# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

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**Matter No P62/1998**

CHRISTOPHER JOHN BULL APPELLANT

AND

THE QUEEN RESPONDENT

*Bull v The Queen* [2000] HCA 24
*11 May 2000*
P62/1998

**ORDER**

1. *Appeal allowed.*

2. *Order of the Court of Criminal Appeal of Western Australia made on 19 January 1998 set aside. In place thereof order that the appeal to that Court be allowed, that the convictions be quashed, and that there be a new trial on each of the counts on which the appellant was convicted.*

On appeal from the Supreme Court of Western Australia

**Representation:**

R G Bayly for the appellant (instructed by Bayly & O'Brien)

R E Cock QC with V R Campbell for the respondent (instructed by Director of Public Prosecutions (Western Australia))

# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

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**Matter No P63/1998**

RODNEY WILLIAM KING APPELLANT

AND

THE QUEEN RESPONDENT

*King v The Queen*
*11 May 2000*
P63/1998

**ORDER**

1. *Appeal allowed.*

2. *Order of the Court of Criminal Appeal of Western Australia made on 19 January 1998 set aside. In place thereof order that the appeal to that Court be allowed, that the convictions be quashed, and that there be a new trial on each of the counts on which the appellant was convicted.*

On appeal from the Supreme Court of Western Australia

**Representation:**

R K Williamson for the appellant (instructed by Messrs Williamson & Co)

R E Cock QC with V R Campbell for the respondent (instructed by Director of Public Prosecutions (Western Australia))

# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

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**Matter No P64/1998**

JAMES LUIS MAROTTA APPELLANT

AND

THE QUEEN RESPONDENT

*Marotta v The Queen*
*11 May 2000*
P64/1998

**ORDER**

1. *Appeal allowed.*

2. *Order of the Court of Criminal Appeal of Western Australia made on 19 January 1998 set aside. In place thereof order that the appeal to that Court be allowed, that the convictions be quashed, and that there be a new trial on each of the counts on which the appellant was convicted.*

On appeal from the Supreme Court of Western Australia

**Representation:**

R K Williamson for the appellant (instructed by Messrs Williamson & Co)

R E Cock QC with V R Campbell for the respondent (instructed by Director of Public Prosecutions (Western Australia))

## CATCHWORDS

**Bull v The Queen**
**King v The Queen**
**Marotta v The Queen**

Evidence – Admissibility of evidence – Exclusion of evidence as to disposition of complainant in cases of sexual offences – Whether evidence admissible at common law – Whether evidence excluded by the *Evidence Act* 1906 (WA), ss 36BA, 36BC – *Res gestae* – Hearsay rule.

Criminal law – Sexual offences – Evidence – Admissibility – Evidence as to disposition of complainant – Whether excluded by *Evidence Act* 1906 (WA), ss 36BA, 36BC.

Words and phrases – "*res gestae*" – "sexual reputation of the complainant" – "disposition of the complainant in sexual matters" – "sexual experiences of the complainant" – "hearsay".

*Evidence Act* 1906 (WA), ss 36B, 36BA, 36BC.

1 GLEESON CJ. The facts of the case, and the relevant legislative provisions, are set out in the reasons for judgment of McHugh, Gummow and Hayne JJ. I gratefully adopt their Honours' account of the historical background to the legislation, and their outline of the scheme of the provisions. That permits me to go directly to the central question of statutory construction which arises. As will appear, whilst I agree with the conclusion of their Honours as to the outcome of the appeal, I am unable to agree with them on one aspect of the construction of the legislation, preferring a view which I understand to have been taken by some members of the Supreme Court of Western Australia. The difference between us is not decisive in the present case, but it could be significant in other cases.

2 Section 36BA of the *Evidence Act* 1906 (WA) provides that, in proceedings for a sexual offence, evidence relating to the disposition of the complainant in sexual matters shall not be adduced or elicited by or on behalf of a defendant.

3 Section 36B makes the same provision as to evidence relating to the sexual reputation of the complainant.

4 Section 36BC makes a similar provision as to evidence relating to the sexual experiences of the complainant, but in that case the prohibition is qualified, not absolute, and is subject to an exception concerning the *res gestae*. The presence of such an exception in s 36BC highlights its absence from s 36BA. In fact, the history of the legislation shows that there once was such an exception in respect of evidence relating to disposition, but it was removed by the legislature. In those circumstances, it is not appropriate to re-introduce such an exception by a process of interpretation.

5 It is s 36BA that is of present concern.

6 The appellants, charged with various sexual offences against the complainant on the occasion of a late-night visit by her to premises occupied by one of them, sought to elicit and adduce evidence of the full terms of a telephone conversation pursuant to which she made the visit, and of some earlier conversations which explained some of the language used in the telephone conversation. In brief, the appellants sought to obtain evidence which they said showed that, contrary to the evidence of the complainant, there were clear sexual overtones in the invitation which was extended to her. The defence case was that, whilst sexual activity had occurred, it was consensual. The alleged terms of the invitation extended to the complainant, if accepted by the jury, could have been regarded as supportive of that case.

7 The trial judge disallowed the evidence on the ground that the parts of the conversation in question, and of the other conversations referred to by way of explanation, amounted to evidence relating to the disposition of the complainant in sexual matters.

8 That the evidence was relevant is not in doubt. If it were otherwise, no question as to the operation of s 36BA would arise. The first rule of evidence is that if information is irrelevant it is inadmissible, and there is no need to examine further any exclusionary rule of common law or statute.

9 It does not follow, however, that one can dismiss from further consideration the subject of relevance. The reason or reasons why evidence is relevant, and the question whether it answers the description of "evidence relating to the disposition of the complainant in sexual matters", may be interrelated.

10 As was noted, there is no exception to s 36BA which permits evidence forming part of the *res gestae*. Yet it is easy to imagine evidence, in relation to an alleged sexual offence, concerning what was said and done between a complainant and an accused on the occasion of the alleged offence, which if accepted, would bear directly on the issue of consent, (if consent be an issue), and which would also reveal the disposition of the complainant in sexual matters. The very terms of an expression of consent may provide an example. What a complainant says, or allegedly says, in agreeing to engage in sexual activity may disclose a certain disposition. It is difficult to accept that s 36BA was intended to exclude such evidence.

11 Similarly, what was said or done by a complainant on some other occasion, even though not part of the *res gestae*, may bear upon whether there was consent on the occasion the subject of a charge, but may also reveal the complainant's disposition in sexual matters.

12 I am unable to accept that, either as a matter of statutory construction, or as a matter of logic, a satisfactory distinction can be drawn between what was said or done on the occasion of the alleged offence and what was said or done on some other occasion. As a matter of fact, the difference may be significant, having regard to the circumstances of a particular case, but that is another matter. To import such a distinction, by implication, into the meaning of s 36BA, would be to introduce the very qualification, as to *res gestae*, which is present in s 36BC and absent from s 36BA. Furthermore, there are cases in which what was said or done some time before, or some time after, an alleged occurrence, may bear just as directly upon the issue of consent, or upon some other issue, as what was said or done on the occasion of the occurrence.

13 It may not be difficult to understand why, amongst ss 36B, 36BA, and 36BC, it was thought necessary that s 36BC should retain an exception concerning the *res gestae*. If there were no such exception in s 36BC, a literal reading of the section would produce the absurd result of excluding, or requiring leave to adduce, evidence of the offence in question, which would be evidence relating to the sexual experiences of the complainant. The same would apply to evidence of conduct of a sexual nature, on the same occasion, preliminary to the actual offence.

14 Apart from any question as to consent, many examples may be given of relevant evidence, which has a significance unrelated to any reasoning based on disposition, of the kind which is now regarded as illogical and offensive, but which happens to indicate disposition.

15 A similar problem arises in relation to evidence which reveals the propensity of an accused person to behave in a criminal manner. The way in which the common law deals with the matter was examined by this Court in *Pfennig v The Queen*[1]. It does not exclude absolutely all evidence which discloses the criminal propensity of an accused, but it requires consideration of the probative value of the evidence, having regard to what it tends to establish concerning a fact in issue, or a fact relevant to a fact in issue, apart from "a mere propensity to commit crimes of the kind in question"[2].

16 The meaning of s 36BA was considered by Kennedy J in *Bannister v The Queen*[3]. That case concerned the wrongful exclusion of evidence of behaviour on the part of a complainant, after the alleged events the subject of the charges in the case, which a jury might have regarded as inconsistent with her allegations, and which might also have been regarded as indicating that she had a propensity to behave in a certain way in relation to sexual matters. Kennedy J said[4]:

> "Nor do I consider that the evidence would relevantly be of the disposition of the complainant in sexual matters, so as to be excluded under s 36BA of the *Evidence Act*. Within the context of the case, the evidence on this point would not have been evidence of the complainant's disposition in the sense of her natural tendency or propensity to act in a particular way. It would have been evidence of her conduct towards the appellant on a particular occasion. The evidence was not directed to establishing the general disposition of the complainant as a step in an argument that she acted in a particular way on another occasion, which is what s 36BA renders inadmissible."

17 The passage directs attention to the reason why the evidence is relevant.

18 Information as to what a person said or did on a particular occasion, or on a number of occasions, whether the occasion of the alleged crime or otherwise,

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**1** (1995) 182 CLR 461.

**2** (1995) 182 CLR 461 at 529 per McHugh J.

**3** (1993) 10 WAR 484.

**4** (1993) 10 WAR 484 at 488.

may reveal, perhaps faintly, perhaps clearly, that person's disposition in sexual matters. Whether such information is properly characterised as evidence relating to the person's disposition in sexual matters requires consideration of the way, or the ways, in which it bears upon the issues before a trial court.

19 If information about what a person said or did is incapable of supporting an inference as to disposition, then there is no difficulty. This may be because the information is so specific to a given occasion that it cannot fairly be regarded as revealing a general propensity, or it may be for some other reason. Whatever the reason, s 36BA does not apply, because the information is of such a nature that it is incapable of constituting evidence relating to disposition. Greater difficulty arises where information is capable of supporting an inference as to disposition, but is also, for other reasons, probative of a fact in issue, or a fact relevant to a fact in issue.

20 In *Willis v Bernard*[5], Tindal CJ said[6]:

> "No doubt it renders the administration of justice more difficult when evidence, which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence."

21 This is the difficulty inherent in a statutory provision, or a rule of common law, which excludes evidence of the disposition of a complainant, or the propensity of an accused. Both matters could form the basis of a dangerous and prejudicial line of reasoning. At the same time, evidence which is otherwise relevant, and ought, in the interests of justice, to be received, may incidentally reveal disposition or propensity. In the case of information which tends to reveal the propensity of an accused, the law deals with the problem by considering its probative significance and value apart from the mere matter of propensity. A similar approach should inform the construction of s 36BA. This would give due weight to the legislature's purpose in excluding disposition evidence, and at the same time, pay due regard to the interests of justice. That appears to be the approach adopted by Kennedy J, with which I agree. It is also the approach adopted by Ipp J, who dissented in the Court of Criminal Appeal in the present case.

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**5** (1832) 8 Bing 376 at 383 [131 ER 439 at 441].

**6** The passage was cited with approval in *B v The Queen* (1992) 175 CLR 599 at 619 per Dawson and Gaudron JJ.

22 If, in a particular case, information which is capable of supporting an inference as to a complainant's disposition in sexual matters is relevant only on that account, then it clearly bears the character of evidence relating to such disposition, and is excluded by s 36BA. If, on the other hand, its tendency to reveal disposition is merely incidental, and its substantial probative significance is related to some other matter, then it is not excluded. That, in my view, is the present case. In such a case it is not appropriate to characterise the evidence as evidence relating to disposition. It may be necessary to give appropriate directions to a jury in order to prevent its use for a purpose contrary to the legislative intention underlying s 36BA, but that is not the problem with which we are presently concerned.

