B would exclude such evidence. This approach was rejected by the NSW Court of Criminal Appeal in *R v PJE*[5] but the arguments presented may have fuelled current moves to amend or repeal s 409B.

The approach taken in this article is informed by feminism and by therapeutic jurisprudence. Readers will need no introduction to feminism and will readily perceive our basic orientation. Therapeutic jurisprudence may be unfamiliar. It is a current school of legal scholarship which takes as its basic premise the proposition that the law has therapeutic and anti-therapeutic consequences. It suggests that those concerned with practising or reforming the law should be encouraged to consider these consequences when interpreting substantive rules of law, developing legal procedures and fulfilling the roles of lawyers and judges.[6] It draws on relevant psychological and psychiatric research and theory and emphasises an empirical orientation.[7]

The terminology used to describe the chief prosecution witness in sexual assault trials is problematic.[8] The term 'victim' is appropriate when the focus is

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3 See generally, J Bargen and E Fishwick, *Sexual Assault Law Reform A National Perspective*, Office of the Status of Women (1995), K Mack, "Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process" (1993) 4 *Criminal Law Forum* 327.

4 NSW Department of Women, Gender Bias and the Law Project, *Heroines of Fortitude. The Experiences of Women in Court as Victims of Sexual Assault*, 1996; see also Australian Law Reform Commission Report 69, *Equality Before the Law Justice for Women*, 1994 at 28, 150

5 (Unreported, NSW CCA, Cole JA, Gove and Sperling JJ, 9 October 1995). Application for special leave to appeal to the High Court refused, see *Grills v R, PJE v R* (1996) 70 ALJR 905.

6 D Wexler and B Winick (eds), *Law in a Therapeutic Key*, Carolina Academic Press (1996) See also E Magner, "Book Review" (1997) 8 *Current Issues in Criminal Justice* 337

7 D Finkelman and T Grisso, "Therapeutic Jurisprudence From Idea to Application" in D Wexler and B Winick (eds), note 6 *supra* at 243-57

8 See *R v Seaboyer; R v Gayme* [1991] 66 CCC (3d) 321 at 333, per L'Heureux-Dube J; T Brettel-Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness The Construction of

on the events out of which the criminal charges arise but not otherwise. The criminal justice system must attempt to avoid re-victimising the witness who has overcome physical and emotional trauma to testify. The term *complainant*, used in the statute, carries unacceptable overtones of suffering and lamenting.[9] The term is not often used where other charges are laid. The simple term *witness* is inappropriate because the specific relationship between this witness and the proceeding is significant. Every witness who testifies in a sexual assault proceeding whether police officer, expert or bystander will have a past sexual history. Only if the witness was the victim of the assault will the court permit an exploration of this history. The term *accusing witness* is therefore used here.

II. BACKGROUND TO SECTION 409B

One plausible theory as to how verdicts are reached is that the verdict reflects the jury's or judge's reaction to the 'story' told by the evidence. If the story matches their preconceptions, it will be accepted.[10] Information about the past sexual history of the accusing witness will be used to select the stereotype by which the accusing witness will be judged. The perceptions of the accused at the time of the crime will be relevant to the existence of the required mental state for the crime.[11] The resonance between the stereotype that the jury or judge adopts and the account given by the accused will be relevant to whether the accused's account of their own perceptions is accepted.

A major problem arises from the fact that a criminal trial results in an unequivocal decision. Either the woman has been violated and the accused is guilty, or the accused is not guilty and the woman has not been violated. This stark choice ignores the possibility that the woman has been violated and the accused is not guilty which may be the situation as the law is currently structured.[12] The focus on the guilt of the accused in a criminal trial means that the law is deaf to, and disqualifies, women's accounts of sexual assault. This perspective defines sexual assault in terms of the male view of sexual relations, legitimises the reference to male stereotypes and threatens to silence women.

A. The Trial as Trauma

Women are routinely subjected to a horrific experience when they become the accusing witness in a sexual assault trial. Many assert that they have been

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Relevance" (1987-8) 2 *Canadian Journal of Women and the Law* 310; E Sheehy, "Feminist Argumentation Before the Supreme Court of Canada in *R v Seaboyer*; *R v Gayme*. The Sound of One Hand Clapping" (1991) 18 *MULR* 450 at 462.

9 *The Concise Oxford Dictionary*, Clarendon Press (6th ed, 1976)

10 WL Bennet and R Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture*, Rutgers University Press (1981).

11 *DPP v Morgan* [1976] AC 182

12 C MacKinnon, "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence" (1983) 8 *Signs Journal of Women in Culture and Society* 635 at 652.

"twice traumatised".[13] No study of rape trauma syndrome has addressed the effect of the trial on the mental health of the accusing witness. The Heroines of Fortitude Report on the experiences of women in court includes accounts of some incidents that support a view of the trial as trauma.[14]

Many lawyers have adopted the attitude that: "[w]hatever indignities are suffered by the complainant in a criminal trial are not likely to compare with those a convicted sexual offender must suffer".[15]

It is unacceptable that an accusing witness should have to pay for justice by suffering great indignity. The only case in which the indignity could properly be weighed in the scales is when the charge is false and justice for the accused can only be achieved in this way. It is impossible to know whether this is the situation. Although the presumption of innocence must be applied in each and every individual case, it need not and should not be applied on a systemic level. Instead, a concern with the therapeutic or anti-therapeutic effect of the law means that a way to achieve justice without imposing trauma must be found.

B. Common Law Prior to Section 409B

At common law, evidence of the past sexual conduct of the complainant was treated as relevant both to the issue in the case[16] and to the credit of the accusing witness.[17] It could be relevant to the issues by determining whether the alleged rape occurred or whether the mental element of the offence was present. Past sexual conduct between the accusing witness and third parties was also considered relevant. Independent evidence of sexual history was only admissible when the evidence was relevant to the issue.[18] The evidence was, however, normally considered to be relevant on both heads, as in *R v Clay*,[19] where evidence that the accusing witness had been a prostitute twenty years prior to the offence was held relevant both to credit and consent.[20]

The sole criteria for admissibility of sexual history going to an issue in the case was logical relevance.[21] Unfortunately, judicial determinations of relevance will be informed by stereotypical perceptions of female sexuality.[22] The stance

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13 For example, see Law Reform Commission of Victoria Report (Interim) 42 *Rape. Reform of the Law and Procedure*, 1991 at 127

14 Note 4 *supra* at 128, case 33 at 130.

15 S Odgers, "Evidence of Sexual History in Sexual Offence Trials" (1986) 11 *Sydney Law Review* 73 at 77.

16 *R v Gregory* (1983) 151 CLR 566 approving *R v Viola* [1982] 1 WLR 1138

17 *R v Bashir* [1969] 3 All ER 692, *R v Holmes* (1871) 12 Cox CC 137, *R v Thompson* [1951] SASR 135

18 *R v King* (1973) 57 A Crim R 466, applying the common law "collateral facts rule" or "finality principle" as stated in *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533; see *R v Aldridge* (1990) 51 A Crim R 151 See now s 106 of the *Evidence Act* 1995 (Cth and NSW) which abolishes this rule

19 (1851) 5 Cox CC 146.

20 In *R v Tissington* (1843) 1 Cox CC 48, the accusing witness' notorious bad character for want of chastity was held to be relevant to both credit and consent.

