HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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**Form 27E – Appellant's reply**

Note: see rule 44.05.5.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S92/2025

BETWEEN:

**WHS**
Appellant

and

**THE KING**
Respondent

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## APPELLANT'S REPLY

**Part I:** It is Certified that these submissions are in a form suitable for publication on the Internet.

**Part II:** **REPLY TO ARGUMENT OF THE RESPONDENT**

1. With respect to ground 1, the respondent argues that the age of the complainant "without more" could never constitute the relevant "disclosure or implication" in the prosecution case against an accused such that s 293(6) is engaged. The appellant agrees. The issue is what "more" means.

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2. The respondent does not clearly identify what "more" would be required to satisfy the requirements of s 293(6). Presumably the respondent adopts the analysis of Fagan J at [38] that the "more" is that the prosecutor must "invite" the jury to draw an inference about lack of prior sexual experience (although it may be noted that the respondent states at [59] that it "does not take issue with the submission that the 'case for the prosecution' should not be understood as exclusively constituted by how the Crown Prosecutor formulates that case in submissions to the jury"). The appellant accepts that would be one way in which it "has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have … had … a lack of sexual experience". However, the appellant contends that another way

30 would be where the (totality of the) evidence adduced in the prosecution case is likely to lead the jury to draw that inference. On this analysis, the "case for the prosecution" is understood as

not just the evidence that is adduced, it is also the evidence that is not adduced. Thus, for example, if the prosecution adduces:

> (a) evidence of a complainant's detailed accounts of various kinds of sexual activity allegedly involving the accused;
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> (b) evidence that the accounts were given by the complainant when she was younger than 10 years old (inevitably raising the question in the minds of the jury of *how* she could have provided such detail if the events did not occur), *and*

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> (c) evidence (or agreed facts) that would tend to indicate prior sexual experience on the part of the complainant

then there would be no real risk that evidence of the age of the complainant would lead the jury to draw an inference of lack of sexual experience. *Munn v R; Miller v R* [2006] NSWCCA 61 is an example of a case where the totality of the prosecution evidence tended to show that "the complainant did not lack experience" (Barr J at [29]). However, where the prosecution does not adduce evidence tending to indicate prior sexual experience that will have the consequence that the jury is likely to infer from the young age of the complainant a relevant lack of sexual

20 experience.

3. For that reason, the respondent's argument at RS [54] that if the age of the complainant "without more" could constitute the relevant "disclosure or implication" in the prosecution case, "one would expect that to have been expressly stated, as opposed to it forming the basis of the "implication" required by s 293(6), is unpersuasive. The appellant does not contend that the age of the complainant "without more" can constitute the relevant "disclosure or implication. It is the totality of evidence adduced in the prosecution case that can imply the lack of sexual experience.

30 4. The respondent generally endorses the analysis of Fagan J. However, one argument relied upon by the respondent that was not part of the reasoning of Fagan J is found at RS [52]. The

respondent argues that the age of a child "is not inadmissible evidence to which s 293(3) is directed" and it would be "incoherent" to hold that such evidence is "not inadmissible" under s 293(3) but nonetheless satisfied the requirements of s 293(6) (RS [52]). The respondent thus adopts the following reasoning:

> (i) some words in one provision (s 293(3)) are the same as words in another provision (s 293(6))
> (ii) the first provision is construed to mean something (the age of a child does not imply a lack of sexual experience)
> (iii) it would be incoherent to construe the second provision to mean something different (the age of a child can imply a lack of sexual experience)

This process of reasoning as advanced by the respondent is flawed at each step of the process.

5. With respect to step (i), the wording of s 293(3) and s 293(6) is not the same. Section 293(3) says "[e]vidence that discloses or implies … that the complainant has or may have had … a lack of sexual experience" while s 293(6) says "it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have … had … a lack of sexual experience". Thus, s 293(3) refers to "evidence" that discloses or implies something while s 293(6) refers to a prosecution case that discloses or implies something. It is true that the appellant contends that "the case for the prosecution against the" appellant did imply that the complainant lacked sexual experience when evidence was adduced that she was 9 years old when she gave her account to the police, but that is because there was no other evidence adduced by the prosecution tending to show that she did have some "sexual experience". As explained above, the "case for the prosecution" is understood as not just the evidence that was to be adduced, it is also the evidence that was not to be adduced by the prosecution.

