HIGH COURT OF AUSTRALIA

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File Number:	S92/2025
File Title:	WHS v. The King
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	14 Aug 2025

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S92/2025

BETWEEN:

WHS

Appellant

and

THE KING

Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. The question raised by ground 1 is whether, in proceedings in respect of a prescribed sexual offence, the mere fact of the age of a young complainant constitutes a disclosure or implication in the case for the prosecution that the complainant lacks sexual experience such that s 293(6)[1] of the *Criminal Procedure Act 1986* (NSW) must apply. The answer to that question must be "no" where the age of the child is not evidence that discloses or implies the matters specified in s 293(3) and so is not inadmissible under that subsection.

3. In this case, the 9-year-old complainant gave a "cogent and compelling" account of sexual offences perpetrated upon her by the appellant, who was the husband of her foster carer.[2] At trial, the appellant sought leave to cross-examine her about material held in her state department records on the basis that it was evidence of her prior sexual experience. Such cross-examination may only be permitted where the court is first satisfied that it has been "disclosed or implied in the case for the prosecution" that the complainant lacks sexual experience. The appellant contends that in the case of a 9-year-old complainant, their lack of sexual experience would necessarily be assumed by a jury, and accordingly that is a matter that is "implied" in the case for the prosecution. The respondent contends that the NSW Court of Criminal Appeal (**CCA**) correctly held that evidence of the complainant's age, without more, cannot invoke the requirement in s 293(6) properly construed. Accordingly, there was no error in the refusal of leave to cross-examine the complainant, and ground 1 should be dismissed.

4. Under ground 2, the appellant relies on part of the Crown Prosecutor's address to submit that the terms in which he closed to the jury were unfair and occasioned a miscarriage of justice. The Crown Prosecutor's submission was that the complainant, who was living in vulnerable circumstances, may have been hesitant to make a complaint of serious sexual misconduct against the husband of her foster mother. No complaint about the Crown address was raised at trial. The CCA correctly refused leave to appeal under this ground.

[1] Now renumbered as s 294CB(6) of the *Criminal Procedure Act 1986* (NSW).
[2] *WHS v* R [2020] NSWCCA 31 (***WHS1***) at [65].

PART III: SECTION 78B NOTICES

5. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

6. The appellant has set out the material facts at [5.1]-[5.7] of the Appellant's Written Submissions (**AWS**). Each of the appellant's grounds relate to his argument that relevant and admissible evidence concerning sexual experience of the complainant was excluded at trial. He asks this Court to conclude that a miscarriage of justice was occasioned by reason of the erroneous exclusion of evidence (ground 1) or an unfair submission by the Crown Prosecutor in circumstances where certain evidence was available but excluded (ground 2). In determining whether there was a miscarriage, it is necessary to understand at some level of detail both the evidence which was adduced, and the evidence which was excluded, in the context of the appellant's trial. For that purpose, aspects of the factual and procedural background are clarified below.

Crown case at the appellant's second trial

7. The Crown alleged that the appellant had sexual contact with the complainant, by way of actual or attempted sexual intercourse or indecent assault, on seven occasions between 1 January 2010 and 10 November 2012 (when the complainant was between six and nine years old).

8. The complainant MW, and her younger brother JW, were wards of the State, placed into foster care when JW was a baby. They were in the care of Ms DB for two periods, from 2005 until 2008, and again from 15 November 2009 until 13 November 2012. In the interval between those periods they were placed with at least four different foster carers and it was a time of disruption for them. The appellant married DB in October 2009 and was initially living with DB and her two daughters at DB's house in Cameron Park when the complainant and JW returned to live with DB. DB's marriage to the appellant was one of the changes that led to the children being returned to her care, and the complainant and JW were reportedly happy to return to live with DB for greater stability. The appellant worked as a child protection caseworker for Family and Community Services (**FACS**), in the same office that managed the complainant's care.[3]

[3] FACS was also referred to in the trial as DoCS, as it was formerly known.

9. In 2010, the appellant moved out and returned to his nearby former residence. Thereafter, he would at times assist DB by having JW, and sometimes the complainant, spend the night at his house. JW had a bedroom and the complainant would sleep on cushions in the lounge room.

10. In early November 2012, DB was in the car with the complainant and JW after an argument with the appellant concerning the ownership of their house. DB said, with respect to the appellant, "I hate him". JW heard this and said that he hated the appellant too, and the complainant said, "I don't hate him". JW said, "No you don't hate him because he takes you into his bedroom all the time". The complainant denied this. Later that night she disclosed to DB that there had been sexual behaviour by the appellant towards her. DB notified the authorities the following day. After this disclosure the complainant and JW were removed from DB's care, and a year later they were no longer placed together.

11. The complainant provided details of her allegations in two police interviews on 13 and 14 November 2012, which were recorded and played as part of her evidence in chief at trial.[4] She was aged nine years and nine months at the time of those interviews.

12. On one occasion when the complainant had been sleeping in the lounge room at the appellant's house, she awoke to find herself in the appellant's bed with him "humping" her bottom with his private parts. He kissed her on the mouth, tried to put his tongue into her mouth and asked if she would like to look at his private part, or lick, suck or squeeze it. He pulled down her clothing and put his penis into her bottom (count 1). He eventually stopped and went to the bathroom, where the complainant could see him "peeing" into the sink, pulling his private part back and forward.[5] In her pre-recorded evidence on 4 and 5 April 2022, the complainant indicated that when watching her interviews from 2012 in preparation for her evidence, she realised she had made a mistake, and on this occasion the appellant had put his penis into her vagina, not her anus.[6] The jury found the appellant guilty of count 1, however the CCA quashed the conviction after

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4 The transcripts of the recordings played at the trial (Trial MFIs 5 and 9) are not identical to the transcripts considered by Traill DCJ in the pre-trial argument (ABFM 105-245). The evidence as it was at trial is included in the RBFM at 4-136. The transcript of the complainant's 2014 evidence played at the trial (Trial MFI 12) is in accordance with the transcript as it appears at ABFM 705-732.