23 As to the analysis by McHugh, Gummow and Hayne JJ of the relevant statutory provisions, I regret that I am unable to accept what they identify as the preferred construction. My reasons are as follows.

24 First, it depends upon treating s 36BC as a positive source of admissibility of evidence relating to sexual experiences forming part of the *res gestae*. The reference in s 36BC to the *res gestae* is not expressed as a source of power or capacity to admit evidence. It is expressed as a qualification upon a rule of exclusion of evidence. If evidence falling within the qualification is admissible, the source of its admissibility is not s 36BC; it is the general law or some other statutory provision. The qualification does not make it admissible, and if, for some other reason, it is inadmissible, (because, for example, it is covered by some common law principle of exclusion), then it does not become admissible because it falls within the qualification in s 36BC. The same must apply if it is inadmissible because of s 36BA.

25 Secondly, it depends upon giving precedence to s 36BC over s 36BA where the two are in conflict. (The scope for conflict, of course, only exists because of the point already mentioned. If, as they appear at first sight to be, they are both simply rules of exclusion of evidence, then they do not conflict.) Why this should be so is not apparent.

26 Thirdly, in its practical application it is capable of turning upon matters unrelated either to the legislative purpose of protecting complainants from illogical and offensive lines of questioning and processes of reasoning, or to the need to do justice to accused persons.

27 For the reasons already given, I favour a different construction of s 36BA, but one which would not exclude the evidence presently in question.

28 I agree that the appeal should be allowed and that there should be an order for a new trial.

29 McHUGH, GUMMOW AND HAYNE JJ. The first question in these appeals (which were heard together) is whether, in a criminal trial for sexual offences, evidence of a telephone conversation was admissible at common law. If it was, further questions arise as to whether it was rightly rejected on the ground that it related "to the disposition of the complainant in sexual matters" or the "sexual experiences of the complainant". If the conversation did relate to the disposition or sexual experiences of the complainant, ss 36BA and 36BC of the *Evidence Act* 1906 (WA) ("the Act"), respectively, prima facie required its rejection. If either or both of those sections did prima facie prevent the tender of the evidence, another question arises as to whether it was admissible under s 36BC of the Act on the ground that it was part of the *res gestae* of the proceedings.

30 Sections 36B, 36BA and 36BC of the Act are three sections whose evident purpose is to restrict the eliciting of evidence concerning the prior sexual activity of the complainant in a prosecution concerning a sexual offence.

31 Section 36B provides:

> "In proceedings for a sexual offence, evidence relating to the sexual reputation of the complainant shall not be adduced or elicited by or on behalf of a defendant."

32 Section 36BA provides:

> "In proceedings for a sexual offence, evidence relating to the disposition of the complainant in sexual matters shall not be adduced or elicited by or on behalf of a defendant."

33 Section 36BC provides:

> "(1) In proceedings for a sexual offence, evidence relating to the sexual experiences of the complainant, being sexual experiences of any kind, at any time and with any person, not being part of the *res gestae* of the proceedings, shall not be adduced or elicited by or on behalf of a defendant unless leave of the court has first been obtained on application made in the absence of the jury (if any).
>
> (2) The court shall not grant leave under subsection (1) unless satisfied that –
>
> (a) what is sought to be adduced or elicited has substantial relevance to the facts in issue; and

(b) the probative value of the evidence that is sought to be adduced or elicited outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission."

34 Although the reference to "*res gestae*" is couched in negative terms, it appears to authorise the admission of evidence of the sexual experiences of the complainant if it is part of the *res gestae*. That is to say, the section prohibits the tender of evidence relating to sexual experiences that would be admissible at common law and then operates substantively to authorise the admission of the evidence if it is part of the *res gestae* or if the judge gives leave to adduce the evidence. It is true that a literal reading of s 36BC might suggest that it merely excludes *res gestae* evidence from its prohibition leaving its admissibility to depend upon the common law. However, it seems unlikely that the section intended to draw a distinction between two classes of evidence relating to sexual experiences, leaving one to be admitted pursuant to the common law and the other under the section. Further, the context of the section – ss 36B and 36BA – as well as the leave provision indicate that its primary purpose was to prohibit the tender of all evidence relating to experiences in sexual matters. Sections 36B and 36BA were intended to prohibit the tender of all evidence relating to reputation and disposition in sexual matters, and it seems best to regard s 36BC as having the same object and intending to prohibit all evidence relating to sexual experiences unless authorised by the section.

35 Furthermore, evidence that tends to prove the sexual experiences of the complainant will often tend to prove the sexual disposition of the complainant. If the admissibility of evidence relating to sexual experiences and being part of the *res gestae* depended on the common law, it would seem to be always inadmissible whenever it also tended to prove the sexual disposition of the complainant. That is because s 36BA prohibits evidence relating to the sexual disposition of the complainant. As will appear, we think that s 36BC authorises the admissibility of evidence relating to sexual experiences even when it tends to prove the disposition of the complainant. But in the face of s 36BA, it is difficult to see how the common law could authorise the admissibility of any evidence which tended to prove sexual disposition even if it also proved the sexual experiences of the complainant.

The material facts

36 The appellants were tried in the District Court of Western Australia with the offence of depriving a woman of her liberty and twelve offences of a sexual nature against her. They were found not guilty of depriving her of her liberty and not guilty of eight of the twelve counts concerning sexual offences. The Court of Criminal Appeal (Pidgeon and Franklyn JJ, Ipp J dissenting) dismissed their appeals against the convictions.

37 The complainant testified that, as a result of a telephone call from the first appellant, Bull, she went to his home to have a drink, smoke marijuana, and talk about his recent trip to Russia. When she got there, she found the appellants and another man were there. The complainant alleged that, after drinking vodka and smoking marijuana with the men, she was handcuffed and that the appellants sexually assaulted her in various ways.

38 The appellants alleged that the complainant consented to the sexual activity and that she was never handcuffed. In support of their defence, they sought to cross-examine the complainant on, and tender evidence of, Bull's version of the telephone conversation that caused the complainant to come to the house. The appellants argue that this conversation tended to prove that the complainant came to the house for the express purpose of having sexual intercourse and giving effect to her sexual fantasies. The trial judge rejected the evidence pursuant to s 36BA of the Act. The evidence sought to be adduced was as follows:

"Mr Bull: Why don't you come over?

Complainant: Oh no, I've got to work tomorrow.

Mr Bull: Well you can sleep the night here and then you can go to work from here.

Complainant: Oh you should have rung earlier.

Mr Bull: Well I did but you were out.

Complainant: I was trying to score some drugs, marijuana.

Mr Bull: Oh we've got marijuana here if you want to come over and have a smoke I'll teach you to drink vodka Russian style.

Complainant: Oh what have you been doing?

Mr Bull: We've been to the strippers and that and playing some cards and that. Oh if you come over here we might be able to do one of your fantasies if you want.

Complainant: Oh what see two guys sleep with each other.

Mr Bull: No the other one.

Complainant: Well if I come over will you be awake?

Mr Bull: We are.

Mr Bull: Have you any cobwebs?

Complainant: Oh lots.

Mr Bull: Well maybe we can blow them away for you."

39 If the conversation had been admitted, the appellants would have adduced evidence that, in referring to "cobwebs", Bull meant, and the complainant understood him to mean, lack of sexual intercourse for some time. To explain the conversation, the appellants would also have relied on evidence that the complainant had three fantasies: (1) watching two men have sex, (2) having sex with a male virgin, and (3) having sex with two or more men.

40 The alleged conversation seems so stilted as to excite doubts whether it occurred. But, if evidence of the conversation was admissible, its truth was for the jury to determine.

41 In our opinion, the conversation was admissible at common law and was not evidence relating to the sexual reputation, disposition or experiences of the complainant. It follows that the Court of Criminal Appeal erred in rejecting the appeals in so far as those appeals were based on the ground that the trial judge had erred in rejecting evidence of the telephone conversation.

The admissibility of evidence of sexual history at common law

42 To understand the purpose and effect of ss 36B, 36BA and 36BC of the Act, it is necessary to understand the state of the law before their enactment and the state of public opinion as to the state of the law before they were enacted.

43 At common law, a complainant in a rape trial could be cross-examined as to whether she was promiscuous[7]. However, a complainant could not be cross-examined about particular acts of intercourse with named men[8]. Moreover, subject to three exceptions, evidence of particular acts of intercourse could not be adduced to rebut her denial that she was promiscuous[9]. Those exceptions were:

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**7** *R v Clarke* (1817) 2 Stark 241 [171 ER 633].

**8** *R v Hodgson* (1812) Russ & Ry 211 [168 ER 765].

**9** *R v Holmes and Furness* (1871) 12 Cox CC 137.

(a) evidence that the complainant had engaged in prostitution[10];

(b) evidence of other acts of intercourse with the accused[11];

(c) evidence of other sexual acts constituting part of the surrounding circumstances[12].

44 In addition, the common law permitted the accused to adduce extrinsic evidence of, cross-examine upon, and rebut denials in relation to, all the surrounding circumstances of the offence. Those circumstances included the sexual behaviour of the complainant.

45 The exception concerning prostitution was liberally interpreted and was not confined to acts of prostitution as ordinarily understood. In practice, it often exposed the complainant to cross-examination on her whole sexual life. In *Krausz*[13], Stephenson LJ, giving the judgment of the English Court of Appeal, Criminal Division, went so far as to say:

> "Evidence which proves that a woman is in the habit of submitting her body to different men without discrimination, whether for pay or not, would seem to be admissible."

46 Evidence concerning the complainant's sexual behaviour which was admissible at common law was regarded as relevant to whether the complainant had consented to the act or conduct the subject of the charge. Common law courts regarded this evidence as relevant for that purpose because they accepted that lack of sexual morality or "lightness of character"[14] made it more probable than not that the complainant had consented to the sexual act or conduct concerned. The common law courts also considered the evidence to be relevant

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**10** *R v Barker* (1829) 3 Car & P 589 [172 ER 558]; *R v Bashir* [1969] 1 WLR 1303 at 1306; [1969] 3 All ER 692 at 693-694.

**11** *R v Martin and Martin* (1834) 6 Car & P 562 [172 ER 1364]; *R v Fitzgibbon* (1885) 11 VLR 232.

**12** *Gregory v The Queen* (1983) 151 CLR 566; *R v Turner* [1944] KB 463.

**13** (1973) 57 Cr App R 466 at 474.

**14** *R v Barker* (1829) 3 Car & P 589 at 590 per Park J [172 ER 558 at 559].

in determining whether the complainant's denial of consent was worthy of belief[15].

47 By the third quarter of the twentieth century the attitudes reflected in the common law rules had become discredited[16]. By then, evidence and in particular cross-examination of the complainant concerning his or her reputation and prior sexual activity were widely seen as an harassment of the complainant and an inquiry into his or her private affairs that was not relevant to the purpose of determining whether the prosecution had proved the guilt of the accused beyond reasonable doubt. It was also widely thought that many women who had been sexually assaulted were not prepared to report the assault because of the humiliation and harassment to which they believed they would be subjected to in cross-examination if a prosecution ensued.[17]

The legislative response to the common law rules of evidence

48 In 1976, the Western Australian legislature responded to the public dissatisfaction concerning evidence which was admissible at common law in sexual assault cases[18]. In the Second Reading Speech of the Evidence Act Amendment Bill, the Attorney-General said[19]:

> "This matter has received particular attention in several Australian States ... In all of these States reports have been submitted to the Government by

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**15** *Thomas v David* (1836) 7 Car & P 350 [173 ER 156]; *Cargill* (1913) 8 Cr App R 224; *R v Richardson* [1969] 1 QB 299.