21 *R v Gregory* note 16 *supra* at 571 See also *R v Viola* note 16 *supra*; *R v Riley* (1887) 18 QBD 481 at 481; *R v Aloisio* (1969) 90 WN (Pt 1) (NSW) 111

22 *R v Seaboyer* note 8 *supra* at 356, per L'Heureux-Dube J

taken by defence counsel is that past sexual history is always relevant, and attempts to restrict it are therefore objectionable.

III. LEGISLATIVE REFORM: SECTION 409B

The *Crimes (Sexual Assault) Amendment Act* 1981 (NSW) contained a package of reforms that changed the definition of sexual assault and the procedure by which sexual assault offences were prosecuted. A major reform[23] was s 409B which was designed to limit evidence of past sexual history and eliminate evidence of sexual reputation. In a second reading speech, Premier Neville Wran referred to the purpose of s 409B as the prohibition of "irrelevant questioning" of sexual assault victims about their prior sexual behaviour. The legislation would, he said, prevent the accused from subjecting the victim of sexual assault to "humiliating and irrelevant questioning".[24]

The underlying rationale of s 409B was expressed in the commentary on the reforms[25] written by the Director of the NSW Criminal Review Division, Dr GD Woods QC, who said consent should not be assumed or inferred on the basis of sexual reputation or on the basis of sexual behaviour with other persons.[26]

The provision dealing with past sexual history applies in "proceedings" for a "prescribed sexual offence", pursuant to s 409B(1). A prohibition on admitting evidence of sexual reputation in such proceedings is imposed by s 409B(2). The exclusionary rule, which limits evidence of sexual experience, or lack of such experience, is in s 409B(3). Six sub-paragraphs contain exceptions to the exclusionary rule, which apply only where the probative value of the evidence outweighs "any distress, humiliation or embarrassment which the complainant might suffer" from its admission. Under s 409B(4)(a) if the exclusionary rule applies, a witness must not be asked to give the evidence. Leave must be obtained to adduce evidence, which comes within an exception to the exclusionary rule under s 409B(4)(b). An additional exception, not subject to the provision about the distress and humiliation of the complainant, is found in s 409B(5). It applies where the case for the prosecution discloses sexual experience or activity and unfair prejudice may result if the accused person is not permitted to cross-examine about the disclosed experience. The admissibility of evidence affected by the section is to be decided in the absence of the jury under s 409B(6). The court is required to record in writing any decision to admit such evidence, specifying the nature and scope of the evidence to be admitted and the reasons for the decision: s 409B(7). Section 409B(8) specifies that the section does not render admissible evidence that was inadmissible immediately before the commencement of the section.

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23 F Walker, New South Wales Legislative Assembly 1981, Debates, vol 161, p 4763.

24 N Wran, New South Wales Legislative Assembly 1981, Debates, vol 161, p 4761.

25 G Woods, *Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Act*, Department of the Attorney General and of Justice (1981).

26 *Ibid* at 30

At about the same time that the reform of NSW legislation governing sexual assault was achieved, comparable reforms were adopted in other Australian jurisdictions.[27] A comparison of s 409B with equivalent provisions shows five important differences. Most significantly, s 409B does not confer judicial discretion to admit evidence of past sexual history.[28] The NSW legislature had rejected a suggestion to include a residual judicial discretion. It was noted that the provision of a residual discretion in the equivalent South Australian legislation had meant that pre-existing practices did not change.[29]

The second difference is that s 409B(2) contains an absolute prohibition on evidence of the accusing witness's sexual reputation, which is not provided for in other jurisdictions.[30] The requirement, in s 409B(7), for a written record of the decision to admit and the "nature and scope" of such evidence is another significant difference.[31] The fourth difference is that s 409B does not expressly permit sexual conduct evidence going to the credit of the accusing witness, as provisions in other States and Territories do.[32] Some jurisdictions do not apply their *rape shield* legislation to evidence of past sexual experience between the accused and the accusing witness.[33] Two other Australian States, Victoria[34] and Western Australia,[35] adopted provisions which do not distinguish between evidence of sexual activity between the accusing witness and the person charged and evidence relating to such activity between the accusing witness and a third party. In both of these States, evidence as to prior sexual activity between the accused and complainant are subject to rape shield legislation where the judicial discretion to admit evidence would be brought into play. South Australian legislation limits evidence of "recent sexual activities with the accused".[36] This provision is directly comparable to s 409B(3)(b), which allows evidence of

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27 *Evidence Act* 1971 (ACT), s 76G, *Sexual Offences (Evidence and Procedure) Act* 1992 (NT), s 4, *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4, *Evidence Act* 1929 (SA), s 34i, *Evidence Act* 1910 (Tas), s 102A; *Evidence Act* 1958 (Vic), s 37A, *Evidence Act* 1906 (WA), s 36BC.

28 All other States and Territories confer discretion in the trial judge. See *Sexual Offences (Evidence and Procedure) Act* 1992 (NT), s 4, *Evidence Act* 1958 (Vic), s 37A; *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4, *Evidence Act* 1906 (WA), s 36BC, *Evidence Act* 1971 (ACT), s 76G; *Evidence Act* 1929 (SA), s 34i.

29 G Woods, note 25 *supra* at 31.

30 See *Evidence Act* 1910 (Tas), s 102A, *Sexual Offences (Evidence and Procedure) Act* 1992 (NT), s 4. Such evidence is prohibited by *Evidence Act* 1971 (ACT), s 76G(1); *Evidence Act* 1906 (WA), s 36G; *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4(1); *Evidence Act* 1929 (SA), s 34i(1)(a).

31 The only other Australian jurisdiction that requires the trial judge to give reasons for admitting past sexual history is Victoria. Section 37A(6) of the *Evidence Act* 1958 (Vic) requires the court to "state in writing the reasons for granting leave, and cause those reasons to be entered in the records of the court" but does not require the "nature and scope" of the past sexual conduct evidence to be stated

32 South Australian legislation also permits such evidence if it goes to the "reliability of the evidence of the alleged victim": *Evidence Act* 1929 (SA), s 34i(2)(b). The Northern Territory and Victoria permit this type of evidence. *Sexual Offences (Evidence and Procedure) Act* 1992 (NT), s 4(3); *Evidence Act* 1958 (Vic), s 37A(3)(a). Western Australia and the ACT do not distinguish between evidence which goes to credit and that which goes to issue: *Evidence Act* 1906 (WA), s 36BC, *Evidence Act* 1971 (ACT), s 76G.

33 *Criminal Law (Sexual Offences) Act* 1978 (Qld), s 4(2); *Sexual Offences (Evidence and Procedure) Act* 1992 (NT), s 4(1)(b); *Evidence Act* 1910 (Tas), s 102A; *Evidence Act* 1971 (ACT), s 76G(2).

34 *Evidence Act* 1958 (Vic), s 37A(2)(a).

35 *Evidence Act* 1906 (WA), s 36BC(1).

36 *Evidence Act* 1929 (SA), s 34i(1)(b)

sexual activity between the accused and the accusing witness where there is an existing or recent relationship at the time of the offence.