5 Trial MFI 5 (transcript of complainant's interview with police, 13 November 2012) (**complainant's first interview**) Q 72-77 (Respondent's Book of Further Materials (**RBFM**) 11); Q 153-245 (RBFM 17-24).

6 Trial MFI 3 (transcript of complainant's pre-recorded evidence 4-5 April 2022) (**complainant's 2022 pre-recorded evidence**) p 35.46-36.31 (see ABFM 758-759); 134.36-135.9 (ABFM 853-854). *WHS2* [62]-[68].

finding the verdict was unreasonable due to the change in the complainant's evidence: *WHS v R* [2024] NSWCCA 242 ***(WHS2)*** (Core Appeal Book (CAB) 113-151) at [84] (per Fagan J), with whom Chen J agreed at [85] and Sweeney J agreed at [89]-[90].

13. On another occasion, the complainant was getting dressed for school in the appellant's bedroom when the appellant entered the room. He pulled down her underpants and laid her on the bed. He put his middle finger up her "middle hole" and kept putting it up there (count 2).[7] When the appellant stopped, he said, "Don't tell anyone or I'll literally kill you" and referred to a cricket bat under his bed as his "hitting bat". The appellant did keep a cricket bat under his bed, and he gave evidence that it had nostalgic value and was also kept for self-protection.[8] The appellant was convicted of this count.

14. On another occasion, the appellant was looking after the complainant and JW at DB's house at Cameron Park. The complainant was cleaning her room, and the appellant went to help her, telling JW to stay where he was. The appellant picked up the complainant and put her on the pool table, and his private part "went in", referring to "the bum … hole" (count 4).[9] He then turned her over and rubbed his private part up and down. JW came in and the appellant dropped the complainant to the floor. As with count 1, the complainant indicated she had been mistaken on this occasion in her description and that it was her vagina that was penetrated, not her anus.[10] The appellant was convicted by the jury of this count, but the conviction was quashed on appeal for the same reason as for count 1: *WHS2* at [84], [85], [89]-[90].

15. On a further occasion the appellant was looking after the complainant and JW at DB's house while DB was shopping at the markets with her daughters. The appellant told JW to go outside and then took her into the ensuite bathroom in DB's bedroom. He pulled down her pants and turned her over, rubbing her front part and "bum crack" with his fingers. He then put his finger inside her bottom and pushed it in and out (count 5). While this happened he was "gently tickle biting" her, and he tried to "suck her boobs". He stopped when they heard a car outside.[11] The appellant was convicted of this count.

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7 Complainant's first interview Q 311-378 (RBFM 30-35).
8 Appellant's 2023 evidence, T 268.33-269.9 (RBFM 203-204).
9 Complainant's first interview Q 516-611 (RBFM 44-51).
10 Complainant's 2022 pre-recorded evidence p 135.14-31 (ABFM 854).
11 Trial MFI 9 (transcript of complainant's interview with police, 14 November 2012) (**complainant's second interview**) Q 141-279 (RBFM 69-82).

16. The jury found the appellant not guilty of two counts. One alleged that around 17 October 2012, when DB's daughter was having her tonsils removed, the appellant entered his bedroom while the complainant was getting changed and started sucking her "boobs" (count 3).[12] The other alleged that on an evening when DB had to take one of her daughters to the train station, the appellant entered his lounge room with no clothes on, pulled down the complainant's pyjamas and put his "doodle" into her "bum" (count 6).[13]

17. The jury was unable to reach a verdict on a count that alleged the appellant got into the shower with the complainant while she was showering in his ensuite bathroom and rubbed soap all over her body, including between her legs (count 7).[14]

18. The complainant was cross-examined at length about her various opportunities to complain earlier, including when speaking with FACS workers and a counsellor that she was seeing at some stage. As to why she did not tell DB after the events of count 1, the complainant said "I didn't want to [tell her]", and "well, I didn't know how". She also said did not know how to tell her grandmother, aunt or older cousins and "probably didn't want" to tell them; she "just didn't know how to say it" to her counsellor and "wasn't going to say nothing" because it was "too hard" and she was young. She said she only told DB because JW "brought something up about it all" in the car.[15]

19. DB gave evidence confirming that the complainant and JW would stay at the appellant's house and that he would look after them at her house, including on one occasion when she went to the markets and came home to find the curtains drawn, the door locked and everything from the vanity basin in her ensuite bathroom in the sink.

20. JW told the police, when interviewed on 14 November 2012 (aged seven), that he was angry with the complainant because, according to DB, the complainant had told lies about the appellant doing something rude to her, and as a result he had been moved. JW said he had not seen any rude things, volunteering that this was "maybe 'cause they had shut the door". JW said every time he went to the appellant's house the appellant would tell him to watch television and not move, before going into his bedroom with the complainant and shutting the door.

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12 Complainant's first interview Q 419-490 (RBFM 37-42).
13 Complainant's second interview Q 290-401 (RBFM 83-93).
14 Complainant's second interview Q 797-821 (RBFM 124-126).
15 Complainant's 2022 pre-recorded evidence p 61.29-37, 150.49-151.22, 152.47-153.7, 154.22-24 (ABFM 784, 869-873).