**16** See, for example, the comments of Bray CJ in *R v Gun; Ex parte Stephenson* (1977) 17 SASR 165 at 168-169.

**17** See, for example, what was said by the Premier of New South Wales in the Second Reading Speech of the Crimes (Sexual Assault) Amendment Bill 1981: "At the present time many victims believe that the humiliation they would face as a witness in court outweighs all other considerations. I have every confidence that this provision will play a significant part in encouraging victims to report offences, and ensure that such victims will be treated justly and humanely by the judicial system." New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 18 March 1981 at 4761.

**18** *Evidence Act Amendment Act* 1976 (WA).

**19** Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 21 October 1976 at 3350.

specialist law reform bodies and all have recommended changes in the law to lessen the likelihood of the complainant being subjected to unnecessary harassment and embarrassment during the procedures of investigation, committal and trial.

...

Both in the United Kingdom and Australia the main concern has been to prevent the introduction of unnecessary evidence as to the complainant's general sexual history and conduct; that is, 'unnecessary' in the sense of not being necessary for the proper defence of the accused. This also is the main concern of the present Bill."

49 Sections 36A and 36B were inserted into the Act. Section 36A dealt with the admissibility of evidence at committal proceedings. Section 36B dealt with evidence admissible at trial, and provided:

"(1) Notwithstanding anything in this or any other Act or rule of law to the contrary at a trial at which a person is charged with a rape offence, no evidence about restricted matters shall be adduced by or on behalf of a defendant and no question about restricted matters shall be asked in cross-examination of the complainant unless leave of the court has first been obtained on application made in the absence of the jury (if any).

(2) The court shall not grant leave under subsection (1) of this section unless it is satisfied that what is sought to be adduced or elicited has substantial relevance to the facts in issue or to the credit of the complainant."

50 For the purposes of s 36B of the Act, "restricted matters" were defined in s 36A(5) as follows:

"'restricted matters', in relation to a particular defendant, means any of the following, namely –

(a) the sexual experiences (of any kind and at any time) of a complainant with a person other than the defendant; and

(b) a complainant's disposition in sexual matters excluding her disposition with respect to the defendant; and

(c) a complainant's reputation in sexual matters,

excluding any matter among the *res gestae* connected with any offence with which a defendant is charged at the trial,

and nothing in this section or section thirty-six B of this Act authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section."

51 In 1985, these sections were repealed by the *Acts Amendment (Sexual Assaults) Act* 1985 (WA) and replaced with their present forms. In the Second Reading Speech of the Acts Amendment (Sexual Assaults) Bill, Mrs Beggs on behalf of the Premier said[20]:

"In the course of the last election campaign, the Government made the following election commitment –

Acts of violence against women are increasing at an alarming rate in our community; a problem which Governments have ignored.

LABOR WILL: Enact tougher more effective laws against rape, sexual assault, and other forms of violence against women.

...

Sections 36A and 36B were introduced into the Evidence Act in 1976 and provide a degree of protection in relation to matters of evidence for victims of sexual offences.

At that time, however, no provision was made for the issues of corroboration of the victim's evidence, or the lack or delay of complaint by the victim. As a result, present practice requires a judge to warn a jury of the danger of convicting on the uncorroborated evidence of the victim, and a jury may draw negative conclusions from the victim's failure to report the rape promptly or at all.

In accordance with the principles stated above, the Bill proposes to effect changes to the Evidence Act which will have the effect that evidence laws will protect the victim from unnecessary hardship *by further restricting* the admissibility of evidence relating to the victim's sexual history during court proceedings.

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**20** Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 September 1985 at 699 and 701.

The accused person's legitimate rights will continue to be protected.

The proposed changes will have the effect that evidence of the victim's sexual reputation and sexual disposition will be absolutely inadmissible on behalf of the defendant.

Evidence of the victim's prior sexual experiences will be admissible in restricted circumstances with leave of the court. It is proposed that in such cases, evidence of or related to the complainant's prior sexual experiences, whether with the accused or any other person, will be inadmissible unless leave of the court has first been obtained in the absence of the jury." (emphasis added)

52 The *Acts Amendment (Sexual Offences) Act* 1992 (WA) changed the scope of the offences to which the sections applied by changing the definition of "sexual assault offence" in s 36A of the Act.

53 Thus, while the common law regarded a complainant's sexual reputation, sexual disposition or sexual experiences as relevant to issues of credibility and consent, ss 36B, 36BA and 36BC of the Act prohibit evidence relating to such matters being adduced. Those sections appear to forbid any chain of "reasoning" that asserts that, because the complainant has a certain sexual reputation or a certain disposition in sexual matters or has had certain sexual experiences, he or she is the "kind of person" who would be more likely to consent to the acts the subject of the charge. Those sections also appear to forbid the chain of "reasoning" that asserts that, because a complainant has a particular sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is less worthy of belief than a complainant without those features. However, s 36BC impliedly authorises the admissibility of evidence of sexual experiences where it is part of the *res gestae* of the proceedings and expressly authorises it where the court gives leave to adduce such evidence. One of the difficulties arising from the sections is that evidence of sexual experiences will often show the sexual disposition of the complainant. Does this mean that s 36BA prohibits the admissibility of evidence relating to the sexual disposition of the complainant when it would otherwise be admissible under s 36BC?

The operation of ss 36B, 36BA and 36BC of the Act

54 All Australian jurisdictions except the Northern Territory have provisions which on their face make evidence relating to the sexual reputation of a

complainant inadmissible. They contain no exceptions[21]. The Northern Territory legislation allows evidence of the sexual reputation of the complainant to be adduced with the leave of the court, if the court is satisfied that evidence sought to be adduced has substantial relevance to the facts in issue[22]. As the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General ("the Committee") pointed out, the justification for making evidence of sexual reputation completely inadmissible is that[23]:

> "evidence of reputation, even if relevant and therefore admissible, is too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances."

55 On the other hand, Australian jurisdictions have adopted divergent approaches in relation to evidence of what is variously described as the "sexual activities"[24], "sexual experience"[25] or "sexual experiences"[26] of the complainant. In New South Wales, the admissibility of such evidence depends on whether it falls within specific statutory exceptions[27]. In the other jurisdictions, the evidence is inadmissible unless the leave of the judge is obtained. Admissibility in those jurisdictions is a matter for the trial judge's discretion, although the exercise of the discretion is subject to various conditions laid down by the

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**21** *Evidence Act* 1971 (ACT), s 76G(1); *Criminal Procedure Act* 1986 (NSW), s 105(2); *Criminal Law (Sexual Offences) Act* 1978 (Q), s 4(1); *Evidence Act* 1929 (SA), s 34I(1)(a); *Evidence Act* 1910 (Tas), s 102A(1)(a); *Evidence Act* 1958 (Vic), s 37A(1)(1); *Evidence Act* 1906 (WA), s 36B.

**22** *Sexual Offences (Evidence and Procedure) Act* (NT), s 4(1)(a).

**23** Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5 – Sexual Offences Against the Person – Report*, (1999) at 219.

**24** *Sexual Offences (Evidence and Procedure) Act* (NT), s 4(1)(b); *Criminal Law (Sexual Offences) Act* 1978 (Q), s 4(2); *Evidence Act* 1929 (SA), s 34I(1)(b); *Evidence Act* 1958 (Vic), s 37A(1)(2).

**25** *Evidence Act* 1971 (ACT), s 76G(2); *Criminal Procedure Act* 1986 (NSW), s 105(3); *Evidence Act* 1910 (Tas), s 102A(1)(b).

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

**27** *Criminal Procedure Act* 1986 (NSW), s 105(4).

legislation[28]. Moreover, as the Committee pointed out[29], a further distinction may be drawn within the "discretionary models". In Victoria, Western Australia, the Northern Territory and Tasmania, the sexual experience provisions apply (expressly or by implication) to prior sexual experience between the complainant and the accused. In the remaining jurisdictions, the sexual experience or conduct provisions do not apply to "recent" sexual activity between the complainant and the accused.

56 Western Australia is alone in having a provision forbidding evidence relating to the "disposition of the complainant in sexual matters". But what does disposition mean in this context? In what way is it to be distinguished from sexual reputation or experiences?

57 In discussing evidence concerning the character of an accused in a criminal trial, the New Zealand Law Commission has pointed out that[30]:

> "On the one hand, the law distinguishes between evidence of general reputation and evidence of individual opinion and, in the case of the defendant in criminal proceedings, has historically recognised only the former[31]. On the other hand, it is not always clear what is meant by reputation. On occasion, it appears to be used interchangeably with *character*. It may be important therefore to distinguish between character as *public estimation* – which is perhaps more correctly referred to as reputation – and character as *disposition* – which is something more intrinsic to the individual in question[32]." (original emphasis)

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**28** *Evidence Act* 1971 (ACT), s 76G(3); *Sexual Offences (Evidence and Procedure) Act* (NT), s 4(1)(b), (2) and (3); *Criminal Law (Sexual Offences) Act* 1978 (Q), s 4(3); *Evidence Act* 1929 (SA), s 34I(2) and (3); *Evidence Act* 1910 (Tas), s 102A(2); *Evidence Act* 1958 (Vic), s 37A(1)(3) and (1)(4); *Evidence Act* 1906 (WA), s 36BC(2).

**29** Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5 – Sexual Offences Against the Person – Report*, (1999) at 223-225.

**30** New Zealand Law Commission, *Evidence Law: Character and Credibility – Preliminary Paper 27*, (1997) at 34.

**31** *R v Rowton* (1865) Le & Ca 520 [169 ER 1497].

**32** See *Plato Films Ltd v Speidel* [1961] AC 1090 at 1128, 1138.

58 The concept of disposition referred to in this passage obviously refers to a person's tendencies or propensities as things intrinsic to the individual in question which exist independently of other persons' opinions of those features. They are part of the character of the person so that given a relevant set of conditions or circumstances the person concerned has a tendency or propensity to act in a particular way. In contrast, the general opinion that others have of those features may constitute part of the person's reputation. Thus, a person who anonymously donates large sums of money to charity may have a reputation for being miserly, but in truth that person's disposition is charitable.

59 As we pointed out earlier, an important object of the 1985 amendments was to ensure that in trials for sexual offences a person's sexual reputation or disposition would not be used as a basis for reasoning that the complainant was the kind of person who would have consented to the conduct in question. That being so, it seems proper to construe "disposition" in s 36BA as referring to any characteristics of the complainant which suggests that he or she is the "kind of person" who would have engaged in the conduct in question. Thus, evidence relates to the "sexual disposition" of the complainant for the purpose of s 36BA only when it tends to prove that he or she is that "kind of person". A contrast is therefore to be drawn between statements and conduct which reveal the intrinsic character of the complainant and those which, although relevant to the particular occasion, do not. It is statements and conduct falling within the former category to which s 36BA is directed. It may not always be easy to draw the distinction between statements and conduct which reveal the intrinsic character of the complainant and those which, although relevant to the particular occasion, do not. But generally, the more direct and confined the relationship between the statement or conduct and the particular occasion, the less likely it is to reveal intrinsic character.

60 Absent an admission, a person's disposition, like a person's feelings, intentions or wishes, can only be proved indirectly. In most cases, a person's disposition can only be proved by:

(a) the person in question expressly or impliedly declaring that he or she has a certain disposition, or

(b) drawing inferences as to a person's disposition from the past conduct of the person, or

(c) drawing an inference from a person's reputation.