IV. APPLICATION OF SECTION 409B

Section 409B has successfully limited the introduction of evidence of sexual experience as was shown by empirical research conducted by the NSW Bureau of Crime Statistics and Research in 1987.[37] It has, however, been the subject of significant judicial criticism, most frequently directed to the absence of judicial discretion. Courts have observed that the "blanket prohibition"[38] creates a "draconian restriction upon judicial discretion" and that such "a bold assumption of perfect prescience is questionable".[39] At the same time, appellate judgments[40] support a broad interpretation of the exceptions admitting past sexual conduct. Such a broad interpretation has been justified by reference to established principles, which require a construction favouring the liberty of the accused.[41] The approach has militated against the legislative intention of protecting the accusing witness from a trial process where the rape is reproduced in the courtroom.

A. Points of General Evidence Law

Two points from the general law of evidence are relevant. The first is that in deciding whether the evidence is to be admitted the trial judge will assume, without deciding, that the evidence to be offered is 'true'. This assumption does have an anti-therapeutic impact on the accusing witness, but is necessary to preserve the function of the tribunal of fact. It is seen in operation in another context in *Driscoll v R.*[42]

The second point relates to the use of evidence for multiple purposes once admitted. In general, once admitted, evidence can be used for any purpose. It may be both directly and indirectly relevant and inferences can be drawn from it in the absolute discretion of the tribunal of fact. There are specific exceptions to

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37 R Bonney, *Crimes (Sexual Assault) Amendment Act 1981, Monitoring and Evaluation, Interim Report 3 - Court Procedures*, NSW Bureau of Crime Statistics and Research (1987) Note that a phone-in report, conducted by the NSW Sexual Assault Committee in 1993, revealed that 33 per cent of those who had been accusing witnesses in a sexual assault trial had their prior sexual history admitted as evidence See NSW Sexual Assault Committee, *Sexual Assault Phone-In Report*, Ministry for the Status and Advancement of Women (1993) at 41

38 *R v M* (1993) 67 A Crim R 549 at 558, per Allen J.

39 *Ibid.* See also *R v Morgan* (1993) 30 NSWLR 543 at 552, per Mahoney JA.

40 *R v Dimian* (unreported, NSW CCA, Hunt CJ at CL, Smart and Simpson JJ, 23 November 1995) at 11-12, *R v McGarvey* (1987) 10 NSWLR 632 at 634, *R v Morgan* note 39 *supra* at 552, *R v Costello* (unreported, NSW CCA, Hunt CJ at CL, Smart and Studdert JJ, 15 December 1995) at 14

41 *R v Morgan*, note 39 *supra* at 551 per Mahoney JA

42 (1977) 137 CLR 517. In this case the judge had to decide whether evidence of a confession would be admitted The accused claimed that no confession had been made but also argued that any confession made in the circumstances would have been involuntary The court, on the *voir dire*, decided only the question of voluntariness The jury was correctly left to consider whether there had been a confession

the general proposition, however, the general view is that instructions designed to limit the use of evidence could not be understood or applied by the jury.[43]

Evidence of sexual conduct has a powerful effect. The admission of past sexual history can be used for purposes other than those for which it was initially tendered. The evidence of sexual conduct admitted pursuant to an exception in s 409B(3) goes primarily to the proof of the offence. There is, however, no rule that limiting instructions are to be given. The tribunal of fact can, therefore, use the evidence, once admitted, in assessing the credibility of the accusing witness. The jury can ask themselves, for example, what sort of woman has sexual intercourse with two different men in the same day,[44] or has sex in a parked car,[45] or engages in group sex?[46]

In *R v Dimian*, the defence sought to introduce evidence that the accusing witness, a fourteen-year old girl, had consensual sex in a van in a car park several hours earlier. The prosecutor commented that the defence sought to introduce such evidence in the hope that the jury would so disapprove of this conduct that they would be disinclined to convict regardless of the substantive evidence.[47] On appeal, Hunt CJ at CL recognised this danger and suggested that when past sexual history is admitted, the jury should be warned against taking the evidence as indicative of the fact that the witness should not be believed, or as implying a willingness to have sexual intercourse on the occasion in question.[48] This is a welcome recognition that societal constructions about appropriate female sexual behaviour affect the assessment of the credibility of the accusing witness. However, there is a danger that juries will disregard such warnings, or that the warning will merely accentuate the evidence.

B. Judicial Interpretation of Evidence of Sexual Reputation

Section 409B(2) renders any evidence relating to the accusing witness' sexual reputation inadmissible. Such evidence could otherwise be used to suggest the accused honestly believed that the intercourse was consensual.[49] There are few decisions interpreting this provision. This may indicate that evidence which would fall within the section's ambit is admitted without objection.

Before modern transportation methods led to the mobility characteristic of the twentieth century, reputation had a much greater significance. The common law admitted evidence of reputation as a form of credit evidence. The House of Lords pointed out that use of reputation evidence was anachronistic but did not

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43 See Australian Law Reform Commission Report 38, *Evidence*, 1987 at [145], Australian Law Reform Commission, Report (Interim) 26, *Evidence*, 1985 at [334], [685] Note that s 136 of the *Evidence Act* 1995 (Cth and NSW) allows the trial judge to exercise his or her discretion to limit the use of evidence

44 As per the facts in *R v Morgan* note 39 *supra*.

45 As per the facts in *R v Dimian* note 40 *supra*.

46 As per the facts in *R v Henning* note 83 *infra* Additionally, in this case evidence that the accusing witness had previously engaged in group sex with one of the accused would affect her credit in the joint trial of all five accused.

47 Crown Prosecutor B Roach, Written Submissions to the Court, 31 August 1994.

48 *R v Dimian* note 40 *supra* at 15

49 See *R v McGarvey* note 40 *supra* at 633-4, per Hunt CJ at CL

change the common law.[50] The provision prohibiting evidence of sexual reputation attempts to impose an obligation on those seeking sexual intercourse to seek consent directly from their prospective partner. Monitoring of the 1981 amendments revealed that the courts had difficulties in classifying sexual reputation. The report suggested that the term "sexual reputation" is problematic because it "fails to address the problem of defining a contemporary standard of what precisely this means".[51] It is unclear how many people must believe that the accusing witness is a slut before this description is transformed into 'her' reputation.[52] It is suggested here that this question is not relevant in interpreting a prohibition. The provision should prevent counsel from adducing in court any indirect report about the sexual experience or otherwise of the alleged victim of the assault. It should be easy to apply this prohibition where the sexual reputation comes to the knowledge of the accused only after the event occurred. A reference to the beliefs of even one other person about the sexual activities of the accusing witness should be prevented by the provision. Applying the prohibition could be more problematic where the accused claims knowledge of the reputation predating the alleged assault. In this situation, knowledge of reputation might be relevant to the subjective element of the offence.[53]

It has been suggested that s 409B precludes the accused from adducing evidence that the accusing witness is a "sexual fantasiser ... all too willing to make allegations".[54] The provision is then criticised on the basis that exclusion of such evidence may be "unfortunate" for the accused in particular cases.[55] The interpretation, which founds this criticism, must be considered doubtful. The prohibition against introducing evidence of sexual reputation is a prohibition against introducing evidence of the opinion of one or more others about the accusing witness' sexual practices. The prohibition does not exclude any factual material from evidence. Proof of the fact that the accusing witness has made other allegations of sexual assault is factual material. It should not be excluded by the provision.

