



**New South Wales
Law Reform Commission**

**Report
87**

**Review of Section 409B
of the Crimes Act 1900 (NSW)**

November 1998

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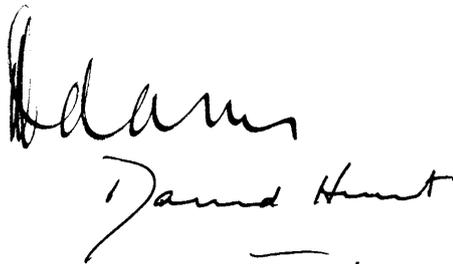
New South Wales Law Reform Commission

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

Review of Section 409B of the Crimes Act 1900 (NSW)

We make this final Report pursuant to the reference to this Commission dated
2 December 1996.



The Hon Mr Justice Michael Adams
Commissioner

The Hon David Hunt QC
Commissioner



Judge John Goldring
Commissioner



Judge Angela Karpin
Commissioner

November 1998

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MLC, referred the following matter to the Law Reform Commission by letter dated 2 December 1996:

to review the operation of section 409B of the *Crimes Act 1900* (NSW) taking into account the purpose for which it was enacted and recent case law.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairman of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Mr Justice Michael Adams
The Hon David Hunt QC
His Honour Judge John Goldring
Her Honour Judge Angela Karpin

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[†] The recommendations in this report and statements of opinion and conclusion are those of the Commissioners of the Law Reform Commission and may not necessarily be shared by the honorary consultants.

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

Section 409B should be retained.

RECOMMENDATION 2

Section 409B should be amended to provide as follows:

409B.(1)(a) This section applies to criminal proceedings for a prescribed sexual offence, whether those proceedings are for that offence alone, or together with any other offence (as an additional or alternative count).

(b) This section applies to all stages of criminal proceedings, including bail, committal, summary hearing, trial, sentencing, and appeal.

(c) This section applies to an inquiry into a conviction for a prescribed sexual offence under Part 13A of this Act.

(d) In this section:

“the accused person”, in relation to any proceedings, means the person charged with a prescribed sexual offence;

“the complainant”, in relation to any proceedings, means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person is charged is alleged to have been committed;

“prescribed sexual offence” means:

- (i)** an offence under section 61B, 61C, 61D, 61E, 61I, 61J, 61K, 61L, 61M, 61N, 61O, 65A,

66, 66A, 66B, 66C, 66D, 66F, 73, 74, 78A, 78B, 78H, 78I, 78K, 78L, 78N, 78O, 78Q, 80A, 86, 87, or 89;

- (ii) an offence (such as an offence under section 37 or 112) which includes the commission, or an intention to commit, an offence referred to in paragraph (i); or
- (iii) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (i) or (ii).

(2)(a) In proceedings to which this section applies, evidence relating to the sexual reputation of the complainant is inadmissible.

(b) Notwithstanding subsection (2)(a), evidence about any sexual experience or sexual activity, or lack of experience or activity, of the complainant shall not be inadmissible merely because it also relates to the sexual reputation of the complainant.

(3)(a) In proceedings to which this section applies, no evidence shall be admitted about any sexual experience or activity of the complainant, or lack of sexual experience or activity, except with leave of the court.

(b) For the purposes of subsection (3)(a), “sexual experience or activity” includes sexual experience or activity to which the complainant did not consent.

(4) The court shall not grant leave under subsection (3)(a) unless:

- (a) the court is satisfied that the evidence has significant probative value to a fact in issue or to credit; and
- (b) the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice, taking into account the matters set out in subsection (6); and

(c) the party seeking to admit the evidence has complied with the requirements in subsection (7).

(5) Evidence of a complainant's sexual experience or activity is not admissible to support an inference that, by reason only of the fact that the complainant has engaged in sexual activity or has had sexual experience, the complainant:

(a) is the type of person who is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

(6) In determining whether the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice under s 409B(4)(b), the court shall take into account the following matters:

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) the distress, humiliation, or embarrassment which the complainant may suffer as a result of leave being granted;

(c) the risk that the evidence may unduly arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;

(d) the need to respect the complainant's personal dignity and privacy;

(e) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(f) any other factor which the court considers relevant.

(7) The party seeking leave under subsection (3)(a) must do so by application to the court in writing and must:

-
- (a) set out:
- (i) the nature of the evidence sought to be adduced; and
 - (ii) how the evidence has significant probative value to a fact in issue or to credit;
- (b) give a copy of the application to the other party within such time before the hearing of the application as the court may prescribe or considers to be appropriate in the interests of justice in the particular case.

(8) The court must hear an application to grant leave under subsection (3)(a) in the absence of the jury (if any) and the public.

(9) The complainant is not a compellable witness at the hearing of an application for leave under subsection (3)(a).

(10) At the conclusion of the hearing of an application for leave under subsection (3)(a), the court must make a determination whether or not to grant leave to admit the evidence and must record or cause to be recorded:

- (a) the reasons for that determination;
- (b) where the court grants leave to question the complainant, the nature of the evidence which may be elicited.

(11) Where evidence of a complainant's sexual experience or activity is admitted at trial under this section, the judge shall give a warning to the jury to the effect that they must not infer, by reason only of the fact that the complainant has engaged in sexual activity or has had sexual experience:

- (a) that the complainant is less worthy of belief;
 - (b) where consent is an issue at the trial, that the complainant is the type of person who is more likely to have consented to the sexual activity that forms the subject-matter of the charge.
-
-

1. Introduction

- Background to this report
- The issues under review
- Section 409B in context
- Scope of the Commission's review
- The structure of this report

1.1 This report reviews the operation of s 409B of the *Crimes Act 1900* (NSW) (“s 409B”). Section 409B relates to the admissibility of evidence in criminal proceedings where the accused is charged with committing a sexual offence. It operates to restrict the admissibility of evidence concerning the sexual experience and reputation of the alleged victim (referred to in this report as “the complainant”).

1.2 Section 409B has been in operation for approximately 17 years. Recently, controversy arose when, in a number of cases, the section was criticised for causing injustice to the accused. On several occasions, s 409B was brought to the attention of the High Court of Australia, where it received similar criticism, the then Chief Justice of the Court commenting that:

It is the unanimous view of the Court ... that the provisions of s 409B of the *Crimes Act 1900* (NSW) clearly warrant further consideration by the legislature in light of the experience of its operation.¹

The main concern of this report is whether s 409B should be reformed to address these criticisms.

BACKGROUND TO THIS REPORT

1.3 As a result of the High Court’s comments, the Attorney General, the Hon Jeffrey Shaw QC, referred a review of s 409B to the NSW Law Reform Commission on 2 December 1996. The terms of the reference are:

to review the operation of section 409B of the *Crimes Act 1900* (NSW), taking into account the purpose for which it was enacted and recent case law.

1.4 As the first stage of its review, the Commission published an Issues Paper on s 409B (“IP 14”) in November 1997. The purposes of the Issues Paper were to outline the problems which were said to have arisen in relation

1. *Grills v The Queen; PJE v The Queen* (High Court of Australia, No S8/96; S154/95, 9 September 1996, unreported), refusing an application for special leave to appeal from the NSW Court of Criminal Appeal. See also *Berrigan v The Queen* (High Court of Australia, No S159/94, 23 November 1995, unreported), refusing special leave to appeal, and *HG v The Queen* (High Court of Australia, No S128/97, 19 May 1998, unreported), granting special leave to appeal from the NSW Court of Criminal Appeal.

to the operation of s 409B, to suggest possible options for reform to address these problems, and to provoke comment from the public about these options.

1.5 Following the publication of IP 14, the Commission received 50 submissions from various groups and individuals in the community. A list of the submissions appears as Appendix A to this report. The Commission also conducted a series of consultations with defence lawyers, prosecutors, judges, sexual assault counsellors and members of the DPP Witness Assistance Service. These people all have particular expertise in the area of sexual assault within the criminal justice system. A list of the consultations appears as Appendix B to this report.

1.6 The Commission was greatly assisted by the views and suggestions put forward by people in submissions and in consultations. The consultations provided us with particular insight into the experiences of complainants and the accused in the courtroom. We appreciate very much the contributions made by these people to our review.

THE ISSUES UNDER REVIEW

1.7 Section 409B was introduced as a response to what was seen to be the distressing and unnecessary investigation in court into complainants' sexual history. There was a perception that the verdict in a sexual offence trial often rested on the jury's assessment of the complainant's sexual morality, particularly whether she had a reputation for promiscuity or "loose morals". Section 409B aimed to refocus the court's attention on the real issue in the case, namely, to determine the guilt or otherwise of the accused, rather than the moral character of the complainant. The section excluded evidence of the complainant's sexual reputation, and imposed rules restricting the admissibility of evidence concerning the complainant's sexual experience, for the purpose of seeking a balance between the distress, humiliation or embarrassment caused to the complainant, and the rights of the accused.

1.8 The problem which is said to have arisen in the operation of s 409B is that it is too restrictive, so that it excludes not only irrelevant but also *relevant* material concerning the complainant's sexual experience. The result of this is that the accused may be denied a fair trial, because he or she is unable to bring all relevant material to the court's attention. It is consequently argued that s 409B should be amended to widen the scope for admitting sexual experience evidence. That argument is strongly opposed by those who

are anxious to ensure that complainants continue to receive some protection from distress in the courtroom.

1.9 Central to this debate is the difficulty in balancing two public interests within the special circumstances surrounding a sexual offence trial. On the one hand, there is the public interest in ensuring the accused has a fair trial, including the need to consider all reasonably relevant evidence, the right to be presumed innocent, and to cross-examine fully the witnesses for the prosecution. On the other hand, there is the public interest in treating alleged victims of crime with compassion and respect, and protecting them from undue distress and humiliation in court. In international as well as domestic law, our legal system has obligations to take both these interests into account in its administration of criminal justice.²

2. See *International Covenant on Civil and Political Rights* (1966) Art 14; *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) Art 4; *Victims Rights Act 1996* (NSW). See also, for example, *Jago v District Court (NSW)* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292.

1.10 For complainants, the simple fact of having to appear in court and publicly relate the details of the alleged crime will be extremely distressing. An important question in this review, taking into account the competing public interests referred to above, is the extent to which s 409B can operate to minimise a complainant's distress without intruding to an unacceptable extent on the rights of the accused and the fairness of the trial.

SECTION 409B IN CONTEXT

1.11 In order to understand the policies behind s 409B, it is important to take into account the context in which the section operates.

1.12 Section 409B applies in criminal proceedings where the accused is charged with committing a sexual offence on the complainant. There are special issues surrounding this type of proceedings which distinguish them from other criminal proceedings.

1.13 In the first place, the nature of these offences is arguably unique. They involve an act which, in other circumstances, is regarded by society as an act of love, intimacy, or pleasure. In the context of a sexual offence, however, that act becomes an exercise of power, usually violent, by one person over another. It amounts to a gross invasion of a person's privacy and a denial of human dignity. Victims of sexual offences will obviously react in different ways: some may feel shock, an inability to cope, extreme vulnerability, and even guilt that they somehow invited the sexual attack.

1.14 Sexual offences also raise in a particularly acute manner issues of gender imbalance within our society and our legal system. Because it is a crime which is predominantly committed by men upon women, sexual violence has come to be regarded as a symptom of women's oppression. The way in which complainants are treated in the justice system is sometimes criticised as further reflecting sexist attitudes towards male violence against women.³

3. See, for example, P Eastal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, Sydney, 1998); NSW, Standing Committee on Social Issues, Legislative Council, *Sexual Violence: The Hidden Crime: Inquiry into the Incidence of Sexual Offences in New South Wales: Part I* (Report 6, 1993); NSW, Standing Committee on Social Issues,

1.15 Victims who make the decision to complain to the police may face special difficulties in court if the perpetrator is prosecuted. They will often be the only person present at the crime, besides the accused. In many cases, there is no dispute that sexual intercourse took place, the only dispute being as to whether the complainant did not consent, or whether the accused knew that there was not consent. A trial for a sexual offence will frequently come down to a question of the complainant's word against the word of the accused. A finding of reasonable doubt about the guilt of the accused will usually depend on casting doubt on the complainant's version of events. Consequently, the complainant's evidence will be the central focus of the prosecution's case and also of the defence's attack. Complainants' experiences of the courtroom may therefore be particularly distressing, traumatic, and isolating.

1.16 From the point of view of a person accused of committing a sexual offence, that person must bear the shame and stigma of being suspected as a sex offender. He (or, in rare cases, she) faces the prospect of possible imprisonment and treatment in gaol as a sex offender. The impact of a possible conviction must also be borne by his or her family. An accused person who maintains his or her innocence, and faces the possible deprivation of his or her liberty, has a right to believe that he or she will be presumed innocent and be tried fairly. As in any criminal trial, a person accused of a sexual offence should expect to have full opportunity to question the prosecution's case and lead a defence to the charges for which he or she

Legislative Council, *Sexual Violence: Addressing the Crime: Inquiry into the Incidence of Sexual Offences in New South Wales: Part II* (Report 9, 1996); P Eastal (ed), *Without Consent: Confronting Adult Sexual Violence: Proceedings of a Conference Held 27-29 October 1992* (Australian Institute of Criminology, Canberra, 1993); Z Adler, *Rape on Trial* (Routledge and Kegan Paul, London, 1987); J Scutt, *Women and the Law: Commentary and Materials* (Law Book Company Limited, Sydney, 1990); J Barga and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (Office of the Status of Women, Canberra, 1995); J Chenoweth, "The Times Are Changing Back" (1993) 4(1) *Polemic* 12; New South Wales, Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Gender Bias and the Law Project, Sydney, 1996). See also recent newspaper reports, such as J Fife-Yeomans, "Rape Victims Still Quizzed on Sex Lives" *The Australian* (30 October 1996) at 3; J Fife-Yeomans, "Rape Review Sparks Outrage" *The Australian* (16 September 1998) at 3.

stands trial. It will often be central to that defence to try to raise doubt about the accuracy of the complainant's testimony.

1.17 Section 409B will usually have a direct effect on the way in which a sexual offence trial is run, and in that sense it may contribute significantly to the experiences of both the complainant and the accused in the criminal justice system. Any proposals for reform of s 409B should therefore be considered in light of the special context in which it operates.

SCOPE OF THE COMMISSION'S REVIEW

1.18 It is important to make clear the precise scope of the Commission's review. Many people in consultations, particularly sexual assault counsellors, identified numerous problems in the conduct of sexual offence trials: for example, lengthy adjournments, long distances to travel to country courts, inadequate amplification in the courtroom, counsel's use of language which is inappropriate to the complainant's age, and insufficient attention to ensuring that the complainant is not placed in close proximity to the accused or his or her relatives. These were all considered to be problems which can make the complainant's experience of court extremely traumatic and may often have a detrimental effect on his or her testimony.

1.19 While these are important concerns, they are outside the scope of the Commission's review. Consequently, we cannot make any recommendations for the reform of those particular aspects of the conduct of sexual offence trials. Our review is confined to the operation of s 409B. Our recommendations are therefore limited to reforming that section.

THE STRUCTURE OF THIS REPORT

1.20 Chapter two of this report outlines the current operation of s 409B. It summarises the key provisions of s 409B and the way in which those provisions have been interpreted in cases. In particular, it looks at the exceptions to the prohibition against evidence of sexual experience, and the ways in which those exceptions have been applied in practice. The procedural requirements arising from s 409B are also examined as well as the types of legal proceedings to which s 409B applies.

1.21 Chapter three traces the history of the introduction of s 409B. It begins with an overview of the law governing the admissibility of evidence of sexual experience and reputation as it existed before the introduction of s 409B. It then outlines the period of reform which led up to the introduction of legislation restricting the admissibility of such evidence in New South Wales and elsewhere. It lastly examines the introduction of s 409B, in particular the purposes which the section was said to serve in light of perceived deficiencies in the existing law at that time.

1.22 Chapter four discusses the problems which have arisen in the operation of s 409B, and in particular focuses on the criticisms which have been made of the section in a number of "problem cases" before the courts in recent years. It then outlines the responses to those criticisms by people who support the current operation of s 409B. Finally, it examines proposals to make s 409B even more restrictive.

1.23 Chapter five considers legislation in other common law jurisdictions which restricts the admissibility of evidence of sexual experience and reputation. It compares the experiences in those jurisdictions with the experiences in New South Wales.

1.24 Chapter six contains the Commission's conclusions and recommendations for reform of s 409B. It includes a detailed discussion of the rationale behind the Commission's recommended reformulation of s 409B, as well as an explanation of the terms of that reformulation.

2. Current operation of section 409B

- Prohibition on evidence of “sexual reputation”
- Restriction on evidence of “sexual experience or activity”
- Making an application to admit evidence under s 409B
- Proceedings covered by s 409B

2.1 Section 409B currently provides as follows:

409B. (1) In this section:

“the accused person”, in relation to any proceedings, means the person who stands, or any of the persons who stand, charged in those proceedings with a prescribed sexual offence;

“the complainant”, in relation to any proceedings, means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person stands charged in those proceedings is alleged to have been committed.

- (2) In prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible.
- (3) In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except:
 - (a) where it is evidence:
 - (i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and
 - (ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;
 - (b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;
 - (c) where:
 - (i) the accused person is alleged to have had sexual intercourse, as defined in section 61H(1), with the complainant and the accused person does not concede the sexual intercourse so alleged; and
 - (ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

- (d) where it is evidence relevant to whether:
 - (i) at the time of the commission of the alleged prescribed sexual offence, there was present in the complainant a disease which, at any relevant time, was absent in the accused person; or
 - (ii) at any relevant time, there was absent in the complainant a disease which, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person;
- (e) where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged prescribed sexual offence); or
- (f) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may, pursuant to subsection (5), be asked,

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

- (4) In prescribed sexual offence proceedings, a witness shall not be asked:
 - (a) to give evidence which is inadmissible under subsection (2) or (3); or
 - (b) by or on behalf of the accused person, to give evidence which is or may be admissible under subsection (3) unless the Court or Justice has previously decided that the evidence would, if given, be admissible.
- (5) In prescribed sexual offence proceedings, where the Court or Justice is satisfied that:
 - (a) it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period:
 - (i) had sexual experience, or a lack of sexual experience, of a general or specified nature; or

- (ii) taken part or not taken part in sexual activity of a general or specified nature; and
- (b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,
the complainant may be so cross-examined but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.
- (6) On the trial of a person, any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examine under subsection (5) shall be decided by the Judge in the absence of the jury.
- (7) Where a Court or Justice has decided that evidence is admissible under subsection (3), the Court or Justice shall, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.
- (8) Nothing in this section authorises the admission of evidence of a kind which was inadmissible immediately before the commencement of this section.

2.2 Section 409B applies to two types of evidence:

- evidence of a complainant’s “sexual reputation”; and
- evidence of a complainant’s “sexual experience”.

PROHIBITION ON EVIDENCE OF “SEXUAL REPUTATION”

2.3 Evidence relating to a complainant’s sexual reputation is absolutely prohibited in criminal proceedings to which s 409B applies.¹ This means that complainants must not be questioned, whether by the prosecution or the defence, about any matters that relate to their sexual reputation, and independent evidence of their sexual reputation must not be admitted.

1. Section 409B(2).

2.4 The term “sexual reputation” is not defined in the legislation. Arguably, it is not always clear what information relates to “sexual reputation” and in what way the term is to be distinguished from the term “sexual experience”.² Generally, “reputation evidence” relates to information revealing the way in which a person is regarded by others. Rather than referring to specific acts or incidents, reputation evidence is concerned with people’s general beliefs and opinions about a person’s character. Evidence of “sexual reputation” is therefore likely to involve evidence of people’s beliefs and opinions about a person’s sexual disposition, in particular that person’s reputation for promiscuity, rather than to specific incidents of sexual activity in which the complainant has or may have been involved. Examples of evidence which would probably amount to evidence of “sexual reputation” include information that a complainant is generally known to be promiscuous or is known to work as a sex worker.³

RESTRICTION ON EVIDENCE OF “SEXUAL EXPERIENCE OR ACTIVITY”

2.5 Evidence of a complainant’s sexual experience or activity, or lack of experience or activity, is inadmissible, except in certain circumstances, in proceedings to which s 409B applies.⁴ This means that, in general, a complainant must not be questioned about,⁵ and independent evidence must not be admitted of, anything which reveals or implies⁶ that the complainant

2. See para 4.81-4.85.

3. It seems that the prohibition against evidence of “sexual reputation” in s 409B was intended to reverse the common law practice of admitting evidence of a complainant’s reputation for promiscuity or prostitution: see *R v McGarvey* (1987) 10 NSWLR 632. See para 3.3.

4. Section 409B(3).

5. It has been held that the rules set down in s 409B for admitting sexual experience evidence apply equally to cross-examination of a complainant about his or her sexual experience, even though this is not specifically spelt out in the subsection: see *R v Henning and others* (NSW, Court of Criminal Appeal, No 406/88; 426/88; 436/88; 425/88; 437/88, 11 May 1990, unreported); *R v Dimian* (1995) 83 A Crim R 358 (NSW CCA).

6. The evidence does not have to *prove* that the complainant has or has not had particular sexual experience. The exclusion in s 409B(3) is attracted if the

has been involved in, or has not been involved in, sexual activity or sexual experience.

2.6 The terms “sexual experience” and “sexual activity” are not defined in the section. They have been said not to be terms of art but, on the contrary, appear to have been chosen because of their broad generality. They have been interpreted to include sexual experience or activity which is not consensual.⁷ So, for example, evidence that a complainant has been sexually abused in the past would seem to constitute evidence of sexual experience or activity so as to come within the prohibition in s 409B(3). It has, however, been argued recently in the High Court that s 409B should be interpreted to apply to consensual sexual experience only. The Court’s decision on this issue is pending.⁸

2.7 Section 409B(3) restricts rather than absolutely prohibits evidence of sexual experience or activity (or lack of it). Such evidence may be admitted if all the following three requirements are met:

- first, the evidence comes within one of the exceptions to the prohibition which are listed in s 409B(3)(a)-(f);
- secondly, the evidence is otherwise admissible according to the ordinary rules of evidence (for example, it must be relevant);⁹ and
- thirdly, the probative value (or relevance) of the evidence outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of the admission of this evidence.¹⁰

2.8 The first requirement is a threshold one: that is, it must be satisfied before the question of admissibility can be considered. There is no residual

evidence conveys information or an imputation about the complainant’s sexual experience: see *R v White* (1989) 18 NSWLR 332 at 340.

7. *R v Bernthaler* (NSW, Court of Criminal Appeal, No 60394/93, 17 December 1993, unreported); *R v G* (1997) 42 NSWLR 451 per Mason P at 457-458, per Sperling J at 460-461, not following Sperling J in *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported) at 5.
8. See transcript of proceedings in *HG v The Queen* (High Court of Australia, No S67/98, 8 September 1998).
9. See *R v Morgan* (1993) 30 NSWLR 543; *R v Uhrig* (NSW, Court of Criminal Appeal, No 60200/96, 24 October 1996, unreported).
10. *Crimes Act 1900* (NSW) s 409B(3).

judicial discretion to admit evidence of the complainant's sexual experience or activity, or lack of it, in any situation which does not come within one of the exceptions listed in s 409B(3)(a)-(f), even if the judge considers such evidence to be directly relevant to the case.¹¹

2.9 Examples of cases in which s 409B(3) has operated to exclude evidence of sexual experience or activity include the following:

R v McGarvey.¹² The accused sought to admit evidence that the complainant had had sexual intercourse with 20 men in the week before the incident of the alleged sexual assault. The evidence was said to be relevant to the belief of the accused that the complainant consented to intercourse with him, on the basis that he believed she had recently consented to intercourse with 20 other men. The evidence was held to be inadmissible.¹³

R v Berrigan.¹⁴ The accused argued that the complainant had consented to sexual intercourse but afterwards had tried to take money from him. At least seven months after the incident of the alleged assault, the complainant had been convicted on two counts of prostitution. Evidence of the convictions was held to be inadmissible at the trial of the accused for the sexual assault.