61 In the context of the Western Australian legislation, a difficulty arises because evidence of a complainant's sexual experiences, which is made admissible by s 36BC, will often, but not necessarily, also be evidence relating to

a person's sexual disposition. This arises from the process of inferential reasoning described in paragraph (b) above. Similarly, if "evidence relating to" means "evidence referring to", evidence concerning a person's sexual reputation may also refer to a person's sexual experiences or disposition: she has a reputation of having slept with every singer who has performed at this club; he has a reputation for picking up "rough trade"; he has slept with every woman in the office.

62 The use in s 36BC of the plural "sexual experiences" in contrast to the singular "sexual experience" is significant. It indicates that the purpose of the section is to prohibit evidence which describes any occasion or episode of sexual activity involving the complainant and another person but its purpose is not to prohibit all evidence that tends to prove the state of his or her sexual experience. Without infringing s 36BC (nor ss 36B and 36BA), the defendant would plainly be able to question the complainant concerning the extent of his or her sexual knowledge. This is clear from the qualifying words "being sexual experiences ... with any person". Those words also indicate that the complainant could be questioned or evidence adduced to prove that the complainant had witnessed the sexual activities of others as long as the evidence did not suggest that the complainant was involved in those activities. Moreover, without infringing the prohibition in s 36BC, to rebut a claim that the complainant had not had sexual intercourse before the events the subject of the charge, the defendant would seem able to adduce medical evidence that an examination of the hymen or anus indicated otherwise.

63 Most evidence tending to prove the sexual experiences of the complainant will be evidence of events anterior to the occasion of the charge. But, as s 36BC itself recognises by its reference to *res gestae*, the sexual experiences of the complainant include those that are connected to or occur contemporaneously with the event which is the subject of the charge. It is well established that the *res gestae* permits the adduction of evidence of incidents connected to the charge. In *O'Leary v The King*[33], this Court held that, on a charge of murder, evidence was admissible of the conduct of the defendant towards others extending over many hours prior to the killing. Chief Justice Latham said that the conduct was "evidence of 'facts and matters which form constituent parts or ingredients of the transaction itself or explain or make intelligible the course of conduct pursued'"[34]. Thus, in the present case each defendant was entitled to give evidence of the sexual activities of the complainant with each of the other

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**33** (1946) 73 CLR 566.

**34** *O'Leary v The King* (1946) 73 CLR 566 at 575.

defendants over several hours. Such evidence is admissible at common law and is not prohibited by s 36BC. In an appropriate case, the "transaction" may include the events of several days. This is likely to be the case where the complainant was part of a group of people who have gone away for a weekend or holiday together.

64 Thus, in a case where evidence relating to sexual experiences of the complainant is also evidence relating to the sexual disposition or the sexual reputation of the complainant, an apparent conflict between ss 36B and 36BC and ss 36BA and 36BC arises. That is because s 36BC allows evidence relating to sexual experiences to be adduced if it is part of the *res gestae* or if the court is satisfied of certain conditions and gives leave to adduce the evidence. Yet in terms s 36B and s 36BA respectively purport to render inadmissible any evidence relating to the sexual reputation of the complainant or to the disposition of the complainant in sexual matters even when it relates to or is derived from the sexual experiences of the complainant. The conflict between the literal meanings of these sections suggests that the literal meanings of ss 36B and 36BA must be qualified to some extent.

"Evidence relating to"

65 One way in which the conflict between ss 36B and 36BA and s 36BC may be reconciled is to construe the words "evidence relating to" as meaning "evidence adduced for the purpose of proving". In *Tooheys Ltd v Commissioner of Stamp Duties (NSW)*[35], Taylor J said:

> "There can be no doubt that the expression 'relating to' is extremely wide but it is also vague and indefinite. Clearly enough it predicates the existence of some kind of relationship but it leaves unspecified the plane upon which the relationship is to be sought and identified. That being so all that a court can do is to endeavour to seek some precision in the context in which the expression is used."

66 If the words "evidence relating to" in ss 36B, 36BA and 36BC are read as meaning "evidence adduced for the purpose of proving", it would cut down the effect of ss 36B and 36BA and reduce, if it did not abolish, the conflict between those sections and s 36BC. Evidence that incidentally revealed or disclosed or tended to prove the complainant's reputation or disposition in sexual matters would not be inadmissible if it was adduced for a different, permissible purpose.

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**35** (1961) 105 CLR 602 at 620.

67 In civil and criminal trials, evidence is frequently admissible for one purpose even though it cannot be admitted for another purpose. A striking example is the law concerning the admissibility of evidence which discloses that the accused has been guilty of criminal acts other than those with which he is charged. In a famous passage, Lord Herschell said[36]:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

68 As Tindal CJ pointed out in *Willis v Bernard*[37] "evidence, which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence." Evidence which is relevant and legally admissible on one issue may often be logically but not legally relevant to some other issue in the trial, but that does not make the evidence inadmissible on the first issue.

69 When evidence is tendered which contains matter that is wholly inadmissible by reason of an exclusionary rule of evidence such as the rule against hearsay, the rule against proving the criminal character or disposition of the accused or a statutory rule, a trial judge will often have to determine whether it has evidentiary value for some other purpose in the trial. If it has, the evidence may be admissible for that purpose although usually the jury, if there is one, has to be warned that the evidence can only be used for the admissible purpose and for no other purpose[38]. Sometimes, it may be necessary to go further and specifically warn the jury that the evidence cannot be used as proof of a particular fact or issue or to reason in a particular way.

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**36** *Makin v Attorney-General (NSW)* [1894] AC 57 at 65.

**37** (1832) 8 Bing 376 at 383 [131 ER 439 at 441].

**38** *B v The Queen* (1992) 175 CLR 599 at 619.

70 In *Bannister v The Queen*[39], Kennedy J, sitting in the Court of Criminal Appeal of Western Australia, may have taken the view that in s 36BA "evidence relating to" means "evidence adduced for the purpose of proving". Kennedy J held that s 36BA did not preclude the admissibility of the words "Any hope?", which were understood in the surf club where they were uttered to mean "a hope of some sexual conduct"[40]. His Honour said[41]:

> "Within the context of the case, the evidence on this point would not have been evidence of the complainant's disposition in the sense of her natural tendency or propensity to act in a particular way. It would have been evidence of her conduct towards the appellant on a particular occasion. The evidence was not directed to establishing the general disposition of the complainant as a step in an argument that she acted in a particular way on another occasion, which is what s 36BA renders inadmissible."

71 His Honour's statement that the "evidence was not directed to establishing the general disposition of the complainant as a step in an argument that she acted in a particular way on another occasion" may indicate that the focus in *Bannister* was on the purpose for which the evidence was adduced although arguably it may have meant that the statement of the complainant had no probative value as evidence of disposition.

72 Evidence of a fact or matter is testimony that tends to prove that fact or matter. Accordingly, any evidence that tends to prove the disposition of the complainant is evidence relating to his or her disposition. Such testimony does not cease to be evidence relating to the disposition of the complainant because it also tends to prove some other fact or matter in the proceedings. Evidence that on the occasion in question or on other occasions a complainant had used sado-masochistic devices in the course of sexual activity would tend to prove the disposition of that complainant in sexual matters. The validity of the proposition would not be affected by the fact that the evidence was tendered *for the purpose of* proving a fact in issue such as consent or an honest belief that the complainant had consented. It may be that the natural meaning of the words "evidence relating to" is wide enough to cover evidence that only incidentally refers to sexual reputation, disposition or experiences, an issue that we must later discuss.

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**39** (1993) 10 WAR 484.

**40** *Bannister v The Queen* (1993) 10 WAR 484 at 486.

**41** *Bannister v The Queen* (1993) 10 WAR 484 at 488.

But it seems impossible to deny that those words in their ordinary meaning at least cover any testimony which tends to prove any of those matters.

73 On the assumption that the words "evidence relating to" are confined to testimony that tends to prove reputation, disposition or experiences, one needs also to bear in mind that testimony relating to conduct and testimony relating to out-of-court statements stand in different positions. As we have pointed out, testimony relating to conduct may have the tendency to prove disposition, even though it has the tendency to prove a fact in issue. Because that is so, the plain language of s 36BA prima facie prohibits all testimony relating to conduct that tends to prove the disposition of the complainant in sexual matters, even if the evidence is relevant and is tendered only for some other purpose. However, testimony relating to out-of-court statements is much less likely to tend to prove such matters. Independently of ss 36B, 36BA and 36BC of the Act, testimony concerning out-of-court statements by or in the presence of the complainant will only be admissible in limited circumstances. Because the complainant is not a party to the proceedings, testimony on behalf of the accused concerning such statements will be admissible to prove a fact asserted in the statement only if it comes within a recognised exception to the hearsay rule. The hearsay rule, and not ss 36B, 36BA or 36BC, will ordinarily prohibit the admission of such testimony. In the present case, for example, assuming that evidence of the telephone conversation was admissible, it nevertheless had no probative value in respect of any of the matters asserted in the statements except to the extent that they could be used as admissions against Bull.

74 At common law, the out-of-court statements of a complainant relating to that person's sexual reputation, disposition or experiences could not be adduced as evidence of the facts therein contained, whether evidence of the making of the statements was sought to be adduced in cross-examination or otherwise. They were excluded by the hearsay rule unless they fell within a recognised exception to that rule. Of course, if admissions could be obtained from the complainant as to the facts in such statements, they could be used to prove any fact in issue and the character and credibility of the complainant. No doubt the contents of the statements might be put to the complainant for various forensic purposes, but in principle proof that the complainant had made the statements would not prove their contents.

75 Sometimes, however, testimony of an out-of-court statement is admissible to prove a fact relevant to a fact in issue such as the intention or purpose of the complainant or even the consent of the complainant. If the statement contains material that *refers* to matters relating to the reputation, disposition or experiences of the complainant in sexual matters, would it be evidence tending to prove those matters and prohibited by one or more of the three sections? We think not.

76 It is trite law that hearsay evidence when admitted is evidence in the case. That is so, whether the evidence is admitted as an exception to the hearsay rule, such as evidence of a confession, or where hearsay is admitted without objection, or because a party is forced to put a hearsay statement into evidence. In *Walker v Walker*[42], where a party was forced to put into evidence a document which his solicitor had called for, Evatt J said[43]:

> "I deny the proposition that, merely because the document was 'hearsay' and therefore inadmissible, it is necessarily deprived of probative value."

77 In the same case, Dixon J said[44]:

> "If the matters which are contained in the document are completely irrelevant to the issues then, of course, they must be thrown out of consideration. But if it contains statements of fact in relation to relevant matters, then it becomes a medium of proof to which such weight may be attached as circumstances warrant."

78 But these statements do not mean that, if a hearsay statement is admitted to prove a fact other than truth of its contents, the contents, upon admission, also become evidence in the case. There are many situations where a hearsay statement is admitted into evidence but is evidence only of an extraneous fact and not the contents of the statement.

79 In *Hughes v National Trustees, Executors and Agency Co of Australasia Ltd*[45], this Court upheld the admissibility of statements by a testatrix about her son's misconduct which were tendered to prove her reason for excluding him from her will, but the Court held that the statements were not evidence of the alleged misconduct. Evidence of a hearsay statement made contemporaneously with the events to which it deposes may be admitted to rebut a suggestion of recent invention. But the statement when admitted is not evidence of the truth of its contents[46]. In sexual assault trials at common law, evidence of a recent

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**42** (1937) 57 CLR 630.

