HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 10 Sep 2025 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S92/2025
File Title:	WHS v. The King
Registry:	Sydney
Document filed:	Form 27F - Respondent's Outline of oral argument
Filing party:	Respondent
Date filed:	10 Sep 2025

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S92/2025

BETWEEN:

WHS

Appellant

and

THE KING

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Ground 1: The NSWCCA erred in holding that evidence of sexual experience was inadmissible

2. Section 293 **[JBA, Vol 1, Tab 3, pp 8-9]** (introduced as s 409B **[JBA, Vol 2, Tab 6, pp 21-22]**) was enacted 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": **RS [41]-[42]**; ***HG*** *v The Queen* (1999) 197 CLR 414 at [24] **[JBA, Vol 3, Tab 9]**. The provision has been re-enacted in similar terms repeatedly since 1981: ***Cook*** *(a pseudonym) v The King* (2024) 98 ALJR 984 at [36] **[JBA, Vol 4, Tab 12]**.

3. The provision operates with respect to child sexual abuse complainants in the same way and for analogous purposes as it does with respect to adult complainants, and applies equally to prior consensual and non-consensual sexual experience or activity: ***Cook*** at [36] **[JBA, Vol 4, Tab 12]**; ***HG*** at [28]-[31] (Gleeson CJ), [70] (Gaudron J), [92] (McHugh J), [124] (Gummow J), [147] (Hayne J) **[JBA, Vol 3, Tab 9]**.

4. Section 293(3) renders inadmissible evidence that "discloses or implies", relevantly, that a complainant has prior "sexual experience" or a lack thereof: ***Cook*** at [35] **[JBA, Vol 4, Tab 12]**. It is an exclusionary rule which only arises for consideration if the evidence sought to be adduced is relevant: ***HG*** at [24], [32] (Gleeson CJ) **[JBA, Vol 3, Tab 9]**.

5. Section 293(6) provides an exemption to the "blanket prohibition" in s 293(3). Leave may be granted to cross-examine a complainant about identified matters where the court is satisfied that it has been "disclosed or implied in the case for the prosecution" that the complainant has sexual experience or a lack of sexual experience, and that the accused might otherwise be unfairly prejudiced. Evidence given in cross-examination is then admissible under s 293(4)(f) as an exception to s 293(3) only if its probative value outweighs any distress, humiliation or embarrassment to the complainant: **RS [43]-[47]**; Attorney General's Second Reading Speech: *Crimes (Sexual Assault Amendment Bill*, 18 March 1981 **[JBA Vol 5, Tab 18, pp 281, 284]**.

6. As the appellant accepts, the Crown adduced no evidence at his trial concerning the complainant's prior sexual experience, nor did the Crown Prosecutor submit to the jury that she had no prior sexual experience: **AS [6.10]**. The appellant relied "solely" upon the age of the complainant at the time of her complaint (she was 9 years old) as "the evidence adduced

in the prosecution case [which] by itself points to or raises the implication that the complainant has or may have had a lack of sexual experience" and which enlivened s 293(6): **AS [2.1]-[2.2], [5.5], [6.2], [6.6]**; ***WHS2*** **[31], [33], CAB 132, 133**; cf Appellant's Reply (**AR**) **[1]-[2], [5]**]. The CCA correctly held that this did not engage the exemption: ***WHS2*** **[24]-[44], CAB 128-137**.

7. Section 293 is a cohesive scheme that must be considered in context as a whole: **RS [48]-[49]**; *SAS Trustee Corporation v* ***Miles*** (2018) 265 CLR 137 at [20]-[26] (Kiefel CJ, Bell and Nettle JJ); [41]-[43] and [53]-[54] (Gageler J) **[JBA, Vol 3, Tab 10]**. Properly construed, age alone could not constitute evidence that is inadmissible under s 293(3), particularly where "age" was an element of each offence:[1] **RS [43]-[48], [52]**. If the age of the child is not evidence of a lack of sexual experience that is inadmissible under s 293(3),[2] then it would be incoherent to construe s 293(6) as meaning that the age of a child can imply a lack of sexual experience: **RS [52], cf AR [2](ii), (iii)**. Section 293(6) cannot be read as effectively a standalone provision, to give the same words different meanings, as the appellant seeks to do: see eg *Miles* at [22] **[JBA, Vol 3, Tab 10]**; **cf AS [6.2], [6.6]**; **AR [5], [7]**. Section 293(6), properly understood, is only engaged if the "case for the prosecution" implies or discloses that matter which if disclosed or implied by "evidence" under s 293(3) would be inadmissible: **RS [33]-[52]**.