R v M.¹⁵ The complainant, a 10 year old girl, claimed that the accused had sexually assaulted her. The accused wished to cross-examine her and call other witnesses to show that she had made similar claims of assault against male members of her family. The evidence was directed at casting doubt on the complainant's reliability, on the basis that it suggested she habitually made false allegations of sexual assault. It was not directed at drawing any inference based on the girl's previous sexual experience. The court ruled, however, that the evidence was inadmissible under s 409B(3), because it implied that the complainant had not had the sexual experience which she claimed to have. The restrictions in s 409B(3) apply equally to evidence revealing a lack of sexual experience as to evidence of sexual experience.

11. *R v M* (1993) 67 A Crim R 549 (NSW CCA).

12. *R v McGarvey* (1987) 10 NSWLR 632.

13. This evidence was inadmissible under s 409B. However, the Court noted that even at common law, the evidence may now be inadmissible.

14. *R v Berrigan* (NSW, Court of Criminal Appeal, No 60412/93, 7 October 1994, unreported); *Berrigan v The Queen* (High Court of Australia, No S159/94, 23 November 1995, unreported), refusing application for special leave to appeal from the decision of the Court of Criminal Appeal.

15. *R v M* (1993) 67 A Crim R 549 (NSW CCA).

The exceptions to the prohibition against evidence of sexual experience or activity

2.10 Section 409B(3)(a)-(f) lists the circumstances in which evidence of a complainant's sexual experience or activity or lack of it may be admissible as exceptions to the general prohibition. However, as noted in paragraph 2.7, this is only one step in admitting such evidence. Even if it can be shown that the evidence comes within one of the exceptions, the two further requirements set out in paragraph 2.7 must be met.

2.11 The courts have stated that the exceptions set out in s 409B(3) should be interpreted broadly and in a way which favours the liberty of the accused. Such an approach is said to be consistent with established principles of construction in the criminal context.¹⁶ The exceptions to the general prohibition, and the way in which they have been interpreted, may be summarised as follows.

2.12 **Exception (a):** Evidence may be admissible of sexual experience or activity or lack of it by the complainant at or about the time of the commission of the alleged sexual offence, where such evidence forms part of a connected set of circumstances in which the alleged offence was committed.

2.13 **Comment:** An example of evidence which would come within this exception is evidence that the complainant had sexual intercourse with a number of persons at around the same time as she was allegedly assaulted by the accused. This exception was said to be principally intended to allow the accused to lead evidence of the complainant's sexual behaviour at the time of the alleged assault as a basis for claiming that the accused knew or believed that the complainant was consenting to intercourse with him.¹⁷ The condition that the sexual experience or activity must be part of a "connected set of circumstances" has been interpreted as requiring that the evidence which is sought to be admitted have real probative value, or be relevant to, an issue in the case, such as the issue of consent.¹⁸ The exception has been applied to

16. See *R v Morgan* (1993) 30 NSWLR 543.

17. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4764; *R v Dimian* (1995) 83 A Crim R 358 (NSW CCA); *R v Uhrig* (NSW, Court of Criminal Appeal, No 60200/96, 24 October 1996, unreported).

18. *R v Beserick* (1993) 30 NSWLR 510 per Hunt CJ at CL at 520-521; *R v Morgan* (1993) 30 NSWLR 543 per Mahoney JA at 551.

admit evidence that a complainant had sexual intercourse with her boyfriend within one to two hours after the time of the alleged assault, on the basis that evidence of the subsequent consensual sexual act may be seen by the jury to make it less likely that the alleged sexual assault in fact occurred.¹⁹

2.14 **Exception (b):** Evidence of sexual experience or activity or lack of it may be admissible if it relates to a relationship between the accused and the complainant, where the relationship was existing or recent at the time of the commission of the alleged offence.

2.15 **Comment:** The term “relationship” has been held to require an emotional or sexual connection of some kind between the accused and the complainant, although for the purposes of interpreting this exception, the sexual aspect of a relationship is a more important consideration than the emotional aspect.²⁰ Consequently, if the evidence discloses a regular sexual liaison between the accused and the complainant, this would ordinarily constitute a “relationship” for the purposes of s 409B(3)(b), even if there is little or no emotional involvement between the people. In child sexual assault cases, the exception has been applied to admit evidence of previous abuse by the accused on the complainant, where the “relationship” may be said to be based on a history of abuse or “guilty passion” on the part of the accused.²¹ A mere conversation, however, between two people would not generally be seen as sufficient to amount to a “relationship” as used in this exception. As for whether a relationship is “recent” or “existing” at the time of the commission of the alleged offence, it will be a matter of degree as to whether the temporal requirement is satisfied in each individual case.²²

2.16 **Exception (c):** Evidence of sexual experience or activity or lack of it may be admissible if the accused denies that intercourse with the complainant took place, and the evidence is relevant to whether the presence of semen, pregnancy, disease, or injury is attributable to the alleged sexual intercourse between the accused and the complainant.

19. *R v Morgan* (1993) 30 NSWLR 543.

20. *R v White* (1989) 18 NSWLR 332; *R v Henning and others* (NSW, Court of Criminal Appeal, No 406/88; 426/88; 436/88; 425/88; 437/88, 11 May 1990, unreported).

21. *R v Beserick* (1993) 30 NSWLR 510; *cf R v G* (1997) 42 NSWLR 451 per Mason P at 458-459.

22. *R v Beserick* (1993) 30 NSWLR 510.

2.17 **Comment:** This exception was intended to allow evidence that the complainant had had sexual intercourse with another person as an explanation for the presence of, for example, semen or injury, where this physical evidence might otherwise tend to incriminate the accused.²³ The term “injury” is not confined to injury caused by sexual intercourse, but may include a general state of dishevelment and distress.²⁴ It appears, however, that “injury” has not been interpreted by the courts in New South Wales to extend to a child’s broken hymen as a means of admitting evidence of previous sexual abuse.²⁵

2.18 **Exception (d):** Evidence of sexual experience or activity or lack of it may be admissible if it relates to the presence of a disease in the complainant at the time of the commission of the alleged offence which, at any relevant time, was absent in the accused, or which was present in the accused at the time of the alleged offence and was absent in the complainant at any relevant time.

2.19 **Comment:** Parliament considered it important to include this exception to allow the accused to question the complainant about the presence or absence of, for example, a sexually transmitted disease as a means of establishing that intercourse with the accused did not in fact take place.²⁶

23. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4765.

24. *R v Dimian* (1995) 83 A Crim R 358 (NSW CCA).

25. See para 4.12-4.15.

26. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4765.

2.20 **Exception (e):** Evidence of sexual experience or activity or lack of it may be admissible where it is relevant to show that the allegation of the offence was first made following a discovery or realisation of pregnancy or disease in the complainant.

2.21 **Comment:** This exception was intended to allow an accused to raise doubt about the truth of a complainant's allegation by showing that it was made only after the complainant learnt that she was pregnant or that she had, for example, a sexually transmitted disease. It was anticipated that the exception would apply in a situation where, for example, a young woman becomes pregnant and makes an allegation of sexual assault to avoid criticism from her parents.²⁷

2.22 **Exception (f):**²⁸ Where the Court is satisfied that the prosecution has disclosed or implied sexual experience or activity (or lack of it) by the complainant, and the accused might be unfairly prejudiced if the complainant could not be cross-examined in relation to the disclosure, the complainant may be so cross-examined.²⁹ Any evidence which the complainant gives in response to this cross-examination which reveals or discloses sexual experience or activity (or lack of it) by the complainant may be admissible as an exception to the general prohibition.

2.23 **Comment:** This exception has been applied where the complainant asserted in her evidence in chief that she barely knew the accused. The accused was permitted to suggest to her in cross-examination that she and the accused were in fact regular sexual partners. This evidence was considered to be relevant to the complainant's credibility as a witness, in light of her original assertion.³⁰ The exception appears to be confined to evidence which the complainant gives in response to questions put to her in cross-examination. Consequently, in the above example, if the complainant denies that she had previous sexual experience with the accused, independent

27. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4766.

28. This exception must be read in conjunction with s 409B(5).

29. This is provided for in s 409B(5).

30. *R v Henning and others* (NSW, Court of Criminal Appeal, No 406/88; 426/88; 436/88; 425/88; 437/88, 11 May 1990, unreported).

evidence would not be admissible under this exception to rebut the complainant's denial.³¹

MAKING AN APPLICATION TO ADMIT EVIDENCE UNDER S 409B

2.24 If counsel in a trial wishes to raise evidence which may come within the restrictions of s 409B, he or she is required first to make an application to the judge. The question whether the evidence is admissible or not must then be decided by the judge in the absence of the jury.³²

2.25 In making an application under s 409B, it is said to be preferable for counsel to provide the judge with a detailed written statement of the evidence which is proposed to be led or extracted in cross-examination.³³ If the judge decides that the evidence is admissible under an exception in s 409B(3), he or she is required by s 409B(7) to record or cause to be recorded the reasons for this decision as well as the nature and scope of the admissible evidence. Even if the judge decides that the evidence is inadmissible under s 409B(3), it is considered to be preferable if reasons for this decision are recorded, although there is no requirement to this effect in the legislation.³⁴

PROCEEDINGS COVERED BY S 409B

2.26 Section 409B applies to "prescribed sexual offence proceedings", which are defined as proceedings in which a person stands charged with a prescribed sexual offence.³⁵ "Prescribed sexual offence" is defined³⁶ as any

31. It appears to have been the express intention of Parliament to limit the application of this exception to the cross-examination of a complainant rather than to the admission of independent evidence: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4766.

32. *Crimes Act 1900* (NSW) s 409B(4) and 409B(6).

33. *R v McGarvey* (1987) 10 NSWLR 632.

34. *R v Uhrig* (NSW, Court of Criminal Appeal, No 60200/96, 24 October 1996, unreported) per Hunt CJ at CL at 11.

35. *Crimes Act 1900* (NSW) s 4(1).

36. *Crimes Act 1900* (NSW) s 4(1).

one or more of the offences listed below, being offences committed under specific sections of the *Crimes Act 1900* (NSW). Accordingly, s 409B will cover any criminal proceedings in which the accused is charged with:³⁷

- sexual assault (s 61I)
- aggravated sexual assault (s 61J)
- assault with intent to have sexual intercourse (s 61K)
- indecent assault (s 61L)
- aggravated indecent assault (s 61M)
- act of indecency (s 61N)
- aggravated act of indecency (s 61O)
- sexual intercourse procured by a non-violent threat (s 65A)
- sexual intercourse with a child under 10 (s 66A)
- attempt to have sexual intercourse with a child under 10 (s 66B)
- sexual intercourse with a child between 10 and 16 (s 66C)
- attempt to have intercourse with a child between 10 and 16 (s 66D)
- sexual intercourse with a person with an intellectual disability (s 66F)

37. According to the definition in s 4(1), s 409B also applies to an offence of attempting or of conspiracy to commit these offences. Moreover, in proceedings where the accused is charged with more than one offence, if one of those offences is a “prescribed sexual offence”, then s 409B applies to the proceedings.

- homosexual intercourse with a boy under 10 (s 78H)
- attempt to have homosexual intercourse with a boy under 10 (s 78I)
- homosexual intercourse with a boy between 10 and 18 (s 78K)
- attempt to have homosexual intercourse with a boy between 10 and 18 (s 78L)
- sexual assault by forced self-manipulation (s 80A)

2.27 Section 409B also applies to offences under the following repealed sections of the *Crimes Act 1900* (NSW):³⁸

- inflicting grievous bodily harm with intent to have sexual intercourse (s 61B)
- inflicting actual bodily harm with intent to have sexual intercourse (s 61C)
- sexual intercourse without consent (s 61D)
- indecent assault (s 61E)

2.28 A person who is charged with any of the offences referred to above will generally stand trial in the District Court before a jury and a judge,³⁹ with the exception that a person charged under s 61E, 66C(1), 66D, 61M, 61O(2), 61L, 61N or 61O(1) or (1A) may instead, in certain circumstances, be prosecuted in a Local Court before a magistrate.⁴⁰

38. Although these sections have been repealed, if an accused person is alleged to have committed an offence coming under one of these sections at a time before it was repealed, then he or she will be charged with an offence under that section: see *Crimes Act 1900* (NSW) Sch 11[2].

39. The offences listed are all felonies, being offences punishable by penal servitude: see *Crimes Act 1900* (NSW) s 9. This means that they are indictable offences to be heard in the District Court (or, in theory, the Supreme Court): *Interpretation Act 1987* (NSW) s 21 and *Justices Act 1902* (NSW) s 4(2), in conjunction with *Criminal Procedure Act 1986* (NSW) s 4(1). Criminal proceedings in the District Court are to be tried by jury, unless the accused elects and the prosecution consents to trial by judge alone: see *Criminal Procedure Act 1986* (NSW) s 31, 32.

40. Section 33C of the *Criminal Procedure Act 1986* (NSW) permits indictable offences listed in Tables 1 and 2 to that Act to be heard summarily before a magistrate in a Local Court, unless the prosecuting authority elects to have it heard on indictment (Table 2 offences) or the accused or the prosecuting

2.29 Arguably, it is not clear whether s 409B applies to committal hearings. These are pre-trial hearings in the Local Court in which a magistrate must decide, based on the prosecution's case against the accused, whether the accused should be committed to stand trial or whether he or she should be discharged.⁴¹ Section 409B is not expressly stated to apply to committal hearings.⁴² However, it certainly seems to be generally considered that s 409B applies equally to the committal stage as to the trial stage.⁴³

2.30 While in theory s 409B may apply to committal proceedings to restrict questioning of complainants about their sexual experience and reputation, in practice the section would seem to have a limited operation at this stage. This is because witnesses do not now usually attend in person to give evidence at a committal hearing. Instead, written statements are tendered. An accused person who seeks to require the attendance in person of an alleged victim of a sexual offence must show special reasons why, in the interests of justice, the alleged victim should be required to give oral evidence.⁴⁴ In practice, there may be few successful applications compelling a complainant to attend a committal hearing. Given that legal aid is not generally available in these types of cases, many people accused of committing a sexual offence will not be legally represented at committal.

authority elects to have it heard on indictment (Table 1 offences). Note the effect of s 495 of the *Crimes Act 1900* (NSW) on certain of these offences for which an accused was charged before 1 September 1995.

41. *Justices Act 1902* (NSW) s 41(6).

42. The term "stands charged" in the definition of "prescribed sexual offence proceedings" in s 4(1) of the *Crimes Act 1900* (NSW) is a term which is used more particularly in the trial context than at committal.

43. See Mr D Milovanovich, *Submission* at 2. An empirical study of s 409B considered the operation of the section in committal hearings, obviously on the assumption that the section applies to committal proceedings: see R Bonney, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation: Interim Report 3: Court Procedures* (NSW Bureau of Crime Statistics and Research, Canberra, 1987) ch 2.

44. *Justices Act 1902* (NSW) s 48E(2)(a) and 48E(9).

3. History of section 409B

- The common law
- Period of reform
- The introduction of section 409B

3.1 Section 409B came into operation on 14 July 1981.¹ Before then, the admissibility of evidence of a complainant's sexual experience and reputation in sexual offence proceedings was governed by the common law. The introduction of s 409B in 1981 was largely as a response to widespread condemnation of the common law, which was seen to be based on irrational notions of relevance and outdated and sexist assumptions about women.

THE COMMON LAW

3.2 At common law, complainants in sexual offence proceedings could traditionally be cross-examined about:²

- (1) their sexual reputation;
- (2) sexual intercourse with the accused on other occasions;
- (3) sexual intercourse with other people.

“Relevance” of sexual reputation

3.3 The common law considered evidence of a complainant's sexual reputation to be relevant to the question of whether she³ consented to sexual intercourse with the accused, as well as to her general reliability as a witness. A complainant could be questioned about her moral character, specifically as to whether she was a prostitute or a woman of notoriously bad character as regarded her chastity. Independent evidence could also be admitted to show that the complainant worked as a prostitute or was otherwise a woman of bad sexual reputation.

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1. See *Crimes (Sexual Assault) Amendment Act 1981* (NSW) Sch 1[15]; New South Wales, *Government Gazette* No 91 of 26 June 1981 at 3392.
 2. See, for example, *R v Bashir* (1969) 54 Cr App R 1; *R v Krausz* (1973) 57 Cr App R 466; *Stokes v The Queen* (1960) 105 CLR 279; *R v Aloisio* (1969) 90 WN (Pt 1) (NSW) 111 at 114; *Gregory v The Queen* (1983) 151 CLR 566 at 571.
 3. Most of the reported cases under the common law regime involved female complainants.

“Relevance” of sexual experience with the accused

3.4 Evidence of sexual intercourse between the complainant and the accused on other occasions, either before or after⁴ the alleged assault, was also seen as relevant to whether the complainant consented to sexual intercourse with the accused on the occasion of the alleged assault. If the complainant denied having had sexual intercourse with the accused on other occasions, evidence could be led to contradict her denial.

“Relevance” of sexual experience with other people

3.5 Traditionally, the common law considered evidence of sexual intercourse between the complainant and people other than the accused as relevant to the complainant’s credibility. It was considered that a woman who had sexual intercourse outside of marriage may for that reason alone be unreliable or less worthy of belief.

3.6 In accordance with general common law principles regarding cross-examination on issues of credit, a complainant could be cross-examined about her sexual experience with people other than the accused, but independent evidence was not admissible to contradict her if she denied the allegation of sexual experience. In one case, however, the High Court stated that there may be some situations where evidence of sexual intercourse between the complainant and people other than the accused could be relevant to a fact in issue in the case, and not merely to the complainant’s credibility as a witness. In these circumstances, independent evidence could be admitted to show that the complainant had had sexual intercourse with other people. For example, evidence of acts of intercourse with other men which were closely connected in time or place with the act of alleged sexual assault could be admitted as tending to show consent or belief by the accused in consent to intercourse on the occasion of the alleged assault.⁵

4. See *R v Aloisio* (1969) 90 WN (Pt 1) (NSW) 111 (Court of Criminal Appeal).
5. *Gregory v The Queen* (1983) 151 CLR 566. In that case, the co-accused sought to admit evidence that the complainant had engaged in consensual sexual intercourse with a number of men shortly before the co-accused had sexual intercourse with her. The Court held that this evidence related to events which formed part of a connected set of circumstances and was therefore admissible as relevant to the issue of consent.

3.7 Although these common law principles were well-established, there was some suggestion in more recent cases that judges were beginning to question their appropriateness, in light of changing social habits and attitudes towards extra-marital sexual activity.⁶ In particular, some judges expressed doubt as to the relevance to a complainant's credibility of her prior sexual experience with other people. Arguably, the scope of the common law to admit evidence of a complainant's sexual experience and reputation is not completely certain. There is at least some indication that the common law principles regarding the admissibility of such evidence were undergoing modifications by the time s 409B was introduced into legislation. Since that time, it has been said of the common law as it operates in Canada that it would no longer permit evidence of sexual conduct and reputation to be used as a basis for making inferences about the complainant's credibility or consent.⁷

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6. See *R v Zorad* [1979] 2 NSWLR 764 per Reynolds JA at 774. See also, for example, *R v McGarvey* (1987) 10 NSWLR 632; *R v White* (1989) 18 NSWLR 332; *R v Morgan* (1993) 30 NSWLR 543. Although the latter cases were determined after the introduction of s 409B, they considered the common law as a pre-requisite to the admissibility of evidence under s 409B.
 7. *Seaboyer v The Queen; Gayme v The Queen* [1991] 2 SCR 577 per McLachlin J at 630-637.

PERIOD OF REFORM

3.8 By the 1970s, there was significant community concern throughout Australia and in other common law countries about the laws and legal procedures relating to sexual assault, or “rape” as it was then described in the legislation. Women’s organisations and feminist rights groups were particularly vocal in their condemnation. They regarded the common law relating to rape to be based on sexist assumptions and moral judgments about women: with its focus on the complainant’s moral character and previous sexual experience, the common law was seen to operate in a way which required women, particularly “promiscuous” women, to prove that they did not “deserve” or “ask” to be raped.⁸

3.9 Of major concern was the treatment of complainants in court, especially the cross-examination of complainants about their sexual experience and reputation. The common law was criticised for admitting evidence of both on the basis that it was relevant to the issues of consent and credibility, where “relevance” was based solely on the notion that a woman who had sexual intercourse with men outside of marriage must, for that reason, be less worthy of belief or must be more likely to have consented to sexual intercourse with the accused. The cost of these common law practices for complainants was to be regularly subjected to the public humiliation of attacks on their credit by reference to their sexual past. Cross-examination of this kind was criticised for diverting the jury’s attention from the real issues in the case and subjecting the complainant to severe emotional distress. It was considered that, as a consequence, it was often the complainant, and not the accused, who was on trial. The prospect of such traumatic courtroom experiences was considered to act as a significant deterrence for many women against reporting sexual offences at all.⁹

8. See, for example, G D 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, Department of the Attorney General and of Justice, 1981) especially at 30; J Marsh, A Geist, N Caplan, *Rape and the Limits of Law Reform* (Auburn House Publishing Co, Boston, 1982) at 1-6, 21-23.

9. See, for example, South Australia, Criminal Law and Penal Methods Reform Committee, *Special Report: Rape and Other Sexual Offences* (Government Printer, Adelaide, 1976) at para 15.9; Victoria, Law Reform Commissioner, *Rape Prosecutions (Court Procedures and Rules of Evidence)* (Report 5, 1976) at para 54-57, 61; New South Wales, Department of the Attorney

3.10 In response to calls for reform, major changes to the laws on sexual violence were introduced in the United States of America.¹⁰ In a relatively short span of time, similar legislative reforms were enacted throughout Australia and in other common law countries. In most jurisdictions, these reforms included the introduction of legislation restricting the admissibility of evidence of sexual experience and reputation,¹¹ on the basis that the existing common law rules for admissibility were out of touch with modern

General and of Justice, Criminal Law Review Division, *Rape and Various Other Offences: A First Report* (1977) at 2-3, 32-33; G D 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, Department of the Attorney General and of Justice, 1981) at 30; Australia, Royal Commission on Human Relationships, *Final Report (Vol 5)* (AGPS, Canberra, 1977) at 189-193; England and Wales, Home Office, *Report of the Advisory Group on the Law of Rape* (Cmnd 6352, HMSO, London, 1975). See generally J Scutt, "Admissibility of Sexual History Evidence and Allegations in Rape Cases" (1979) 53 *Australian Law Journal* 817; E McDonald, "Her Sexuality as Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 *Criminal Law Journal* 321; K Winters, "United States v Shaw: What Constitutes an 'Injury' under the Federal Rape-Shield Statute?" (1989) 43 *University of Miami Law Review* 947; J Osborne, "Rape Law Reform: The New Cosmetic for Canadian Women" in C SchWeber, C Feinman (eds), *Criminal Justice Politics and Women: The Aftermath of Legally Mandated Change* (Haworth Press, New York, 1985) at 49-64.

10. For a history of the legislative reforms in the United States, see J Marsh, A Geist and N Caplan, *Rape and the Limits of Law Reform* (Auburn House Publishing Co, Boston, 1982); H Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 *Minnesota Law Review* 763; D Haxton, "Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence" (1985) *Wisconsin Law Review* 1219.
11. See *Criminal Law (Sexual Offences) Act 1978* (Qld); *Evidence Act Amendment Act 1976* (SA); *Evidence Act (No 3) 1976* (Tas); *Rape Offences (Proceedings) Act 1976* (Vic); *Evidence Act Amendment Act 1976* (WA). In the territories, legislation restricting evidence of this kind was introduced in 1985: see *Sexual Offences (Evidence and Procedure) Act 1983* (NT); *Evidence (Amendment) Ordinance (No 2) 1985* (ACT). See also *Sexual Offences (Amendment) Act 1976* (Eng and Wales) s 2; *Criminal Law Amendment Act 1975* (Canada).

views of morality, and permitted offensive and irrelevant questioning of complainants about their sexual behaviour.¹²

3.11 New South Wales was one of the last jurisdictions in Australia to introduce legislation restricting evidence of sexual experience and reputation. Several reviews were undertaken in this state in the late 1970s which made proposals for widespread reform of the law on sexual assault generally. There followed considerable community debate about which proposals, if any, should be adopted, and the way in which any legislative changes should be formulated.¹³

3.12 As in other jurisdictions, a significant number of the calls for reform in New South Wales were directed at the rules governing cross-examination of complainants about their sexual experience and reputation.¹⁴ Two opposing models were proposed, at different times, for legislative reform of this area.