6. With respect to step (ii), it is very doubtful that the correct construction of s 293(3) is that it never renders evidence of the age of a child inadmissible. The better construction is that it *does* have the effect that the age of a complainant can imply that the complainant has or may have

had a lack of sexual experience and thus be inadmissible on that basis. Parliament intended that it would be caught by s 293(3). However, it was also intended that the exception in s 293(4)(a) would apply. It will be evidence of the complainant's lack of sexual experience at or about the time of the commission of the alleged prescribed sexual offence and of events that are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed. In the Second Reading Speech with respect to s 409B, the Attorney-General gave as an example of the operation of what became s 293(4)(a) (then s 409B(4)(a)) – "the police doctor may give evidence that upon examination the hymen of the victim had been recently broken, indicating that she was a virgin prior to that time" (see ABFM vol 3 at 948.4). Thus, it was understood that this was evidence of lack of sexual experience caught by s 409B(3) but the exception in s 409B(4)(a) would apply. As noted in the original written submissions, the Attorney General returned to this scenario when discussing the operation of s 293(6) (then s 409B(5)), observing that "if it is somehow suggested during the prosecution case - for example through the evidence of the police surgeon - that the complainant was a virgin prior to the events, then the accused may explore that matter by cross-examination, if he sees any benefit in it" (see ABFM vol 3 at 950.5). Thus, it was understood that evidence implying lack of sexual experience adduced by the prosecution would fall within the exception in what became s 293(4)(a) but this would permit cross-examination in appropriate circumstances by the defence pursuant to what became s 293(6). It follows that if the prosecution adduces evidence that the complainant was very young at the time of the alleged sexual offence(s) described by the complainant, thereby implying that the complainant lacked sexual experience at or about the time of the commission of the alleged prescribed sexual offence(s), that evidence would fall within the exception in s 293(4)(a) but would, in turn, permit cross-examination in appropriate circumstances by the defence pursuant to s 293(6).

7. With respect to step (iii), even assuming (contrary to the above) steps (i) and (ii) were applicable in the present case there would be good reason to consider that the same words in the two provisions were not intended to operate in the same way. Parliament could well have intended s 293(3) to turn on the intended *use* of evidence while s 293(6) extended to the (likely) *effect* of the evidence. That is, s 293(3) may have been intended to render evidence inadmissible only where the prosecution sought to use the evidence to show lack of sexual

experience (so it would not apply if evidence of the age of the complainant was adduced for another reason, such as to establish an element of an offence) but s 293(6) was intended to apply regardless of the intended use by the prosecution of the evidence if the evidence adduced by the prosecution was likely to be understood by the jury as showing that the complainant lacked sexual experience. It is entirely plausible that Parliament intended that the same (or similar) words have a different operation in the two discrete provisions. There is no incoherence.

8. As regards the submission by the respondent at RS [54] that the necessary result of the appellant's argument is that every young child complainant could be cross-examined about their prior sexual experience "if the court was satisfied the accused might suffer unfair prejudice", this would not be the case (as in *Munn v R; Miller v R*) where the totality of the *prosecution* evidence showed that "the complainant did not lack [sexual] experience". In any event, before any such cross-examination would be permitted, it would be necessary to establish on a voir dire that there was in fact evidence of prior sexual experience (see RS [47]). A speculative cross-examination would not be permissible.

9. As regards ground 2, at least part of the Crown Prosecutor's argument to the jury regarding delay in complaint relied upon a submission that "it would be hard for any young girl to talk about sexual things". The evidence of which the Crown Prosecutor was aware summarised at AWS [6.11] showed that it was not hard for this complainant and that she complained about even minor "sexual" matters, including behaviour that she misconstrued as "sex", in the context of ongoing specialised counselling due to her sexualised behaviours.

Dated: 20 August 2025

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