Evidence of sexual experience enables the jury (or judge alone) to draw inferences as to the accusing witness' sexual reputation. It is a fiction that evidence admitted pursuant to s 409B(3) will only be used for the purpose of proof of the offence. The prevalent stereotypes of female sexuality make it inevitable that the trier of fact will use evidence admitted under s 409B(3) to build a picture of the accusing witness' sexual reputation.

C. Judicial Interpretation of Evidence of Sexual Experience

Evidence disclosing or implying that the accusing witness has had (or has not had) sexual experience is rendered inadmissible by s 409B(3). The word

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50 *Toohey v Metropolitan Police Commissioner* [1965] AC 595

51 R Bonney, note 37 *supra* at 120

52 *Ibid* at 13.

53 See *R v Masters* (1986) 24 A Crim R 65

54 See *R v M* note 38 *supra*, *R v Bernthaler* (unreported, NSW CCA, Kirby P, Badgery-Parker and Ireland JJ, 17 December 1993)

55 *R v Bernthaler* note 54 *supra* at 6, per Badgery-Parker J.

disclose was interpreted to mean "to make a statement, which reveals or makes apparent some fact, previously unknown to someone who hears or reads the statement".[56] Evidence of conversations in which the accusing witness disclosed 'her' previous sexual experience was precluded as it disclosed that the accusing witness had, or may have had, sexual experience.

The exclusionary provision may apply to exclude evidence offered by the prosecution. Although this does not appear consistent with the legislative objective, there is nothing in the wording of the provision to prevent such an interpretation. Further, there are two appellate decisions arising out of applications to exclude prosecution evidence. In the first,[57] evidence given in chief by the accusing witness, a fifteen year old girl, that she had told the accused that she did not "do that kind of thing" because she was "a Christian", was held inadmissible. It disclosed the accusing witness' lack of sexual activity. Chief Justice Street commented that the trial had miscarried because the evidence of "this unmarried girl"[58] was capable of conveying "the misleading impression that she did not as a matter of principle take part in sexual intercourse".[59] The other case did not prohibit the defence from taking such an objection.[60]

The prohibition against evidence of 'sexual experience' may not catch evidence of prior sexual abuse.[61] In a case in which the accusing witness was a girl several years below the age of consent, the defence wished to reveal the abuse to attack the credibility of her story. Justice Sperling, on appeal, commented that the s 409B(3) may apply only to prior sexual experience which was consensual.[62] The suggested interpretation may allow the defence to frustrate the intended protection for accusing witnesses in cases where the witness is most vulnerable and should be protected most stringently. The sheer horror of the suggestion would be reduced if the information could be obtained otherwise than by cross-examination of the victim of the prior abuse.

D. The Exceptions to Section 409B(3)

Evidence otherwise excluded by the prohibition in s 409B(3) may be led if it comes within an exception in a subparagraph to the section. An analysis of the judicial exposition of these exceptions, offered here, shows a tendency to interpret the exceptions very broadly. This supports the view that a residual judicial discretion might have defeated the purpose of the legislature.

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56 *R v White* (1989) 26 A Crim R 251 at 258.

57 *R v Linskey* (1986) 23 A Crim R 224

58 The fact that Street CJ referred to the witness as "unmarried" is worthy of comment. The judgment also contains the comment that "[i]t was undoubtedly an incredibly foolish action by this girl to set forth as she did hitch-hiking and to enter the vehicle with two young men clad as she was to some extent in swimming clothes. She thus exposed herself to the risk of what she said did in fact happen, that is to say, a sexual attack" *ibid* at 229.

59 Note 57 *supra* at 229

60 *R v Johnson* (unreported, NSW CCA, Gleeson CJ, Clarke JA and Studdert J, 23 July 1990)

61 *R v PJE* note 5 *supra*.

62 *Ibid* at 5.

(i) Evidence of a Connected Set of Circumstances

Evidence of sexual experience or activity is admissible, if it occurred at or about the time of commission of the alleged sexual offence and forms part of a connected set of circumstances in which the alleged offence was committed. Such evidence would have come within the common law *res gestae* exception.[63] Fishman points out that the accusing witness' conduct at or near the time of the alleged offence may be highly relevant on the issues of consent and credibility.[64] However, there are also circumstances in which the admission of such evidence would directly contradict the principles behind the legislation. Fishman suggests that in these circumstances the courts should exclude the evidence.[65]

One case, which illustrates circumstances in which such evidence is legitimately admitted, arose where teenage boys were charged with rape after the accusing witness had voluntarily entered their car asking to be taken to a party.[66] Just before the incident, the woman had been with two acquaintances. They testified that only a few minutes earlier the complainant approached another stranger in the parking lot and asked him to take her to a party announcing: "I want to ... get me some nookey". Fishman suggests that evidence that the complainant indicated sexual interest in another shortly before the alleged assault occurred properly is admissible.[67]

Section 409B(3)(a) contains two clauses in a conjunctive relationship. These lay down preconditions to the admission of the evidence. Admissibility is dependent, first, on a temporal relationship between the other sexual experience and the alleged offence. The other encounter must occur "at or about the time" of the offence. The second stipulation is that the other encounter must "form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed". It is suggested that the reference to circumstances in which the offence was committed should be interpreted as a reference to circumstances which impact in some way on the actions of the accused. This view could be supported by a case in which evidence of sexual activity six hours before the assault was excluded.[68] The court held it was not "*by itself* logically probative"[69] and accordingly did not fall within s 409B(3)(a).[70] A wider view of relevance was, however, taken in another case.[71] Evidence of an alleged sexual relationship between the accusing witness and a supporting witness was admitted as it might suggest a motive for the supporting witness to lie. In the United

63 J Stone, "Res Gestae Reagitata" (1939) 55 *Law Quarterly Review* 66; S Odgers, "Res Gestae Regurgitated" (1989) 12 *UNSWLJ* 262

64 CS Fishman, "Consent, Credibility and the Constitution: Evidence Relating to a Sex Offence Complainant's Past Sexual Behaviour" (1995) 44 *Catholic University Law Review* 709 at 777.

65 *Ibid* at 778.

66 *Villafranco v State* 313 SE 2d 469 (Ga 1984) as recounted by CS Fishman, *ibid* at 783.

67 CS Fishman, note 64 *supra* at 782 citing, at 785, *People v Wilhelm* 476 NW 2d 753 (Mich Ct App 1991) cert denied 113 S Ct 2359 (1993).

68 *R v Dimian* note 40 *supra*

69 *Ibid* at 12, per Hunt CJ at CL (emphasis in original).

70 The evidence was admissible pursuant to s 409B(3)(c)

71 *R v Bond* (unreported, NSW CCA, Grove and James JJ, Hamilton JA, 20 August 1996)

States, such evidence would be admissible despite the exclusionary provision, under the Sixth Amendment to the *Constitution.*[72]

In *R v Morgan*,[73] evidence of consensual sexual intercourse occurring one or two hours after the alleged offence was admitted pursuant to s 409B(3)(a). It is suggested that the decision is deeply problematic. The court found[74] that the sexual activity satisfied the dual requirements of "temporal relationship",[75] and "connection".[76] The finding that the temporal requirement was satisfied, while dubious, would appear to lie within the discretion of the judge. The finding that there was a connection is more difficult. The behaviour could not possibly affect the accused's actions or behaviour. The suggested 'connection' between the consensual intercourse and the alleged assault was that an inference arose from the witness' subsequent conduct that it was unlikely the assault occurred. An alternative statement of this proposition is that women who have been sexually assaulted would not shortly thereafter have consensual sexual intercourse.[77] There is no empirical data to support such a rationale, and in the light of the descriptive work on Rape Trauma Syndrome, it must be considered highly suspect.[78] Further, it is just the kind of narrow, morality based reasoning that the section should exclude.