21. The complainant provided a description of the appellant, including details of hair on his body and scars on his "bum crack" and belly.[16] She described his genitalia as comprising the sac and the penis. The sac hung down like "a baby's nappy" when they have "peed heaps of times", and looked "squishy", with lines on it and hair around it.[17] She described the appellant's penis as having a mole or moles on it that were brown and shaped like a flat circle.[18] Evidence was led from a general practitioner, Dr Yates, who had examined the appellant in 2012 (but who did not give evidence at the first trial) that the appellant had an appendectomy scar on his lower abdomen, another surgical scar at the top end of the gluteal cleft, and several flat pigmented nevi (freckles) on his foreskin, which a layperson might call moles.[19]

22. An audio recording of the appellant's evidence from his first trial in 2014 was tendered by the Crown in his second trial. The appellant denied each allegation but agreed that on occasions after he moved back to Edgeworth the complainant and JW would stay at his house. He denied there had been any occasion upon which he had gone into a bedroom with the complainant alone, other than once when wrapping Christmas presents. He denied that he had ever had any moles or little brownish marks on his penis.[20]

23. The appellant gave further evidence in his second trial and called character evidence as to his behaviour with other children. The appellant agreed that there were freckles on his foreskin as Dr Yates described. He sought to explain his earlier denial by the fact that he had never seen a "close up" of his penis "to spot any freckles or anything like that".[21] He denied deliberately exposing his penis to the complainant, but when asked about the possibility of accidental exposure he said he loved wearing big baggy boxer shorts because they were comfortable, and because they were so baggy "half the time I didn't even check, I just – I feel embarrassed that it did happen".[22]

First Court of Criminal Appeal Decision

24. In support of his contention of miscarriage, the appellant relies upon findings made in the CCA's earlier decision in *WHS v R* [2020] NSWCCA 31 (***WHS1***) (ABFM 5-23).

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16 Complainant's second interview Q 830-839 (RBFM 127-128), Q 909-910 (RBFM 134).
17 Complainant's second interview Q 839-864 (RBFM 128-130).
18 Complainant's second interview Q 865-874 (RBFM 130-131).
19 RBFM 137-143. No evidence was called from Dr Yates in the 2014 trial; it was only given in the second trial.
20 Trial MFI 39 (transcript of appellant's evidence in previous trial, 7-8 August 2014) p 145 (RBFM 156); p 156.14 (RBFM 167).
21 T 261.47-262.2 (RBFM 196-197); T 283.20 (RBFM 218).
22 T 262.16-37 (RBFM 197); T 272.33-37 (RBFM 207).

However, when the particular and confined context in which *WHS1* was determined is considered, it is clear that the conclusion of the CCA (and the concession of the Crown) was limited to the potential relevance of the disputed evidence, and did not extend to any finding about its admissibility.

25. *WHS1* followed a trial in 2014 of the same charges against the appellant, in which he was found guilty of seven of eight offences. On appeal, the Crown conceded that there had been a breach of the prosecutorial duty of disclosure in that the appellant had not been provided "documents that were in the possession of investigating police at the time of the applicant's trial which were potentially exculpatory in nature and which should for that reason have been disclosed to the applicant" (emphasis added): *WHS1* at [6], [9]. The Crown further conceded that that failure to disclose gave rise to a miscarriage of justice, and that the proviso was not engaged: *WHS1* at [6].[23]

26. It was accepted by the Court that the appellant's convictions should be quashed. The only question for the CCA to determine, therefore, was whether it should direct the entry of a verdict of acquittal, or order a new trial: *WHS1* at [7].

27. The Court found that the material before it by way of "fresh evidence" "consisted solely of representations of fact or opinion in hearsay form": *WHS1* at [38]. The Court held that whether its task was to examine the probative value of the fresh evidence, which rose no higher than "untested hearsay", or whether it was to "make an assessment as to the way in which those hearsay statements would be likely to unfold as admissible evidence at any past or future trial (which would require the Court to speculate as to an unspecified body of credibility evidence)", it was not possible for the Court to reach the state of mind required in order to establish a miscarriage of justice warranting an acquittal: *WHS1* at [44]. Critically, the Court at [52] expressly stated (emphasis added): "Leaving aside for the purpose of the present discussion the provisions of s 293 of the *Criminal Procedure Act*, it may be accepted that records of that kind may afford an explanation, which was absent at the trial, for some of the detail MW was able to provide in support of the counts on the indictment."

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[23] The Crown's concession that a miscarriage of justice had occurred was limited to the failure to disclose the portion of the records that contained material potentially relevant to the complainant's credibility and that did not raise s 293 or sexual assault communications privilege: Crown's written submissions dated 19/02/20 at [84]. At the subsequent trial, questions were asked about matters arising from these records of the complainant (including MFI 3 p 53-54, 58-62, 98-116; see ABFM 776-777, 781-785, 821-835), DB (T 166-172, 178-179), two of the complainant's school teachers (T 107-108, T 190-191), a psychologist (T 111-116), a counsellor (T 157-159), a caseworker (T 208-209) and a casework manager (T 119-124).

28. Thus, *WHS1* was not concerned with the admissibility of the evidence. Rather, the focus of the CCA was whether it could be satisfied that there had been a miscarriage of justice such that it should direct the entry of a verdict of acquittal. In so determining, the CCA expressly left aside considerations of s 293.

Procedural background concerning the s 293(6) application

29. In the first pre-trial argument before Traill DCJ ahead of the second trial, the appellant sought a ruling that a bundle of documents that he had titled 'Evidence of Prior Sexualised Behaviour" (**Annexure B** of VD Exhibit 2) "is admissible pursuant to section 293(6)": Judgment *R v WHS*, unreported 12 August 2021 (**first Traill judgment**) (ABFM 60-102), [13(3)].

30. The documents within Annexure B (at ABFM 397-543) included a number of FACS documents recording reports (some second-hand) of the complainant, aged 3-8 years, exposing herself and touching herself (or, on some occasions, other children), in a manner potentially capable of being construed as sexual, or exhibiting what was described with generality, in the opinion of the author, as "sexualised behaviour". The only complaint of potential sexual touching by an adult caregiver was of DB touching the complainant's vagina when putting a nappy on her (ABFM 441.18, .40). Doubt as to the sexual nature of this allegation was expressed in the first Traill judgment at [65] and in *WHS1* at [55]. The appellant's position was that all of the documents disclosed or implied that the complainant may have had sexual experience or engaged in sexual activity and therefore fell within s 293(3) (VD MFI 1 [28], ABFM 641), but he argued that s 293(6) applied to permit cross-examination of the complainant about the subject-matter of the documents.

