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Hon Kiritapu Allan

Minister of Justice

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Dear Minister

RE: Book launch, 8 March

Invitations have been sent out in your name for an event at Parliament to launch a book authored by Professor Elisabeth McDonald, titled, "Intimate partner rape and the trial process: Research, reflections and reform". It is likely that this book continues the author's campaign for major changes to the conduct of rape trials.

It is the strongly held view of ADLS Criminal Law Committee that Professor McDonald's work has harmfully influenced the legal landscape – to the detriment of those the law is actually required to presume innocent - and we suggest that her influence should not be further lauded.

Professor McDonald was one of the personalities behind the draconian 'reform' to remove the long-established right of defendants to lead relevant evidence as to sexual practices between the defendant and the complainant, within their prior relationship. That 'achievement' was enacted via the Sexual Violence (Legislation) Act 2021. Moreover, during her select committee appearance on the bill, Professor McDonald made comments that are reasonably interpreted as supporting the enactment of further circumscriptions as to even mentioning during trial, the prior relationship between the complainant and the defendant. I must let you know that the Defence Bar, will be implacably opposed to any further 'reform' along this track.

It has long been the law here and in many comparable (Anglo-American) jurisdictions that the jury in a rape trial cannot hear evidence about a rape complainant's sexual experience with people other than the defendant. This is to

prevent a jury colouring their decision with misplaced opinions about the complainant's sexual reputation.

The new amendment extended the same bar to evidence of the complainant's sexual experience with the *defendant.* This amendment will create injustice because the two situations are fundamentally different. Experience with other people does not usually bear upon consent from the complainant, but evidence of experience with the defendant does do so. A crucial matter is that a jury in a rape trial, is not only required to determine whether consent was present. It is also required to determine whether the defendant had a reasonable belief that consent was present, which is not the same thing.

Intimate relationships routinely rely on understandings and nonverbal communication. Where a defendant asserts he had a reasonable belief that his partner was consenting, this can only be evaluated by receiving evidence of what was usual and established between the two people. The new law prevents a defendant offering this vital exculpatory context to a jury as of right. It is true that there is still scope under the Evidence Act for the judge to allow this evidence in, but the defendant must ask permission for that step. To support this request, he must show that the evidence is of "direct relevance" to the issues. When this issue was at the Bill stage it was repeatedly referred to as a "heightened relevance" test.

Relevance however, is in fact, a black and white concept. If something is relevant then logic has always permitted any party it assists to admit it. "Direct" and "heightened" relevance are legally nonsensical. Introducing these terms creates uncertainty for defendants and likewise judges who have to make rulings. At a minimum, qualifying relevance in this way acknowledges that some relevant evidence will not be admissible. This is not consistent with the basic right to a fair trial.

Repeatedly, the large bulk of defence lawyers defending these cases, prosecutors, the ADLS and other organisations voiced deep concern that these changes will imprison innocent people. Also, tellingly, the Law Commission's own advisory panel of judges (including the two from the Sexual Violence Pilot Court) did not support presumptively outlawing all evidence of the complainant's relevant experience with the defendant, concerned that it would make it difficult for defendants and complainants to tell their story.

Concurrently, the law was also changed so that lawyers for defendants are directed to cross examine a complainant on video before trial, purportedly so she does not have to attend trial months later. This flies in the face of the experience of any lawyer who has worked in this area. Defendants' lawyers take months to refine

their cases as prosecution disclosure (often very slowly) makes its way to them. It is impossible for any lawyer to effectively cross examine a complainant before trial, let alone months before, with any degree of certainty that their client's interests will be properly served. It is most likely that Complainants will be required to return to court to complete cross examination in the second part of the trial, thus defeating the purported objective of the pre-recording. The logistical difficulties of getting two court dates (one for the pre-recording and one for the remainder of the trial) to suit both counsel and the Judge will be almost insurmountable. The fact that these issues are not well understood at an academic or legislative level is of grave concern to those of us that are forced to accommodate these changes at the "coal face".

Lastly and on behalf of the ADLS, I ask you to bear in mind that while debate into better trial processes might always be fashionable, posited 'reforms' should never undermine basic principles of fairness and defendant trial rights to which the legal system of this country has given its allegiance for a very long time.

Yours sincerely,

JULIE-ANNE KINCADE KC

ADLS Council Member and Convenor of Criminal Law Committee at ADLS