**43** *Walker v Walker* (1937) 57 CLR 630 at 638.

**44** *Walker v Walker* (1937) 57 CLR 630 at 636.

**45** (1979) 143 CLR 134.

**46** "Such statements are admissible not to prove the truth of the facts stated but merely to show the consistency of the witness's assertions": *The Nominal Defendant v Clements* (1960) 104 CLR 476 at 487 per Menzies J.

complaint of rape, where the complaint was made out-of-court, is admissible as an exception to the hearsay rule. But, as Barwick CJ pointed out in *Kilby v The Queen*[47], "the admissibility of that evidence ... can only be placed ... upon the consistency of statement or conduct which it tends to show, the evidence having itself *no probative value* as to any fact in contest". At common law, when a witness who is not a party admits in cross-examination that he or she previously made a statement that is inconsistent with his or her sworn evidence, the contents of the statement are evidence only of the extent of the inconsistency. The contents of the prior inconsistent statement affect the credit of the witness and are not evidence of any of the matters asserted in the statement[48]. Similarly, when a witness has been declared a hostile witness and admits that he or she has made an inconsistent statement, the contents of the statement are not proof of the facts therein stated[49]. The matter is different if the witness not only admits that he or she made an inconsistent statement but also deposes that the facts in that statement are true. In that situation, the contents of the statement are evidence of the facts which it contains[50].

80 If a hearsay statement is admissible to prove a fact in issue or a fact relevant to a fact in issue, it is evidence of that fact only and the statement cannot be regarded as evidence tending to prove any fact in the statement. It follows that, in a trial to which ss 36B, 36BA or 36BC apply, a statement of the complainant that is admissible to prove a fact in issue or a fact relevant to a fact in issue other than the reputation, disposition or experiences of the complainant in sexual matters, does not become, upon admission, evidence tending to prove those matters even if the contents of the statement refer to them. The statement has no probative value in respect of those matters. Accordingly, it is not evidence tending to prove any of those matters.

81 But, as we have said, evidence of conduct stands in a different category. The ordinary and natural meaning of the words "evidence relating to" is that they cover any testimony that tends to prove a fact or matter. If testimony tends to prove the sexual reputation, disposition or experiences of the complainant in

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**47** (1973) 129 CLR 460 at 472. (emphasis added)

**48** *Taylor v The King* (1918) 25 CLR 573 at 574-575; *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498 at 509; *Lee v The Queen* (1998) 195 CLR 594 at 603.

**49** *Golder* (1960) 45 Crim App R 5 at 11; *R v Thynne* [1977] VR 98 at 100.

**50** *Birkett v AF Little Pty Ltd* [1962] NSWR 492; *R v Thynne* [1977] VR 98 at 100-101.

sexual matters, it does not matter that it is adduced for some other purpose. It will, by force of ss 36B, 36BA and 36BC, be inadmissible for all purposes.

82 We are therefore unable to agree that the reasoning in *Bannister*[51] is correct if it is read as suggesting that those sections do not prohibit the adduction of evidence on behalf of the defendant which is tendered for a purpose other than that of reputation, disposition or experiences even though it tends to prove one of those matters. It may be, however, that in that case Kennedy J meant no more than that the content of the particular statement had no probative value other than its tendency to prove that the complainant had offered to have sexual intercourse with the defendant. As will later appear, if that was the basis of his Honour's reasoning, we think he was correct in holding that the evidence was not prohibited by s 36BA.

83 But do those sections go further than prohibiting testimony that tends to prove reputation, disposition or experiences? Do they prohibit adducing evidence that merely refers to these matters? The history of the sections gives some support to the view that they do. Under the 1976 amendments, evidence of "restricted matters" could not be given without leave of the judge, and "restricted matters" were defined to include "a complainant's disposition in sexual matters *excluding her disposition with respect to the defendant*". (emphasis added) The omission of this exclusion from the current legislation and the removal of disposition evidence from the *res gestae* and leave exclusions, which it enjoyed under the 1976 legislation, suggest that the legislature was concerned, as Mrs Beggs said in the Second Reading Speech[52], to make disposition evidence absolutely inadmissible, even when it proved the disposition of the complainant with respect to the defendant and even if the evidence was part of the *res gestae.*

84 Given the legislative changes in 1985 and the statement in the Second Reading Speech that evidence of "sexual reputation and sexual disposition will be absolutely inadmissible"[53], there is much to be said for the view that both s 36B and s 36BA prohibit any evidence that refers to or discloses the sexual reputation or disposition of the complainant. But if they are given this meaning, an apparent conflict between ss 36B and 36BA and s 36BC automatically arises

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**51** (1993) 10 WAR 484.

**52** Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 September 1985 at 701.

**53** Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 September 1985 at 701.

in many cases. In these appeals, one issue is whether s 36BA has this wide effect.

Three competing constructions of s 36BA

85 In light of the foregoing considerations, there are three competing constructions of the operation of s 36BA. Each of them has varying degrees of persuasion, and none is entirely satisfactory.

*The first construction – a blanket exclusion*

86 The first construction is that s 36BA unconditionally prohibits the tender of any evidence which in any way reveals or discloses the disposition of the complainant in sexual matters. Thus, if an accused adduces evidence for the purpose of proving a fact other than the complainant's sexual disposition but that evidence reveals the sexual disposition of the complainant, the evidence is inadmissible. This interpretation finds support in the Second Reading Speech where it was said that evidence of sexual reputation and sexual disposition was to be "absolutely inadmissible" on behalf of the defendant. The history of the legislation also supports this view. Under the 1976 legislation, the *res gestae* exception expressly applied to evidence of disposition. The fact that the prohibition of evidence of sexual disposition is now contained in another section – namely, s 36BA – indicates that the legislature intended that it was no longer to be subject to the *res gestae* exception. If the prohibition is not subject to the *res gestae* exception, it would appear to follow that it has no exception and that s 36BA is to be read literally. Moreover, ss 36B, 36BA and 36BC were enacted in furtherance of a political promise to "[e]nact tougher more effective laws"[54] against sexual assault crimes. In this context, it is arguable that the legislation must be given the interpretation which will provide the greatest protection for the complainant.

87 However, the first construction has the potential to work great injustice on accused persons by excluding evidence highly probative of the accused's innocence. For example, if in a sexual assault case the defence was that, although the intercourse had occurred, the defendant had gone to a brothel or had answered an advertisement offering sexual services and that the complainant had consented to the intercourse in exchange for the payment of money, the first construction would prevent the accused from adducing this evidence. It would be inadmissible because it would reveal that the complainant had a disposition to

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**54** Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 September 1985 at 699.

supply sexual services in exchange for money. Such a construction might therefore result in the conviction of an innocent person. Moreover, it is hardly to be supposed that the legislature intended to prevent the accused adducing evidence as to the circumstances in which intercourse took place.

88 In resolving the ambiguities inherent in legislation, it is legitimate to take into account the presumption that the legislature did not intend to "sterilize the trial judge's ability to secure a fair trial"[55]. This is especially so in this case. In the Second Reading Speech, Mrs Beggs, on behalf of the Premier, declared that[56]: "The accused person's legitimate rights will continue to be protected."

89 Also militating against the correctness of the first construction is the fact that the Western Australian Parliament used the words "evidence relating to" instead of the words "evidence disclosing or implying". In New South Wales, s 409B(3) of the *Crimes Act* 1900, which was in force at the time the 1985 Western Australian amendments were enacted, provided that "evidence which discloses or implies that the complainant has or may have had sexual experience" was inadmissible except on certain conditions. In his commentary on what was then s 409B(3) of the *Crimes Act* (now s 105(3) of the *Criminal Procedure Act* 1986 (NSW)), Dr G D Woods QC stated[57]:

> "Note that the evidence need only 'disclose or imply' sexual experience or sexual activity to fall within the prohibition. It is immaterial that such disclosure or implication might be unintentional or merely incidental."

90 In contrast, the then s 409B(2) of the *Crimes Act* used the same "evidence relating to" formula as appears in s 36B of the Act:

> "In prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible."

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**55** *Longman v The Queen* (1989) 168 CLR 79 at 86.

**56** Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 September 1985 at 701.

**57** Woods, *Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act, 1981, and Cognate Act*, New South Wales Criminal Law Review Division of the Department of Attorney-General and of Justice (1981) at 34.

91 Of this provision, Dr G D Woods QC stated[58]:

> "This is an important provision, excluding irrelevant material about a complainant's supposed sexual behaviour as a proper basis upon which the facts of a particular allegation of sexual assault should be judged."

92 The reference to "a proper basis" suggests that the purpose for which the evidence is adduced may be important.

93 The juxtaposition in the New South Wales legislation of "evidence relating to" and "evidence which discloses or implies" indicates that the Parliament of that State intended "evidence relating to" a certain fact to mean "evidence adduced for the purpose of proving" that fact. The use of the words "evidence relating to" in the Western Australian legislation, therefore suggests that the legislature did not wish to prohibit evidence merely because it disclosed the disposition of the complainant in sexual matters, particularly if the evidence was also evidence relating to sexual experiences within the meaning of s 36BC of the Act.

*The second construction – a purposive exclusion*

94 The second construction is that s 36BA prohibits the tender of evidence, which reveals or discloses sexual disposition, only when it is tendered for the purpose of asserting that, by reason of a general or particular disposition in sexual matters, it is probable that the complainant consented to the sexual activity charged or is unworthy of belief. On this view, evidence which merely incidentally reveals or discloses sexual disposition is admissible to prove other relevant facts, although no doubt the jury would usually have to be warned that the evidence cannot be used to draw any inferences from or regarding the complainant's sexual disposition.

95 On the second construction, no conflict between ss 36BA and 36BC arises. On that construction, if evidence is tendered by the accused which relates to the complainant's sexual experiences but incidentally reveals his or her sexual disposition, s 36BA prevents the evidence being used for the purpose of proving sexual disposition as a link in the impermissible chain of reasoning discussed above, but does not otherwise prohibit its admission or use. Section 36BC would

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**58** Woods, *Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act, 1981, and Cognate Act*, New South Wales Criminal Law Review Division of the Department of Attorney-General and of Justice (1981) at 33.

govern the admissibility of evidence tendered for the express purpose of proving the complainant's sexual experiences but which incidentally disclosed or tended to prove the complainant's disposition or reputation in sexual matters. However, evidence which proved any other fact in issue or relevant to a fact in issue would be admissible in accordance with the ordinary rules of evidence even though it revealed the sexual disposition of the complainant.

96 The difficulty with the second construction is that the admission of such evidence, even with a warning to the jury, undermines the legislative intention of protecting complainants, an intention apparent in the wide words "relating to" and the terms of the Second Reading Speech. The width of those words and the terms of the Second Reading Speech suggest that evidence relating to the disposition of the complainant in sexual matters was to be "absolutely inadmissible" in order to prevent humiliation and embarrassment to the complainant as a result of having such evidence before the court.

97 A perhaps more fundamental objection to the second construction is that it would make the conditions laid down in s 36BC almost, if not wholly, irrelevant. If evidence does not relate to disposition when it is tendered for some purpose other than proving disposition, then, applying the same reasoning to s 36BC, evidence cannot relate to the sexual experiences of the complainant when it is tendered for some purpose other than proving those sexual experiences. But evidence that tends to prove the sexual experiences of the complainant will in most cases, perhaps always, go to the issue of consent or some other fact in issue such as honest belief of consent. In many cases, particularly where there are multiple defendants, evidence tending to prove the sexual experiences of the complainant will be part of the *res gestae.* Yet if the second construction is correct, the evidence will not be "evidence relating to the sexual experiences" of the complainant and will therefore not fall within s 36BC. This seems an extraordinary conclusion. If it is correct, it would seem to mean that in practice there would be few occasions, if any, where the trial judge would have to rule whether the evidence was part of the *res gestae* or that the evidence had substantial relevance and that its probative value outweighed the distress, humiliation or embarrassment which the complainant might suffer as the result of its admission. The evidence would not attract the operation of s 36BC any more than evidence which revealed or tended to prove the reputation or disposition of the complainant but which was directed to an issue in the trial would attract the prohibitions in ss 36B and 36BA.