31. There was a second pre-trial application before Traill DCJ on 2 September 2021 which did not rely upon s 293(6), but did involve applications to adduce further material concerning sexual experience: Judgment *R v WHS*, unreported 5 April 2022 (**second Traill judgment**) (ABFM 664-682). Both in the first and second applications before Traill DCJ, the appellant argued the admissibility of evidence beyond that included in Annexure B, either on the basis that it was not caught by s 293(3), or if it was, that it was admissible pursuant to s 293(4): *WHS2* at [16]-[20]. That included, relevantly: (i) a recorded interview on 16 August 2017 in which the complainant (aged 14) described sexual conduct towards her by AT (a boy three years her senior) including penile/anal and penile/vaginal penetration when she was aged 6-8 and AT was 9-11; (ii) an additional

FACS document that records an allegation by the complainant that DB "had sex" with her and JW (ABFM 294.40-45) ("sex" meant kissing to the complainant in that conversation (ABFM 443.25, 477.2)); (iii) a suggestion not reflected in any document but based upon proposed evidence to be elicited that the complainant had viewed pornographic movies with her cousins.[24]

32. In the CCA, the appellant's argument was advanced only on the basis of s 293(6) in respect of a total of 13 matters (10 documents from Annexure B and the three additional documents/matters listed above, the admissibility of which had been advanced before Traill DCJ on a different basis): *WHS2* [24]-[26]; AWS [5.5].

PART V: ARGUMENT

Ground 1 – The Proper Construction of s 293(6) of the *Criminal Procedure Act*

Relevant legislative provisions

33. Section 293 (since renumbered to s 294CB) "applies to proceedings in respect of a prescribed sexual offence": s 293(1). There is no contest between the parties that the proceedings against the appellant were in respect of a "prescribed sexual offence" as defined in s 3, namely, offences under ss 66A(2), 66B and 61M(2) of the *Crimes Act 1900* (NSW), such that s 293 applied.

34. Section 293(3) provided that:

> Evidence that discloses or implies—
>
> (a) that the complainant has or may have had sexual experience or a lack of sexual experience, or
>
> (b) has or may have taken part or not taken part in any sexual activity,
>
> is inadmissible.

35. Section 293(4) provided that "subsection (3) does not apply" if, relevantly, any one of six different exceptions are met, and "if the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission". That is, s 293(4) operates to exclude the operation of s 293(3). Although the appellant contends that none of those exceptions form the basis for the appeal before this Court (see AWS [5.5], p 6.20), as is addressed below, one of the exceptions is relevant to this appeal, namely, s 293(4)(f).

[24] This further material was excluded in the first Traill judgment at [62]-[63] (item ii) and [125]-[137] (item (i)); and in the second Traill judgment at [18]-[22] (items (i) and (iii)).

36. Section 293(6) stated as follows:

> If the court is satisfied—
>
> (a) that it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period—
>
> (i) had sexual experience, or a lack of sexual experience, of a general or specified nature, or
>
> (ii) had taken part in, or not taken part in, sexual activity of a general or specified nature, and
>
> (b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,
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> the complainant may be so cross-examined, but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.

37. As set out above, the appellant during a pre-trial application and on appeal relied on s 293(6). Section 293(6) does not itself state that s 293(3) "does not apply", rather, the effect of s 293(6) is to provide an accused person the right to cross-examine a complainant[25] upon certain pre-conditions being met.

38. Unlike a decision that "evidence is admissible" under s 293(4), which requires the court to record in writing the nature and scope of the evidence that is admissible and the reasons for that decision,[26] s 293(6) neither itself renders evidence admissible[27] and nor does it require any written reasons before the court may permit cross-examination.

39. However, by reason of s 293(4)(f) any evidence given (or anticipated to be given) by a complainant in cross-examination, including evidence adduced pursuant to leave granted under s 293(6), is admissible only if the "probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant might suffer as a result of its admission".

Legislative history and purpose of s 293

40. It is well-settled that "[t]he starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its

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25 See eg how it is described in s 293(7) (emphasis added): "On the trial of a person, any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examine under subsection (6) is to be decided by the court in the absence of the jury."

26 See s 293(8).

27 As is accepted by the appellant at AWS [6.1] p 11.15. See also *WHS2* at [15]. It is noted, however, that Ground 1 of the appeal is that "The New South Wales Court of Criminal Appeal erred in holding that evidence of sexual experience was inadmissible". Cf also AWS [5.1] on p 6.21; AWS [5.7], p 10.1; AWS [5.7], p 10.8.

context and purpose", and that "[c]ontext should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense": *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle Gordon JJ); see also Gageler J at [35]-[39].

41. The purpose of s 293 was as noted by the majority (Gordon ACJ, Edelman, Steward and Gleeson JJ) in ***Cook*** *(a pseudonym) v The King* (2024) 98 ALJR 984 at [35] (citations omitted):

> The predecessor provision to s 293 was enacted in 1981 to "ease, so far as is possible, the humiliation experienced by sexual assault victims, to remove the stigma attached to the rape victim, to encourage victims to report the offences, and to bring the offenders to justice as justice demands".

42. Section 293 is the statutory expression of the legislature's deliberate choice to reform the rules which govern the admission of evidence of a complainant's sexual history – consensual or otherwise[28] – in criminal trials: see eg Bathurst CJ in *Jackmain v The Queen* (2020) 102 NSWLR 847 at [24] (with whom Johnson J agreed at [232], Button J agreed at [239], and Wilson J agreed at [240]). As was noted in *Cook*, "[t]he prohibition must be taken to concern evidence that discloses or implies relevant sexual experience or sexual activity which occurred prior to or at the time of the alleged offending": *Cook* at [35].

Proper construction of s 293(6)

43. The starting position under s 293 is that "evidence that discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience, or has or may have taken part or not taken part in any sexual activity, is inadmissible": s 293(3).

44. Section 293(4) then provides limited exceptions where s 293(3) "does not apply", provided that the probative value of the evidence outweighs the "distress, humiliation or embarrassment that the complainant might suffer". Section 293(5)(a) reiterates that a witness must not be asked to give evidence that is inadmissible under, relevantly, s 293(3).