3.13 One model, proposed by the Criminal Law Review Division of the Attorney General's Department, followed a discretionary approach to

12. See Queensland, Law Reform Commission, *Reform of the Law of Rape* (Report 21, 1976); South Australia, Criminal Law and Penal Methods Reform Committee, *Special Report: Rape and Other Sexual Offences* (Government Printer, Adelaide, 1976); Tasmania, Law Reform Commission, *Reducing Harassment and Embarrassment of Complainants in Rape Cases* (Report 6, 1976); Victoria, Law Reform Commissioner, *Rape Prosecutions (Court Procedures and Rules of Evidence)* (Report 5, 1976). These reviews followed release of the report of the Home Office of England and Wales, which recommended widespread reform to the law on sexual assault (or "rape"): see England and Wales, Home Office, *Report of the Advisory Group on the Law of Rape* (Cmnd 6352, HMSO, London, 1975).

13. See New South Wales, Department of the Attorney General and of Justice, Criminal Law Review Division, *Rape and Various Other Offences: A First Report* (1977); New South Wales, Department of the Attorney General and of Justice, Criminal Law Review Division, *Rape and Various Other Offences: Supplement to the First Report* (1977); New South Wales, Task Force on Care for Victims of Sexual Offences, *Care for Victims of Sexual Offences: Report of the Inter-Departmental Task Force* (1978); New South Wales, Department of the Attorney General and of Justice, Criminal Law Review Division, *Rape and Various Other Sexual Offences: A Second Report* (1978); New South Wales, Women's Advisory Council to the Premier, *Position Paper on Reform of New South Wales Rape Legislation* (August 1980).

14. New South Wales, Department of the Attorney General and of Justice, Criminal Law Review Division, *Rape and Various Other Sexual Offences: A First Report* (1977) at 33-34.

restricting sexual experience evidence. According to this model, counsel would be required to seek leave to raise evidence, and the trial judge would be left to decide whether or not to admit it, depending on whether it was reasonably material to the proper determination of the issues in the case.¹⁵ This model had been adopted by every other Australian jurisdiction on the basis that it allowed flexibility to admit evidence of sexual experience which was truly relevant to the individual case.

3.14 The second model, put forward by the Women's Advisory Council to the Premier, followed a rules-based approach to restricting sexual experience evidence. This was based largely on legislation which had been introduced in Michigan, and adopted in other states of the United States of America.¹⁶ The proposed provision set down rules for the admissibility of such evidence.¹⁷ It left no discretion for the judge in an individual case to decide whether to admit evidence falling outside specified categories. Evidence which did fall within the specified categories could only be admitted with the judge's leave.

THE INTRODUCTION OF SECTION 409B

3.15 It was in this context that s 409B was introduced in 1981, as part of a package of reforms to the law on sexual assault. In its final form, s 409B adopted the rules-based approach to restricting evidence of sexual experience. That is, it prohibited such evidence except in specific circumstances which were listed in the section. It also imposed an absolute prohibition on evidence of sexual reputation. By regulating the admissibility of evidence in this way, s 409B was said to serve the following purposes.

15. The proposal placed a greater restriction on evidence of sexual reputation, which was not admissible if it was directed only at proving that the complainant consented to sexual intercourse. See New South Wales, Department of the Attorney General and of Justice, Criminal Law Review Division, *Rape and Various Other Sexual Offences: A First Report* (1977) recommendation 20; New South Wales, Department of the Attorney General and of Justice, Criminal Law Review Division, *Rape and Various Other Sexual Offences: Supplement to the First Report* (1977) at 1.

16. See para 5.23-5.27.

17. NSW, Women's Advisory Council to the Premier, *Position Paper on Reform of New South Wales Rape Legislation* (August 1980) proposal 8.

3.16 First, the section was designed to put an end to the common law practice of allowing evidence of previous sexual experience to be used as a basis for inferring that the complainant was untruthful or was more likely to consent to sexual intercourse with the accused.¹⁸ The section was said to ensure that there would be no irrelevant questioning of sexual assault victims about their prior sexual behaviour; admissible evidence of prior sexual behaviour would be confined to material which, consistent with contemporary standards of behaviour, was genuinely relevant. Parliament was said to have deliberately adopted the rules-based approach, as opposed to the discretionary approach, as a way of ensuring that irrelevant evidence concerning sexual experience was excluded and that the old common law practices did not recur. There was concern that, if judges were given a discretion to admit evidence, they may continue to admit irrelevant and offensive material as had been the practice at common law. The imposition of rigid rules for admissibility was thought to be the only means of ensuring that irrelevant evidence would be excluded.¹⁹

3.17 Secondly, the section aimed to limit the circumstances in which complainants would be subjected to distressing cross-examination about their sexual experience. It was said to do this by offering complainants a “double protection”: first, by ensuring that all irrelevant evidence was excluded by means of a general prohibition; secondly, by providing that even evidence which was relevant and admissible under one of the exceptions in s 409B could nevertheless be excluded if the distress, humiliation or embarrassment it may cause to the complainant outweighed or was equal to its probative value. This was said to provide a distinctly stronger protection against

18. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4761. See also G D 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, Department of the Attorney General and of Justice, 1981) at 30. Dr Wood’s commentary was prepared in order to provide assistance in the interpretation and application of the new reforms introduced by the *Crimes (Sexual Assault) Amendment Act 1981* (NSW).

19. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4763-4764 and Legislative Council, 8 April 1981 at 5456; G D 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, Department of the Attorney General and of Justice, 1981) at 32.

distress for the complainant than a mere judicial discretion to exclude irrelevant evidence.²⁰

3.18 Thirdly, it was considered that the section would encourage sexual assault victims to report the offence by reassuring them that they would not be subjected to humiliating and offensive questioning in the courtroom.²¹

3.19 Fourthly, the section was said to provide the accused person with full and proper scope to question the complainant on the facts of the case. Parliament had given consideration to including a judicial discretion to cover instances where evidence not falling within one of the listed exceptions was relevant to the case and should therefore be admitted. However, it was ultimately determined that there would be no other circumstances other than those listed as exceptions in s 409B(3) in which evidence would be legitimately relevant as to warrant a judicial discretion. It was therefore considered that the exceptions listed in s 409B(3) were sufficient to ensure that no injustice to the accused arose.²²

3.20 Section 409B was amended in 1987 and again in 1989.²³ These amendments did not change the substance of the section, but rather expanded the application of s 409B to a wider range of newly-created sexual offences. In particular, the application of s 409B was extended to proceedings for child

20. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4763-4764 and Legislative Council, 8 April 1981 at 5456; G D 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, Department of the Attorney General and of Justice, 1981) at 32. See also *R v M* (1993) 67 A Crim R 549 (NSW CCA).

21. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4761.

22. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 8 April 1981 at 5456; G D 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, Department of the Attorney General and of Justice, 1981) at 2. See also the commentary on the formulation proposed by the Women's Advisory Council, which formulation was adopted in substance in s 409B: New South Wales, Women's Advisory Council to the Premier, *Position Paper on Reform of New South Wales Rape Legislation* (August 1980) at 9.

23. *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW) Sch 3[1] and Sch 3[8]; *Crimes (Amendment) Act 1989* (NSW) Sch 1[1] and Sch [9].

sexual assault. It was stated that s 409B would serve the same purpose of protecting complainants in proceedings of this kind against questioning about their sexual experience and reputation.²⁴

24. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 October 1987 at 15466. See also New South Wales, Child Sexual Assault Taskforce, *Report of the New South Wales Child Sexual Assault Taskforce* (1985).

4. Review of section 409B

- Arguments in support of reform
- Arguments in support of the current operation of section 409B
- Proposals for greater restrictions in section 409B

4.1 In 1996, the High Court of Australia expressed the view that s 409B was in need of reform. The High Court's comments followed a number of cases in the District and Supreme Courts of New South Wales, in which judges found that s 409B operated too restrictively and excluded evidence which was highly relevant to the case for the accused.¹ The Commission's review arises from the High Court's comments.

4.2 Proposals to reform s 409B to address the High Court's criticisms have been met with strong opposition by some members of the community, in particular women's organisations and feminist legal commentators.² They argue that s 409B works well in practice and, if anything, should be made more restrictive to ensure that it is not applied too liberally in favour of the accused.

4.3 These opposing views of s 409B were strongly expressed to the Commission in both consultations and submissions. Some people, for the most part defence lawyers, considered that s 409B was unfairly restrictive and intruded to an unacceptable extent on the rights of the accused. They agreed with the High Court that reform of s 409B was desirable, indeed essential, to ensuring a fair trial for the accused. Other people, for the most part women's organisations and sexual assault counselling services, took the

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1. See, for example, *R v McIlvanie* (NSW, District Court, No 93/11/1405, Shillington DCJ, 30 August 1994, unreported); *R v Morris* (NSW, Supreme Court, No 70005/89, Wood J, 18 October 1990, unreported); *R v Murphy* (NSW, District Court, No 94/21/0425, Rummery DCJ, 30 May 1995, unreported); *R v PJE* (NSW, District Court, No 94/21/1248, Dent DCJ, 5 April 1995, unreported); *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported); *R v Grills* (NSW, Court of Criminal Appeal, No 60445/95, 12 December 1995, unreported). See also *R v Morgan* (1993) 30 NSWLR 543 per Mahoney JA at 554; *R v M* (1993) 67 A Crim R 549 (NSW CCA) per Allen J at 558; *R v Bernthaler* (NSW, Court of Criminal Appeal, No 60394/93, 17 December 1993, unreported) per Badgery-Parker J at 9.
 2. See, for example, M Kumar and E Magner, "Good Reasons for Gagging the Accused" (1997) 20 *University of New South Wales Law Journal* 311; A Cossins, "Sex, Lies and the Rights of a Rape Victim" *Sydney Morning Herald* (16 April 1997) at 15; New South Wales, Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Gender Bias and the Law Project, Sydney, 1996) at 250-251; New South Wales, Standing Committee on Social Issues, Legislative Council, *Sexual Violence: Addressing the Crime: Inquiry into the Incidence of Sexual Offences in New South Wales: Part II* (Report 9, 1996) at 27-28

view that s 409B was not unduly restrictive. Their concern was directed at protecting the interests of complainants from further trauma in the courtroom and from preventing a return to the “bad old days” of the common law.

4.4 This Chapter examines the arguments put forward for widening the scope of s 409B on the one hand, and the opposing arguments to leave s 409B in its current form, or to make it more restrictive.

ARGUMENTS IN SUPPORT OF REFORM

Right of the accused to a fair trial

4.5 It is fundamental to our system of law that a person charged with a criminal offence is presumed innocent until proven guilty and should not be convicted except after having a fair trial.³ The call for reform of s 409B is based on the claim that the section operates in certain cases to deny an accused person the right to a fair trial. According to this argument, there is some evidence concerning a complainant’s sexual experience which is directly relevant to determining the guilt or innocence of an accused in a particular case. The evidence may be so important to that case that, if it is excluded by s 409B, the accused will be prevented from making a full response to the charge against him or her in court. In the worst case, s 409B may result in the conviction of an innocent person who has been prevented from bringing important information to the court’s attention.

4.6 As we noted in Chapter 3, the effect of legislative restrictions concerning sexual experience evidence on the right of an accused to a fair trial was an issue which was debated by Parliament before the introduction of s 409B in 1981. In particular, consideration was given to whether the

3. See, for example, *Barton v The Queen* (1980) 147 CLR 75; *Jago v District Court (NSW)* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292. It has been held, however, that the right to a fair trial may be curtailed by statute, to the extent that the courts have no power to stay criminal proceedings on the basis that legislation operates in those proceedings to cause injustice to the accused: see *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported), approved by the High Court in refusing an application for special leave to appeal: *Grills v The Queen*; *PJE v The Queen* (High Court of Australia, No S8/1996; S154/1995, 9 September 1996, unreported).

formulation of s 409B, which only allows sexual experience evidence to be admitted under closely-defined exceptions, was too inflexible to ensure that the section did not operate unjustly against the accused. Parliament ultimately took the view that no such injustice would arise. It was considered that the exceptions to the prohibition, listed in s 409B(3), would make admissible all evidence which, in the interests of justice and in fairness to the accused, should be admissible.

4.7 In the first few years following its introduction, there were no reported cases in which judges referred to any problems in the operation of s 409B. Since 1990, however, there have been several occasions on which judges have publicly noted a danger that s 409B may operate to deny an accused person a fair trial.⁴ It could be argued from these cases that the section has proven insufficient to prevent injustice to the accused in every situation and that, consequently, it should be amended to provide greater opportunity for introducing evidence of a complainant's sexual experience so as to ensure that the accused has a fair trial. This was a view which was strongly expressed by some people in submissions and in consultations.⁵ Defence lawyers referred to cases in which they considered that their clients, the accused, were unable to lead relevant evidence because it was prohibited by s 409B.

The “problem cases”

4.8 The “problem cases” are the cases in which s 409B has received particular attention by the courts for its impact on the accused. Judges in these cases have commented on the danger that s 409B may exclude certain evidence in a way which denies the accused a fair trial. Most of the problem cases have had the following features in common:⁶

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4. See para 4.1.
 5. Legal Aid Commission, *Consultation*; Public Defenders, *Consultation*; Forbes Chambers, *Consultation*; District Court judges, *Consultation*; Bar Association, *Submission* at 1; Law Society, *Submission* at 2-4; Public Defenders, *Submission* at 1-4; Confidential, *Submission* at 3-4; T Molomby, *Submission* at 1-2; H di Suvero, *Submission* at 5-9; J Gallagher, *Submission* at 1-7.
 6. In the case of *R v Bernthaler* (NSW, Court of Criminal Appeal, No 60394/93, 17 December 1993, unreported), it was commented that this may be a case in

- the complainant was a child;
- the accused denied that the alleged abuse occurred; and
- the evidence which was excluded by s 409B was evidence of sexual experience or activity (or lack of it) rather than evidence of sexual reputation.

4.9 In submissions and consultations, defence lawyers argued that it is these types of cases in which s 409B most commonly operates to cause potential injustice to the accused.⁷ Complainants in these cases are usually children, or adults with an intellectual disability or a mental illness.⁸

4.10 Evidence which has generally been excluded in these cases may be described as falling into two broad categories:

- (a) evidence of sexual abuse of the child by someone other than the accused;⁹
- (b) evidence that the child made “false” allegations of sexual abuse on other occasions.

(a) Relevance of evidence of sexual abuse of the child by someone other than the accused

4.11 Evidence of this kind may be relevant to the case for the accused in the following ways.

4.12 First, where there is reason to believe that a child has been sexually abused on another occasion by a person other than the accused, the evidence of abuse on that other occasion may be relevant to the case for the accused to explain why the child demonstrates certain signs of abuse. For example, it

which s 409B operated to cause injustice to the accused: see Kirby P at 5, Badgery-Parker J at 9. This case involved an adult complainant, although the evidence which was excluded related to evidence of false allegations of abuse by the complainant when she was a child.

7. Legal Aid Commission, *Consultation*; Forbes Chambers, *Consultation*; Public Defenders, *Consultation*. See also Law Society, *Submission* at 2-3; Bar Association, *Submission* at 1-2. The Director of Public Prosecutions also identified these as the types of cases in which s 409B has been controversial for its potential injustice to the accused: see N Cowdery QC, *Submission* at 1-2.
8. Public Defenders, *Consultation*.
9. For example, *R v Morris* (NSW, Supreme Court, No 70005/89, Wood J, 18 October 1990, unreported); *R v G* (1997) 42 NSWLR 451.

may provide an explanation as to why the child has physical symptoms of abuse.¹⁰ In other instances, the child's allegation may involve a description of a sexual act about which a jury would not normally expect a child of that age to have knowledge. In those instances, it may be relevant to the jury to be aware that the child has been previously abused in a similar way to that described in the allegation against the accused.¹¹ In the absence of that information, the jury may be more likely to conclude that the accused has abused the child.

4.13 In other instances, evidence of abuse by someone else may be relevant to suggest that the child, for whatever reason, is blaming the accused for abuse which was in fact committed by that other person.¹² For example, the accused may wish to argue that the child has in fact been abused by a member of his or her family, such as a father or brother, but has blamed the accused for the abuse rather than identify the real offender. Evidence suggesting that the child has been abused by another person would normally be excluded by s 409B.

4.14 A number of people in submissions and in consultations disputed that evidence of previous abuse is ever relevant to the question of whether the accused has sexually abused the child.¹³ It was said that the mere fact that a child has been abused by someone else does not mean that he or she was not also abused by the accused.

4.15 Evidence that a child has been abused by someone else is not proof in itself that the accused has not also abused the child. However, as shown in the examples above, it may be relevant information for the jury to consider in determining whether there is a reasonable possibility that the sexual abuse in question was committed by someone else rather than by the accused. The

10. For example, where medical evidence shows that the child has a ruptured hymen: see *R v Morris* (NSW, Supreme Court, No 70005/89, Wood J, 18 October 1990, unreported).

11. See, for example, *R v Morris*, where the child stated that she had seen an erect penis. In consultation, defence lawyers stated that they had encountered cases where the child demonstrates a knowledge of sexual matters, such as bizarre sexual acts: see Legal Aid Commission, *Consultation*; Forbes Chambers, *Consultation*.

12. See, for example, *R v G* (1997) 42 NSWLR 451 (decision on appeal to the High Court pending). See also Public Defenders, *Consultation*.

13. Southern Area Health Service, Sexual Assault Services, *Consultation*; DPP Witness Assistance Service, *Consultation*; NSW Rape Crisis Centre Inc, *Submission* at 7-8.

policy issue is to identify where the balance should lie in these cases between the rights of the alleged victim and the rights of the accused at trial. This issue is addressed in Chapter 6.

(b) Relevance of evidence that the child has made false allegations of sexual abuse on other occasions

4.16 Evidence that a child has made a demonstrably false allegation of sexual abuse on another occasion has been considered relevant to the case for the accused to suggest, for example, that the child has a general propensity to lie or make false allegations,¹⁴ or is a “sexual fantasist”,¹⁵ or that the allegation of abuse against the accused is activated by the improper motives of others,¹⁶ or otherwise generally to discredit the child as an unbelievable or unreliable witness. The exclusion of evidence of previous false allegations has been said to cause injustice to the accused in some cases because it prevents the accused from bringing information before the jury which may cause them to doubt the complainant’s version of events.

4.17 For example, in one case, a child made a complaint of sexual abuse against her step-father.¹⁷ The step-father and the child’s mother were recently separated. According to the accused, the child’s mother had threatened him that she would do to him what she had done to the child’s natural father, that is, make an allegation of sexual abuse to prevent him from seeing the child. The accused wished to lead evidence of the alleged threat to show that the child’s complaint had been made under the direction of the mother for the purpose of taking revenge on the accused. The evidence was, however, excluded by s 409B.

4.18 Another example involves a “street kid” who was said to have made an identical allegation of sexual abuse against a series of social workers.¹⁸ Evidence of the previous allegations was said to be relevant to the case for the accused in order to suggest that the child, for whatever reason, was in the

14. See *R v Bernthaler* (NSW, Court of Criminal Appeal, No 60394/93, 17 December 1993, unreported); *R v McIlvanie* (NSW, District Court, No 93/11/1405, Shillington DCJ, 30 August 1994, unreported).

15. See *R v M* (1993) 67 A Crim R 549 (NSW CCA).

16. See *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported). See Bar Association, *Submission* at 2.

17. *R v PJE*.

18. This example was given by the Public Defenders: see Public Defenders, *Submission* at 3.

habit of making false allegations of sexual abuse and therefore the allegation against the accused was more likely also to be false.

4.19 In situations such as those described above, evidence that a complainant (whether a child or an adult) has made clearly false allegations of abuse on other occasions will be directly relevant to the question of whether the complainant has fabricated the allegation against the accused. Indeed, in the United States, the accused is considered to have a constitutional right to introduce such evidence where it is relevant, despite legislative restrictions on sexual experience evidence similar to the restrictions in s 409B.¹⁹ In New South Wales, the general rules of evidence would ordinarily allow a witness to be questioned about false allegations which they have made, whether or not the allegations were of a sexual nature. In some cases, independent evidence may also be able to be introduced to prove that the witness has made these allegations, if, for example, she or he has denied doing so in the witness box. Such evidence may be relevant to the witness' credit, to show that she or he has a propensity to lie or cause a public mischief, or it may be relevant to the facts in issue in the case.²⁰

4.20 A problem in determining the admissibility of evidence of "false" allegations in the context of sexual offence proceedings is being able to determine with any accuracy whether an allegation made on another occasion is in fact false. This is an issue relating to the probative weight of such evidence. That is, the extent to which allegations made on other occasions may be shown to be false will affect the extent to which they are relevant to determining whether the complainant has fabricated the allegation against the

19. See, for example, *People v Hackett* 365 NW 2d 120, 124-125 Mich 1984); *People v Makela* 383 NW 2d 270, 276 (Mich Ct App 1985). See C Fishman, "Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behaviour" (1995) 44 *Catholic University Law Review* 709 at 768-769.

20. See the discussion by McHugh J of the distinction between evidence relevant to credit and evidence relevant to a fact in issue in *Palmer v The Queen* (1998) 72 ALJR 254 at 265-267, cited with approval by Smart J in the NSW Court of Criminal Appeal in *R v Vawdrey* (NSW, Court of Criminal Appeal, No 60432/97, 16 April 1998, unreported) at 11-13. The extent to which evidence of previous allegations of sexual abuse may be used to show a propensity to lie and fantasise was discussed in *R v Bernthaler* (NSW, Court of Criminal Appeal, No 60394/93, 17 December 1993, unreported) per Badgery-Parker J at 10. See also *Evidence Act 1995* (NSW) s 102-103.

accused. Flowing on from the difficulty involved in determining the probative weight of this evidence are concerns of fairness and policy which may weigh against its admissibility. These issues are all discussed in Chapter 6. It is worth noting at this point, however, that the purpose of the line of questioning about previous allegations is to demonstrate that no prior sexual activity in fact occurred, rather than to humiliate the complainant by suggesting that he or she is sexually immoral.

Other cases

4.21 Although it is cases of the kind described above in which s 409B is most commonly criticised for causing injustice to the accused, defence lawyers emphasise that the danger of injustice is not limited to these types of cases. They claim that there are other cases in which, in their experience, evidence of sexual experience is highly relevant, and its exclusion by s 409B may prevent the accused from having a fair trial.²¹

4.22 It is difficult to ascertain with any precision the extent to which s 409B may operate in situations other than those outlined above in a way to cause injustice to the accused. Several magistrates and District Court judges have suggested that, in their experience, it is only in rare cases that an accused may be considered to be denied a fair trial because of the operation of s 409B, and that most of those cases involve evidence of previous allegations as referred to in paragraph 4.16-4.20 above.²² Of course, it is possible that not all cases in which s 409B is considered to operate unfairly against the accused will be brought to the attention of a judicial officer. There may be cases where counsel for the accused does not attempt to have relevant evidence admitted

21. Public Defenders, *Consultation*; Legal Aid Commission, *Consultation*, Forbes Chambers, *Consultation*. See also Law Society, *Submission* at 4.