(ii) Evidence of a Relationship with the Accused

Evidence of a pre-existing relationship between the accused and the accusing witness is admissible if the conditions specified in s 409B(3)(b) are satisfied. The relationship must have been "existing or recent" at the time of the commission of the alleged offence. The Court of Criminal Appeal has commented[79] that the term "relationship" is "sometimes used with almost deliberate obscurity".[80] The Court concluded that the word must be interpreted narrowly. The evidence in question was of a conversation between the accusing witness and the appellant that disclosed the witness' prior sexual activity.

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72 CS Fishman, note 64 *supra* at 751 citing numerous cases including *Daniels v State* 767 P 2d 1163 (Alaska CA 1989); *Castro v State* 591 So 2d 1076 (Florida DCA 1991) at 1076-7

73 Note 39 *supra.*

74 *Ibid* at 544, per Gleeson CJ

75 Pursuant to s 409B(3)(a)(i)

76 Pursuant to s 409B(3)(a)(ii).

77 Mahoney JA held that: "I do not think I should conclude that it would not be properly open to a jury of men and women to conclude that for her to have such sexual intercourse an hour or two after forced intercourse is, in the relevant sense, unlikely or contrary to human experience". note 39 *supra* at 550

78 Expert opinion of Rape Trauma Syndrome suggests that not every victim will respond in the same way to sexual assault: see A Burgess and L Holmstrom, "Rape Trauma Syndrome" in D Chappell, R Geis, G Geis (eds), *Forcible Rape - The Crime, The Victim and The Offender*, Columbia University Press (1977) Note that in *R v F* (unreported, NSW CCA, Gleeson CJ, Gove and Abadee JJ, 2 November 1995) evidence of 'Child Sex Abuse Syndrome' was inadmissible. However, the Court did state, at 11, that "[i]t is not possible to say, categorically that evidence about such a syndrome could never be admissible".

79 *R v White* note 56 *supra* The accusing witness and the appellant had previously met casually on the beach on two occasions. When the third such meeting occurred an hour-long conversation ensued The accusing witness then invited the appellant to her house for coffee At her house the alleged sexual assaults took place.

80 *R v White* note 56 *supra* at 260

Applying a narrow interpretation, the court found there was no existing relationship between "two people who have met ... once or twice before and who strike up a conversation on the beach".[81] The disputed evidence did not fall within the exception.[82]

Construing the word "relationship" narrowly excludes connections that could be classified as mere acquaintance, but does not resolve the question of whether emotional commitment is necessary or whether a mere sexual encounter is enough.

R v Henning supports the suggestion that emotional commitment is not necessary to constitute a relationship.[83] The Court of Criminal Appeal, applying *R v McGarvey*,[84] held that "in the context of an alleged sexual assault" the emotional aspect was overshadowed by the sexual. The Court held that it would be unwise to attempt to define "relationship" too closely. The Court stated:

> In this volatile area of human activity, there must be a degree of latitude in order to enable judges to meet the particular exigencies of individual cases.[85]

The evidence offered in *Henning* was to the effect that "in their school days", the accusing witness had sexual (presumably consensual) intercourse with one of the accused. On this all parties and relevant witnesses agreed. Thereafter the evidence diverged. The accusing witness testified that she had not seen this accused since. The accused relied on conflicting testimony. The trial judge accepted the evidence of the accused. The gist of this evidence was that over the intervening period of nine years, the two had participated in group sex on about twenty occasions.

A decision that an emotional connection is not necessary may also advance prosecution interests. In *R v Beserick*,[86] the appellant was charged with indecent and sexual assault on two juvenile boys. The Crown was permitted, under the principles governing propensity evidence,[87] to lead evidence of subsequent sexual activity between the appellant and the accusing witness. The defence submitted that the evidence was inadmissible under s 409B(3). Hunt CJ at CL held that the evidence was admissible to establish guilty passion at the time of commission of the offence.[88] He commented that "guilty passion" evidence is

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81 *Ibid.*

82 Although the Court did not find a relationship existing between the accusing witness and the appellant, the point was made that "[i]t was common ground that the complainant was wearing nothing but the briefest of G-string swimming costumes with no top", *ibid* at 252

83 (Unreported, NSW CCA, Gleeson CJ, Campbell and Mathews JJ, 11 May 1990)

84 Note 40 *supra* at 634, per Hunt CJ at CL

85 Note 83 *supra* at 77.

86 (1993) 30 NSWLR 510.

87 *Ibid* at 521, applying *Harriman v The Queen* (1989) 167 CLR 590 and *S v The Queen* (1989) 168 CLR 266. It could be argued that under the *Evidence Act* 1995 (NSW) the admissibility of evidence of a 'guilty passion' is subject to ss 97, 101, 135 and 137.

88 Hunt CJ at CL observes that there are two true bases of admissibility of evidence of 'guilty passion'. The first is "to establish a sexual relationship which makes the complainant's allegation more likely to be true". *B v The Queen* (1992) 175 CLR 599, *Harriman v The Queen* note 87 *supra* The second is "to place the evidence of the offence in a true and realistic context, to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act occurring without any apparent reason".

"*not* the mischief which the legislation sought to cure",[89] and held that *R v White*[90] should not be read as "intending to lay down an all-embracing definition applicable in all cases".[91] While the suggestion that a romantic or emotional involvement is not necessary appears correct, the term "relationship" must be interpreted so as to exclude evidence of mere acquaintanceship.[92] An acceptable definition would include passionate but non-physical liaisons and sexual, even if not passionate, relationships.

Relationship evidence, under s 409B(3)(b), must be "existing or recent" at the time of the alleged offence. There has been little judicial exposition of the meaning of this term. The point was not specifically canvassed in *R v Henning*[93] as the defendant testified that the most recent encounter occurred three weeks before the focal event. In *R v Beserick*,[94] the relevant activity occurred subsequent to the offences. The Court distinguished between the temporal requirements in s 409B(3)(a) and s 409B(3)(b). The former requires the activity to be "at or about the time" of the alleged offence. In interpreting the second exception in *Beserick*, the court held that evidence of a relationship existing at the time of the alleged offence might include evidence of activity that happened after the alleged crime.[95]

(iii) Evidence to Explain Physical Evidence

Evidence of past sexual activity is admissible to explain physical evidence, where the accused denies that intercourse took place. Such physical evidence may be evidence of the presence of semen, pregnancy, disease or injury. If alleged past sexual intercourse might account for the physical evidence it is admissible.

In an extraordinary interpretation of this section, the Court of Criminal Appeal[96] interpreted the term 'injury' to include not only injury caused directly by sexual intercourse, such as damage to the victim's vagina, but also evidence of distress and dishevelment. The Crown case was that the appellant, pretending to be a police officer coerced the accusing witness into his car. He then handcuffed her to the gear lever and subjected her to a series of brutal sexual assaults. She escaped when a security guard approached, and made an immediate complaint to that guard. Police were called. The guard, attending police and the accusing witness' mother all gave evidence of her considerable state of distress. The appellant denied that sexual intercourse had taken place. The 14 year-old accusing witness disclosed, in her statement to police, that she participated in consensual sexual intercourse earlier on the relevant evening.