45. Section 293(6), however, permits cross-examination of a complainant where the court is satisfied: that the complainant's sexual experience or lack thereof, or participation or non-participation in sexual activity, "has been disclosed or implied in the case for the prosecution against the accused person"; and that the accused might be unfairly prejudiced if cross-examination were not permitted. In such circumstances, the court may

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[28] See eg the majority in *Cook* at [36] observing that in *HG v The Queen* (1999) 197 CLR 414 at 424-425 [28]-[29], 435 [70], 441 [92], 449-450 [124], 456 [147], the High Court rejected the submission that the predecessor provision to s 293 applied only to "prior consensual sexual episodes".

allow cross-examination, but only "in relation to the experience or activity of the nature…so specified", and limited to a specified period if applicable.

46. The subject matter of subsection (6) is the scope of the cross-examination of the complainant in the trial. The cross-examination, if permitted, will be limited to the information disclosed or implied "whether that be of a *general or specified nature*": ***Uddin*** *v The Queen* (2020) 290 A Crim R 1 at [57] (Meagher JA); [101] (Fullerton and Wilson JJ).

47. Evidence given by a complainant under s 293(6) is then admissible under s 293(4)(f) if a court determines that the probative value of the evidence outweighs any distress, humiliation or embarrassment to the complainant as a result of its admission.[29] Ordinarily, in practice, the court's decision under s 293(4)(f) as to admissibility of the complainant's anticipated evidence is made in advance of the questioning through a detailed statement of the nature and scope of the evidence proposed to be extracted in cross-examination, handed to the trial judge, in order that the admissibility of the matters can be ruled upon: see eg *Dimian v The Queen* (1995) 83 A Crim R 358 at 364; *Taylor v R* (2009) 78 NSWLR 198 at [44]-[48].[30]

48. Read in context, s 293 as a whole makes clear that the phrase "discloses or implies" in s 293(3), concerning evidence of a complainant's sexual experience or activity, bears the same meaning as the expression "has been disclosed or implied" in the case for the prosecution in s 293(6). That is, the expressions refer to the same form of disclosure or implication. As a plurality of this Court (Kiefel CJ, Bell and Nettle JJ) observed in *SAS Trustee Corporation v* ***Miles*** (2018) 265 CLR 137 at [22]-[26], cognate statutory terms – such as "incapacity", "incapacitated" and "incapable" – will, in the absence of contrary legislative intention, be construed to "import[] the same idea". So too here. If the same disclosure or implication that renders evidence inadmissible under s 293(3) arises in the case for the prosecution, s 293(6) provides a mechanism by which the accused may seek to address the potentially resulting unfair prejudice. Self-evidently the meaning of "sexual experience" and "sexual activity" are also the same as between the provisions.

49. There is no contest between the parties that 293(6) is concerned with fairness to the accused (see eg AWS [6.6], p 14.1-5), but it only applies where a complainant's sexual

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[29] See the Attorney-General's Second Reading Speech at ABFM 950 ("Proposed section 409B(3)(f) [293(4)(f)] has to be read in conjunction with proposed section 409B(5) [293(6)].").

[30] In this case, while there was no detailed statement of the evidence *per se*, as noted by Fagan J in *WHS2* at [15], the foreshadowed cross-examination of MW was to be "about the events of a sexual nature that were reported as second hand and third hand hearsay in the FACS records" set out in the first Traill Judgment (at [13(3)].

experience or lack thereof, although otherwise inadmissible under s 293(3), has been disclosed or implied in the prosecution case. In such circumstances, s 293(6) empowers the court to permit cross-examination to the extent necessary to ameliorate any potential unfair prejudice to the accused. Section 293 in this regard is a cohesive scheme.

No error in the CCA's approach such that Ground 1 should be dismissed

50. The appellant's submission that s 293(6) "applies where the evidence adduced by the prosecution is likely to lead the jury to draw [the] inference [about lack of prior sexual experience]" (AWS [2.1]) was and is based on the contention that "the young age of the complainant necessarily implies that she is a person with no sexual experience or has not taken part in sexual activity…whether or not it is explicitly raised during the trial": AWS [5.5], p 8.5-8.[31]

51. However, once the above construction of s 293 is accepted, it follows (contrary to the appellant's contention) 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 in the manner contended by the appellant.

52. *First*, as set out above, that which is the subject of the "disclosure or implication" under s 293(6) must contextually be the same disclosure or implication that, if the subject of evidence, would be inadmissible under s 293(3). The age of a child is not inadmissible evidence to which s 293(3) is directed, particularly where, as here, the age of the child (from which the appellant's suggested implication or inference as to lack of experience would be drawn) was an element of each offence with which the appellant was charged: counts 1, 2, 4, 5 and 6 refer to a child under 10 years (s 66B; s 66A(2)), and counts 3 and 7 refer to a child under 16 years (s 61M(2)). That is, to make out each of the offences against the appellant, the prosecution was required to disclose, indeed prove, the age of the complainant in its case. For that disclosure to constitute the necessary trigger for s 293(6) to be engaged, when that age could never be inadmissible "evidence" under s 293(3), but rather was an element of each of the offences, would be an incoherent result.[32]

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[31] See eg AWS [5.5], p 8.12-15 ("it was almost inherent or implied within the Crown case that the complainant has a lack of sexual experience…because the jury is certainly coming to court with that preconceived notion when you're talking about a child…); AWS [6.4], p 12.12 ("it was likely, if not inevitable, that the jury would infer from her age when she was interviewed by police, and the absence of the evidence ruled inadmissible under s 293, that she did lack such prior experience."); first Traill judgment at [26], ABFM 73.

[32] See eg *Miles* at [20] (Kiefel CJ, Bell and Nettle JJ).

53. *Secondly*, the statutory gateway that enlivens the operation of s 293(6) is that the court is satisfied that the complainant's sexual experience or lack thereof "has been disclosed or implied in the case for the prosecution". That is, as is discussed below, a markedly different concept to the provision "appl[ying] where the evidence adduced by the prosecution is likely to lead the jury to draw [the] inference [about lack of prior sexual experience]": see eg AWS [2.1].