22. One magistrate submitted that, in his eight years' experience as a magistrate, he had not encountered any cases of summary prosecution in which he considered that the accused was denied a right to a fair trial because of the operation of s 409B: see D Milovanovich, *Submission* at 3. Of course, the limited jurisdiction of the Local Court to hear sexual offence cases may mean that issues relating to s 409B rarely arise in the Local Court. In consultation, several District Court judges recollected a few cases in which they considered s 409B severely restricted the defence case because of the exclusion of evidence of previous allegations: see District Court judges, *Consultation*.

because it is assumed that it will be prohibited by s 409B,²³ or where the Crown decides not to proceed with the prosecution of the accused because evidence will be excluded by s 409B in a way which is considered may deny the accused a fair trial.²⁴

4.23 The Public Defenders submitted that, in general, s 409B does not operate unfairly against the accused in cases involving adult complainants, where the issue in dispute is whether there was consent to intercourse rather than whether intercourse with the accused occurred at all.²⁵ In most cases of this kind, it was considered that the exceptions in s 409B(3) are sufficient to admit evidence which is important to the case for the accused. However, this does not mean that s 409B never operates unfairly in these types of cases: the Public Defenders submitted that they have been involved in “consent” cases in which evidence which they considered to be important to their clients’ case was excluded by s 409B.

4.24 An example which was given related to evidence of prostitution in cases where the accused claimed that there was consensual intercourse in exchange for money, and that the complainant subsequently claimed she was sexually assaulted to avoid being apprehended for soliciting. Without the restrictions imposed by s 409B, evidence that a complainant was working as a sex worker around the time of the alleged assault would ordinarily be admissible as tending to establish a motive for invention.

4.25 Arguably, in these circumstances, evidence of prostitution might be admissible under the existing exception to s 409B(3), which admits evidence of sexual activity or experience where it forms part of the “connected circumstances” of the alleged incident.²⁶ However, in order to be admissible

23. It was stated in consultation with Legal Aid solicitors that, in their experience, there are cases where counsel for the accused does not attempt to have relevant evidence admitted because it is presumed it will be rejected by reason of s 409B: see Legal Aid Commission, *Consultation*.

24. See para 4.49-4.50.

25. Public Defenders, *Submission* at 6.

26. In *R v Berrigan*, the Court of Criminal Appeal commented that if the complainant’s convictions for soliciting had occurred closer to the time of the alleged incident, they may be relevant to support the accused’s claim that she had consented to intercourse with him then demanded money, and may have been admissible under s 409B(3)(a): see *R v Berrigan* (NSW, Court of Criminal Appeal, No 60412/93, 7 October 1994, unreported); see also *Berrigan v The Queen* (High Court of Australia, No S159/94, 23 November 1995, unreported), refusing the application for special leave to appeal.

under this exception, the sexual activity in question, namely the acts of prostitution, must be recent and must form part of the connected circumstances of the alleged assault. These requirements may exclude much evidence relating to acts of prostitution.

4.26 A few additional examples were given by defence lawyers of cases other than child sexual assault cases where they considered that s 409B operated unfairly. One example involved evidence of false allegations made by the complainant, only in this instance the complainant was an adult rather than a child.²⁷ In other cases, it was submitted that s 409B may prevent a full version of the facts from being presented to the jury, without which the jury is left with a skewed perception of events.²⁸ For example, in a case involving an allegation of homosexual sexual assault, where the issue in dispute is whether the complainant consented to intercourse, evidence that the complainant is homosexual is inadmissible because it implies sexual activity under s 409B(3).²⁹ From the point of view of the accused, evidence of the complainant's homosexuality may be relevant to the likelihood of whether he or she consented to intercourse with the accused. Although consent cannot be implied from the mere fact that the complainant is a practising homosexual, it could be argued that the complainant's sexuality may affect the likelihood that he or she consented to homosexual intercourse just as, in the reverse situation, evidence that a complainant has never engaged in homosexual activity may affect the likelihood that he or she consented to homosexual intercourse on this one instance with the accused.

4.27 It was also submitted that the operation of s 409B may sometimes lead to absurd results because of the way in which the section is drafted.³⁰ For example, strictly speaking, s 409B prohibits evidence that the complainant is a mother, because this implies that she has been sexually active. Examples such as these may be unlikely to cause injustice to the accused, but they may make it difficult to place the alleged offence in its full context.

4.28 Defence lawyers did not generally consider that any problems arose for the accused from the absolute prohibition in s 409B(2) against evidence

27. See J Fleming, *Submission* at 1-2. Ms Fleming is a magistrate. The example given in her submission related to a case in which she had been involved as a solicitor.

28. Forbes Chambers, *Consultation*.

29. *R v Uhrig* (NSW, Court of Criminal Appeal, No 60200/96, 24 October 1996, unreported).

30. T Molomby, *Submission* at 1.

relating to sexual reputation.³¹ Some considered that, in theory, there may be evidence relating to a complainant's sexual reputation which would be relevant to the case for the accused. For example, evidence that the complainant worked as a sex worker, which arguably relates to her sexual reputation, may be relevant to a claim by the accused that she consented to intercourse. However, it was thought that the term "sexual experience" is sufficiently wide to encompass evidence of this kind, so that the prohibition on sexual reputation evidence did not usually give rise to problems for the accused.³²

4.29 This analysis may be somewhat inadequate. On a strict reading of s 409B, even if evidence may be shown to relate to sexual experience and to be admissible under one of the exceptions in s 409B(3), the fact that it also relates to the complainant's sexual reputation may mean that it is nevertheless inadmissible under the prohibition in s 409B(2).³³ If this is correct, it may be particularly difficult to conduct a prosecution where the complainant is a sex worker and the accused is his or her client. The sex worker/client relationship may be an essential part of the context in which the alleged assault occurred, for example, if the complainant claims to have consented to one sexual activity in exchange for money, but the accused then allegedly forces him or her to engage in another sexual activity which does not form part of the agreement. The prosecution's ability to lead evidence of the initial circumstances leading up to the alleged assault may be greatly hindered if evidence that the complainant was a sex worker is prohibited by

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31. Public Defenders, *Consultation*; Legal Aid Commission, *Consultation*; Forbes Chambers, *Consultation*. As for the suggestion that the term "sexual reputation" be defined in legislation, see para 4.81-4.85.
 32. Of course, as we discussed in paragraph 4.24-4.25, even if evidence of prostitution may be shown to be evidence of "sexual experience", it may still be inadmissible under the prohibition in s 409B(3). The proximity requirement in s 409B(3)(a)(i) would in most cases preclude its admission under this exception.
 33. See *Leahy v Price and Anor* (NSW, Supreme Court, Adams J, No 11756/98, 28 September 1998, unreported). In this case, the complainant, a female sex worker, alleged non-consensual anal intercourse following abduction. It was part of the prosecution's case that she entered the accused's car, and accepted \$100 in exchange for other sexual acts. It was suggested by the court that this evidence related to the complainant's sexual reputation, since it demonstrated that the complainant was a sex worker. It was therefore inadmissible by virtue of s 409B(2). If this suggestion is correct, it might well be that the prosecution in such a case cannot proceed, a result which would be most unjust from the point of view of the complainant.

s 409B(2). This is an issue which the Commission addresses in its recommended reformulation.³⁴

4.30 It was asserted by the Crown Prosecutors, in consultation, that there have been other cases in their experience where s 409B has excluded evidence to the detriment of the complainant and the case for the prosecution.³⁵ For example, in a couple of cases encountered by one Crown Prosecutor, there was evidence that the complainant had remained immobile during the sexual attack, which may have been construed by some jurors as an unusual and unlikely response. The complainant's reaction could be explained, however, by the fact that she had been the victim of incest as a child, and the attack as an adult had brought back memories of the previous abuse, rendering her immobile. Because of s 409B, the Crown was unable to lead evidence of the earlier abuse to explain the complainant's reaction to the attack.

4.31 It was also submitted by the Crown Prosecutors that there may be cases where it is relevant to lead evidence that the complainant was a virgin before the sexual assault. For example, if the accused claims to have believed the complainant was consenting, it may be relevant to show that, before the attack, the complainant was a virgin in order to make the version of events told by the accused less likely.

Operation of s 409B beyond its original rationale

4.32 It was submitted that one of the reasons why problems have arisen in the operation of s 409B is because the section has been applied to a range of situations to which it was never originally intended to apply.³⁶

4.33 As we noted in Chapter 3, at common law, the fact that a woman had had sexual intercourse on other occasions was considered relevant in itself to the questions of consent and credibility. "Relevance" was based on a moral judgment that women who were sexually active outside of marriage had a greater propensity both to consent to sexual intercourse and to lie. When s 409B was introduced, it was said to overcome these common law practices

34. See recommendation 2 and para 6.148.

35. Crown Prosecutors, *Consultation*.

36. T Molomby, *Submission* at 1.

of drawing inferences about a complainant's credibility and consent based solely on his or her sexual history.

4.34 However, s 409B is drafted in a way which imposes a general prohibition against evidence of sexual conduct, with specific exceptions listed. This has the result that, other than for the excepted purposes, the section restricts the admissibility of sexual experience evidence regardless of the purpose for which it is sought to be admitted. Evidence relating to sexual experience is inadmissible even if its purpose is other than to draw an inference about a complainant's credibility or consent based solely on the fact that he or she has had previous sexual encounters. Similar legislative provisions in the United States and Canada have been criticised for their inability to distinguish between the different purposes for which sexual experience evidence may be raised.³⁷

4.35 For example, in child sexual assault cases, evidence of prior sexual abuse of the child is not sought to be introduced in order to suggest that, because of the previous abuse, the child is less believable or is more likely to have consented to the sexual act with the accused. On the contrary, such evidence is usually relevant for the purpose of suggesting that the child is being abused by someone other than the accused, or to provide an explanation as to why the child demonstrates certain signs of abuse, where otherwise those signs may be attributed to abuse by the accused. Indeed, the purpose of admitting such evidence may often be consistent with the rationale underlying the exception in s 409B(3)(c), which allows evidence of sexual experience or activity to be admissible where it is relevant to explain the presence of semen, pregnancy, injury, or disease in the complainant. In both instances, the evidence is raised for the purpose of providing an explanation as to why the complainant demonstrates signs that a sexual act with someone has occurred.³⁸

37. See *Seaboyer v The Queen*; *Gayme v The Queen* [1991] 2 SCR 577 per McLachlin J (delivering the judgment of the majority of the Court) at 618; H Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 *Minnesota Law Review* 763.

38. Arguably, in some cases, evidence relating to previous abuse could be brought within the existing "injury" exception in s 409B(3)(c). For example, it could be argued that, for the purposes of s 409B(3)(c), a child's broken hymen amounts to an injury so as to allow evidence of previous sexual abuse to explain this physical evidence. There does not appear to be any discussion in

4.36 Another situation in which it could be argued that s 409B has been applied in a way which goes beyond its original rationale is where evidence that a complainant is a mother is excluded because it implies that she has had previous sexual experience. It seems unlikely that s 409B was ever originally intended to restrict such evidence.

4.37 The section is also broad in its application both to the prosecution's evidence as well as evidence for the accused. Unlike equivalent legislation in some other jurisdictions,³⁹ s 409B is not confined to restricting evidence elicited only by the accused but may also exclude evidence sought to be admitted by the prosecution.⁴⁰ It may be argued that this result runs contrary to the rationale of the section, in so far as it aimed to protect complainants from humiliating cross-examination by defence counsel, rather than to be used to the possible detriment of the prosecution's case.⁴¹

4.38 Similarly, the inclusion of "lack of sexual activity or experience" in the prohibition in s 409B(3) may seem inconsistent with the rationale of the section, which was particularly aimed at preventing inferences being made about sexually active and "promiscuous" women. The inclusion of this term results in, for example, the prohibition of evidence of previous false allegations of sexual abuse, because such evidence implies that the complainant has not had the experience which she claims to have had.

the cases, however, as to whether the term "injury" could extend to cover such evidence: see *R v Morris* (NSW, Supreme Court, No 70005/89, Wood J, 18 October 1990, unreported); *R v Murphy* (NSW, District Court, No 94/21/0425, Rummery DCJ, 30 May 1995, unreported). Similarly, it could be argued that evidence of a child's emotional distress, consistent with sexual abuse, could be classified as an "injury" for the purposes of admitting evidence of previous sexual abuse. See *R v Dimian* (1995) 83 A Crim R 358 (NSW CCA), in which "injury" was interpreted to include emotional distress.

39. Equivalent legislation in Western Australia, Victoria, and Canada imposes restrictions on questioning of a complainant only in cross-examination, not examination-in-chief: see *Evidence Act 1906* (WA) s 36BC; *Evidence Act 1958* (Vic) s 37A(2)(a); *Criminal Code* (Canada) s 276(2).

40. See *R v Linskey* (NSW, Court of Criminal Appeal, No 306/85, 9 April 1986, unreported). There is some inconsistency in the section. Section 409B(5) seems to anticipate that the prosecution may raise evidence of sexual experience or activity, or lack of it, whereas s 409B(2) and (3) generally prohibits such evidence.

41. A couple of submissions suggested that s 409B be amended so that it not apply to the prosecution: see Fems Rea, *Submission: Part II* at 32; E Magner and M Kumar, *Submission* at 11-12.

Although the purpose of introducing such evidence relates, at least in part, to discrediting the witness, it is not relying on the complainant's sexual practices as a reason in itself for discrediting her, but rather on the fact that she has previously made a "false" allegation.

4.39 Of course, the reasons for introducing s 409B were not confined to overcoming the deficiencies in the common law as outlined above. Other purposes included minimising the distress to complainants in the courtroom, preventing trials becoming an investigation into complainants' sexual lives, and limiting the admission of prejudicial material concerning sexual experience. Although, on the one hand, it may be argued that the section has been extended beyond its original rationale, these other purposes must also be recognised in considering any calls for reform. Any changes to s 409B will involve a decision about the extent to which evidence which does not rely on the common law inferences for its relevance should continue to be excluded by the legislation, taking into account the other purposes for which it was introduced.

Consequences of finding that an accused may be denied a fair trial

4.40 It is not clear what remedies are available in cases where s 409B is seen to operate in a way to deny an accused a fair trial. Moreover, any such remedies, if they are available at all, may present certain difficulties.

4.41 *Stay of proceedings.* On a number of occasions between 1990 and 1995, judges permanently stayed proceedings on the basis that the accused would be unable to have a fair trial due to the exclusion of evidence by s 409B.⁴² This meant that the prosecution of the accused for the commission of the offences in question had to be permanently discontinued. Since then, however, the Court of Criminal Appeal has held that the power to stay proceedings does not apply to cases where s 409B is considered to operate unfairly against the accused. The Court stated that judges cannot stay proceedings simply because they consider that a valid law, passed by

42. *R v McIlvanie* (NSW, District Court, No 93/11/1405, Shillington DCJ, 30 August 1994, unreported); *R v Murphy* (NSW, District Court, No 94/21/0425, Rummery DCJ, 30 May 1995, unreported); *R v PJE* (NSW, District Court, No 94/21/1248, Dent DCJ, 5 April 1995, unreported).

Parliament, is operating in a way to cause injustice.⁴³ Consequently, the power to stay proceedings is no longer available as a remedy to the accused against a perceived injustice caused by s 409B.

4.42 *Appeal against conviction.* It may be possible for the accused to appeal against a conviction where it is considered that s 409B has operated unfairly to exclude relevant evidence.⁴⁴ The accused could argue that the conviction was unsafe and unsatisfactory, because the evidence which was excluded by s 409B was of such significance to the case that a conviction without consideration of that evidence resulted in a substantial miscarriage of justice. The effect of a successful appeal on this basis would be either to order a retrial, or quash the conviction and direct that a verdict of acquittal be entered.

4.43 However, it is not completely certain whether, in law, a conviction can be found to be unsafe and unsatisfactory on the basis that evidence was excluded at the trial by the operation of valid legislation. There have been statements made by the Court of Criminal Appeal which suggest that a finding to this effect is available in these circumstances, and consequently this remedy would be available where it was considered that the operation of s 409B had denied the accused a fair trial.⁴⁵ On the other hand, there have also been remarks in the High Court which may be seen to suggest that no such avenue of appeal is available against the operation of s 409B.⁴⁶ The High Court has recently reconsidered the availability of this remedy in

43. *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported), approved by the High Court in refusing an application for special leave to appeal: *Grills v The Queen*; *PJE v The Queen* (High Court of Australia, No S8/96; S154/95, 9 September 1996, unreported).

44. See *Criminal Appeal Act 1912* (NSW) s 6.

45. See *R v Morgan* (1993) 30 NSWLR 543 per Mahoney J at 554; *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported) per Cole JA at 3, per Grove J at 2.

46. In *Berrigan v The Queen* (High Court of Australia, No S159/94, 23 November 1995, unreported), Dawson J remarked that the correct application of s 409B cannot of itself found an argument that the trial was unsafe or unsatisfactory. In this particular case, however, the Court found it unnecessary to examine the issue further, since it refused the application of the accused for special leave to appeal.

relation to s 409B in the case of *HG v The Queen*. The Court's judgment in that case is pending.⁴⁷

4.44 Even if this remedy is available, from the point of view of the accused, it is less than satisfactory. He or she will inevitably be in custody while waiting for the appeal to be heard, and will have suffered the substantial embarrassment of a conviction.⁴⁸

4.45 In a practical sense, it may be difficult to determine an appeal of this kind because it would require the Court of Criminal Appeal to consider the significance of evidence which has been untested by the prosecution at trial and to which the witnesses for the prosecution have not had the opportunity to respond. In the case of *HG v The Queen*,⁴⁹ it was argued by counsel for the appellant that the Court of Criminal Appeal could determine an appeal of this kind by receiving the evidence which was excluded by s 409B at trial, and permitting the Crown to cross-examine on that evidence in the hearing of the appeal. Evidence of sexual experience could be admitted on appeal, it was argued, because s 409B applies to trial proceedings, not to appeals. The High Court is still to rule on the correctness of this interpretation of the section.

4.46 ***Prosecution's decision not to lead evidence.*** There may be cases where the prosecution and defence counsel in a trial agree that s 409B would unfairly prohibit the accused from responding to certain evidence put forward by the prosecution. As a way of preventing injustice to the accused in these instances, the prosecution may decide not to lead its evidence. For example, in one case involving an allegation of child sexual assault, the prosecution had medical evidence that the child's hymen was not intact.⁵⁰ It was known that the child had been previously sexually assaulted by someone other than the accused. If the prosecution led the medical evidence, it was thought that counsel for the accused would be prohibited by s 409B from referring to the previous abuse as a possible explanation for the broken hymen. This was considered to be unfair to the accused. Consequently, the prosecution decided not to lead any medical evidence about the child.

47. *HG v The Queen* (High Court of Australia, No S67/98, 8 September 1998, unreported).

48. Legal Aid Commission, *Consultation*.

49. *HG v The Queen* (High Court of Australia, No S67/98, 8 September 1998, unreported).

50. *R v Morris* (NSW, Supreme Court, No 70005/89, Wood J, 18 October 1990, unreported).

4.47 In some cases, a decision by the prosecution not to lead evidence may give rise to difficulties. The jury may question why there is no evidence on a particular matter about which they would ordinarily expect to hear, and may consequently speculate about the reasons why there is no evidence on this point. For example, in the case discussed above, the jury asked the trial judge a question about whether the child had been examined by a doctor after making the complaint of assault. The trial judge formed the view that he was prohibited by s 409B from answering the jury's question but that to leave the question unanswered would cause the jury to speculate in a way as to give rise to injustice to the accused. He consequently discharged the jury and directed a new trial.⁵¹

4.48 As well as possibly confusing the jury, this remedy is unsatisfactory because it relies on the decision of the individual prosecutor not to lead evidence.⁵²

4.49 **Decision not to prosecute.** If, before a trial, the prosecution forms the view that s 409B will operate to exclude evidence in a way that may deny the accused a fair trial, the prosecution may take the decision not to proceed with the prosecution.⁵³ Under the Prosecution Policy of the Director of Public Prosecutions, a decision whether or not to prosecute must consider any factors in the case which dictate that, in the public interest, the matter should not proceed. One of the factors is whether there are special circumstances that would prevent a fair trial from being conducted. This would appear to allow consideration of whether or not s 409B may operate to prevent a fair trial.⁵⁴

4.50 This remedy is likely to be highly unsatisfactory from the complainant's point of view. It may also be unsatisfactory to the general

51. In *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported), Sperling J at 17 disagreed with the approach taken by Wood J in discharging the jury in *R v Morris*. Justice Sperling took the view that a court cannot decline to exercise its jurisdiction on the ground that a trial would be unjust because of the operation of a statutory law.

52. Some prosecutors have, unfortunately, demonstrated an inappropriate zealotry: see *R v Dimian* (1995) 83 A Crim R 358 (NSW CCA).

53. See District Court judges, *Consultation*.

54. New South Wales, Office of the Director of Public Prosecutions, *Prosecution Policy and Guidelines* (Sydney, March 1998) para 5. Of course, this factor may need to be weighed up against other factors in the decision whether to prosecute, such as the seriousness of the alleged offence, and whether the alleged offence is of considerable public concern.

public for legislation to operate in such a way that it prevents the prosecution of an alleged sex offender.

ARGUMENTS IN SUPPORT OF THE CURRENT OPERATION OF SECTION 409B

4.51 In response to criticisms of s 409B, a number of people in submissions and in consultations expressed strong support for the section and argued that it has, to a reasonable extent, successfully achieved the purposes for which it was introduced, at least in cases of adult sexual assault.⁵⁵ The section was said to have provided some protection to complainants against distressing questioning in court, and to have reduced the amount of irrelevant material regarding sexual experience which is admitted. The “success” of s 409B in achieving these aims was attributed to a large extent to the rules-based approach underlying the section. It was argued that s 409B has proven far more effective in protecting complainants than similar legislation in other jurisdictions, because, unlike that other legislation, s 409B does not contain a

55. P Wagstaff, *Submission*; M Roberts, *Submission*; M Curtis, *Submission*; T Manson, *Submission*; Westmead Sexual Assault Service, *Submission*; P Williams, *Submission*; Richmond Sexual Assault Service, *Submission*; Fems Rea, *Submission*; Dympna House, Incest Counselling, Information and Resource Centre, *Submission*; Office of the Status of Women, Department of the Prime Minister and Cabinet, *Submission*; Kingsford Legal Centre, *Submission*; Women’s Legal Resources Centre, *Submission*; Liverpool/Fairfield Sexual Assault Service, *Submission*; Macquarie and Far West Sexual Assault Services, *Submission*; Redfern Legal Centre, Aboriginal Women’s Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission*; Child Protection Unit, New Children’s Hospital, *Submission*; L Martin, *Submission*; NSW Council on Violence Against Women, *Submission*; Department for Women, *Submission*; Sex Workers Outreach Project, *Submission*; Royal North Shore Sexual Assault Service, *Consultation*; Southern Area Health Service, Sexual Assault Services, *Consultation*; Eastern and Central Sexual Assault Service, *Consultation*; Liverpool/Fairfield Sexual Assault Service, *Consultation*. A number of people commented that, while s 409B should be retained in its current form, there are issues relating to the operation of the section in child sexual assault cases which may warrant special consideration and perhaps the introduction of a separate provision for child complainants: see para 6.74-6.81.

judicial discretion to admit sexual experience evidence.⁵⁶ It was strongly argued that s 409B should be retained in its current form in order to ensure that complainants continue to be protected from distressing and irrelevant questioning. Some submissions conceded that it may be desirable to introduce an additional exception to the list of exceptions in s 409B(3) to take account of the “problem cases”, but emphasised that a rules-based model for s 409B should be retained.⁵⁷

4.52 In consultation, sexual assault counsellors unanimously agreed that s 409B provides some reassurance to their clients, who are often concerned that they will be questioned in court about their past sexual experiences. They are reassured with the knowledge that there are rules against questioning about sexual experience and reputation, although they are aware that these rules do not always provide a complete protection against such questioning. Counsellors remarked that, based on their observations of cross-examination in court, there are some defence counsel who are able to overcome the restrictions imposed by s 409B by asking questions which, on their face, are not excluded by s 409B, but which give rise to innuendos and insinuations about the complainant’s sexual experience, for example questions about whether the complainant lives in Kings Cross, or whether she frequents nightclubs.