98 There seems no escape from the conclusion that, if evidence is outside ss 36B and 36BA when it is not adduced for the purpose of proving the sexual reputation or disposition of the complainant, it must also be outside s 36BC when it is not adduced for the purpose of proving the sexual experiences of the complainant but is tendered for some other purpose. The only possible escape

from that conclusion is to read ss 36B and 36BA as permitting the admission of evidence that incidentally reveals the sexual reputation or disposition of the complainant when that evidence is tendered for some purpose other than proving that reputation or disposition. But that would mean that the admission of evidence "relating to" reputation or disposition was subject to less stringent terms of admissibility than evidence of sexual experiences. This seems extremely unlikely given that s 36BC expressly makes some classes of evidence of sexual experiences admissible, while ss 36B and 36BA were intended to make "evidence of the victim's sexual reputation and sexual disposition ... absolutely inadmissible on behalf of the defendant"[59].

99 Some examples serve to illustrate the difficulties of the second construction. Suppose the accused wished to prove that he had an honest or, in the Criminal Code jurisdictions of Queensland, Tasmania and Western Australia, an honest and reasonable belief that the complainant had consented to sexual intercourse by tendering evidence that, on previous occasions whenever asked, she had always consented to intercourse with him and others. Such evidence would not be hearsay[60]. It would be proof of a fact (willingness to have indiscriminate sexual relations) relevant to a fact in issue (consent). But such evidence would also tend to prove the sexual disposition and experiences of the complainant. Would the evidence be automatically admissible because the purpose of the tender was to prove consent and not sexual disposition or experiences? That would seem to make the prohibitions in both ss 36BA and 36BC impotent in the very sort of case to which they seem to be directed. Or, assuming the evidence has substantial relevance, would it be admissible only if its probative value outweighed the harm to the complainant? That is to say, would the evidence be outside s 36BA but still have to comply, and be admissible only if it complied, with the stringent conditions contained in s 36BC?

100 Suppose, further, that the accused wished to prove consent by tendering evidence that on previous occasions the complainant had said that she would like to have sexual relations with men like the accused. That evidence would not be hearsay. It would be original evidence of her intentions, and it would probably be admissible at common law in accordance with the reasoning in *Walton v The Queen*[61]. However, it would tend to prove the complainant's disposition in

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**59** Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 September 1985 at 701.

**60** See Ferguson, "Hearsay Evidence", (1927) 1 *Australian Law Journal* 195.

**61** (1989) 166 CLR 283.

sexual matters and would not relate to her sexual experiences. On the second construction of the three sections, this evidence would seem to be admissible. Yet it would seek to prove consent by a chain of reasoning that asserted that, because the complainant was a woman who would have sexual relationships with men of a certain type, she had consented to a sexual relationship with the accused. But such reasoning is nothing more than proof by disposition, the very type of reasoning that s 36BA was designed to prevent. Moreover, it seems very unlikely that the legislature could have intended evidence of intention or desire tending to prove disposition, but not evidence of sexual experiences, to be used for such reasoning. Evidence of experiences, but not disposition, must pass the conditions laid down in s 36BC.

101 The final difficulty with the second construction is that it fails to come to grips with the fact that, when evidence is tendered for a purpose that tends to prove disposition, proof of the purpose will often in form and almost always in substance depend on disposition reasoning, as it does in the above example. The facts of *Bannister*[62] can be extended to provide an example. In no real sense did the evidence allegedly uttered by the complainant – "Any hope?" – relate to her disposition in sexual matters. That statement said nothing about the intrinsic character of the complainant in sexual matters. It indicated, of course, a willingness to have intercourse with the accused. But unless the words "the disposition of the complainant in sexual matters" are read so widely as to include any casual or transient wish or desire of the complainant – a view that we have already rejected – the evidence in *Bannister* was not evidence of disposition in sexual matters and was not prohibited by s 36BA. But suppose that in *Bannister*, in support of a defence of consent, the accused had sought to tender evidence that the complainant had often asked surf club members to have sexual intercourse with her. That evidence would be evidence of conduct, not hearsay, but would have revealed her disposition in sexual matters. It could only have been used as part of a chain of reasoning that, because of her disposition, it was more likely than not that she consented on the occasion of the charge. If the second construction would admit such evidence, as it would appear to do, s 36BA would have failed spectacularly to achieve its professed object.

*The third construction – a blanket exclusion subject to s 36BC*

102 Both the first construction and the second construction have difficulties. The first construction excludes evidence that might be highly probative of the accused's innocence. The second construction admits evidence that undermines the paramount legislative intention that complainants in sexual assault matters

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**62** (1993) 10 WAR 484.

should be protected against the admission of evidence that tends to prove sexual reputation, disposition and experiences. However, there is a third construction of s 36BA which arguably strikes a more appropriate balance between these competing considerations.

103 The third construction is that s 36BA prohibits the tender of any evidence which tends to prove the disposition of the complainant in sexual matters except where the evidence is evidence of the sexual experiences of the complainant and is admissible under s 36BC. This construction resolves the apparent conflict between ss 36BA and 36BC referred to above. On this construction, evidence which proves the complainant's sexual experiences but which also tends to prove the complainant's disposition in sexual matters is governed by s 36BC in so far as it proves the sexual experiences, but is governed by s 36BA for all other purposes.

104 In our opinion, the third construction is the one which best reconciles the legislative intention underlying ss 36B, 36BA and 36BC of the Act. That construction gives each of those sections "the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."[63] In *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*, this Court said[64]:

> "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals[65]. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions[66]."

105 The third construction strikes an appropriate balance between the competing aims of ensuring that the accused can put all cogent evidence before

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**63** *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 per McHugh, Gummow, Kirby and Hayne JJ.

**64** (1998) 194 CLR 355 at 381-382 per McHugh, Gummow, Kirby and Hayne JJ.

**65** *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.

**66** See *Australian Alliance Assurance Co Ltd v Attorney-General (Q)* [1916] St R Qd 135 at 161 per Cooper CJ; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J.

the court and protecting the complainant from humiliation and embarrassment. It accords with the terms of s 36BC which indicate that the Western Australian Parliament considered that, in the circumstances defined in s 36BC, evidence of the sexual experiences of the complainant should be admissible. Furthermore, the third construction reduces the potential for unfairness to the accused. At the same time, it protects the complainant by subjecting evidence of sexual experiences which tends to prove sexual disposition to stringent conditions. In order to be admissible, the evidence must relate to the complainant's sexual experiences and either be part of the *res gestae* of the proceedings, or (1) have substantial relevance to the facts in issue and (2) have a probative value that outweighs the distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

106 The third construction also gives the words "relating to" in all three sections a wider and, in our opinion, a more natural meaning than that required by the second construction. It is true that it gives those words a meaning which is not as wide as "disclosing or implying". Given the refusal of the legislature to use those words despite the example of s 409B(3) in the New South Wales legislation, it seems safe to assume that the legislature of Western Australia intended the words to have a narrower meaning.

107 Finally, the third construction gives effect to the important point that the very essence of the changes that were made by these sections was to require courts and juries to focus primarily upon what was alleged to have been done, or thought or said, on the *particular* occasion, and to put aside what might be said to have been done, or thought or said, on *other* occasions.

*Res gestae*

108 What is meant then by the words "not being part of the *res gestae* of the proceedings" in s 36BC of the Act? In his article "Res Gesta Reagitata", Professor Stone described the law as to *res gestae* as "the lurking place of a motley crowd of conceptions in mutual conflict and reciprocating chaos"[67]. Professor Stone pointed out that[68]:

> "evidence admitted under the *res gesta* decisions falls, *on a proper analysis*, into five distinct categories. First, the facts in issue; second, facts relevant to the facts in issue; third, declarations not in themselves in issue or

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**67** Stone, "Res Gesta Reagitata", (1939) 55 *Law Quarterly Review* 66 at 67.

**68** Stone, "Res Gesta Reagitata", (1939) 55 *Law Quarterly Review* 66 at 68.

> relevant, but constituting a verbal part of either a fact in issue or a relevant fact; fourth, facts of all kinds, which, though not facts in issue or relevant, are so inextricably bound up with either, that effective proof of the one cannot be made without proof of the other; and fifth, statements admitted as hearsay under what constitute in effect three exceptions to the hearsay rule." (emphasis added)

109 Perhaps Professor Stone was right when he complained[69] that the requirement that a fact be part of the *res gestae* is usually nothing more than a requirement that it be relevant. However, in assigning a meaning to the words "*res gestae*" in s 36BC, we do not think that the term can cover all of the five categories to which Professor Stone referred. Section 36BC prima facie forbids the chain of "reasoning" that asserts that, because the complainant has a certain sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is the "kind of person" who is likely to have consented to the sexual activity which is the subject of the charge. Yet such evidence would be relevant to the charge. If ss 36B and 36BA are to have meaning, *res gestae* in s 36BC must embrace more than relevance and not be so wide a concept that it would admit any evidence of reputation or disposition that fell within Professor Stone's five categories.

110 One recognised meaning of *res gestae* is that it refers to "[t]hings so close in time or space to the matter being proved as to be inseparable from it."[70] Given the object of ss 36B and 36BA, this seems the most likely meaning of *res gestae* in s 36BC. The evidence relating to the sexual experiences of the complainant must be part of the thing that happened if it is to qualify for automatic admission under s 36BC. That is to say, the evidence relating to sexual experiences must be part of the "transaction" which gives rise to the charge. If it is not, it can only be admitted with the leave of the Court.

111 In *Dawson v The Queen*, Dixon CJ said[71]:

> "It is the thesis of English law that the ingredients of a crime are to be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction amounting to the crime, and are not inferred from the character and tendencies of the accused."

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**69** Stone, "Res Gesta Reagitata", (1939) 55 *Law Quarterly Review* 66 at 71.

**70** *Butterworths Australian Legal Dictionary* (1997) at 1015.

**71** (1961) 106 CLR 1 at 16.

112 This statement provides an insight as to what constitutes the "*res gestae*" for the purpose of s 36BC. The existence of consent, for example, is not to be "inferred from the character and tendencies of the [complainant]", but is to "be proved by direct or circumstantial evidence of the events, that is to say, the parts and details of the transaction amounting to the crime". Where an act or statement is intimately connected with the particular sexual conduct which is the subject of the charge, or in other words with "the parts and details of the transaction amounting to the crime", it is part of the *res gestae* and so is admissible under s 36BC without leave. That applies to acts or matters tending to prove the disposition of the complainant, as well as to other acts or matters relating to the sexual experiences of the complainant.

113 The third construction means, of course, that evidence which tends to prove the disposition of the complainant in sexual matters but which is not evidence relating to the complainant's sexual experiences and part of the *res gestae* will be inadmissible, regardless of the purpose for which it is adduced. Probative evidence of considerable cogency will therefore sometimes be excluded. However, evidence of sexual experiences which is not part of the *res gestae* may still be admissible with leave notwithstanding that it also tends to prove the disposition of the complainant. Whether the evidence of sexual experiences is admitted as part of the *res gestae* or with leave, the jury should be warned against using the evidence to reason that the complainant was the "kind of person" who would be more likely to consent to the acts the subject of the charge or was the "kind of person" who is less worthy of belief than others. In other words, if consent is the fact in issue, the jury could only use the evidence of the sexual experiences as the basis of probability, but not disposition, reasoning.