54. *Thirdly*, the appellant's construction would result in an unjustified different application of 293(3) in respect of any complainant who was of a "young age" or a "child" at the time of the offending. Age would necessarily have to be disclosed to make out certain offences, and would then mean that a court would never have to be satisfied of the matters in s 293(6)(a) in respect of those complainants because their age, without more, had implied their lack of sexual experience. If the legislature, notwithstanding the contended purpose of s 293, had intended s 293 to contain such a broad exception, one would expect that to have been expressly stated, as opposed to it forming the basis of the "implication" required by s 293(6). Otherwise, the necessary result of the appellant's argument is that a child (up to some undefined age)[33] would in every case be presumed to lack sexual experience such that they could in every case be cross-examined about their prior sexual experience if the court was satisfied the accused might suffer unfair prejudice.

55. Fagan J (with whom Chen and Sweeney JJ agreed) stated as follows at [38] – which is the passage with which the appellant takes most issue (AWS [6.5], p 12.31; [6.6], p 13.11-13):[34]

> The statutory test is not one of risk as to how jurors might reason but of whether the evidence and submissions relied upon by the Crown have conveyed an implication of prior sexual experience or activity, or lack thereof. Here, I find nothing in the presentation of the Crown case that effectively invited the jury to draw an inference about lack of prior sexual experience or activity of MW (other than in the events charged), on the basis of her age.

56. Here, Fagan J was distinguishing between what a jury might assume, and what was actually disclosed or implied in the prosecution case, emphasising that for s 293(6) to apply sensibly, it could never operate in respect of what a jury *might* assume or how jurors *might*

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[33] It is unstated on the appellant's argument at what age of a child (if any) the claimed implication of "lack of sexual experience" ceases.

[34] The appellant states at [6.6] (p 13.6-10) that a "minor criticism" in respect of *WHS2* was "that the primary question was whether Traill DCJ was correct in ruling, prior to trial, that s 293(6) did not apply because the Crown Prosecutor gave an undertaking that he would not invite the jury to draw an inference about lack of prior sexual or activity of the complainant from the age of the complainant when she spoke to the police". The appellant then states: "It was not what actually transpired at trial". It is unclear whether the appellant is suggesting in this paragraph that the Crown Prosecutor went back on his undertaking, but as the appellant himself acknowledges, the "Crown Prosecutor did not explicitly invite the jury to infer that the complainant lacked sexual experience (other than in the events charged) when she was 9 years old": AWS [6.10].

reason, absent any basis or invitation to do so, but rather, that the "activation of subsection (6) depends upon the trial judge being 'satisfied that it has been […] implied in the case for the prosecution' that the complainant had, or did not have, prior sexual experience or activity": at [38]. It was in that context that Fagan J observed that "it would likely be the common experience amongst jurors that, up to the age of nine, it would not be expected that a girl would have gained sexual experience or engaged in sexual activity, within the meaning of the section, unless in circumstances of abuse": at [37]; AWS [6.5], p 12.26-29. Fagan J then continued at [38], stating that:

> [i]t does not follow that in this case, as a result of the Crown tendering the November 2012 JIRT interviews of the nine-year-old complainant, there arose any positive implication that she had not previously been abused by someone other than the appellant or that she had not exceptionally and precociously gained sexual experience or engaged in sexual activity in other circumstances.

57. The CCA in *WHS2* thus accepted the construction of s 293 advanced above, namely, that age alone could not constitute a disclosure or implication in the prosecution case that "the complainant has or may have…had a lack of sexual experience".

58. The appellant relies on a number of matters in support of the proposition that the case for the prosecution can disclose or imply that a complainant has or may have had a lack of sexual experience, if "evidence adduced in the prosecution case [ie, the complainant's age] by itself points to or raises the implication that the complainant had or may have had a lack of sexual experience": AWS [6.6], p 13.16-19. With respect, none of these matters advance the appellant's case.

59. The respondent 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", or that s 293 strikes "a balance" between fairness to the accused and the interests of a complainant, or with the examples in the Attorney-General's second reading speech from 1981 – but none of these matters support the appellant's contention that the complainant's age alone can constitute the relevant implication or disclosure in s 293: cf AWS [6.6], p 13.21-30 ("First"); AWS [6.6], p14.8-20 ("Third"); AWS [6.6], p 14.28-15.19 ("Fifth").

60. The appellant's reliance on *Munn v R; Miller v R* [2006] NSWCCA 61 at [29] is similarly misplaced in this regard: cf AWS [6.6], p 15.20-16.12 ("Sixth"). Barr J's statement that "I do not think that the material put before his Honour raised an implication likely to be relied on by the Crown that the complainant lacked experience" immediately followed his

Honour stating: "[w]hile it was nowhere disclosed that the complainant lacked experience of the kinds of acts she described in her first interview, defence counsel obviously took the view that the very age of the complainant implied a lack of experience." If anything, this decision supports the respondent's suggested construction.

61. The appellant also contends that "the purpose of s 293(6) [is] to prevent a jury having a misconception regarding some aspect of the complainant's prior sexual experience which might unfairly prejudice the accused…regardless of how it may arise": AWS [6.6], p 14.1-5 ("Second") (emphasis added). He relatedly contends that there should be no distinction drawn between a situation where the "prosecution actively fosters [a] misconception" and where the "prosecution inherently creates the risk that the misconception will occur" because the "injustice experienced by the accused is the same": AWS [6.6], p 14.22-26 ("Fourth"). This should not be accepted where the relevant gateway in s 293(6) is that the lack of sexual experience has been "disclosed or implied in the case for the prosecution", and that the age of the complainant alone could never constitute that implication or disclosure.

62. When the above is considered, it is clear that the CCA did not err in rejecting the appellant's ground of appeal that "Traill DCJ erred in excluding evidence of the complainant's sexual experience": see AWS [5.3], p 5.15.