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89 Note 86 *supra* at 519 (emphasis in original)

90 Note 56 *supra*.

91 *R v Beserick* note 86 *supra* at 517

92 See NSW Standing Committee on Social Issues Report 9, *Sexual Violence Addressing the Crime, Inquiry into the Incidence of Sexual Offences in New South Wales, Part II*, (Recommendation 1), 1996 at 28

93 Note 83 *supra*

94 Note 86 *supra*.

95 *Ibid* at 521.

96 *R v Dimian* note 40 *supra*.

Perhaps police officers should be vigilant to exclude irrelevant past sexual conduct in preparing briefs for sexual assault prosecutions. Defence counsel submitted, on appeal, that cross examination about this prior sexual activity should have been permitted under s 409B(3)(c) as the earlier sexual intercourse might have caused the distress and dishevelment. In admitting the evidence, the Court interpreted the term "injury" to include the distressed emotional state. On appeal, the prosecutor submitted that the words "injury ... attributable to the sexual intercourse" in s 409B(3)(c) meant that the "injury" must be the direct result of sexual intercourse and that the term "injury" should be interpreted with the words, "semen, pregnancy [and] disease". Hunt CJ at CL rejected this submission. He referred to these words of the legislature:

> If the accused denies that intercourse occurred at all, and says that the offence must have been committed by someone else, it would not be fair to deprive him of the right to cross-examine the complainant as to whether the complainant had, at around the relevant time, been having intercourse with another person.[97]

The decision is particularly troubling because it had the effect of allowing the defence to introduce evidence of consensual sex, to explain distress. Clearly consensual sexual intercourse might be responsible for the presence of semen or pregnancy or "injury"; it is much more doubtful if it would account for distress. It is suggested that the finding that evidence of consensual sex is relevant to the distress of the victim may be accepted only in the light of the extreme youth of the accusing witness.

It appears that, where the prosecution adduces evidence of the accusing witness' distress to corroborate the sexual assault allegation,[98] defence counsel can rebut this with evidence suggesting that distress resulted from prior sexual intercourse.[99]

This exception does not specify a temporal connection between the alleged assault and the past sexual conduct.

(iv) Evidence of Infection, Disease or Pregnancy

No Australian case law illuminates the fourth and fifth exceptions contained in s 409B(3). Relevant case law exists in the United States of America, however, and this material will be referred to briefly here. The fourth exception applies where the evidence might show that, at a relevant time, either of the participants in intercourse had a disease not present in the other. In *Ex Parte Geeslin*,[100] the prosecutor did not present evidence that shortly after the rape was reported a vaginal smear of the accusing witness showed the presence of sperm carrying gonorrhoea. This was coupled with evidence that twelve days later a semen sample taken from the defendant was negative for the disease. It was held that this suppression deprived the defendant of a fair trial despite the fact that the prosecutor had reason to believe that the defence was fully cognisant of the

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97 *Ibid* at 13: quoting F Walker, Second Reading Speech, New South Wales, Legislative Assembly, 1981, Debates, vol 161, p 4765.

98 *R v Ryan* (unreported, NSW CCA, Gleeson CJ, Mahoney JA and Wood J, 15 April 1994)

99 Provided the accused denies that sexual intercourse took place: s 409B(3)(c).

100 505 So 2d 1246 (Ala 1986)

significance of the evidence. Three cases,[101] in which the defendant attempted to present evidence that the accusing witness was infected by a sexually transmitted disease with which the defendant was not infected, yielded mixed results. Such evidence clearly indicates that the accusing witness has engaged in prior sexual conduct. On the other hand, medical opinion denies that such evidence has clear relevance as to whether intercourse occurred.[102]

No case, in which evidence was led that the defendant had a disease absent in the accusing witness, is reported. This would appear to be explained by the fact that such evidence would prejudicially affect the defence.

The fifth exception applies where it is suggested that the first complaint was made when the accusing witness realised that she was pregnant or diseased. In *State v Parker*,[103] it was held to be a prejudicial error that the accusing witness' admission that she had left home just prior to the alleged rape because she was pregnant was not in evidence. This evidence was said to be probative of a motive to fabricate the accusation. The accusing witness might have wished to deflect attention from the fact that she had engaged in consensual sex. This case may exemplify the worst nightmares of Hale[104] and defence lawyers, but it may also represent a situation in which the accusing witness made a brave and courageous attempt to achieve justice despite the fact that circumstances would argue against her. The fact that she admitted both the pregnancy and its consequences without more is insufficient to allow us to decide between the two possibilities. It is agreed that the admission should have gone to the jury.

In American cases it has also been held that, if the complainant is pregnant with another man's child when she testifies, the fact should be concealed from the jury.[105] If this is not possible, and the jury might believe the child is the defendant's, the pregnancy must be explained.

(v) Evidence to Rebut Prosecution Evidence

The final exception to the prohibition on evidence of sexual experience applies under s 409B(3)(f) if the defence could be unfairly prejudiced if cross-examination was not allowed, pursuant to s 409B(5). It allows defence cross-examination where the prosecution discloses or implies that the complainant has had or lacks sexual experience. The exception has rarely been referred to in judgments. This may be because such cases fall within the 35 per cent of cases in which the evidence is admitted without discussion.[106] This provision sits strangely with the interpretation of s 409B that prohibits the prosecution from

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101 *State v Ervin* 723 SW 2d 412 (Mo Ct App 1986) at 415, *State v Jarry* 641 A 2d 364 (Vt 1994) at 366, *State v Steele* 510 NW 2d 661 (SD 1994).

102 CS Fishman, note 64 *supra* at 737 citing AM Rees and C Wiley (eds), *Personal Health Reporter* (1993) p 111.

103 730 P 2d 921 (Idaho 1986) at 924-5.

104 M Hale, *The History of the Pleas of the Crown* (1736) p 626.

105 *Moore v Duckworth* 687 F 2d 1063 (7th Cir 1982) at 1064; *Moore v State* 293 NE 2d 175 (Ind 1979) at 177

106 *Heroines of Fortitude* Report, note 4 *supra* at 232.

introducing such evidence.[107] It may operate as a fail-safe mechanism but it is not clear that this is the only possible interpretation.