114 In our opinion, the third construction is the one which best reconciles the apparent conflict between ss 36B and 36BA on the one hand and s 36BC on the other and gives maximum effect to the language of each provision, notwithstanding the verbal contradiction between the literal meanings of the sections. Moreover, the third construction places a restriction on the admissibility of evidence tending to prove sexual reputation or disposition which will protect the complainant from much unnecessary hurt, humiliation and embarrassment, but will not deprive the accused of the opportunity to adduce relevant and probative exculpatory evidence. It addresses the concern of fairness to the accused but remains based on the terms of s 36BC.

115 For these reasons we conclude that:

(a) Section 36BA prohibits the tender of any evidence which tends to prove the disposition of the complainant in sexual matters, except where the evidence is evidence of the sexual experiences of the complainant and is admissible under s 36BC.

(b) In s 36BA, "disposition ... in sexual matters" refers to characteristics of the complainant which suggest that he or she is the "kind of person" who would have engaged in the conduct in question.

(c) Evidence that tends to prove the disposition of the complainant in sexual matters is evidence "relating to" his or her disposition in those matters.

(d) An out-of-court statement of the complainant will be admissible to prove a fact asserted in the statement only if it comes within a recognised exception to the hearsay rule.

(e) An out-of-court statement of the complainant admitted to prove a fact *other than* the truth of the facts asserted in the statement does not, if the content of the statement concerns the complainant's sexual reputation, disposition or experiences, tend to prove those matters. By contrast, if testimony relating to the complainant's conduct tends to prove the sexual reputation, disposition or experiences of the complainant, it will tend to prove those matters no matter what is the purpose for which it is adduced.

The effect of the hearsay rule on the evidence in question

116 Evidence of what was said in the telephone conversation in the present case is evidence concerning statements made out of court. Because that is so, evidence of the telephone conversation could not be adduced as evidence of the facts asserted in the conversation unless an exception to the hearsay rule applies.

117 As the operation of the hearsay rule depends on the purpose for which the evidence is adduced[72], it is necessary to identify the fact which the statements in the telephone conversation were designed to prove. That fact was the complainant's intention or purpose in attending Bull's house. The conversation's relevance to this issue does not depend upon the truth of the following express and implied assertions made by the complainant in the conversation:

(i) the complainant's implied assent to the proposition put to her by Bull that she had two fantasies, one of which was to "see two guys sleep with each other";

(ii) the complainant's express assertion that she had "lots" of cobwebs;

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**72** *Subramaniam v Public Prosecutor* [1956] 1 WLR 965.

(iii) the complainant's implied assertion that she would attend Bull's house after being reassured that the occupants of the house would be awake.

118 If the relevance of the evidence depended upon the truth of these assertions, the hearsay rule would make the evidence inadmissible. However, the relevance of the conversation depends not on the truth of these assertions but on the facts that Bull said "Oh if you come over here we might be able to do one of your fantasies if you want", that, in relation to "cobwebs", he said "Well maybe we can blow them away for you", and that the complainant subsequently went to the house (which fact was not in dispute). Regardless of the truth value of these statements by Bull, the fact that they were made by Bull and that the complainant responded in the way she did is relevant to the complainant's reason for going to the house in the light of her subsequent action in attending the house in response to the telephone call. Her state of mind – her reason for going to the house – was relevant to whether she consented to the sexual activities that took place after she arrived and her statements in their context were evidence of her state of mind[73].

119 Evidence of what was said in the telephone conversation was relevant to, in the sense of being rationally probative of, a fact (the complainant's intention or purpose in attending Bull's house) which is itself relevant to a fact in issue (whether the complainant consented to the acts which allegedly occurred once she arrived there). Although the chain of relevance involves two steps, it does not rely on any impermissible intermediate step of a generalisation based upon the complainant's sexual disposition, reputation or experiences.

120 No doubt the jury might have concluded that the intention or purpose of the complainant two hours prior to the alleged acts threw little light upon whether she later consented to those acts. The jury might well have concluded that, even if the conversation took place, the circumstances escalated far beyond anything which the complainant had envisaged at the time of the telephone call. But in our opinion, these matters did not go to admissibility. They went to the weight to be given to the evidence of the telephone conversation. That was for the jury to decide, as was the more fundamental question of whether Bull's version of the telephone conversation should be believed.

121 Because the purpose or reason for the complainant going to Bull's house was relevant to a fact in issue (consent and, in the case of Bull, honest belief in consent), the conversation was admissible as original evidence to prove that purpose or reason. The law of hearsay did not prevent its admission. As

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**73** *Walton v The Queen* (1989) 166 CLR 283 at 288-289, 300-302, 307.

Lord Justice Mellish pointed out in *Sugden v Lord St Leonards*,[74] "wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were." In *Lloyd v Powell Duffryn Steam Coal Company Limited*[75], Lord Moulton said:

> "[I]t is well established in English jurisprudence, in accordance with the dictates of common sense, that the words and acts of a person are admissible as evidence of his state of mind. Indeed, they are the only possible evidence on such an issue. It was urged at the Bar that although the acts of the deceased might be put in evidence, his words might not. I fail to understand the distinction. Speaking is as much an act as doing.
>
> It must be borne in mind that there is nothing in the admission of such evidence which clashes with the rooted objection in our jurisprudence to the admission of hearsay evidence. The testimony of the witnesses is to the act, ie, to the deceased speaking these words, and it is the speaking of the words which is the matter that is put in evidence and which possesses evidential value. The evidence is, therefore, not in any respect open to the objection that it is secondary or hearsay evidence."

122 In accordance with this principle, evidence of the oral and written statements of the debtor has always been admitted in bankruptcy proceedings, to prove the purpose or reason for a debtor leaving the jurisdiction[76]. In *Skinner & Co v Shew & Co*[77], a plaintiff, who claimed that a third party had been induced to break off contractual negotiations by the defendant's threats, was allowed to prove the reason for the breakdown by tendering a letter from the third party stating the reason for withdrawal. In *Walters v Lewis*[78], a statement made at the time when money was handed over was admitted to prove the purpose of the payment. In *Hughes v National Trustees, Executors and Agency Co of*

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**74** (1876) 1 PD 154 at 251, applied by Mason CJ in *Walton v The Queen* (1989) 166 CLR 283 at 288.

**75** [1914] AC 733 at 751-752.

**76** *Rawson v Haigh* (1824) 2 Bing 99 [130 ER 242]; *Rouch v The Great Western Railway Company* (1841) 1 QB 51 [113 ER 1049].

**77** [1894] 2 Ch 581.

**78** (1836) 7 Car & P 344 [173 ER 153].

*Australasia Ltd*[79], as we have pointed out, this Court upheld the admissibility of statements by a testatrix about her son's misconduct which were tendered to prove her reason for excluding him from her will.

123 Similarly, statements that a person intended to go to a particular place or to perform a particular act have been admitted for the purpose of proving that the person went to that place or performed that act[80] when going to that place or performing that act was a relevant fact.

124 Until recently, it would have been possible to argue that the present case is different from those dealt with in the above authorities and that admitting the conversation in this case would infringe the hearsay rule. The argument would be that the intention of the complainant was not itself a fact in issue, was only a fact relevant to a fact in issue, and that admitting the conversation would permit its contents to be used circumstantially to prove that the complainant had given effect to her fantasies and to her intention of getting rid of her "cobwebs".

125 In *Walton v The Queen*[81], however, this Court narrowed the scope of the hearsay rule by rejecting an appeal against the admissibility of statements made by the deceased to other persons to the effect that she intended to meet the accused at a particular time and place. Although the judge had directed the jury that the statements of intention by the deceased did not prove that she had met him, the statements were plainly used as circumstantial evidence, together with other evidence which indicated that the accused had planned to meet the deceased, to prove that the accused and the deceased had met. The reasoning process was that the deceased intended to meet the accused, that people usually carry out such an intention and that that fact could be used in conjunction with evidence of the accused's intention to meet her to conclude that they had met on the day of the murder. Thus, although the jury could not use the content of the deceased's statements to find that they had met, it could use the statements indirectly to prove the same fact. This seems to come perilously close to permitting the assertions in the statements to be used to prove a fact, contrary to

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**79** (1979) 143 CLR 134.

**80** *Mutual Life Insurance Company v Hillmon* 145 US 285 (1892); *Sugden v Lord St Leonards* (1876) 1 PD 154.

**81** (1989) 166 CLR 283.

the hearsay rule[82]. Common sense pragmatism prevailed, however, and the majority held that the use of the statements was not a breach of that rule.

126 In light of these authorities, particularly *Walton* (the correctness of which has been assumed in the argument in these appeals), the conversation between Bull and the complainant was admissible. It tended to prove a fact relevant to a fact in issue, but it did not prove it by asserting the contents of the conversation. That being so, it did not tend to prove the sexual reputation, disposition or experiences of the complainant. Furthermore, evidence explaining the terms used in the conversation was admissible because such evidence had no probative value beyond the explanation of those terms.

Direction to the jury

127 If the evidence of the telephone conversation had been admitted, as it should have been, a direction to the jury would have been required. The jury would have had to be told that the evidence was not evidence of, and could not be used to draw inferences about, the complainant's disposition in sexual matters or her propensity to consent to any of the acts charged. This was because the evidence was admitted only to prove the complainant's state of mind.

Miscarriage of justice

128 The Crown contended that, even if evidence of the telephone conversation was admissible, no miscarriage of justice had occurred. However, we find it impossible to accept this proposition. The evidence, if accepted, placed an entirely different complexion on the events of the evening. It might be thought to show that the complainant went to Bull's house for the express purpose of having sexual intercourse with him.

129 It was for the jurors, who saw and heard the witnesses, to determine what credence, if any, should be given to Bull's account of the telephone conversation. Indeed it is possible, although unlikely, that under cross-examination the complainant would have admitted that she had spoken the words relied on by the appellants. However, she may have conceded that on other occasions she had used the term "cobwebs" to refer to lack of sexual intercourse, or at all events understood this to be a meaning of the word. If so, it might have led the jury to conclude that the conversation had taken place.

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**82** cf the criticism of Professor Colin Tapper in "*Hillmon* Rediscovered and *Lord St Leonards* Resurrected", (1990) 106 *Law Quarterly Review* 441, and by J D Heydon QC, editor of *Cross on Evidence*, 6th Aust ed (2000) at par 31065.

130 Furthermore, the jury were not prepared to accept the complainant's evidence beyond reasonable doubt in respect of nine of the thirteen charges. This indicates that the jurors were not prepared to fully accept the complainant's evidence as to what happened on the night she went to Bull's house. This being so, if the jurors had heard Bull's account of the conversation, they might have had a reasonable doubt about the charges on which the appellants were convicted. It is therefore impossible to say that the appellants have not lost a fair chance of acquittal by reason of the erroneous rejection of evidence concerning their version of a telephone conversation which, by common agreement, brought the complainant to Bull's house at 2.30 am on 18 November 1995.

Orders

131 The appeals must be allowed, the convictions of the appellants quashed and a new trial ordered. The Crown stated that, if the convictions were quashed, it would not seek a new trial of the appellants. However, nothing in the materials before this Court makes it an appropriate case to enter an acquittal in favour of the appellants. The ground of appeal which the appellants have made out entitles them to a new trial, not an acquittal. Whether or not they should be re-tried is a matter for the Executive government of Western Australia, which may well take the view that the acquittal of the appellants on so many charges makes it practically, although not legally, impossible to try the appellants fairly.