Empirical studies of the operation of s 409B

4.53 Two empirical studies of the impact of s 409B on the conduct of sexual offence proceedings in New South Wales have been carried out. In general, both studies have found that the section has successfully reduced the amount of material relating to a complainant’s sexual experience and reputation

56. See Chapter 5.

57. See S Egger and J Gans, *Submission*; NSW Rape Crisis Centre Inc, *Submission*; NSW Health Department, *Submission*; Victims Advisory Board, *Submission*; Women Lawyers’ Association, *Submission*; N Cowdery QC, *Submission*; Crown Prosecutors, *Consultation*. See paragraph 6.21-6.31 for further discussion of the option to introduce additional exceptions into s 409B(3). One submission supported the general approach taken in s 409B, but suggested as an option for overcoming unfairness that the complainant be vested with the power to decide whether to agree to the admission of evidence of her or his sexual experience: see E Magner and M Kumar, *Submission*; see further at para 6.94-6.95.

which is raised in court, but considered that there are some areas in which s 409B could operate more restrictively to provide greater protection to complainants.

4.54 The first study compared sexual assault proceedings from before and after the introduction of the 1981 legislative reforms.⁵⁸ It examined transcripts of proceedings for the periods January 1979 to July 1980 and July 1981 to January 1983. In relation to committal proceedings in the Local Court, the study found that, since the introduction of s 409B, evidence relating to sexual experience or activity was raised half as frequently as it had been before the introduction of s 409B. In trials in the higher courts, it found that, since the introduction of s 409B, evidence relating to sexual experience or activity was raised in approximately 41% of trials, as compared with 68% of trials in which such evidence was raised before the introduction of s 409B. In addition, the study found that, since the introduction of s 409B, a greater percentage of the sexual experience evidence which was admitted in court related to sexual experience between the complainant and the accused, while a lesser percentage of such evidence related to the issue of whether the complainant was a virgin. Lastly, it was found that, despite the absolute prohibition against evidence of sexual reputation in s 409B(2), such evidence was nevertheless raised and admitted in a small percentage of cases at committal and at trial.⁵⁹ Evidence of this kind generally related to the complainant's promiscuity or prostitution. Based on these findings, the study concluded that s 409B had been successful in reducing the level of investigation into complainants' past sexual conduct. It argued that there could be greater clarification of the term "sexual reputation" in order to ensure that evidence relating to sexual reputation was consistently excluded.

4.55 The second study, entitled *Heroines of Fortitude*, examined complainants' testimony in all sound-recorded sexual assault proceedings in

58. R Bonney, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation Interim Report 3: Court Procedures* (NSW Bureau of Crime Statistics and Research, Sydney, 1987).

59. It was found that, since the introduction of s 409B, the complainant's sexual reputation was raised in 8.9% of cases at trial, and in 7.6% of cases at committal: see Bonney at para 2.2 and 3.2. "Sexual reputation evidence" was interpreted in the study to consist of references to the complainant's prostitution, assertions that the complainant was believed or known to be promiscuous, or other references to the complainant's sexual proclivities which were asserted to be commonly known: see Bonney at para 1.4.4.

the District Court from May 1994 to April 1995.⁶⁰ There was a total of 111 cases included in the study. It was found that the incidence of sexual experience evidence raised in court had remained fairly constant since the time of the earlier study. In the 111 cases, defence counsel were found to have raised such evidence 72 times and were successful 58 times (67%) in admitting it.⁶¹ Evidence of the complainant's sexual reputation was raised in 12% of cases, such evidence generally relating to the complainant's promiscuity, allegations of lesbianism, or virginity.⁶² It was also found that the procedural requirements for making an application to admit sexual experience evidence were not followed in 35% of the instances in which such evidence was admitted. The authors did not know, however, whether the issue of admissibility had been dealt with before the trial, or informally during the trial. The study concluded that the term "sexual reputation" should be defined in the legislation. It also concluded that the purpose of s 409B had not been fully achieved, and that the rules imposed by s 409B remain necessary to protect women from attacks on their claims to truth.

4.56 The studies' finding that s 409B reduced the instances in which evidence of a complainant's sexual experience was admitted in court is perhaps not surprising. It could be expected that the restrictions imposed by s 409B would cause a reduction of this kind. It would require a detailed analysis of the types of situations in which sexual experience evidence was either admitted or excluded to evaluate whether s 409B was successfully achieving its purposes.

60. New South Wales, Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (Gender Bias and the Law Project, Sydney, 1996) ("*Heroines of Fortitude*") at 223-253. It appears that the study of s 409B was confined to examination of the complainant's testimony, and did not look at testimony of the accused or the issues at trial: see *Heroines of Fortitude* at 229.

61. The prosecution raised sexual experience material 23 times in the 111 cases, and were successful 21 times in admitting such evidence (91%).

62. The term "sexual reputation" was given the same meaning in this study as in the previous study.

PROPOSALS FOR GREATER RESTRICTIONS IN SECTION 409B

4.57 Although generally supporting the current operation of s 409B, it was considered in some submissions that the section could be made more restrictive in order to provide a stronger protection to complainants against the admissibility of evidence concerning their sexual experience.⁶³ This view reflects the general conclusions of the studies discussed above, in particular the *Heroines of Fortitude* report. Proposals for greater restrictions were made in respect of the following aspects of s 409B:

- the exceptions to the prohibition against sexual experience evidence in s 409B(3);
- a legislative definition of the term “sexual reputation”; and
- the procedures for making an application to admit evidence under s 409B.

The exceptions to the prohibition in section 409B(3)

4.58 It was submitted that several of the exceptions to the prohibition against sexual experience evidence in s 409B(3) have been interpreted too broadly by the courts.⁶⁴ The result of this, it was argued, is that the protection

63. One submission proposed that all evidence of the complainant’s sexual experience should be excluded altogether in sexual offence proceedings, on the basis that it will never be relevant to the question of whether the accused committed the alleged offence: see D Turney, *Submission*.

64. NSW Rape Crisis Centre Inc, *Submission* at 11; Fems Rea, *Submission* at 7 and para 5.3-6.4; Office of the Status of Women, Department of Prime Minister and Cabinet, *Submission* at 6-7; Kingsford Legal Centre, *Submission* at 8; Women’s Legal Resources Centre, *Submission* at 8-9; NSW Health Department, *Submission* at 5-6; Redfern Legal Centre, Aboriginal Women’s Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission* at 2-3; E Magner and M Kumar, *Submission* at 24-30; NSW Council on Violence Against Women, *Submission* at 3-6, 10; Department for Women, *Submission* at 8-11, 21; Sex Workers Outreach Project, *Submission* at 3. See also *Heroines of Fortitude* at 228. On the other hand, the Women Lawyers’ Association expressed the view that it is not necessary to reformulate the exceptions in s 409B(3): see Women Lawyers’ Association, *Submission* at 5.

provided to complainants by s 409B has been gradually eroded, as there is greater opportunity for evidence of a complainant's previous sexual experience to be admitted through the exceptions than was originally intended by Parliament. It was proposed that the legislation should be amended to make these exceptions more restrictive in admitting sexual experience evidence. In addition, it was considered that some of the exceptions to the prohibition are based on offensive and outmoded notions of women. It was proposed that these exceptions should be abolished.

4.59 In Chapter 6, we recommend that s 409B be redrafted in a way which abolishes the existing exceptions set out in s 409B(3). Strictly speaking, therefore, it is unnecessary to address these proposals. However, it is useful to address the criticisms in these submissions for two reasons. First, if our recommendation for reformulating s 409B is not adopted into legislation, it may assist Parliament to know our conclusions on proposals to make the exceptions in s 409B(3) more restrictive. Secondly, whatever formulation is adopted for s 409B, it is worthwhile to provide some discussion of the general probative value of sexual experience evidence which, according to some submissions, should not be admissible.

“Existing or recent relationship” exception

4.60 The first area where, it was submitted, the courts have applied too broad an interpretation relates to the exception for evidence concerning an existing or recent relationship. This exception allows evidence of sexual experience or activity to be admissible where it relates to an existing or recent relationship between the accused and the complainant. It was submitted that the words “existing or recent relationship” have been interpreted too broadly and should be defined in legislation.

4.61 As an indication that this exception is applied too widely, submissions relied on a finding in the *Heroines of Fortitude* report that the “recent or existing relationship” exception was the most commonly used exception for admitting evidence of a complainant's sexual experience.⁶⁵ It was concluded from this that the courts apply the broadest possible interpretation to the term “recent relationship” to admit evidence in an inappropriately wide range of

65. As a percentage of instances in which sexual experience evidence was admitted in the cases studied, the “recent or existing relationship” exception was used in 27% of instances to admit such evidence: see *Heroines of Fortitude* at 232-233.

cases. Without any clear time limits to define the word “recent”,⁶⁶ it was submitted that judges may use the exception to admit evidence of a relationship which has occurred years before the alleged assault.

4.62 Submissions also focused on the way courts have interpreted the word “relationship”. It was submitted that judges have interpreted “relationship” inconsistently⁶⁷ and, in some instances, inappropriately, in order to allow the accused to raise evidence of the complainant’s sexual experience. In particular, submissions objected to the interpretation of “relationship” adopted by the Court of Criminal Appeal in the case of *R v Henning*.⁶⁸ In that case, the Court held that a relationship, for the purposes of the exception in s 409B(3)(b), could consist of a regular sexual liaison between the accused and the complainant, even if there were no emotional involvement between the two parties. It was submitted that this interpretation of the word “relationship” is based on an assumption that it is more likely that a complainant consented to intercourse on the occasion in question, because she consented to intercourse with the accused in the past. Submissions also expressed concern that an accused could fabricate evidence of a previous sexual relationship with the complainant in order to introduce evidence of the complainant’s sexual experience. It was submitted that it would be preferable if “relationship” were defined to require an emotional element rather than simply a sexual connection. It was thought that it would be more difficult for an accused to fabricate evidence of an emotional connection with the complainant than it would be to assert that he had been in a purely sexual

66. The legislation does not impose any precise time limits on the word “recent”, and the courts have chosen not to define the word in the context of s 409B(3). In one case, it was noted that what constitutes a recent relationship will be a matter of degree, and will depend on the facts of the particular case: see *R v Henning and others* (NSW, Court of Criminal Appeal, No 406/88; 426/88; 436/88; 425/88; 437/88, 11 May 1990, unreported) at 76-78.

67. It was submitted that, in the case of *R v White* (1989) 18 NSWLR 332, the court interpreted the word “relationship” narrowly to require an emotional connection of some kind, whereas in the case of *R v Henning*, the court interpreted “relationship” broadly to require simply a sexual connection: see Fems Rea, *Submission* at para 6.3.2.

68. In its inquiry into sexual offences in New South Wales in 1996, the Standing Committee on Social Issues expressed the view that the effect of the decision in *R v Henning* on the operation of s 409B was in need of urgent review: see New South Wales, Standing Committee on Social Issues, Legislative Council, *Sexual Violence: Addressing the Crime: Inquiry into the Incidence of Sexual Offences in New South Wales: Part II* (Report 9, 1996) at 26-28.

relationship with the complainant. At the least, it was submitted that the word “relationship” should be defined in legislation to exclude evidence of mere acquaintance.

4.63 The Commission is not convinced that there is a need for further legislative clarification of the exception relating to a recent or existing relationship. A finding that this exception is commonly used as a means of admitting evidence of the complainant’s sexual experience is not in itself an indication that the exception is being interpreted too broadly. It may simply reflect a high incidence of sexual offence cases involving partners or former partners coming before the courts.⁶⁹

4.64 Parliament originally included this exception in s 409B(3) because it considered that, in some circumstances, evidence of sexual experience or activity between the accused and the complainant would be relevant to an issue in the case, in particular to the issues of consent or belief by the accused in the complainant’s consent. The fact that the complainant engaged in consensual sexual activity in the past may be relevant to the question of whether she consented to sexual activity on this occasion, or whether the accused believed she was consenting. Of course, consent on this occasion cannot be assumed or proven from the fact that the complainant consented previously. There may be a variety of reasons why the complainant did not consent on this occasion. Evidence that the accused and the complainant were in a previous relationship is not in itself conclusive proof of any fact in issue, such as consent. It is simply a factor which may be relevant for the jury to consider in weighing up the evidence, particularly on the issue as to whether the accused knew that the complainant was not consenting (often described as the “honest belief” issue).⁷⁰

4.65 The Commission questions the view that the case law is inconsistent on the meaning of the word “relationship”. The term appears to have been

69. Indeed, the *Heroines of Fortitude* report found that in 27% of the cases studied, there was some evidence of prior consenting sexual intercourse between the accused and the complainant: see *Heroines of Fortitude* at 248.

70. In New South Wales, as a defence to a charge of sexual assault, the accused may claim that he or she had an honest but mistaken belief that the complainant was consenting to sexual intercourse. This follows the English approach set down in *DPP v Morgan* [1976] AC 182. There is no requirement that the mistaken belief be reasonable although, of course, as a matter of evidence, the fact that the belief was unreasonable may be relevant to the determination of whether the accused did indeed honestly hold that belief.

interpreted in each reported case in the context of the surrounding facts. In the Commission's view, it is preferable to have flexibility to interpret the term in the context of each case rather than attempt to define it by legislation. The Commission does not consider it to be inappropriate if, in a particular case, "relationship" is interpreted to include a purely sexual relationship. Given that s 409B applies to offences of a sexual nature, it may be relevant to consider previous sexual encounters between the accused and the complainant. It would also be difficult to define "emotional connection" in legislation as a requirement for a relationship within the meaning of this exception. The Commission does not consider that it would be any more or less difficult for an accused to fabricate evidence of a purely sexual relationship as opposed to a relationship which includes an emotional connection of some kind. Any assertion by the accused of a recent or existing relationship is subject to cross-examination by the prosecution. Lastly, the Commission is satisfied that the case law has established that a relationship must be more than a mere acquaintance to allow evidence of sexual experience.⁷¹

"Connected set of circumstances" exception

4.66 The second exception which, it was submitted, has been interpreted too broadly is the exception to admit evidence of sexual experience where it forms part of a connected set of circumstances with the alleged assault.

4.67 This exception permits the admission of evidence of a complainant's sexual experience or activity at or about the time of the alleged assault. The exception appears to have been directed mainly to admitting evidence which is relevant to the question of consent or belief by the accused in the complainant's consent.⁷² However, in one case, *Morgan's* case, the exception was relied on to admit evidence relevant to the question of whether the alleged intercourse had occurred at all. In this case, it was held that the exception could be used to admit evidence that the complainant had sexual intercourse with her boyfriend a couple of hours after the alleged assault by another man.⁷³ The evidence was considered to form part of the "connected circumstances" of the alleged assault on the basis that it was relevant to determining the likelihood that the assault occurred, it being open to the jury

71. See *R v White* (1989) 18 NSWLR 332. In *R v Henning*, contrary to the assertions in some submissions, evidence of sexual activity was admitted on the basis that the complainant and the accused had been engaging in regular sexual relations for at least several months before the alleged assault.

72. See *R v Dimian* (1995) 83 A Crim R 358 (NSW CCA).

73. *R v Morgan* (1993) 30 NSWLR 543.

to consider that the subsequent consensual sexual act was an unlikely reaction to a sexual assault.

4.68 Submissions objected to the application of this exception in *Morgan's* case. It was submitted that the exception was never intended to allow evidence of subsequent sexual activity as a basis for assessing whether an assault has occurred. It was further submitted that such evidence should not be admissible because it permits juries to speculate about whether an assault has occurred based on the complainant's subsequent reaction, when in fact it is not possible to make any accurate generalisations about the way victims will react to a sexual assault.

4.69 The introduction of s 409B was essentially aimed at precluding moral judgments about women's sexual behaviour from providing a basis for admitting evidence. This was a response to the common law's view about women who were sexually active outside of marriage.

4.70 In *Morgan's* case, evidence of subsequent sexual activity was admitted on the basis that it was relevant to whether a sexual assault had occurred. Its relevance did not involve a moral judgment about how women, or victims of sexual assault generally, *should* behave. Rather, it was based on a generalisation about how victims of sexual assault *do* behave, namely that victims in general may be considered unlikely to engage in consensual sexual activity shortly after being sexually assaulted. To this extent, the admission of such evidence does not offend the underlying principle of s 409B, that is, to ensure that relevance is not based on outmoded views of morality.

4.71 It is a different issue to consider whether the generalisation made by the court in *Morgan's* case is a valid one to make about human behaviour, in order to assess the probative value or relevance of evidence of subsequent sexual activity. That is, the relevance of such evidence, and consequently its admissibility, depends on whether it is a valid generalisation about human behaviour to say that people who have been sexually assaulted do not usually engage in consensual sexual intercourse shortly after the alleged assault.

4.72 Most jury questions are determined on the basis of ordinary human experience. Similarly, in the Commission's view, it should be a matter for the jury to decide whether it is ordinary human experience to engage in consensual sexual activity shortly after being sexually assaulted. Of course, there may be a variety of reasons to explain why, in a particular case, a victim of sexual assault consented to sexual intercourse after being assaulted, such as shock, or fear of reprisals in domestic violence settings. It is for the

prosecution to bring such explanations to the jury's attention and it is for the jury to make an assessment of the facts based on their collective judgment of human experience, provided they are warned against making assumptions about the complainant's moral character by reason of the evidence of his or her subsequent sexual activity.⁷⁴

Exception to explain physical evidence

4.73 The third exception which was considered in some submissions to require greater legislative restriction is the exception relating to physical evidence. This exception allows evidence of a complainant's sexual experience or activity to be admitted where the accused denies that intercourse occurred, and the evidence is relevant to explain signs of intercourse, that is, semen, pregnancy, disease, or injury.

4.74 This exception was criticised for the way in which the word "injury" has been interpreted. In one case, "injury" was held to include a complainant's general state of dishevelment and emotional distress. Evidence that the complainant had had sexual intercourse with her boyfriend earlier in the evening of the alleged assault was considered admissible to explain why the complainant appeared dishevelled and distressed after the alleged assault. It was submitted that the extension of "injury" to include general dishevelment and distress goes beyond the logical meaning of the word and is contrary to the original intention of the exception to allow the accused to respond to physical evidence of intercourse. It was thought effectively to allow evidence of sexual experience to be admitted in a wide range of circumstances. It was submitted that the term "injury" should be clarified in legislation.

4.75 The Commission does not agree that the word "injury" has been interpreted in a way which is inconsistent with the original intention of Parliament, nor that it needs to be defined in legislation in order to restrict its meaning. This exception was intended to allow evidence that the complainant had had sexual intercourse with someone at around the time of the alleged assault, where such evidence was relevant to explain why the complainant showed signs of having had sexual intercourse. Parliament considered it necessary to include this exception in fairness to the accused, to allow him or her to provide an alternative explanation for these signs of intercourse which

74. See subsection 11 of the Commission's recommended reformulation: recommendation 2 and para 6.127-6.128.

might otherwise tend to incriminate him or her.⁷⁵ It accords with the underlying purpose of the exception to interpret the word “injury” in a way which applies to any evidence which tends to indicate that sexual intercourse with someone has occurred, including signs of dishevelment and distress.

Exception for evidence of disease in the complainant or in the accused

4.76 A number of submissions objected to retaining an exception to admit evidence of a complainant’s sexual experience or activity where it relates to the presence of a disease, either in the accused or in the complainant. This exception was originally intended to cover cases where the complainant has a sexually transmitted disease from a previous sexual encounter which is absent in the accused, or where the accused has a sexually transmitted disease which is absent in the complainant. Evidence of a sexually transmitted disease in these circumstances was regarded as relevant to the issue of whether intercourse with the accused occurred.

4.77 It was submitted that this exception should be abolished. It was asserted that evidence of a disease in one but not both parties can neither prove nor disprove contact, and therefore such evidence has a low probative value. In contrast, there is a high risk that this sort of evidence will humiliate the complainant and prejudice him or her in the eyes of some jurors.

4.78 Obviously, evidence of a disease in either the complainant or the accused is not conclusive proof that intercourse did or did not occur. This does not mean, however, that evidence of this kind may not have a significant probative value in a particular case. Although, on its own, it does not prove that intercourse occurred or did not occur, in some instances, it may be directly relevant to that question. The Commission therefore considers that such evidence should be admissible on the basis that in some cases it will have a high probative value. Any risk of prejudice or humiliation for the complainant which arises from this evidence is a factor to be weighed up by the judge in deciding whether to admit it. Even if it is admitted, the judge should warn the jury about the use they may make of the evidence, and that

75. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 18 March 1981 at 4765; G D 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, Department of the Attorney General and of Justice, 1981) at 37.

they should not use it to draw the conclusion that the complainant is unreliable or more likely to consent to sexual intercourse.⁷⁶

Exception for evidence of discovery of pregnancy or disease

4.79 Some submissions also objected to including an exception to admit evidence of a complainant's sexual experience or activity where it relates to discovery that the complainant is pregnant or has a disease. This exception was intended to allow evidence that a complainant made an allegation against the accused only after discovering that she was pregnant or had a disease. It was submitted that this exception is based on the notion that women are prone to lie about sexual assault to avoid criticism for their sexual activities. It was proposed that this exception be abolished.

4.80 The Commission does not agree that this exception reflects any sexist assumptions about women. Where a person is accused of a sexual offence and pleads not guilty, it is usually⁷⁷ central to his or her defence to argue that the complainant's version of events is not true, that the complainant is either mistaken or is lying. Although it may be extremely distressing to a complainant to have his or her word publicly doubted, it is fundamental to our system of law that an accused have the right to plead not guilty and to introduce evidence which may raise a reasonable doubt in the jury's minds about the prosecution's case. Consistent with that principle, the exception for pregnancy or disease allows the accused to admit evidence which may be relevant to raising a reasonable doubt. It does not rely on sexist assumptions about women generally. Rather, it reflects the possibility that, in some cases, a complainant of a sexual offence, just like a complainant of any other type of offence, may have a motive to lie, and it permits the accused to bring evidence of this motive to the jury's attention.

76. See *R v Dimian* (1995) 83 A Crim R 358 per Hunt CJ at CL at 367.

77. This may not always be the case. For example, an accused person who claims to have honestly though mistakenly believed that the complainant was consenting to intercourse is not necessarily asserting a version of events which is inconsistent with the complainant's testimony.

Definition of “sexual reputation”

4.81 It was submitted that the term “sexual reputation” in s 409B(2) should be legislatively defined.⁷⁸ Submissions referred to the empirical studies of s 409B,⁷⁹ both of which made proposals to the same effect. The studies found that, despite the prohibition against sexual reputation evidence in s 409B(2), material which should properly be classified as sexual reputation evidence had been admitted in a small proportion of the cases studied. The material was admitted either on the basis that it came within one of the exceptions to the prohibition on evidence of sexual experience, or on the basis that it was not caught at all by s 409B. The studies concluded that judges and lawyers would benefit from a clear legislative definition of “sexual reputation” to ensure that the prohibition was consistently applied and that evidence relating to “sexual reputation” was more easily distinguished from evidence of “sexual experience”. The same conclusion was reached in a study of the Tasmanian legislative provision prohibiting evidence of sexual reputation.⁸⁰

4.82 As noted in Chapter 2, no guidance is given in the legislation as to the meaning of the terms “sexual reputation” and “sexual experience” nor has there been any detailed consideration of the meaning of the term “sexual reputation” in cases.

4.83 In consultation, a number of defence lawyers opposed any attempt to define the term “sexual reputation” in legislation.⁸¹ They conceded that the term is unclear and that it sometimes overlaps with the term “sexual experience”, but they did not consider that this ambiguity gave rise to any problems in practice. In their view, it was preferable for the interpretation of

78. Kingsford Legal Centre, *Submission* at 22; Office of the Status of Women, Department of the Prime Minister and Cabinet, *Submission* at 4-5; E Magner and M Kumar, *Submission* at 9-10; NSW Council on Violence Against Women, *Submission* at 13; Department for Women, *Submission* at 29; L Byrnes, *Submission* at 1-2.