8. The relevant disclosure or implication must derive from evidence adduced (or submissions made) in the case for the prosecution, not from an assumption a juror might hold based upon a complainant's age: **cf AR [1]**; **RS [53], [55]-[56], [61]**; ***WHS2*** **[37]-[39], CAB 134-135**. The uncertainty involved in the appellant's proposed approach is illustrated by the fact that the appellant has never stated at what "age" it is that that disclosure or implication arises such that cross-examination would be permitted.[3] The examples relied upon by the appellant (see **AS [6.6]**) do not advance his construction: **RS [58]-[60]**; ***Cook*** at **[57] [JBA, Vol 4, Tab 12]**. Similarly, the observations of the CCA in *WHS1* at [14] and [47] [**ABFM, Vol 1, pp 9, 18**] concerned the potential relevance of the evidence whilst considering whether the conceded non-disclosure of that evidence resulted in a miscarriage of justice, and not to its admissibility: **RS [24]-[28]**.

---

1 The relevant offences in this case were offences under ss 66A(2) (sexual intercourse with child under 10), 66B (attempt intercourse with child under 10); and 61M(2) (aggravated indecent assault with person under 16) of the *Crimes Act 1900* (NSW): **AS [52]; Indictment, CAB 9-11; JBA Vol 2, Tab 5, pp 15-19**.

2 Cf **AR 4(ii)** where the appellant suggests the respondent's "reasoning" is that "the age of child *does not imply* a lack of sexual experience" (emphasis added).

3 See eg. **RS [54]**, **AS [5.5]** ("young age"), **AS [6.2]** ("young age of the complainant… she was 9 years old); **AS [6.4]** ("young age"); **AR [2]** ("young"); **AR [2(b)]** ("younger than 10 years old"); **AR [6]** ("very young").

9. The appellant's construction would permit cross-examination of every child of a "young age" as to their prior sexual history. This would create an "invidious distinction" in the case of child sexual assault complainants: **RS [54]**; ***HG*** at [30] **[JBA, Vol 3, Tab 9].**

10. Ground 1 complains of the exclusion of "evidence of sexual experience". If, contrary to the respondent's submission, s 293(6) is engaged, the appellant has not identified with precision how the necessary assessments of unfair prejudice under s 293(6) and probative value under s 294(4)(f) are to be made with respect to <u>each</u> of the matters he seeks to put to the complainant: **RS [63]-[65]**; ***WHS2*** at **[24], CAB 128.** No error has been demonstrated.

The Appellant's Reply

11. The appellant appears to contradict his previous case in his Reply: **AR [1], [3]; cf AS [2.1]-[2.2], [5.5], [6.2]; cf *WHS2* [31]-[33], CAB 133.** The appellant's construction of s 293(6) in his Reply, including that the "case for the prosecution" includes evidence that is <u>not</u> adduced (**AR [2], [5]**) is illogical and would render the prohibition nugatory.

<u>Ground 2: The CCA erred in holding that a miscarriage of justice did not result from the final address by the Crown Prosecutor</u>

12. The Crown Prosecutor's closing address was not unfair. The Crown Prosecutor properly invited the jury to consider the entirety of the complainant's situation when assessing the significance of her delay in complaint: **RS [67]-[71], [30]; ABFM Vol 3, 880.33-882.41; *WHS2* [54], CAB 142.**

13. The material relied upon (at **ABFM 294 Vol 1; ABFM 477 Vol 1; ABFM 441-442 Vol 1)** does not bear out the appellant's assertion that the complainant had made "several prior complaints about sexual matters", including against her foster mother, capable of contradicting the Crown Prosecutor's submission (**cf AS [6.11]-[6.12]; *WHS2* at [55], CAB 143.**

<u>Relief</u>

14. If the appeal is allowed, the interests of justice do not require the entry of an acquittal. A new trial should be ordered: **RS [72]-[74]; [19]-[23].**

Dated 10 September 2025

H Roberts SC **S Palaniappan** **K Jeffreys**