132 KIRBY J. The answer to the essential controversy in these appeals is to be found in the reasoning of Kennedy J in *Bannister v The Queen*[83]. That was an earlier decision of the Court of Criminal Appeal of Western Australia on the provisions of the *Evidence Act* 1906 (WA) ("the Act") whose meaning is the subject of the present dispute[84].

Three difficulties with statutory exclusions of evidence

133 There are three fundamental difficulties presented by ss 36B, 36BA and 36BC of the Act. First, the sections are enacted to operate in the context of a criminal trial as it is conventionally conducted in Australia. Their obvious purposes are to prevent reasoning from stereotypes and unjust or irrelevant humiliation of complainants[85]. Courts must give effect to such purposes. The language of the sections and the context of their intended operation make it clear that they were not enacted to deprive an accused person of the right to adduce evidence which is specifically relevant to (perhaps even vital for) an issue proper to the trial. Thus, facts specifically relevant to a complainant's consent to the particular sexual act charged on the particular occasion must obviously be capable of being proved. Lack of consent is commonly an element in a sexual offence. To deprive the accused of the chance to test the prosecution evidence or to call evidence to rebut this ingredient of consent could, in a particular case, depart in a fundamental respect from the accused's right to a fair trial. That cannot have been the purpose of Parliament in enacting the sections. Another construction must therefore be found.

134 Secondly, there is the undoubted fact that evidence admitted for one purpose may incidentally come to be used by the decision-maker for other purposes. I do not take the sections to prohibit the receipt of evidence, perhaps highly relevant to an issue in the trial, merely because, incidentally and to some minds, the evidence so admitted might be taken to reveal the "disposition" of a complainant in sexual matters. Judicial warnings on impermissible use might then be necessary by the common law. But total exclusion of the evidence (when relevant for other purposes and otherwise admissible) is not required by the statute. The clearest possible language in the Act would be needed to lead to the conclusion that it had such a drastic operation.

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**83** (1993) 10 WAR 484.

**84** ss 36B, 36BA, 36BC set out in the reasons of McHugh, Gummow and Hayne JJ.

**85** *R v Gun; Ex parte Stephenson* (1977) 17 SASR 165 at 168-169 per Bray CJ; *R v Seaboyer* [1991] 2 SCR 577 at 651-655 per L'Heureux-Dubé J.

135 Thirdly, the sections provide different regulation of the propounded evidence. The specification of three categories of "sexual reputation"[86], "disposition … in sexual matters"[87] and "sexual experiences"[88] is, to some extent, artificial. Inevitably, those categories will sometimes overlap. Proof of particular "sexual experiences", if shown to have occurred frequently enough, could reasonably strike some decision-makers as tending to show something about the participant's "disposition". If known by others it might constitute, or give rise to, conclusions about "sexual reputation". There is no bright line. Yet, somehow, the Act requires differential classification of the evidence in question because, depending on that classification, different legal results will flow.

The need for a clear approach

136 These problems encourage a search for a clear approach, one easy to apply. Appellate courts should not forget that rulings on the tender of such evidence must be made in the midst of criminal trials without the luxury of lengthy cogitation, analysis of case books or scrutiny of the Second Reading speeches of those who introduced the legislation in question.

137 That is why I consider that the approach to the classification of evidence which Kennedy J adopted in *Bannister*[89] was accurate, sensible and applicable here. It captures the purpose of the legislation in respect of the prohibition on certain evidence without destroying the accused's chance of a fair trial which is fundamental to any civilised legal system and may be implied in the judicial system which the Australian Constitution creates or envisages[90].

138 At issue in *Bannister* was an alleged statement by the complainant to the accused at a surf club, in the presence of another member of that club, some six days after some of the offences charged were alleged to have taken place. The complainant allegedly said to the accused: "Any hope?"[91] This was accepted as referring to a hope of sexual activity with the accused.

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**86** The Act, s 36B.

**87** The Act, s 36BA.

**88** The Act, s 36BC.

**89** (1993) 10 WAR 484 at 485-489.

**90** cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 489, 502.

**91** (1993) 10 WAR 484 at 486.

139 The Crown objected to the reception of the evidence in that case on the basis that it related to the "sexual disposition" of the complainant. If this had been so, it would have been excluded by force of the Act[92]. However, the accused wished to adduce the evidence as tending to confirm his case that the sexual offences alleged never took place and that the approach to him by the complainant was fundamentally inconsistent with his guilt of the charges. The trial judge excluded the evidence. The Court of Criminal Appeal unanimously allowed the appeal. It quashed the conviction. Kennedy J drew the distinction which I would also adopt[93]:

> "Within the context of the case, the evidence on this point would not have been evidence of the complainant's disposition in the sense of her natural tendency or propensity to act in a particular way. It would have been evidence of her conduct towards the appellant on a particular occasion. The evidence was not directed to establishing the general disposition of the complainant as a step in an argument that she acted in a particular way on another occasion, which is what s 36BA renders inadmissible. …
>
> In my view, the evidence sought to be called went beyond a mere matter of credibility and went to the issue of whether the events of which the complainant gave evidence had occurred. It would have raised for the jury, if they accepted the evidence for the defence, the unlikelihood that the complainant, having suffered the experiences which she claimed she suffered, would sexually proposition the appellant six days later."

140 The evidence in *Bannister* "related" to the offence charged. It did not, as such, "relate to" the complainant's "sexual disposition". A classification was required by the language of the Act. Necessarily, upon objection, that classification would have to be made by the trial judge. If the judge ruled that the evidence did not "relate to the sexual disposition" (or "sexual reputation" or "sexual experiences") of the complainant as such, the evidence might be admitted without offence to the language and purposes of the legislation. What weight the jury (if one were involved) would then place on the evidence would be a matter for that jury.

The alternative construction of the provisions

141 I have had the benefit of reading the opinion of McHugh, Gummow and Hayne JJ. It follows from what I have written that I agree with their Honours that the reconciliation of the sections (ss 36B, 36BA and 36BC) presents difficulties

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**92** The Act, s 36BA.

**93** (1993) 10 WAR 484 at 488.

having regard to the language used in them. I also accept that alternative approaches may be possible. Much as I would like to agree with my colleagues, the structure, language and history of the three provisions is, in my respectful opinion, incompatible with the interpretation which they have adopted.

142 If one looks at the structure of the legislation, it seems to me that the three sections are intended to deal with three categories of forbidden evidence. This is evidence relating to "sexual reputation", evidence relating to "disposition … in sexual matters" and evidence relating to "sexual experiences". Whilst evidence relating to "sexual experiences" would undoubtedly overlap with each of the other categories, that fact of itself cannot be determinative. In a like way, evidence relating to "sexual reputation" may sometimes overlap with evidence relating to "sexual disposition". Indeed, often the alleged "reputation" will relate to the alleged "disposition". Therefore, as a matter of construction, none of the three categories is exclusive of the others.

143 The language of the sections indicates that s 36BC is not a provision that qualifies the operation of ss 36B and 36BA – the so-called "third construction" which McHugh, Gummow and Hayne JJ prefer. This appears on the face of the opening words of s 36BC. Had that section been intended to be no more than a general qualification upon ss 36B and 36BA it would have been differently expressed. It would then have said something to the effect of "Notwithstanding ss 36B and 36BA … evidence may be adduced …" in specified circumstances. The reference to the *res gestae* exclusion would then have been expressed as a general exemption, universally applicable. However, in the Act, it is a self-contained exclusion and one limited solely to the category of "evidence relating to … sexual experiences".

144 The opening words of s 36BC also show what is intended. Those words follow precisely the opening words of each of ss 36B and 36BA. The sections are thus dealing with three cases of a kind. Each contemplates the venue of "proceedings for a sexual offence". Each involves "evidence" being "adduced or elicited". Each envisages that the conduct in question is "by or on behalf of a defendant". So the preconditions to the application of each of the three sections are identical. However, the categories that enliven the provisions differ in the three ways mentioned, namely sexual "reputation", "disposition" and "experiences".

145 This symmetry in the sections also demonstrates that s 36BC concerns a separate category, not a qualification upon the earlier categories. Only in relation to that separate category are the exclusion (*res gestae*) and exemption (admission by leave under s 36BC(2)) applicable. Such exclusion and exemption do not, by their terms, relate back to the earlier categories.

146 Three additional textual considerations reinforce this conclusion. First, there is the fact that the *res gestae* exclusion is, of its nature, peculiarly relevant

to evidence relating to sexual "experiences" (rather than "reputation" and "disposition"). Secondly, there is the fact that the leave referred to in s 36BC(2), is confined in terms to "leave under subsection (1)", ie in a case relating only to "sexual experiences". It is not, as such, applicable to cases of sexual "reputation" or "disposition". Thirdly, the category of forbidden evidence in s 36BC refers to "experiences". It does not refer to "experience". Thus, it is focused not on a general matter of character or some other feature of the accused's background (such as "reputation" and "disposition" are). Instead, it is addressed to particular conduct that falls within the description invoked by the word "experiences". This differentiation makes it all the more unlikely that the exclusion and exemption provided for in s 36BC somehow relate back to the matters of generality ("reputation" and "disposition") referred to in ss 36B and 36BA.

147 The history of the sections confirms the foregoing conclusions. As Gleeson CJ points out,[94] the legislation formerly included an exemption for *res gestae* evidence relating to sexual disposition. This was repealed by Parliament.[95] This Court may not, and certainly should not, restore what Parliament has deleted.

148 These reasons lead me to return to the task of classification of the evidence, as it is "adduced" or "elicited". The duty of the judge is, in each case, to consider whether such evidence should be classified as "relating to" the "sexual reputation", "disposition" or "sexual experiences" of the complainant. That task, difficult though it may be in a particular case, should be discharged in the way described by Kennedy J in *Bannister*.

Conclusion: the proper approach

149 The Court of Criminal Appeal ought therefore to have followed its own authority in *Bannister*. In his reasons Ipp J[96] referred to the passage from the

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**94** Reasons of Gleeson CJ at [4].

**95** Section 15 of the *Acts Amendment (Sexual Assaults) Act* 1985 (WA) repealed ss 36A and 36B of the Act and substituted ss 36A, 36B, 36BA, 36BC, 36BD and 36BE. The original ss 36A and 36B provided that no evidence about restricted matters, defined as including "disposition in sexual matters", shall be adduced by the defendant except as authorised by leave of the Court, such leave to be provided only if it could be shown that the matters were substantially relevant or of such relevance that it would be unfair to the defendant to exclude them.

**96** *Bull v The Queen* unreported, Court of Criminal Appeal (WA), 19 January 1998 at 12-13.

opinion of Kennedy J in that case which I have quoted. It led Ipp J to his dissent. In my view his Honour was correct both in his approach and in his conclusion.

150 Of course, according to some observers, the complainant's question in *Bannister*, like the alleged conversation in this case, might be classified, out of context, as showing a *general* disposition of the complainant to sexual promiscuity and thus as relating to her sexual "disposition" and even possibly her "reputation". But neither conversation was adduced or elicited to show these things. Neither offered evidence of the *general* stereotyped kind which the sections are designed to exclude. It would be artificial to categorise the rejected evidence in such a way. The key to making the decisions necessary and to classifying the evidence accurately lies, in my view, in observing the distinction drawn by Kennedy J. That distinction secures the purpose which this legislation seeks to attain.

Orders

151 In all other matters in issue I agree with Gleeson CJ. In particular, I agree with the reasons which his Honour gives[97] for being unable to accept the "third possible construction" of the relevant statutory provisions propounded by McHugh, Gummow and Hayne JJ[98]. It is for these reasons that I agree in the orders which are common to all members of the Court.

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**97** Reasons of Gleeson CJ at [24]-[26].

**98** Reasons of McHugh, Gummow and Hayne JJ at [102]-[107].