79. See para 4.53-4.56.

80. T Henning, *Sexual Reputation and Sexual Experience Evidence in Tasmanian Proceedings Relating to Sexual Offences* (Occasional Paper 4, University of Tasmania Law School, University of Tasmania Law Press, 1996) at para 6.1. See also T Henning and S Bronitt, “Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence” in P Eastaer (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, Sydney, 1998) at 84-85.

81. Legal Aid Commission, *Consultation*; Public Defenders, *Consultation*.

the term to remain flexible, rather than to be tied to a specific legislative meaning. Members of the Witness Assistance Service of the Office of the DPP also opposed the suggestion to define “sexual reputation” in legislation.⁸² They were concerned that, if the term were defined, there would be a greater risk of evidence of a complainant’s sexual conduct being admitted on the basis that it did not technically come within the legislative definition of “sexual reputation”.

4.84 The Commission agrees that it is undesirable to tie the term “sexual reputation” to a specific legislative definition. The prohibition in s 409B(2) on sexual reputation evidence was principally intended to exclude evidence that a woman was known to be promiscuous as evidence relevant to credibility and the issue of consent. The Commission is satisfied that this legislative intention is sufficiently clear by reference to the Parliamentary debates leading to the introduction of s 409B. It is preferable to leave a degree of flexibility with the interpretation of “sexual reputation” to ensure it does not inadvertently exclude evidence which should be admissible.

4.85 In particular, the Commission is concerned to ensure that the prohibition against evidence relating to sexual reputation does not wrongly exclude relevant evidence which may also be characterised as evidence of sexual experience. As we discussed in paragraph 4.29, the wording of the current s 409B(2) may be interpreted as excluding evidence of sexual experience if it also relates to sexual reputation, such as evidence of acts of prostitution. This may disadvantage not only the case for the accused, but also, in some situations, the case for the prosecution. The Commission addresses this issue in its recommended reformulation.⁸³

Procedure for admitting evidence of sexual experience or activity

4.86 A number of submissions expressed concern that lawyers and judges do not always follow the correct procedure in admitting evidence of sexual

82. DPP Witness Assistance Service, *Consultation*. One submission also opposed the suggestion to define “sexual reputation” in legislation, unless guidance was given to practitioners: see M Roberts, *Submission* at 3.

83. See recommendation 2 and para 6.143-6.148.

experience or activity.⁸⁴ As noted in Chapter 2, if counsel wish to raise such evidence, then s 409B(4) and (6) requires that an application first be made to the trial judge, in the absence of the jury, who must decide whether the evidence is admissible under one of the exceptions in s 409B(3).

4.87 The *Heroines of Fortitude* report found that in 35% of the cases in which evidence of the complainant's sexual experience was admitted, an application to the judge was not made beforehand. The report concluded that judges and lawyers either fail to recognise that evidence comes within the restrictions imposed by s 409B, or ignore the proper procedures for admitting such evidence.⁸⁵

4.88 On the other hand, defence lawyers and District Court judges, in consultation, insisted that they routinely follow the correct procedures for admitting evidence under s 409B.⁸⁶ Defence lawyers asserted that the only cases where they may not seek leave before leading sexual experience evidence is where there is prior agreement between the defence and the prosecution that such evidence is obviously admissible and no objection to its admission is made by the prosecution. Where both prosecution and defence agree to the admission of a piece of evidence, whether it be evidence of sexual experience or any other type of evidence, it is normal practice for the evidence to be admitted without intervention by the trial judge. The methodology adopted in the research for the *Heroines of Fortitude* report could not take into account applications made before trial or agreements reached informally between the Crown and the defence during trial. Arguably, this suggests that no particular reliance should be placed on the conclusion which the report reaches regarding procedure.

4.89 Whatever view is taken of the current procedural requirements, the Commission considers that there are advantages in setting out with greater precision in the legislation the procedures which must be followed under the

84. Redfern Legal Centre, Aboriginal Women's Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission* at 8; NSW Health Department, *Submission* at 2-3; Fems Rea, *Submission* at 4; Office of the Status of Women, Department of the Prime Minister and Cabinet, *Submission* at 8; Kingsford Legal Centre, *Submission* at 12-13; NSW Council on Violence Against Women, *Submission* at 4; Department for Women, *Submission* at 14.

85. *Heroines of Fortitude* at 240-252.

86. District Court judges, *Consultation*; Forbes Chambers, *Consultation*; Public Defenders, *Consultation*.

Commission's recommended reformulation of s 409B. With the introduction of a restricted discretion in the recommended reformulation, the imposition of strong procedural requirements will act as an important means of ensuring that the discretion is properly exercised. The ways in which the recommended procedures will achieve this are discussed in Chapter 6.

5. Legislation in other jurisdictions

- Australian jurisdictions
- United States of America
- Canada
- New Zealand
- England and Wales
- Ireland
- Scotland

5.1 This Chapter examines the legislation in other common law jurisdictions which restricts evidence of a complainant's sexual experience and reputation. In Chapter 3, it was noted that the introduction of this kind of legislation occurred almost simultaneously throughout the common law world, largely due to the efforts of the women's movement to overcome sexist practices in the law's treatment of rape. Jurisdictions adopted various formulations in their legislation and most of these have been controversial at some time. It is useful to compare the experiences in the operation of legislation in these other jurisdictions with the experiences in New South Wales. In particular, it is worth noting how legislation in those jurisdictions has balanced the interests of the accused in a fair trial with the interests of the complainant to be protected from distressing cross-examination. This comparison reveals that New South Wales is now the only jurisdiction which continues to restrict sexual experience evidence by the imposition of inflexible rules.

AUSTRALIAN JURISDICTIONS

5.2 Every Australian jurisdiction has legislation which limits the admissibility of evidence of sexual experience and reputation in some way.¹ Except for New South Wales, all jurisdictions adopt, in various forms, a discretionary approach to determining the admissibility of sexual experience evidence. That is, the trial judge has a discretion to admit material relating to the complainant's sexual experience if it is considered sufficiently relevant to the individual case.

5.3 In all Australian jurisdictions except the Northern Territory, legislation absolutely prohibits the admission of evidence of a complainant's sexual reputation (or, as it is termed in some provisions, evidence of general

1. See *Evidence Act 1958* (Vic) s 37A; *Evidence Act 1910* (Tas) s 102A; *Evidence Act 1929* (SA) s 34i; *Evidence Act 1906* (WA) s 36A, 36B, 36BA, 36BC; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1971* (ACT) s 76G; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4-5. The Queensland legislation was to have been repealed by the *Criminal Code Act 1995* (Qld) s 460(1), but the 1995 *Criminal Code* was never proclaimed and was eventually repealed in 1997.

reputation with respect to chastity).² In the Northern Territory, legislation provides that such evidence may not be elicited or led except with the leave of the court.³ The terms “sexual reputation” and “general reputation with respect to chastity” are not legislatively defined in any jurisdiction.

5.4 In all jurisdictions except New South Wales, legislation provides that evidence of the complainant’s sexual experience, or “sexual activities”,⁴ is not admissible except with leave of the court. In most jurisdictions, this limitation is drafted to apply only to evidence of sexual experience or activity, not to a lack of experience or activity. In Tasmania⁵ (and in New South Wales), the legislative restriction expressly extends to evidence revealing a lack of sexual experience.

5.5 In Tasmania, Western Australia, and Victoria, the legislative restriction on the admissibility of sexual experience evidence applies both to the complainant’s sexual experience with the accused and with other people. In contrast, the legislative restrictions in Queensland, the Australian Capital Territory and the Northern Territory are stated to apply only to evidence of the complainant’s sexual experience with people other than the accused and consequently do not restrict the admissibility of evidence of the complainant’s sexual experience with the accused. The South Australian legislation restricts the admissibility of evidence of the complainant’s sexual activities “other than recent sexual activities with the accused”.

5.6 In Western Australia, legislative restrictions on the admissibility of evidence of sexual experience and sexual reputation apply only to the accused, not to the prosecution.⁶

5.7 The legislation in every jurisdiction (other than New South Wales) sets down certain conditions which must be met before the trial judge may grant leave to admit evidence of a complainant’s sexual experience. For example,

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2. *Evidence Act 1958* (Vic) s 37A(1); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(a).
 3. *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(a).
 4. *Evidence Act 1958* (Vic) s 37A(2); *Evidence Act 1929* (SA) s 34i(1)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b).
 5. In the Tasmanian legislation, the term “sexual experience” is defined to include a lack of experience: *Evidence Act 1910* (Tas) s 102A(3).
 6. *Evidence Act 1906* (WA) s 36B, 36BA, 36BC.

the South Australian legislation stipulates that the judge must not grant leave to admit such evidence unless satisfied that it:

- (a) is of substantial probative value; or
- (b) would, in the circumstances, be likely materially to impair confidence in the reliability of the evidence of the alleged victim, and its admission is required in the interests of justice.⁷

5.8 Similarly, the Victorian legislation requires that the court shall not grant leave to admit sexual experience evidence unless:

it is satisfied that the evidence has substantial relevance to facts in issue or is proper matter for cross-examination as to credit.⁸

5.9 In other jurisdictions, the legislation requires that the judge shall not grant leave unless satisfied that the evidence in question:

has substantial relevance to the facts in issue, and the probative value of the evidence outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.⁹

5.10 In the Australian Capital Territory, the legislation states that a judge must not grant leave unless satisfied that a refusal to admit the evidence would prejudice the fair trial of the accused.¹⁰

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- 7. *Evidence Act 1929* (SA) s 34i(2). The provisions in Queensland and the Northern Territory are drafted in similar terms but require only that the evidence has “substantial relevance” to the facts in issue or is proper matter for cross-examination as to credit, without reference in the legislation to consideration of the interests of justice: see *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(3); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2). Terms such as “substantial probative value” and “likely materially to impair” are used in a number of provision under the *Evidence Act 1995* (NSW) in relation to the admissibility of evidence: see, for example, s 103.
 - 8. *Evidence Act 1958* (Vic) s 37A(3)(a). If the evidence is sought to be admitted as relevant to the sentencing of the accused rather than to the determination of the guilt or innocence of the accused, then it is sufficient to admit such evidence if it has “substantial relevance” to the issue of the appropriate sentence to be imposed: s 37A(3)(b).
 - 9. *Evidence Act 1906* (WA) s 36BC(2). See also *Evidence Act 1910* (Tas) s 102(2).
 - 10. *Evidence Act 1971* (ACT) s 76G(3)(b).

5.11 In Victoria, Queensland and the Northern Territory, the legislation contains an additional express limitation on the exercise of the judge's discretion to admit sexual experience evidence. In these jurisdictions, the legislation provides that sexual experience evidence shall not be regarded:

- (a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or
- (b) as being proper matter for cross-examination as to credit in the absence of special circumstances by reason of which it would be likely materially to impair confidence in the reliability of the evidence of the complainant.¹¹

5.12 This provision is a direct response to the old common law practices of admitting sexual experience evidence. At common law, as we noted in Chapter 3, evidence that a complainant had had previous sexual experience was admissible for the purposes of inferring that, simply because she was sexually active, she was less worthy of belief or was more likely to consent to sexual intercourse. The legislation in these three jurisdictions attempts to put an end to the common law practices by prohibiting the admission of sexual experience evidence for the purpose of making a general inference about the complainant's character based solely on the fact that she has had previous sexual experience.

5.13 In addition, the Victorian legislation contains particularly detailed procedural requirements which must be followed in order to apply for the court's leave to admit sexual experience evidence. Where counsel seeks to introduce such evidence through cross-examination of the complainant, counsel must make an application in writing. The written application must be given to the Director of Public Prosecutions at least 14 days before the date fixed for the commencement of the trial, or, in the case of a committal proceeding, on or before the committal mention date. The application must set out the initial questions sought to be asked of the complainant, the scope of the questioning, and how the evidence has substantial relevance to facts in issue or is a proper matter for cross-examination as to credit.¹² The court may hear an application to cross-examine even if it is made less than 14 days before the commencement of the trial, provided there are exceptional circumstances for doing so. The court may also waive the requirement that an application be made in writing, provided again that there are exceptional

11. *Evidence Act 1958* (Vic) s 37A(4); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2).

12. *Evidence Act 1958* (Vic) s 37A(5)(aa).

circumstances. The legislation does not otherwise specify what sanctions, if any, may be imposed for a failure to follow these procedural requirements.

5.14 At the Federal level, it has been recommended that the national model criminal code include a provision regulating the admissibility of evidence of a complainant's sexual experience. It was proposed that a provision to this effect should allow a general judicial discretion to admit evidence of sexual experience and should be drafted in terms similar to the Victorian model.¹³

Empirical studies

5.15 A number of empirical studies have been conducted of the legislation restricting evidence of sexual experience and reputation in Victoria and Tasmania.

Victoria

5.16 The Law Reform Commission of Victoria carried out an empirical study of all rape prosecutions initiated in Victoria from 1988 to 1989.¹⁴ As part of this study, the Commission examined transcripts for 40 trials¹⁵ and 62 committals in order to evaluate the operation of s 37A of the *Evidence Act 1958* (Vic).¹⁶ At the time in which the study was conducted, s 37A operated to restrict the admissibility of evidence of a complainant's sexual experience with other people, but did not restrict the admissibility of evidence of a complainant's sexual experience with the accused.

5.17 It was found that applications to admit evidence under s 37A were made in relation to 31% of the complainants who gave evidence. Leave to admit evidence was granted in 75% of those applications. The most common circumstance in which sexual experience evidence was admitted under s 37A was where the complainant was, or was alleged to be, a sex worker. Following these findings, the Commission made recommendations for judicial and advocate education about issues relating to the conduct and

13. Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, *Model Criminal Code, Chapter 5: Sexual Offences Against the Person* (Discussion Paper, 1996) at 175.

14. Victoria, Law Reform Commission, *Rape: Reform of Law and Procedure* (Appendices to Interim Report 42, 1991) ("VLRC Report 42").

15. These cases represented 80% of all the trials in the study.

16. See VLRC Report 42 at 101-110.

control of cross-examination, and the formulation of a written set of ethical rules for courtroom behaviour.¹⁷ The Commission did not consider that it was appropriate to attempt further legislative regulation of the cross-examination of complainants, on the basis that matters which are appropriate for cross-examination will vary from case to case and it would therefore be impossible to formulate in legislation all the circumstances in which sexual experience evidence should be admissible.

5.18 A subsequent study was carried out in Victoria which included a review of prosecution case files for rape cases in 1992 and 1993.¹⁸ Transcripts contained in those files were examined for the purpose of assessing the operation of s 37A. It was found that sexual experience evidence was admitted in a significant number of committal and trial proceedings: at committal, approximately 65% of all complainants were questioned about their sexual experience; and at trial, approximately 70% of complainants were questioned about their sexual experience. It was concluded that the courts routinely granted leave to raise evidence of the complainant's sexual experience with the accused, and were generally reluctant to refuse an application to admit sexual experience evidence in other situations if it was described as being critical to the defence case. Consequently, it was recommended that the procedures for making an application for leave under s 37A be tightened by requiring counsel to make an application in writing, setting out the ways in which the material sought to be introduced is substantially relevant. This recommendation was subsequently adopted into the Victorian legislation. It was also recommended that there be greater judicial and advocate education.

5.19 This study does not provide a detailed qualitative evaluation of the situations in which sexual experience evidence was considered sufficiently relevant to be admitted. Its conclusions were essentially based on what was regarded as the high percentage of complainants being questioned on sexual experience. In the absence of an analysis of the situations in which sexual experience evidence was admitted, it is difficult to assess whether the judicial discretion was generally exercised appropriately or inappropriately.

17. Victoria, Law Reform Commission, *Rape: Reform of Law and Procedure, Supplementary Issues* (Report 46, 1992) at 31-32.

18. Victoria, Department of Justice, Attorney General's Legislation and Policy Branch, *The Crimes (Rape) Act 1991: An Evaluation Report* (Rape Law Reform Evaluation Project, Report No 2, January 1997) chap 5.

Tasmania

5.20 In Tasmania, a study was conducted of transcripts of proceedings for major sexual offences in the period from 1987 to 1994.¹⁹ This study followed significant amendments to the Tasmanian legislation in 1987, which aimed (amongst other things) to place tighter controls on the exercise of the judicial discretion to admit sexual experience evidence.²⁰

5.21 The study attempted a detailed qualitative analysis of the types of situations in which evidence of sexual experience and reputation was admitted in sexual offence proceedings in Tasmania. The study found that the overall rate at which sexual conduct evidence was raised had not appeared to have altered substantially since the enactment of the 1987 reforms. Applications to admit evidence of the complainant's sexual conduct with the accused were invariably successful. In 45 of the 72 cases in which sexual experience evidence was introduced, no application for leave to introduce it was made. The principal grounds of relevance for evidence raised on application were evidence explaining physical injury or the presence of semen, evidence supporting an allegation of fabrication, such as evidence of a prior allegation of abuse, evidence relating to the issue of consent or belief in consent, and evidence raised to dispel the court's possible expectations about the complainant, such as her sexual naivety or preferences. It was also found that evidence of sexual reputation was raised in a small number of cases.

5.22 The study concluded that the legislation had been largely successful in eliminating evidence of sexual reputation, although courts sometimes had difficulty in distinguishing accurately between evidence of sexual reputation and sexual experience. Consequently, it was recommended that "sexual reputation" be defined in the legislation. It was further concluded that the legislation was strong and capable of producing the results sought by its enactment, although it could be made more effective by greater clarification of some of its terms, such as the term "substantial relevance". The recommendations which were made in the study maintained the basic structure and approach of the provision, but made suggestions to clarify some

19. T Henning, *Sexual Reputation and Sexual Experience Evidence in Tasmanian Proceedings Relating to Sexual Offences* (Occasional Paper No 4, University of Tasmania Law School, University of Tasmania Law Press, 1996).

20. See the *Evidence Amendment Act 1987* (Tas). The amendments followed a report by the Law Reform Commission of Tasmania, *Report and Recommendations on Rape and Sexual Offences* (Report 31, Tasmanian Government Printer, 1982).

aspects, strengthen others, and promote increased vigilance with respect to its application.

UNITED STATES OF AMERICA

5.23 Legislative provisions restricting evidence of sexual reputation and experience exist in 48 American states and also form part of the *Federal Rules of Evidence*.²¹ The provisions vary widely in their approaches to regulating the admissibility of such evidence, but may generally be divided between those which retain some form of judicial discretion to admit relevant evidence, and those which, like the New South Wales provision, adopt the Michigan model of automatically excluding evidence which does not fall within one of a list of categories. Since the New South Wales legislation is based on the Michigan model, it is useful to refer in particular to the experiences in that American state.

Michigan

5.24 As we stated, the Michigan provision is similar to s 409B in that it does not contain a judicial discretion but instead seeks to regulate the admission of sexual experience evidence by the imposition of absolute rules. The Michigan provision (and others which follow its approach) has been challenged in the courts from time to time on the basis that it infringes the right of an accused to a fair trial, and is therefore unconstitutional under the American Bill of Rights. Judges have noted that there is potential for the provision to deny an accused a fair trial if it is interpreted in a way which automatically excludes relevant evidence falling outside one of the listed categories. However, contrary to the Canadian experience, the American courts have not struck down the Michigan legislation as unconstitutional.

21. For an analysis of the various American statutes, see H Galvin, "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 *Minnesota Law Review* 763; D Haxton, "Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence" (1985) *Wisconsin Law Review* 1219; C Fishman, "Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior" (1995) 44 *Catholic University Law Review* 709.

Various strategies have been adopted by the courts to admit relevant evidence falling outside the listed exceptions in a way to avoid a finding that the legislation as a whole infringes on the right of the accused to a fair trial.

5.25 One strategy has been to rely on legislative history and policy considerations in order to admit evidence of sexual experience which, on its face, is excluded by the provision. For example, evidence has been admitted on the basis that, considering the purposes of the legislation, there could be no rational ground for excluding it and that its exclusion had not been intended by the legislature, despite the clear prohibition set out in the legislation.²² The Commission does not consider this to be an appropriate approach.

5.26 Another strategy adopted by the courts has been to determine that the legislation does not operate in an individual case because if it did, it would exclude evidence of such relevance to the facts of the case that it would deny the accused a fair trial, in violation of the Bill of Rights.²³ In this way, it could be argued that the courts have introduced a “defacto” discretion into the legislation. If evidence of sexual experience is considered to be of significant probative value but is excluded by the legislation, then the legislation may simply not be applied to that particular case.

5.27 In 1982, a study was published which examined the effect on the conduct of sexual assault trials of the legislative reforms on sexual assault, including the provision dealing with evidence of sexual experience and reputation.²⁴ The study was based on interviews with rape crisis counsellors and criminal justice officials, as well as on crime statistics for Michigan for before and after the introduction of the reforms. Based largely on the responses from those people interviewed, the study concluded that the provision restricting sexual experience evidence had substantially reduced courtroom investigation into complainants’ sexual lives, although some such evidence continued to be admitted through innuendo or despite the legislative prohibitions. Moreover, almost half the people interviewed considered that the restrictions on sexual experience evidence improved the chance of the prosecution obtaining a conviction.²⁵ However, an increase in rape reporting

22. See, for example, *People v Mikula* 84 Mich App 108; 269 NW 2d 195 (1978).

23. See, for example, *Michigan v Lucas* 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205 (1991).

24. J Marsh, A Geist, N Caplan, *Rape and the Limits of Law Reform* (Auburn House Publishing Co, Boston, 1982).

25. *Rape and the Limits of Law Reform* at 44-45.

rates was generally not considered by interviewees to be a result of the legislative reforms. The study did not examine the types of situations in which sexual experience evidence was admitted, and did not consider the issue of whether evidence was ever unfairly excluded, that is, in a way which some considered caused injustice to the accused.

CANADA

5.28 The Canadian legislation relating to evidence of sexual experience and reputation has undergone substantive amendments on three occasions.

5.29 In 1976, the Canadian Parliament introduced legislation which aimed to restrict the admissibility of evidence of sexual experience and reputation in sexual offence proceedings.²⁶ The legislation gave trial judges a discretion to admit such evidence if they were satisfied that:

the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.²⁷

5.30 The application of this legislation by the courts received strong criticism.²⁸ The provision was said to have failed to give any greater protection to complainants against courtroom trauma. Indeed, it was criticised for providing even less protection than at common law. This was because the courts had interpreted the legislation as permitting the accused, where leave was granted, to lead independent evidence relating to the complainant's sexual experience to contradict the complainant's testimony on matters relating solely to credit.²⁹ At common law, such evidence would not

26. See *Criminal Code* (Canada) s 142 (repealed), introduced by the *Criminal Law Amendment Act 1975* (Canada), SC 1974-75-76, c 93, s 8.

27. *Criminal Code* (Canada) s 142(1)(b) (repealed).

28. Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Carswell Company Ltd, Toronto, 1982) at para 7.2-7.3. See also *R v Konkin* [1983] 1 SCR 388 per Wilson J (dissenting) at 396; *Seaboyer v The Queen*; *Gayme v The Queen* [1991] 2 SCR 577 per L'Heureux-Dube J (dissenting in part) at 671-674.

29. *R v Forsythe* [1980] 2 SCR 268.

generally have been admissible.³⁰ Moreover, it was held that, under the legislation, a complainant was compellable to give evidence about her sexual experience as part of an application to the trial judge for leave to admit such evidence at the trial.³¹ Arguably, to compel a complainant to speak about her sexual experience in order to determine whether her testimony amounted to admissible evidence defeated the purpose of the legislation.