Miscarriage of Justice

63. The appellant asks this Court to conclude that "a substantial miscarriage of justice resulted from the exclusion of the evidence of the complainant's sexual experience": AWS [6.8]. To the extent that he relies upon the observations of the CCA in *WHS1*, as explained, the reasons did not go beyond a conclusion about the *potential* relevance of the previously undisclosed material, and the CCA expressly did not consider s 293.

64. If, contrary to the respondent's submissions above, this Court accepts the appellant's construction of s 293(6), what must then be shown is that an error was made with respect to the refusal of leave to cross-examine the complainant, and that error could realistically have affected the reasoning of the jury to its verdict: *Brawn v The King* (2025) 99 ALJR 872 at [3]. The appellant's suggestion that a conclusion of miscarriage is axiomatic upon a finding of error in the construction of the provision overlooks the need to consider the application of the provision, properly construed, in light of the evidence at the trial and the material upon which the appellant seeks to cross-examine the complainant.

65. The necessary assessment is more complex than the appellant suggests, requiring identification with precision of the implication that is to be drawn from the complainant's age of nine years and nine months at the time of her first interview, including whether it is an implication of a general or specific lack of sexual experience (*Uddin* at [101]; *WHS2* at [33]); the subject-matter of each of the proposed cross-examination topics or propositions; and their relationship to the implication identified. The question of *admissibility* of evidence beyond the complainant's answers in cross-examination is a separate and additional matter. No court has undertaken the exercise of considering whether it was satisfied that the appellant might be unfairly prejudiced if he was not granted leave to cross-examine (s 293(6)(b)), and where the probative value of the evidence has not been weighed against the distress or humiliation the complainant might suffer (s 293(4)(f)), in respect of *each* of the documents set out at AWS [5.5].[35] In those circumstances, the appropriate order may be one of remittal to the CCA so that the question of leave to cross-examine pursuant to s 293(6) can be redetermined with the benefit of this Court's reasons and judgment, as a determination that there was error in the refusal of that leave is anterior to the question of establishing a miscarriage of justice.

66. In the alternative, and if this Court is satisfied that there has been a miscarriage of justice, the appropriate order would be for a retrial: see below at [72]-[74].

Ground 2 – Crown's closing address

67. By ground 2, the appellant complains in respect of a portion of the Crown's closing address (AWS [6.10], p 17.29-18.5). The Crown's submission as to delay in complaint bears repeating to put it into its proper context (ABFM 880.33-882.41) (with the appellant's emphasis in <u>underlining</u> and respondent's emphasis in *italics*):

> There was a failure on the part clearly – failure is probably a bit harsh. *[MW] as a child failed to take the opportunities available to her to complain, to tell authority figures, to tell family members what was happening to her.* To tell [DB], the lady she referred to in the interview with Detective Barrett as mum. [DB] said that she used to get mum sometimes. But ultimately she did tell mum but didn't tell her straight away, didn't tell step foster sisters [K] or [A], didn't tell her grandmother [E] until 2017, didn't tell Aunty [L] until 2017, didn't tell Ms [T], didn't tell the DoCS caseworkers, didn't tell Ms [M], didn't tell anybody else.
>
> Let's look at that. *A seven to nine year old girl whose home life has been, since she was two, living with foster families. Really that's all she'd known to that point in her life. She's in year 1 to year 3 during the period of the offending and who does she say is doing these sexual things to her? [DB] or mum's husband. She'd been to [DB's] and the accused's wedding* not long before she moved back to live with [DB] for that second period. One telling thing that she said towards that first interview with

[35] See also the observations of Fagan J (albeit in the context of addressing the permanent stay ground): *WHS2* at [45]-[51], CAB 137-140.

> Detective Barrett on 13 November was *when she was asked how she felt about the accused, and the answer she gave was she was "shocked". And then she explained "Because I thought he would never do that."*
>
> She explained why she was slow off the mark to tell anyone about what the accused was doing to her. Her reason for not telling her grandmother [E] was instructive, and this is something she gave as a 19 year old last year in the prerecord. "I don't know, I was young. I didn't know how to tell her, I didn't want to lie to her or anything." And she went on and added, "I probably didn't want to tell her." And those were the reasons that she said she didn't tell Aunty [L] or her cousins. Same reasons.
>
> *Also remember, so [MW] says, she was threatened by the accused on the morning of what's alleged to have taken place in count 2. "I will literally kill you", that's the version, the account she gave to Detective Barrett very early in that first interview. "I will literally kill you. That's my hitting bat", which she took to be the bat under his bed, the sentimental Gray-Nicolls Scoop under the accused's bed.* Maybe, if the threat did happen – that's a matter for you members of the jury – maybe that was a reason why she didn't tell anyone even though there was opportunity to do.
>
> …
>
> *The Crown's answer to criticism of [MW] failing to say something sooner is this, this context: step back and look at where seven to nine year old [MW] found herself and where she was at that point in her life. …*
>
> …Clearly there's no issue that there are records that talk about complaints she put on the record: allegation of a cricket bat, being hit with that as a form of discipline in that context, an incident that was alleged by [MW] to have taken place up at Nelson Bay.
>
> You might think though it's one thing to make a complaint about being disciplined, it's another to talk and describe something as personal as being sexually touched and abused in the way that [MW] was telling Detective Barrett. About sexual things *the man as she knew as [DB's] husband was doing to her. The same man who, according to JW, bought fish and chips, allowed to watch movies with and took them for sleepovers sometimes.*
>
> Now whether or not those children knew what [WHS] the accused may or may not have thought of them, it's a case that you'd wonder whether or not the children would've been aware of that. *He's a man that's looking after them, he is [WHS], he's the husband of the lady that they sometimes refer to as mum. As who, to seven and nine year old [MW], must have really been an extension of that foster family unit that she and [JW] knew.* I mean, that's why he signed up in that case plan 2009/2010. Just after he got married in November 2009, he signed the case plan, and that case plan involved him – well the primary carer was [DB]. No issue though that her situation had changed in the view of the Department of Community Services: one, because she was going to no longer work full-time and she'd be able to devote her days to looking after the kids, but secondly because she had married the accused.
>
> Understandably, you might think it would be difficult for a young girl to tell anybody about a man with a relationship to her does with his rude part to her middle hole – well, where she does a poo. Understandably, you might think that'd be hard for any child, *let alone a child in the situation of [MW], a foster child.* The Crown's not asking you to be sympathetic towards [MW], to be understanding of the situation she found herself in. You have to consider that, you have to take it into context, but put sympathy to one side.