It was suggested in *R v Henning*[108] that the evidence would have been admissible pursuant to s 409B(5). In evidence in chief, the accusing witness stated that she had not seen the accused since leaving school: in the context it was clear that this implied a lack of sexual intercourse in that period.[109]

At least one case suggests that the defence preferred to argue for a stay rather than to invoke this exception. In *R v Morris*,[110] the jury was discharged because the judge held that the defence would be prevented from suggesting that prior sexual abuse of the accusing witness explained the medical evidence. Arguably, discharging the jury was not necessary as, under s 409B(5), the defence could have raised prior sexual abuse if the prosecution's medical evidence "disclosed or implied" a lack of sexual experience.[111]

E. Auxiliary Provisions

Although judicial attention has focused on the exceptions to the prohibition in s 409B(3), the section also contains a number of auxiliary provisions. A discretion is vested in the trial judge by s 409B(3). It is not often invoked. It allows the trial judge to exclude evidence, although it falls within an exception, if its probative value is less than "any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission". As Mahoney JA observed, the "double protection"[112] available under the provision is rarely offered by judges. He criticised the "double protection" on four bases. It places distress above imprisonment. It requires the effect of the evidence to be determined in the absence of information that would help the judge assess its distressing effect. It ignores the uncertainties of cross-examination and applies if the probative value outweighs distress that *might* be suffered.[113] The authors submit that evidence could be presented on a *voir dire* to help the judge assess the distressing effect, and that in many cases the distressing effect becomes quite obvious. It has also been suggested above that distress or imprisonment should not be weighed against each other. They are not notions that are measurable arithmetically against each other.[114]

Having decided to allow the evidence, the judge is required to record the "nature and scope of the evidence that is so admissible and the reasons for that decision".[115] Hunt CJ at CL has twice commented[116] on this requirement. Counsel should be vigilant, his Honour said, to see that a proper record of the

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107 *R v Limskey* note 57 *supra*

108 Note 83 *supra*.

109 *Ibid* at 72-4

110 Unreported, NSW SC, Wood J, 18 October 1990

111 The reasons for judgment contain no reference to s 409B(5).

112 See *R v M* note 38 *supra* at 557, per Allen J.

113 *R v Morgan* note 39 *supra* at 551.

114 See the criticism of the judicial discretion for excluding evidence where the "prejudicial effect outweighs the probative value" referred to by McHugh J in *Pfennig v R* (1995) 182 CLR 461 at 528.

115 Section 409B(7).

116 *R v McGarvey* note 40 *supra*; *R v Dimian* note 40 *supra* at 9.

material is made. This should be achieved by handing a detailed written statement to the judge and having it marked for identification.[117] The prosecutor should not insist on the defence identifying each question they intend to ask.[118] The judge should, however, exercise firm control to ensure that the precise limits laid down are not exceeded in cross-examination.[119] It has been recommended that trial judges intervene to ascertain the direction and the purpose of the cross-examination.[120] Although such an approach has been criticised[121] as unfair to the defence case, it is clearly in line with the legislative intention.

V. STAYING TRIALS WHERE SECTION 409B APPLIES

A tactic recently adopted by defence counsel derives from the High Court's decision in *Dietrich v The Queen*.[122] An argument for staying the proceedings to avoid an unfair trial is presented when s 409B would preclude the defence from leading available evidence. Comments by Mahoney JA in *R v Morgan* support this argument. He suggested that:

> Where the non-compliance with the law goes to the substantial propriety of the trial and its fairness, the court in my opinion, will intervene. It will not do so if the non-compliance with the law is peripheral.[123]

The inherent contradiction in the position appears from the outset. If evidence is excluded by the application of s 409B the law has been observed. As Mahoney JA[124] points out, the High Court has stressed the "fundamental nature" of the right of the accused to a fair trial. The verdict of guilty could not, his Honour said, be set aside in every case in which probative evidence was excluded by s 409B. The question must be whether the trial was rendered unfair to the accused.[125]

In a strange legal development, the argument was used to stay a number of child sexual assault prosecutions.[126] This was before the Court of Criminal Appeal's decision in *R v PJE*.[127] The development is seen as strange because s 409B was enacted to protect accusing witnesses against intrusive probing of their sexual histories, to reduce the accusing witness' trauma during the trial and

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117 *R v McGarvey* note 40 *supra* at 634-5

118 *R v Dimian* note 40 *supra* at 9

119 *Ibid* at 15.

120 J Nader, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials* (1993) at 59

121 Oral evidence given by M Latham on 24 May 1994 to the NSW Standing Committee on Social Issues Report 9, note 92 *supra* at 154 The Report also discusses the Nader recommendation. *ibid*

122 (1992) 177 CLR 292; see also *Jago v District Court (NSW)* (1989) 168 CLR 23

123 Note 39 *supra*

124 *Ibid* at 544.

125 *Ibid* at 554

126 *R v McIlvane* (unreported, NSW DC, Shillington DCJ, 30 August 1994), *R v Murphy* (unreported, NSW DC, Rummery DCJ, 30 May 1995) The argument was unsuccessfully advanced in the cases of *R v Morley* (unreported, NSW DC, McGuire DCJ, 23 June 1995), *R v Grills* (unreported, NSW DC, O'Reilly DCJ, 6 June 1995) and *R v PJE* (unreported, NSW DC, Dent DCJ, 5 April 1995).

127 *R v PJE* note 5 *supra*.

thus to increase the reporting of offences.[128] It is ironic that legislation intended to protect victims could be used to stop a trial. Justice Sperling identified this anomaly when he said:

> It would be the height of irony if a law enacted to facilitate the bringing of charges for sexual offences were to provide grounds upon which to stay such proceedings.[129]

Defence barristers, however, argue that, as the accusing witness will not be exposed to cross-examination about past sexual conduct when there is no trial, such stays of proceedings comply with the legislative purpose.[130] Discussion of the application of the exceptions above shows that a substantial amount of past sexual history is admitted into evidence despite the apparent 'rigidity' of the section and weakens the argument for such a stay.

In *R v PJE*,[131] the appellate court held that the separation of powers between courts and Parliament meant that a court's jurisdiction to stay proceedings does not extend to a situation where the unfairness is a consequence of the operation of a valid legislative provision. The Crown appeal against a stay of proceedings granted in the District Court was successful. In upholding the appeal, Justice Sperling stated:

> A court cannot, in my view, decline to exercise its jurisdiction on the ground that, in its opinion, the trial would be unjust because of the operation of a statutory law relating to the way the trial is to be conducted. The Parliament has the prerogative to say how a trial is to be conducted. The courts cannot over-ride that prerogative by refusing to exercise their jurisdiction.[132]

In refusing special leave to appeal, in *R v Berrigan*, McHugh J in the High Court echoed this comment labelling the defence argument "a staggering proposition" and asking how a trial can be unfair if conducted in accordance with the law?[133] The context of the decision in *R v Dietrich*[134] was, his Honour pointed out in *R v PJE*, entirely different. There the decision, which resulted in the stay, was made in the exercise of a broad administrative discretion.[135] In rejecting an application for special leave in *R v Berrigan*,[136] the High Court suggested, but did not decide, that the correct application of s 409B cannot, of itself, found an argument that a verdict is unsafe and unsatisfactory. Justice Dawson remarked, however, that it might be possible to conclude that the application of the section could lead to an unfair trial or an unsafe or unsatisfactory verdict.[137] The exclusion of evidence by virtue of s 409B,

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128 *R v Dimian* note 40 *supra* at 11, per Hunt CJ at CL. See also *R v Beserick* note 86 *supra* at 519

129 *R v PJE* note 5 *supra*.

130 *Grills v R, PJE v R* note 5 *supra*, applicant's submissions, at [3.6]: "The continued availability of a stay of proceedings in these circumstances would not interfere with the intention behind the legislation There would be no question of the courts admitting evidence in defiance of the legislature There would be no embarrassment of the complainant"

131 (Unreported, NSW CCA, 25 August 1995); *cf* note 5 *supra*

132 *R v PJE* note 5 *supra*.