5.31 In light of the perceived failings of the 1976 provision, legislative reforms were introduced in 1982.³² These reforms brought significant changes to the law relating to sexual assault generally. The old provision relating to sexual history evidence was repealed and was replaced by s 246.6 and 246.7 of the Canadian *Criminal Code* (later renumbered as s 276 and 277). These provisions prohibited the admission of sexual reputation evidence for the purpose of challenging or supporting the complainant's credibility, and limited the circumstances in which evidence of a complainant's sexual activities was admissible. Like the New South Wales legislation, the new provisions adopted the Michigan model for restricting the admissibility of sexual experience evidence. That is, they listed specific circumstances in which evidence of a complainant's sexual activities were admissible, and left no judicial discretion to admit such evidence outside of these circumstances.

5.32 In 1991, the majority of the Supreme Court of Canada ruled that s 276 (formerly s 246.6), the provision restricting the admissibility of sexual activity evidence, was unconstitutional and should be struck down.³³ The majority of the Court found that the provision infringed the right of an accused person to a fair trial (as enshrined in the Canadian *Charter of Rights and Freedoms*)³⁴ because it absolutely excluded evidence which did not fall

30. See para 3.6. There are signs of relaxation of the common law rule in New South Wales: *Natta v Canham* (1991) 104 ALR 143 at 157-161; *Urban Transport Authority of NSW v Nweiser* (1992) 28 NSWLR 471 at 477-8; *R v Hawes* (1994) 35 NSWLR 294 at 301.

31. *R v Forsythe* [1980] 2 SCR 268.

32. *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof* SC 1980-81-82-83, c 125, s 19.

33. *Seaboyer v The Queen; Gayme v The Queen* [1991] 2 SCR 577.

34. See s 7 and 11(d) of the Canadian *Charter of Rights and Freedoms*. Under s 7, every person has the right not to be deprived of his or her liberty except in accordance with the principles of fundamental justice. It was agreed in *Seaboyer v The Queen* that this right included the right for an accused person

within one of the listed categories, without any means of evaluating the importance of that evidence to the individual case. This had the effect that evidence which may be highly relevant to a case would be automatically excluded if it did not fall within one of the categories. On the other hand, the Court found that s 277, the provision prohibiting the admission of sexual reputation evidence, did not infringe the right of an accused to a fair trial and consequently did not violate the *Charter of Rights and Freedoms*.

5.33 As a result of the Supreme Court's ruling, the provisions restricting the admissibility of sexual history evidence were substantially amended in 1992 to reintroduce a judicial discretion.³⁵ The current provisions are set out in s 276 and 277 of the Canadian *Criminal Code*. In summary, s 277 prohibits the admission of evidence of sexual reputation for the purpose of challenging or supporting the complainant's credibility. "Sexual reputation" is not defined. Section 276 deals with evidence of sexual activity and applies only to the accused, not the prosecution. It provides that evidence of the complainant's sexual activity, whether with the accused or with any other person, is inadmissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to sexual activity with the accused, or is less worthy of belief. Where the evidence is sought to be admitted for a purpose other than supporting these inferences, the judge may grant leave to admit it if it is evidence of specific instances of sexual activity, is relevant to an issue at trial, and has significant probative value which is not substantially outweighed by the danger of prejudice to the proper administration of justice. The legislation sets out a list of factors which the judge must consider in determining whether to admit evidence of sexual activity, such as the potential prejudice to the complainant's personal dignity and right of privacy, and the right of the accused to make a full answer and defence.

5.34 In addition, s 276.1 contains detailed procedural provisions relating to the making and determination of applications to admit evidence of sexual activity. These provisions regulate the form and content of an application, and require that the prosecution generally be given seven days' notice of the application. They also stipulate that a complainant is not compellable to give evidence in the hearing of an application to admit evidence of sexual activity.

to present a full and fair defence. Section 11(d) of the *Charter* states (among other things) that a person charged with an offence has the right to be tried according to law in a fair and public hearing.

35. SC 1992 s 2, 38.

5.35 According to some people, there is a risk that s 276, as amended, may continue to deny an accused the right to a fair trial.³⁶ Unfairness is said potentially to result from the prohibition in s 276(1) against evidence of sexual activity where such evidence is used to support an inference that a complainant is less worthy of belief or is more likely to have consented. It is argued that, because of this prohibition, evidence of sexual activity will never be admissible where it relates to the issue of consent or to the credibility of the complainant, even if it is highly relevant to these issues. In opposing this argument, other people have argued that s 276 does not absolutely exclude evidence which is relevant to consent or to the complainant's credibility.³⁷ Instead, it is suggested that the section is directed at overcoming the old common law practices which allowed general inferences to be made about a woman's trustworthiness or likelihood of consenting based solely on the fact that she was sexually active. It is argued that evidence of sexual activity which does not rely on these general inferences for its relevance to the issues of consent or credibility does not come within this general prohibition in s 276 and therefore may be admissible if it is sufficiently important to the case. This matter is still to be determined by the Supreme Court of Canada.³⁸

NEW ZEALAND

5.36 Section 23A of the *Evidence Act 1908* (New Zealand) provides that evidence relating to a complainant's sexual reputation or sexual experience with a person other than the accused shall not be admitted unless by leave of the trial judge. The judge must not grant leave unless satisfied that the evidence:

is of such direct relevance to —

- (a) Facts in issue in the proceeding; or
- (b) The issue of the appropriate sentence, —

36. See D Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive the *Charter* Challenge" 21 CR (4th) 223 at 226. See also *R v Ecker* (1995) 96 CCC (3d) 161 per Lane JA (dissenting) at 194.

37. See the majority in *R v Ecker* (1995) 96 CCC (3d) 161. See also D Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive the *Charter* Challenge" 21 CR (4th) 223.

38. See the decision of the Ontario Court of Appeal in *R v Darrach* 38 OR (3d) (1998). Leave to appeal to the Supreme Court of Canada was granted on 4 June 1998.

as the case may require, that to exclude it would be contrary to the interests of justice.

Evidence is not to be regarded as having direct relevance by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.³⁹

5.37 This section has been interpreted as requiring a high degree of relevance before leave will be granted to admit evidence. It has been held that much evidence going only to the credit of the complainant will be excluded because it has only an indirect relevance to the facts in issue.⁴⁰ It has also been held that evidence of the complainant's "promiscuity" has only an indirect relevance to the belief of the accused in her consent, and is therefore inadmissible under s 23A.⁴¹

5.38 In 1997, the New Zealand Law Commission published a discussion paper on the laws of evidence relating to character and credibility generally.⁴² The paper included an examination of s 23A of the *Evidence Act 1908* (NZ).⁴³ The Law Commission found that s 23A had avoided any serious problems in its operation. It considered that the provision did not unreasonably restrict the right of the accused to present a defence and examine the complainant, because sexual experience evidence could still be admitted if it could be shown to be in the interests of justice to do so. It therefore did not infringe the rights of the accused as provided for in s 25 of the *Bill of Rights Act 1990* (NZ).

5.39 The Law Commission did find that there were isolated cases where the courts appeared to have admitted sexual experience evidence inappropriately by giving inadequate weight to the requirement in s 23A for a high degree of relevance. Elsewhere, the operation of the section has been criticised for an apparent absence of clear principles to guide the exercise of the judicial discretion in granting leave, and for a reliance by some judges on myths and stereotypes about women in the exercise of that discretion.⁴⁴

39. *Evidence Act 1908* (NZ) s 23A(3).

40. *R v McClintock* [1986] 2 NZLR 99 at 104.

41. *R v Daniels* [1986] 2 NZLR 106.

42. New Zealand, Law Commission, *Evidence Law: Character and Credibility, A Discussion Paper* (Preliminary Paper 27, 1997).

43. New Zealand, Law Commission (Preliminary Paper 27) chap 11.

44. W Young, *Rape Study: A Discussion of Law and Practice* (Institute of Criminology, Department of Justice, Wellington, 1983) vol 1 at 134-135; E

5.40 The Law Commission made two proposals to strengthen the protection in the legislation for the complainant. First, it proposed that s 23A be amended to include an absolute prohibition on evidence of sexual reputation, where such evidence was said to be relevant only to the truthfulness of the complainant or the consent of the complainant. Secondly, it was tentatively proposed that the restrictions on admissibility of evidence in s 23A should apply equally to evidence of the complainant's sexual experience with the accused as with other people.

ENGLAND AND WALES

5.41 Section 2 of the *Sexual Offences (Amendment) Act 1976* (Eng and Wales) applies to trials for a "rape offence". It provides that an accused must not introduce evidence of a complainant's sexual experience with a person other than the accused except with leave of the judge. The judge must not grant leave unless satisfied that "it would be unfair to that defendant to refuse to allow the evidence".

5.42 This section has been interpreted as allowing evidence of sexual experience where it might reasonably lead the jury to take a different view of the complainant's evidence from that which it might take if the evidence were not admitted.⁴⁵ It has been said that if the evidence is shown to be relevant to an issue in the trial, rather than merely to credit, it will likely be admitted.⁴⁶

5.43 The operation of s 2 has been criticised by some people for setting too low a standard for the admissibility of sexual experience evidence.⁴⁷ In 1984, as part of a review on the law relating to sexual offences, the Criminal Law

McDonald, "Her Sexuality As Indicative of His Innocence: The Operation of New Zealand's 'Rape Shield' Provision" (1994) 18 *Criminal Law Journal* 321.

45. *R v Lawrence* [1977] Crim L R 492; *R v Mills* (1978) 68 Cr App R 327; *R v Viola* [1982] 3 All ER 73.

46. *R v Viola* [1982] 3 All ER 73.

47. J Temkin, "Sexual History Evidence — The Ravishment of Section 2" [1993] *Criminal Law Review* 3; Z Adler, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" [1985] *Criminal Law Review* 769. See also the submissions to the Criminal Law Revision Committee, referred to in: England and Wales, Criminal Law Revision Committee, *Sexual Offences* (Report 15, HMSO, London, 1984) at para 2.87.

Revision Committee assessed the operation of s 2. The Committee noted the criticism from members of the public, in particular from women's organisations, that s 2 was proving ineffective in protecting complainants' privacy and that judges frequently granted leave to admit sexual experience evidence. The Committee took the view, however, that there was no ground for claiming that the spirit and purpose of s 2 was being ignored. The Committee considered that there were situations in which evidence of a complainant's sexual experience was relevant and that the frequency with which leave was granted to admit such evidence was no indication that judges granted leave in undeserving cases. It was argued that counsel may not make applications for leave to admit sexual experience evidence unless they believed that they had a strong case for arguing that leave should be granted.

5.44 The Committee concluded that there was no need to amend the legislation to provide greater protection to complainants. It did recommend, however, that s 2 be amended to apply equally to evidence of a complainant's previous sexual experience with the accused.

5.45 More recently, s 2 of the *Sexual Offences (Amendment) Act 1976* (Eng and Wales) was reviewed in June 1998 by an interdepartmental working group as part of a report on the treatment of vulnerable or intimidated witnesses in the criminal justice system.⁴⁸ In contrast to the views of the Criminal Law Revision Committee, the Working Group took the view that evidence of sexual experience is admitted too frequently by the courts and that s 2 is not achieving its purpose of protecting complainants. The grounds on which this view is based are not set out in any great detail in the Working Group's report. Reference is made to anecdotal evidence provided by the public, in particular by Rape Crisis Centres, of distressing cross-examination of some women in court. As well, the Working Group refers to a study of 50 rape trials in 1987 which found that leave to admit sexual experience evidence was granted for 75% of applications made.⁴⁹ The Working Group concluded that the existing law restricting sexual experience evidence was not achieving its purpose. The Working Group did not, however, address the argument put forward by the Criminal Law Revision Committee that the

48. See England and Wales, *Speaking Up for Justice* (Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, Home Office, 1998) at para 9.56-9.72.

49. See Z Adler, *Rape on Trial* (Routledge and Kegan Paul, London, 1987) at 73.

percentage of applications which are successful is not in itself an indication that leave to admit such evidence is routinely granted in undeserving cases.

5.46 The Working Group recommended that s 2 be amended to set out clearly when sexual experience may be admitted. The New South Wales legislation was put forward as a possible model. In the end, however, the Working Group favoured amendments to s 2 which followed the approach taken by the Scottish legislation.⁵⁰ This legislation sets out in considerable detail the situations in which sexual experience evidence is admissible, but also includes a discretionary provision to allow evidence in other situations where it would be contrary to the interests of justice to exclude it. It was noted by the Working Group that to remove a judicial discretion altogether from the legislation may exclude evidence unfairly and could lead to the wrongful conviction of innocent people.

5.47 Finally, a proposal was made in Parliament in March 1998 to amend s 2 of the *Sexual Offences (Amendment) Act 1976* (Eng and Wales).⁵¹ One of the proposed amendments would have the effect of expanding the application of the section to other sexual offences in addition to “rape offences”. The second of the proposed amendments would apply in situations where the judge grants leave to the accused to introduce evidence of the complainant’s sexual experience. Where leave is granted, the proposed amendment would permit evidence to be introduced that the accused has committed, been convicted of, or charged with a sexual offence in the past.

IRELAND

5.48 Legislation in Ireland provides that, except with the leave of the judge, no question can be asked in cross-examination and no evidence may be adduced about any sexual experience of a complainant with any person, other than that to which the current charge relates.⁵²

5.49 Section 3 has been reviewed on a number of occasions. In 1988, the Irish Law Reform Commission found that it would be premature to make any

50. See para 5.50.

51. United Kingdom, *Parliamentary Debates, House of Lords (Hansard)*, 19 March 1998.

52. *Criminal Law (Rape) Act 1981* (Ireland) s 3; *Criminal Law (Rape Amendment) Act* (Ireland) s 13.

conclusions about the way the section was operating in practice, although there was material to suggest that it was being under-utilised.⁵³ The Working Party on the Legal and Judicial Process⁵⁴ has recommended that, amongst other things, s 3 be amended to codify the situations in which evidence of the complainant's sexual experience was admissible and that where such evidence was admitted to attack the complainant's credibility, evidence of the accused's past record or sexual history should also be admissible. The Working Party also recommended that provision should be made to allow complainants to be legally represented, at least in an application by defence counsel for leave to introduce evidence concerning the complainant's sexual experience. Issues relating to the admissibility of evidence of sexual experience are currently under review by the Irish Department of Justice, Equality and Law Reform.⁵⁵

SCOTLAND

5.50 Scottish legislation generally prohibits evidence which shows or tends to show that the complainant is not of good character in relation to sexual matters, is a prostitute, or has engaged in sexual behaviour with any person.⁵⁶ The court may admit such evidence on application where it is designed to explain or rebut evidence adduced otherwise than by the accused, or relates to sexual behaviour which took place on the same occasion as the alleged incident, or is relevant to the defence of incrimination, or where "it would be contrary to the interests of justice to exclude the questioning or evidence". These restrictions do not apply to evidence sought to be admitted by the Crown.

5.51 The Scottish legislation is based on recommendations of the Scottish Law Commission.⁵⁷ The Law Commission recommended that the legislation

53. Ireland, Law Reform Commission, *Rape and Allied Offences* (Report 24, 1988) at 10-12.

54. Referred to in Ireland, Department of Justice, Equality and Law Reform, *The Law on Sexual Offences: A Discussion Paper* (Stationery Office, May 1998).

55. Ireland, Department of Justice, Equality and Law Reform, *The Law on Sexual Offences: A Discussion Paper* (Stationery Office, May 1998).

56. *Criminal Procedure (Scotland) Act 1995* s 274, 275.

57. Scottish Law Commission, *Evidence: Report on Evidence in Cases of Rape and Other Sexual Offences* (Scot Law Com No 78, HMSO, 1983) at 30. The original provisions which followed the Law Commission's recommendations

should include a general provision to admit evidence of sexual behaviour where it is in the interests of justice to do so. A provision to this effect was considered necessary to avoid the risk of injustice, since it would not be possible to foresee every circumstance in which evidence of sexual behaviour may have real relevance to a case.⁵⁸

5.52 An empirical study was conducted of the operation of the Scottish legislation over a three and a half year period, from 1987 to 1990.⁵⁹ The study found that the legislation had been partly successful in excluding undue investigation of complainants' sexual lives. Blatant attacks on the complainant's sexual character had become rare, as had the practice of suggesting that the complainant was a liar because he or she was promiscuous. The procedure for requiring leave had also provided a means of questioning the defence about their proposed use of evidence and for placing limits on their questioning.

5.53 However, the study also found that evidence concerning sexual conduct was admitted in about half of the sexual offence trials involving juries, and that some of the evidence admitted was of a type which the legislation had sought to exclude. It was also found that some defence counsel could overcome the restrictions of the legislation by asking questions which did not directly relate to the complainant's sexual activity, but which carried with them innuendos about his or her sexual character. The study concluded⁶⁰ by offering some possible remedies for the problems it identified in the current operation of the legislation. These included guidelines encouraging the prosecution to take a more proactive role in intervening where questions of sexual conduct arose in trials, greater public and jury education, and greater restrictions in the legislation on the exercise of judicial discretion in determining the admissibility of evidence of sexual conduct,

were s 141A and 141B of the *Criminal Procedure (Scotland) Act 1975*, introduced by the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1985*. The current provisions are in almost identical terms to the old provisions. For a history of the introduction of legislation restricting sexual experience evidence in Scotland, see B Brown, M Burman and L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (Edinburgh University Press, Edinburgh, 1993).

58. *Evidence: Report on Evidence in Cases of Rape and Other Sexual Offences* at para 5.14-5.19.

59. B Brown, M Burman, L Jamieson, *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* (Edinburgh University Press, Edinburgh, 1993).

60. *Sex Crimes on Trial: The Use of Sexual Evidence in Scottish Courts* chap 12.

such as a requirement that the court balance the probative value of the proposed evidence against its prejudicial effect.

6. Reform of section 409B

- The need for reform
- Options for reform
- The Commission's recommendations
- Discussion of the Commission's recommendations

THE NEED FOR REFORM

6.1 Section 409B has been particularly controversial in relation to certain types of cases, referred to in this report as the “problem cases”.¹ The evidence which was excluded in the problem cases related either to sexual abuse by another person, or to previous, supposedly false, allegations. The Commission has come to the conclusion that evidence of this kind may be highly relevant to a particular case. Its exclusion by s 409B indicates the need to reform that section if the accused is to be assured of a fair trial. In reaching this conclusion, we have taken account of the objections to the admissibility of this type of evidence, expressed by a number of people in submissions and consultations.

Objections to the admissibility of evidence of sexual abuse

6.2 In relation to the admissibility of evidence of sexual abuse by someone other than the accused, a number of arguments were put forward as to why s 409B should not be amended to admit evidence of this kind.² First, it was said that there will often be great trauma and distress involved for the complainant in being publicly asked questions about previous sexual abuse.

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1. See para 4.8-4.20.
 2. M Roberts, *Submission* at 2; NSW Rape Crisis Centre Inc, *Submission* at 7-8; Women’s Legal Resources Centre, *Submission* at 4; Redfern Legal Centre, Aboriginal Women’s Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission* at 5-6; Child Protection Unit, New Children’s Hospital, *Submission* at 2; Department for Women, *Submission* at 6-7; Liverpool/Fairfield Sexual Assault Service, *Consultation*. The Sexual Assault Service at Royal North Shore considered that it may be desirable to introduce a separate provision to admit evidence of sexual abuse in child sexual assault cases, but emphasised the need for the judge in such cases to warn the jury not to rely on stereotypes of children as sexually provocative: Royal North Shore Sexual Assault Service, *Consultation*. One submission supported an amendment to s 409B to permit evidence of sexual abuse, on the condition that only independent evidence of abuse should be admissible, that is, the complainant should not be permitted to be questioned about the abuse. This proposal was said to avoid trauma to the complainant: see E Magner and M Kumar, *Submission* at 13.

Secondly, there is a danger that such evidence will be prejudicial in so far as it may reinforce in some jurors' minds myths about sexual assault victims, particularly children, being sexually provocative and in some way inviting sexual advances.³ It is argued that the effect of this may be to divert jurors' attention away from the real issues in the case, with the result that their verdict will be based on prejudices and misconceptions rather than a proper evaluation of the evidence. Thirdly, young children in particular may become very confused while giving evidence if they are asked questions which refer to a previous incident of abuse not the subject of the current charges. As a result, a jury may wrongly perceive the child as an unreliable witness and discount the child's evidence.

Objections to the admissibility of evidence of false allegations of abuse

6.3 As we noted in paragraph 4.20, it may be difficult to determine with any accuracy whether an allegation of abuse is in fact false. A number of people in submissions and consultations expressed concern about the admissibility of allegations of abuse because of this.⁴ They emphasised that there are victims of sexual assault who make complaints but, for a variety of reasons, those complaints do not end in a conviction. This does not necessarily mean that the complaint was false. For example, there may be family or community pressure to withdraw a complaint, or threats from the

3. T Marcketti, "Rape Shield Laws: Do They Shield the Children?" (1993) 78 *Iowa Law Review* 753 at 763.

4. P Wagstaff, *Submission* at 2; Westmead Sexual Assault Service, *Submission* at 2; S Egger and J Gans, *Submission* at 3-4; NSW Rape Crisis Centre Inc, *Submission* at 6; Kingsford Legal Centre, *Submission* at 17-19; Women's Legal Resources Centre, *Submission* at 7; NSW Health Department, *Submission* at 4; Victims Advisory Board, *Submission* at 1; Liverpool/Fairfield Sexual Assault Service, *Submission* at 3; Child Protection Unit, New Children's Hospital, *Submission* at 1-2; Department for Women, *Submission* at 16-19; Southern Sydney Sexual Assault Service, *Oral Submission*; Royal North Shore Sexual Assault Service, *Consultation*; Southern Area Health Service, Sexual Assault Services, *Consultation*; Eastern and Central Sexual Assault Service, *Consultation*; Crown Prosecutors, *Consultation*; Liverpool/Fairfield Sexual Assault Service, *Consultation*; DPP Witness Assistance Service, *Consultation*; Newcastle/Hunter Sexual Assault Service, *Oral Submission*.

abuser. Even where a complaint proceeds to trial and the alleged perpetrator is acquitted, this does not necessarily mean that the complaint was false, but that the prosecution failed to prove its case beyond reasonable doubt.

6.4 Particular concern was expressed about the admissibility of such evidence in proceedings where the complainant is Aboriginal.⁵ It was submitted that Aboriginal women are often vulnerable to sexual assault and domestic violence, and are also likely to withdraw complaints of abuse due to community pressure. Evidence of these previous allegations should not be used against them if they choose later to proceed to court.

6.5 In response to this objection, the Public Defenders argued that the question of the falsity or otherwise of an allegation is surely a matter for the jury to determine.⁶ The accused simply needs to raise a reasonable doubt about his or her guilt, and should not be precluded from doing so by questioning the reliability of a witness.

6.6 Some submissions also objected to the possible prejudicial effect which evidence of this kind may have on the accuracy of the fact finding process.⁷ Evidence of previous allegations may play upon some jurors' misconceptions of women and children as essentially unreliable and prone to making false accusations of sexual assault out of spite, vengeance, or suppressed sexual fantasies. The prejudicial effect of such evidence may be particularly strong in cases involving complainants who are children or adults with an intellectual disability, who arguably are commonly viewed as inherently unreliable. In these cases, the mere suggestion that the complainant has made an allegation of abuse in the past may be assumed to indicate that he or she must be in the habit of making up stories of abuse.