68. As is immediately apparent, and contrary to the appellant's submission, the focus of the Crown prosecutor's submission was not just on the "sexual nature of the alleged abuse" as opposed to "the fact that the abuse was at the hands of a foster-father": cf AWS [6.11], p 19.10-12. Rather, the jury was invited to consider evidence regarding the appellant's relationship with the complainant together with the nature of the sexual acts he was alleged to have committed. The appellant's assertion that the "reference to it being 'hard

for any child' was a suggestion that it would be hard for any young girl to talk about 'sexual things'" (AWS [6.11], p 19.9-10) ignores that the Crown Prosecutor's submission was in respect of the "sexual things *the man she knew as DB's husband was doing to her*", and that it would be "hard for any child, *let alone a child in the situation of MW, a foster child*".

69. Read fairly, the crux of the Crown Prosecutor's submission was that it was necessary for the jury, in evaluating the complainant's delay in making a complaint, to consider the complainant's entire situation.[36] The appellant was both the husband of DB and thus an extension of her foster family unit, and an employee of FACS. He was instrumental in her return (and that of JW) to the care of DB in 2009. The Crown Prosecutor's submission was an invitation to consider how those matters may have influenced the complainant's delay in making a complaint about serious sexual misconduct. It anticipated the submission advanced on behalf of the appellant that the timing of the complaint related (in a different way) to the overall situation and demonstrated a motive to make a false complaint.[37] That this was the gravamen of the submission is reflected by the way it was summarised by the trial judge to the jury[38] and in the fact that trial counsel perceived no unfairness in it: *WHS2* at [55] and [81].

70. In addition, the appellant's submission in this Court that "there was evidence of several [prior] complaints made by the complainant regarding 'sexual experience', some of which related to the complainant's foster mother, and several other statements regarding sexually related matters" (AWS [6.11]), does not bear scrutiny.[39] The "several complaints" relied on by the appellant as constituting complaints regarding "sexual experience" against DB were not always about sexual experiences (cf DB putting a nappy on her; or the complainant defining sex as kissing[40]) and were often recounts of the same experience.[41] As Fagan J correctly concluded (*WHS2* at [55], CAB 143) there was nothing in the

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36 The fact that it is often difficult for children to make a complaint about family members specifically is an accepted concept, see eg, *BQ v The King* (2024) 279 CLR 124 at [19]-[22].

37 ABFM 931-935.

38 CAB 37.

39 The only matter which could clearly be described as a 'complaint' about sexual experience was the disclosure about AT, which had not yet occurred. It appears that the appellant properly does not rely upon this item under ground 2.

40 ABFM 477.1-3.

41 See eg appellant's reliance at [6.11] on the contents of the "finalisation submission" which the appellant says is dated 27 October 2009 at ABFM 294 and the interview of 30 October 2009 at ABFM 441-444. In fact, the finalisation submission was "finalised" on 21 July 2011 (ABFM 295), and date of 27 October 2009 is the "Date to AAE", being "Allegations Against Employees Unit" (ABFM 294). Both the items on ABFM 294 and the contents of the interview at ABFM 441 are repeated references to the same matters, including DB touching MW while putting a nappy on MW: see eg ABFM 294.40, and ABFM 441.17 & .35.

material relied upon by the appellant that would have materially impacted upon the submission being made had they been in evidence.

71. For these reasons, ground 2 should be dismissed.

Relief Sought

72. In the event that the appeal is allowed, a new trial should be ordered: cf AWS [8.1], p 21.

73. Unless the interests of justice require the entry of an acquittal, an appellate court should ordinarily order a new trial where there is evidence to support the charge: *Spies v The Queen* (2000) 201 CLR 603 at [104]; *The Queen v A2* (2019) 269 CLR 507 at [84].

74. The Crown case is not weak, noting in particular the evidence given by JW and DB that supports the complainant and the medical evidence as to the appearance of the appellant's penis consistent with the particular description given by the complainant. The matters raised by the appellant that favour no further trial stand to be weighed against the seriousness of the charges, the public interest in having them prosecuted and the desirability of them being determined by a jury: see eg *Gilham v R* (2012) 224 A Crim R 22 at [649].

PART VI: NOTICE OF CONTENTION OR CROSS-APPEAL

75. Not applicable.

PART VII: ESTIMATE OF TIME

76. The respondent will require 1.5 hours to present oral submissions.

Dated 14 August 2025

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ANNEXURE TO RESPONDENT'S SUBMISSIONS
LIST OF STATUTES AND STATUTORY INSTRUMENTS

No	Statute	Version	Provision	Reason for providing version
1.	*Criminal Procedure Act 1986* (NSW)	Version for 31 May 2021 to 31 August 2021	s 293	Version in force at time of first pre-trial judgment of Traill DCJ on 12 August 2021
2.	*Criminal Procedure Act 1986* (NSW)	Version for 29 March 2022 to 31 May 2022	s 293	Version in force at time of second pre-trial judgment of Traill DCJ on 5 April 2022 (it is noted that s 293 was in the same terms on both 12 August 2021 and 5 April 2022)
3.	*Criminal Procedure Act 1986* (NSW)	Version for 1 June 2022 to 17 October 2022	s 294CB	S 294CB came into force in its current form on 1 June 2022
4.	*Criminal Procedure Act 1986* (NSW)	Version as in force since 1 May 2025	s 294CB	Version currently in force (it is noted that s 294CB remains in the same form as when it first came into force)