133 *R v Berrigan* (unreported, HC Special Leave Application, Dawson, Toohey and McHugh JJ, 23 November 1995) at 3, per McHugh J

134 Note 122 *supra*. Proceedings were stayed due to the lack of legal representation.

135 See transcript of *Grills v R, PJE v R* note 5 *supra*, per McHugh J.

136 Note 133 *supra* at 10.

137 *Ibid* at 10, per Dawson J.

combined with other aspects of the trial, may cause a verdict to be set aside. Given this suggestion, and given the fact that special leave to appeal was rejected, it remains possible that the High Court may still decide that a stay of proceedings should be granted where s 409B applies.

It is suggested that, although important, the public interest in protecting the right to present a defence is not absolute; neither is it the sole public interest to be relevant. The right to present a defence is the right to present a full and fair defence, not the right to present any defence available no matter how unfair to the accusing witness. This point was clearly established in cases such as *R v Sorby*.[138] There is a public interest in ensuring that the processes of criminal justice are just and that the accused has a fair hearing. There is also a public interest in the effective prosecution of offenders. These interests were recognised in *Jago v District Court (NSW)*.[139]

In this context, the public interest in the effective prosecution of sexual offences is matched by a public interest in protecting victims of sexual assaults against traumatisation in the courts. The application of the argument, that a prosecution must be stayed when the resulting trial will be unfair, to *all* cases in which s 409B will operate to exclude evidence is based on the premise that the defence must not be hampered in any way. This premise is unacceptable and is not presented by responsible defence barristers. A question remains as to whether the argument can be presented in any case in which s 409B would apply. The application of the argument to some cases in which s 409B will operate to exclude evidence might be justifiable but it will be difficult to decide in advance of hearing whether a case falls into this category. Where the court has to rely on unsupported assertions of counsel to assess such cases, there is an obvious source of concern. There must be at least a temptation for the defence to exaggerate the importance of the to-be-excluded evidence when arguing for a stay of proceedings. The stay achieves the result that the accused is no longer in jeopardy of spending time in gaol and the legal representative of the accused will have completed the task they accepted. This must be the point of the comment by Sperling J that it may be appropriate to allow an appeal on the basis that the verdict is rendered unsafe and unsatisfactory.

As s 409B currently stands, the accusing witness is given no choice. It is possible that, if given a choice, some would choose to have the trial proceed despite the fact that their sexual history would be paraded. This is undoubtedly what happened informally at common law. In another context, leading exponents of therapeutic jurisprudence have argued that to allow people self-determination, to allow them a choice in how a hearing proceeds, is essential to their psychological well being and effective functioning.[140] A witness allowed to

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138 [1986] VR 753; (1986) 21 A Crim R 64. See also *R v Howard* (1932) 32 SR (NSW) 541; *R v Kilby [No 1]* [1970] 1 NSWLR 158

139 Note 122 *supra*.

140 B Winick, "The Side Effects of Incompetency Labelling and the Implications for Mental Health Law" (1995) 1 *Psychology, Public Policy, and Law* 6; TR Tyler, "The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings" (1992) 46 *Southern Methodist University Law Review* 433 (reprinted in D Wexler and B Winick (eds), note 6 *supra*).

decide whether or not to submit to cross-examination on sexual history may be better able to deal with a potentially traumatic experience. Taking this approach would not involve a return to the position before the provision was enacted. It is suggested that this would be more effective than vesting discretion in the judge, as control remains with the witness.

VI. CONCLUSION

It is suggested that there are good reasons for gagging the accused when the defence attempts to introduce evidence of past sexual history. Given the trauma that accusing witnesses had suffered in our courts, and the judicial failure to address the problem, the enactment of s 409B was justified. The legislature attempted to ensure that the courts would give weight to these concerns by enacting a rule instead of creating a discretion which might not be exercised. It now appears certain that s 409B will not survive in its current form. The Model Criminal Code proposal, prepared by the Standing Committee of Attorneys-General,[141] would see the current provision replaced by a discretion comparable to those created in other Australian jurisdictions in the mid-1980s. This move will meet the call of NSW judges for a residual discretion in the trial judge to permit evidence of past sexual conduct of the accusing witness to be led in order to prevent serious injustice to the accused.[142] It is of concern, however, that the process of education of the bench[143] and the bar may not yet have gone far enough. An unguided discretion may lead to renewed agony for the accusing witness in such trials. As the accused has the right to appeal against a verdict but the prosecution does not, the trial judge may be slow to exercise a discretion to exclude. If a discretion is to be adopted, a provision comparable to that adopted in Canada should be preferred. This legislation specifically requires the judge to consider the personal dignity of the witness and the effects of sexual stereotyping.[144]

On the other hand, at least the draft has not adopted the option of abandoning any attempt to limit evidence of past sexual history. It would still be unduly utopian to suggest that defence counsel would not attempt to use such evidence to appeal to the puritanical streak in society in order to obtain an undeserved verdict for the accused. If such a utopia is attainable, there will be time enough to repeal such provisions once it has been attained. Given that the accused is free to appeal against a verdict of guilty but that neither prosecutor nor accusing witness can appeal against an acquittal, it would also be undesirable to rely on general exclusionary discretions.[145] Development of the discretions now

141 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Discussion Paper, *Model Criminal Code, Chapter 5, Sexual Offences Against the Person*, 1996.

142 See *R v Bernthaler* note 54 *supra* at 8, per Kirby P.

143 NSW Standing Committee on Social Issue Report 9 (Recommendation 3), note 92 *supra* at 29.

144 *Canadian Criminal Code*, s 276

145 As was demonstrated in *R v Sommerville* (unreported, NSW DC, Dent DCJ, 29 September 1995) In this case, Dent DCJ held that s 409B did not apply to a trial for allegations of sexual assault which

available under the *Evidence Act* provisions[146] may change this but again this has not yet been shown.

Another option would have been to amend s 409B. This article has suggested a number of amendments would have been warranted. The application of the provision to both prosecution and defence evidence should be reconsidered. Applying the provision to the prosecution prevents an appeal to sexist stereotypes but it also prevents an informed choice to waive the protection in the interest of proceeding with an attempt to obtain a conviction. Where the prosecution introduced such evidence, the defence can rely upon ss 409B(3)(f) and (5). The approach of having different rules for different parties to the proceedings is not unique.[147]

Amendment of s 409B(2) excluding evidence of sexual reputation appears necessary to make the provision effective. The provision in s 409B(3)(b) relating to evidence of a relationship has been given an unacceptably broad interpretation in some cases;[148] this problem could also be addressed by an amendment. A clause to allow the prosecution to adduce evidence of "guilty passion" nurtured by an accused towards a child victim, might also be considered.[149]

The interpretation of "injury" used in *R v Dimian*[150] is beyond the ambit of the logical meaning of such a term within the context and intended purpose of s 409B(3)(c). The legislation could define "injury" to limit it to the direct result of the alleged offence, for instance injury to the genitalia. Such injury should not include "distress and dishevelment". Finally, a provision should be introduced to deal with the situation where the trial judge determines that the trial cannot proceed without introducing such evidence. This provision should allow the witness to choose whether to submit to such a cross-examination.

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occurred prior to the enactment of s 409B and therefore evidence that the accusing witness had "quite promiscuous behaviour" was admissible

146 *Evidence Act* 1995 (NSW) ss 97, 103, 135, 136.

147 *Evidence Act* 1995 (Cth and NSW), s 137.

148 See discussion of *R v Henning* note 83 *supra*.

149 See discussion of *R v Beserick* note 86 *supra*.

150 Note 40 *supra*