6.7 While some submissions conceded that there may be situations where it is relevant to raise evidence which establishes a pattern of making demonstrably false allegations, it was argued that in cases where the evidence is less compelling, the suggestion of a previous allegation may simply serve

5. DPP Witness Assistance Service, *Consultation*.

6. Public Defenders, *Consultation*.

7. Redfern Legal Centre, Aboriginal Women's Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission* at 5; Kingsford Legal Centre, *Submission* at 17-18; NSW Rape Crisis Centre Inc, *Submission* at 7; Department for Women, *Submission* at 16. See also Southern Area Health Service, Sexual Assault Services, *Consultation*.

to divert the jury's attention from the real issues by way of prejudicial and mostly irrelevant material.⁸ A number of sexual assault counsellors expressed the view that, in their experience, there is only a very small number of cases involving people who make multiple false allegations of sexual assault, and these cases very rarely proceed to court. There is a far greater risk that evidence of a previous true allegation will be used to prejudice the complainant's evidence.⁹ This assertion was, however, strongly disputed by defence lawyers.¹⁰

6.8 There are also policy concerns about admitting evidence of previous allegations. Complainants may suffer great distress at having the details of an earlier allegation investigated within the trial for the current complaint.¹¹ There is concern that an amendment to s 409B to allow evidence of previous allegations may result in "fishing expeditions" by the defence to try to find means to discredit the complainant.¹² Lastly, it was submitted that an amendment to allow evidence of previous "false" allegations of sexual abuse to be admissible may discourage victims from reporting the commission of these offences.¹³

The Commission's response

6.9 It is integral to the fairness of a trial that the accused has an opportunity to cross-examine and lead evidence on matters of substantial relevance to his or her defence. Protecting that right is not a question of favouring the accused over the complainant, or of weighting the system to protect the "criminal". It is surely a matter of public interest that our criminal justice system remain centred on the presumption of innocence and the right

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8. S Egger and J Gans, *Submission* at 3-4; Women's Legal Resources Centre, *Submission* at 7.
 9. See Royal North Shore Sexual Assault Service, *Consultation*; Southern Area Health Service, Sexual Assault Services, *Consultation*; Eastern and Central Sexual Assault Service, *Consultation*; DPP Witness Assistance Service, *Consultation*; Newcastle/Hunter Sexual Assault Service, *Oral Submission*; Southern Sydney Sexual Assault Service, *Oral Submission*.
 10. Public Defenders, *Consultation*.
 11. Crown Prosecutors, *Consultation*; Southern Area Health Service, Sexual Assault Services, *Consultation*.
 12. Crown Prosecutors, *Consultation*.
 13. DPP Witness Assistance Service, *Consultation*.

of every person charged to be tried fairly. These principles are not, and should not become, mere rhetoric; they shape the substance and procedure of the criminal law and common justice. The focus of a criminal trial is always on the accused; it is, after all, his or her liberty which is ultimately at stake.

6.10 In the Commission's view, there may be instances where evidence of sexual abuse, or of an allegation of abuse, has substantial probative value in relation to the issues. The exclusion of such evidence would make it difficult for an accused to have a fair trial. Our view is supported by comments of the High Court.¹⁴ Elsewhere, in the United States of America, it has been held that the exclusion of the types of evidence arising in our "problem cases" may violate the accused's constitutional right to a fair trial.¹⁵

6.11 At present, the only safeguards against injustice to the accused in these situations are, as outlined in paragraph 4.40-4.50, a decision not to prosecute, a decision by the prosecution not to lead certain evidence, and, possibly, an appellate decision to quash a conviction and enter an acquittal. These safeguards are less than satisfactory. On the one hand, they may have the result that a person is not prosecuted for the alleged commission of an offence because of the unfair consequences of legislation, or that a jury's decision is overturned on the basis of evidence that has been untested at trial. On the other hand, they may result in the imprisonment of a person who has been wrongly convicted while that person awaits the determination of an appeal.

6.12 The policy objections to the admissibility of this type of evidence are based on the possibility of an increase in distress for complainants and the risk that sexual assault victims will be discouraged from reporting. One of the purposes of s 409B was to minimise the distress suffered by complainants in the courtroom. If s 409B is amended to allow evidence of sexual abuse and previous "false" allegations of abuse, it is possible that some complainants

14. *Grills v The Queen; PJE v The Queen* (High Court of Australia, No S8/96; S154/95, 9 September 1996, unreported), refusing an application for special leave to appeal from the NSW Court of Criminal Appeal. See also *Berrigan v The Queen* (High Court of Australia, No S159/94, 23 November 1995, unreported), refusing special leave to appeal, and *HG v The Queen* (High Court of Australia, No S128/97, 19 May 1998, unreported), granting special leave to appeal from the NSW Court of Criminal Appeal.

15. *People v Mikula* 84 Mich App 108, 115-116, 269 NW 2d 195 (1978); *People v Hackett* 365 NW 2d 120, 125 (Mich 1984); cf *People v Arenda* 330 NW 2d 814, 818 (Mich 1982).

will suffer greater distress in giving evidence as a result of being questioned on these issues. That distress should not be trivialised or disregarded. In some cases, and for some complainants, perhaps particularly for children, cross-examination on these topics may be extremely traumatic.

6.13 We can only speculate about what effects, if any, the admission of evidence of sexual abuse or of an allegation of abuse may have on the incidence of reporting of sexual abuse. To our knowledge, the introduction of s 409B has not been found necessarily to have led to an increase in reporting rates.¹⁶ However, it would certainly be an extremely unfortunate consequence if the admissibility of evidence of sexual abuse or of allegations of abuse had a detrimental effect on reporting.

6.14 Ultimately, however, the Commission considers that the importance of this evidence in appropriate cases must outweigh these concerns. In so far as complainants may suffer distress from being cross-examined about previous sexual abuse or an allegation of abuse, that distress cannot be a sufficient reason for excluding evidence if it is of significant probative value in determining the guilt or otherwise of an accused person. Section 409B was introduced essentially to stop complainants from being subjected to distressing and *irrelevant* questioning. Evidence of previous sexual abuse and of allegations of abuse does not rely for its relevance on the old common law inferences about the morality of sexually active women. To the extent that complainants may be distressed by being questioned about abuse or allegations of abuse, that distress is unfortunate but may be necessary to ensure that all relevant material is before the court.

6.15 The second ground for objecting to the admissibility of evidence of abuse and allegations of abuse amounts to an issue of fairness: that is,

16. The study conducted by Ms Bonney for the Bureau of Crime Statistics and Research in 1985 found that, since the introduction of the sexual assault reforms in 1981, there had been an approximate increase of 15.4% in the number of reports of a sexual offence to the police. However, the study emphasised the need to be cautious in drawing any conclusion from this about the effect of the legislative reforms on reporting rates. There could be other factors which contributed to reporting rates, such as the wider range of sexual offences for which a person could be charged, better training for police and medical staff in handling complaints of sexual abuse, and changes in attitude in the general community about the criminality of violence against women: see R Bonney, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation: Interim Report No 1: Characteristics of the Complainant, the Defendant and the Offence* at 8; *Interim Report 2: Sexual Assault: Court Outcome, Acquittals, Convictions and Sentence* at 62-63 (NSW Bureau of Crime Statistics and Research, Sydney, 1985; 1986). See also similar conclusions reached in an American study: J Marsh, A Geist, N Caplan, *Rape and the Limits of Law Reform* (Auburn House Publishing Co, Boston, 1982) at 42-43.

whether there is a danger that evidence of this kind will detrimentally affect the accuracy of the fact-finding process in a trial. The court may give undue probative value to evidence of a “false” allegation to discredit the complainant, when there is little basis for claiming that that allegation was in fact false. There may also be a risk that this evidence will give rise to prejudice and misconceptions about women and sexual assault complainants generally, in a way which wrongly influences the court’s evaluation of the facts.

6.16 These are real concerns. However, in the Commission’s view, they are concerns which are better addressed in each individual case, rather than by absolute prohibitions in legislation. The trial judge is in the best position to make a detailed assessment of the probative value of evidence in the context of the particular facts of the case, weighing up that probative value against its prejudicial effect. For other types of evidence in criminal proceedings, including evidence which may be prejudicial to the accused, such as evidence that the accused has committed crimes in the past, it is left to the trial judge to weigh up the probative value of the evidence against its prejudicial effect in order to determine its admissibility.

6.17 We do acknowledge, however, that there is concern about the ability of judges and lawyers to assess sexual experience evidence objectively. It is also clearly in the public interest that the distress and possible prejudicial effect flowing from the admission of evidence of this kind be minimised. To some extent, these concerns can be addressed by legislation. For example, legislative measures can be imposed which require judges to take into account a range of factors in determining the admissibility of such evidence, including the possible prejudicial effect of such evidence and its likely distress to the complainant. Other legislative measures can be put in place to reduce the risk of “fishing expeditions” by the defence, as an attempt to discredit the complainant without basis.

6.18 Trial judges also have a responsibility to instruct the jury about the proper use which they may make of evidence, and to warn them about its possible prejudicial effect. Moreover, while cross-examination is likely always to be a distressing experience, no matter what the context, that distress may be reduced by lawyers who treat witnesses with respect and common politeness. This is something which may be partly achieved by the trial judge’s close control over the courtroom. It should also be addressed by proper education of the judiciary and the legal profession about the special issues surrounding sexual offence proceedings.

OPTIONS FOR REFORM

6.19 It is the Commission's view that, in light of the experiences in the "problem cases", there should be some legislative reform of s 409B. Six options for amendment have been considered:

- introduce additional exceptions to the prohibition in s 409B(3) to address the problem cases;
- include an overriding judicial discretion to admit evidence which falls outside the exceptions in s 409B(3);
- reformulate s 409B by omitting the exceptions listed in s 409B(3) and introducing instead a specific judicial discretion to admit evidence where it complies with certain conditions;
- create a separate legislative provision for child sexual abuse cases;
- abolish s 409B and rely on the general rules governing the admissibility of evidence; or
- introduce legislation permitting a trial judge to stay proceedings on the basis that s 409B will operate unjustly against the accused.

6.20 There have been several proposals made in submissions and in consultations about how each option should be formulated in legislation.

Option 1: Additional exceptions

6.21 Section 409B could be amended to provide expressly that evidence of sexual abuse by someone other than the accused and previous allegations of abuse may be admissible in sexual offence proceedings.

6.22 One way to amend s 409B to admit these kinds of evidence would be to define the terms "sexual experience" and "sexual activity" in s 409B(3) to refer to *consensual* experience and activity only,¹⁷ and to remove from the

17. See *R v PJE* (NSW, Court of Criminal Appeal, No 60216/95, 9 October 1995, unreported) per Sperling J at 5, not followed in *R v G* (1997) 42 NSWLR 451 per Mason P at 457-458, per Sperling J at 460-461. See also submissions of defence counsel on appeal to the High Court in *HG v The Queen*: transcript of proceedings No S67/98 on 8 September 1998. The Women Lawyer's Association expressed the view that evidence of

prohibition in s 409B(3) reference to a lack of sexual experience or activity (that is, so that s 409B(3) would apply only to exclude evidence disclosing or implying sexual experience or activity, not a lack of it). These amendments would mean that s 409B(3) would simply not apply to evidence of sexual abuse or evidence of previous false allegations. The admissibility of such evidence would instead be determined according to the general rules of evidence. Arguably, a disadvantage of an amendment to this effect would be that courts would no longer be required to apply the special balancing test in s 409B, which involves consideration of the distress and embarrassment to the complainant, when determining the admissibility of this evidence.¹⁸

6.23 Another way to amend s 409B to take account of this kind of evidence would be to add to the list of exceptions to the prohibition in s 409B(3). This could be done either by expanding the existing exceptions to include evidence of abuse and false allegations of abuse,¹⁹ or by adding exceptions to the list. For example, two exceptions could be added to admit evidence which disclosed or implied sexual experience or activity, or lack of it, where this evidence related to, first, previous sexual abuse of the complainant, and, secondly, a previous false allegation of sexual abuse made by the complainant.

6.24 In relation to an exception for previous allegations of abuse, a number of suggestions were made to define “false” in the legislation in a way which would ensure that only evidence of false allegations of sexual abuse was admissible under any amendment to s 409B. This was in response to one of the main concerns about admitting evidence of this kind, namely that complainants who have been assaulted on several occasions should not be discredited in court for making multiple allegations.

6.25 One suggestion put forward was that evidence of a previous allegation be admissible only where there is cogent, credible and independent evidence that the allegation was false. This would require independent corroborative

previous false allegations of abuse does not amount to an investigation into past sexual experiences and should fall outside the scope of s 409B. It was considered, however, that this was an issue which relates particularly to child sexual assault cases, and such could perhaps more appropriately be dealt with by separate legislation: see Women Lawyers’ Association, *Submission* at 4-5.

18. *R v G* (1997) 42 NSWLR 451 per Mason P at 457-458, per Sperling J at 460-461.

19. For example, the exception for injury, etc in s 409B(3)(c) could be expanded to include evidence of previous sexual abuse.

evidence of the falsity of the allegation, rather than simply an assertion by the accused or the earlier alleged perpetrator that the allegation was false.²⁰ The legislation would give the trial judge a discretion to admit or reject evidence of a previous false allegation, based on whether the evidence was shown to be of a high probative value to the facts in issue, rather than simply going to the credibility of the complainant.

6.26 Another suggestion was that evidence of a previous allegation be admissible where there has been a positive conclusion by an investigating authority, such as the Police or the Department of Community Services, that the allegation was false.

6.27 A third suggestion was that, in order to be admissible, the evidence must show that the previous allegation of sexual abuse was substantially similar to the current allegation made against the accused, and that the accused could credibly claim that the previous allegation was false without requiring the court to conduct a “trial within a trial” to ascertain whether the complainant was in fact previously abused.²¹

6.28 In the United States, which has legislation similar to s 409B,²² some States specifically provide in their legislation that evidence of a previous false allegation may be admissible. The legislation is drafted in terms, for example, to admit “evidence that the victim has a history of false reporting of sexual assaults”²³ or simply to admit evidence of “false allegations of past sexual offences made by the alleged victim”.²⁴ In deciding whether an allegation is false, American courts have held, in isolated cases, that it is sufficient proof of its falsity if the complainant recanted the allegation, or if, based on evidence produced at a pre-trial hearing to determine admissibility, a reasonable person could reasonably infer that the complainant made prior untruthful allegations. It has been held not to be sufficient proof of falsity simply to show that no arrest was made following the complaint, or that the previous accused was acquitted.²⁵

20. Crown Prosecutors, *Consultation*.

21. S Egger and J Gans, *Submission* at 5.

22. See para 5.23-5.27.

23. See Colorado Rev Stat 18.3-407(2) (1986).

24. See Mississippi R Evid 412(b)(2)(C).

25. See C Fishman, “Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant’s Past Sexual Behaviour” (1995) 44 *Catholic University Law Review* 709 at 773-775.

6.29 There was qualified support in submissions and consultations for the option to amend s 409B by adding exceptions to the list of exceptions in s 409B(3).²⁶ Those in favour of this option considered that amendments to s 409B may be desirable to take account of the concerns arising in the “problem cases”, but did not support an amendment to introduce a general judicial discretion into s 409B. They favoured the addition of either an exception to admit evidence of previous sexual abuse or an exception to admit evidence of previous false allegations or both. People who did not support this option generally did so on one of the following (opposing) grounds: first, that the evidence which was excluded in the “problem cases” should not be admissible and was rightly

26. The Crown Prosecutors supported the addition of exceptions to address the “problem cases”, that is to cover evidence of sexual abuse and previous false allegations. They also favoured the inclusion of an additional exception in s 409B(3) to allow the prosecution to raise evidence of sexual experience or activity or lack of it where it is important to the prosecution’s case and where not to do so would be detrimental to the complainant: see Crown Prosecutors, *Consultation*. A number of submissions favoured the addition of an exception to admit evidence of previous false allegations, but did not address the question of whether an exception should also be added to admit evidence of previous sexual abuse: see N Cowdery QC, *Submission* at 1-2; S Egger and J Gans, *Submission* at 4-5; NSW Health Department, *Submission* at 6. Other submissions supported the addition of an exception to admit evidence of previous false allegations, provided “false” could be defined in a satisfactory way in legislation: see Women’s Legal Resources Centre, *Submission* at 4 and 7; NSW Young Lawyers, *Submission* at para 5.2. One submission supported a provision permitting independent evidence of sexual abuse to be introduced where consent is not an issue, but not permitting questioning of the complainant about the abuse: M Kumar and E Magner, *Submission* at 12. The Hon J Saffin MLC, *Submission* at 3, gave qualified support to adding exceptions to s 409B(3) if the issues arising from the current operation of the section could not be settled without recourse to legislative change. See also M Roberts, *Submission* at 1.

excluded;²⁷ secondly, that it would be preferable to address the concerns in the “problem cases” by introducing a separate legislative provision to govern the admissibility of evidence in child sexual assault cases;²⁸ and thirdly, that the addition of exceptions to s 409B(3) would be inadequate and a judicial discretion should be introduced instead.²⁹

6.30 Arguably, there are two principal advantages in adopting this option of adding exceptions to the prohibition in s 409B(3) to admit evidence of previous sexual abuse and of previous false allegations of abuse. First, an amendment to this effect would address the most common concerns raised in the case law, and in submissions and consultations, in relation to the current operation of s 409B. Secondly, it would retain the rules-based approach which was expressly adopted by Parliament to govern the admissibility of evidence concerning a complainant’s sexual experience. While it is true that the addition of these two exceptions would extend the circumstances in which evidence of a complainant’s sexual experience could be introduced under s 409B, such an extension would be confined to identified, isolated, and closely-defined areas. The balancing exercise between the competing interests of the accused and the complainant would continue to be governed by rules as set down by Parliament, with the addition of these two exceptions in order to avoid injustice to the accused.

6.31 In opposition, it may be argued that the rules-based approach underlying s 409B has proven inadequate in preventing injustice to the accused and that s 409B should be amended to include a judicial discretion.

Option 2: Overriding judicial discretion to admit evidence

6.32 Section 409B could be amended to introduce an overriding judicial discretion to admit evidence which otherwise falls outside the exceptions in

27. Liverpool/Fairfield Sexual Assault Service, *Consultation*; Eastern and Central Sexual Assault Service, *Consultation*; Southern Area Health Service, Sexual Assault Services, *Consultation*; Child Protection Unit, New Children’s Hospital, *Submission* at 1-2; Macquarie and Far West Sexual Assault Services, *Submission* at 2; Richmond Sexual Assault Service, *Submission* at 1; T Manson, *Submission* at 2-3.

28. See para 6.74-6.81.

29. All defence lawyers who were consulted or who made a submission took this view. See para 6.33.

s 409B(3). Following an amendment to this effect, a trial judge would exercise a discretion to admit evidence concerning the complainant's sexual experience and/or reputation, if it was considered to be sufficiently relevant to the case. A judicial discretion would be introduced into the section by way of an additional provision in the list of exceptions in subsection (3). Evidence which was not admissible under one of the exceptions to the prohibition could be admitted under this discretionary provision if the judge decided that it should be admitted.

6.33 A number of people in submissions and in consultations supported the option to introduce a judicial discretion into s 409B. Defence lawyers were unanimous in their support. On the other hand, this option was strongly opposed by other people including the Crown Prosecutors, the Director of Public Prosecutions, and by sexual assault counsellors. A number of District Court judges were also hesitant in giving their support to this option.³⁰

6.34 A judicial discretion to admit evidence could apply both to evidence of sexual experience and evidence of sexual reputation, or, alternatively, it could apply only to evidence of sexual experience. Some of the people who favoured an amendment to introduce a judicial discretion suggested that the discretion should apply both to evidence of sexual reputation and sexual experience, on the basis that there may be occasional cases where it is relevant to introduce evidence of sexual reputation.³¹ In general, however, it was considered that it would be a sufficient safeguard against injustice to the accused if a judicial discretion was introduced to apply only to evidence of sexual experience or activity, or lack of it.

Arguments in favour of a discretion

6.35 The main arguments in favour of introducing a judicial discretion into s 409B may be summarised as follows.

6.36 First, it is impossible for Parliament to foresee every situation in which injustice will arise from the exclusion of evidence under s 409B. Parliament attempted to do so by formulating a list of exceptions to the prohibition on evidence of sexual experience. This attempt has proven unsuccessful, as illustrated by recent cases. Simply to add exceptions to the list to address the problems identified in these cases would not remove the danger that s 409B may operate unjustly in other, unforeseen, cases.

30. See District Court judges, *Consultation*.

31. Public Defenders, *Submission* at 10; Legal Aid Commission, *Consultation*.

6.37 The notion of injustice to the accused is not simply an academic or theoretical argument. The consequence of preventing the accused from introducing highly relevant material may be the wrongful deprivation of his or her liberty. Although defence lawyers generally agreed that the main deficiencies in s 409B are those which were identified in the “problem cases”, it was argued that these are not the only cases in which s 409B may operate unfairly against the accused. A rigid, rules-based approach to the admissibility of evidence in this area is not adequate to ensure a fair trial in each individual case. There needs to be flexibility to assess and admit evidence which has sufficient probative value to a particular situation.

6.38 Secondly, it was argued that, in other aspects of the criminal process, the judge is entrusted to make a decision about the admissibility of evidence in individual cases, and the jury is entrusted to weigh up that evidence in order to make a decision. While there are other rules of law which operate to exclude relevant evidence, as discussed in paragraph 6.106, those rules have a large degree of flexibility in their application. In contrast, s 409B predetermines admissibility of evidence according to inflexible legislative rules. This approach is essentially based on the assumption that judges, lawyers, and juries cannot be trusted to assess the relevance of evidence concerning sexual experience and make appropriate decisions about that evidence. It is, however, inconsistent and illogical to base one legislative provision on a distrust of a system which our society has chosen as the most appropriate means of determining the question of criminal guilt.

6.39 Thirdly, it was argued that attitudes of the legal profession, including defence lawyers and judges, towards the conduct of sexual offence proceedings have changed since the time s 409B was first introduced. The change in attitude in the legal profession reflects a change in the general community towards sexual assault. The old practices of discrediting a complainant by irrelevant questioning about her sexual past would no longer be seen as acceptable by jurors and would consequently no longer be followed by the defence. Moreover, judges are now more experienced in the conduct of sexual offence cases and are more aware of the issues relating to sexual assault. They are now in better positions to make appropriate decisions about the relevance of evidence concerning sexual experience and would actively ensure that inappropriate questioning was disallowed. That awareness is buttressed by the provisions relating to credibility evidence in s 103 of the *Evidence Act 1995* (NSW). Crown Prosecutors are also vigilant in objecting to any attempt to introduce evidence relating to sexual experience and reputation and would therefore protect the interests of the

complainant. These changes indicate that a judicial discretion in s 409B would be unlikely to be misused by defence lawyers and judges as a means to return to the old common law practices.

6.40 Lastly, every other Australian jurisdiction as well as common law jurisdictions overseas have adopted a discretionary approach in their legislation restricting evidence of a complainant's sexual experience. This is an indication that a discretionary approach is generally viewed as the only way of ensuring that injustice does not arise in the individual case. In Canada and the United States, a rules-based approach to restricting sexual experience evidence has been considered by the courts to infringe constitutional principles of fundamental justice.³² This supports the argument in favour of a discretionary model.

Arguments against a discretion

6.41 In response, the arguments against introducing a judicial discretion in s 409B may be summarised as follows.

6.42 First, a judicial discretion is unnecessary and undesirable. Section 409B has been in operation for approximately 17 years. There was almost no public criticism of the way the section was operating until the last few years. The concerns which have been expressed since that time relate to a small number of cases, and have identified specific situations in which s 409B is said to cause injustice to the accused. If it is considered that s 409B should be amended to address the concerns in these cases, it would be sufficient to do this by adding exceptions to the section. If a discretion were introduced into s 409B, there is a far greater danger that it would be misused to introduce prejudicial and irrelevant material than there is a danger of injustice to the accused without the introduction of such a discretion. It was argued that empirical studies of jurisdictions in which a discretionary model exists, such as Victoria, demonstrate a significantly higher rate of admission of sexual experience evidence.

6.43 In the Commission's view, the fact that public criticism of s 409B has arisen only in relatively recent years and in specific types of cases cannot be relied on as indicating that there have been no other circumstances in which the operation of the section has been controversial. Such an assertion does not take into account cases where the Director of Public Prosecutions may not proceed with the prosecution of an accused, because of the potential for s 409B to operate unfairly against him or her. Nor does it take into account

32. See Chapter 5.

cases where the prosecution may suppress evidence because its introduction would be unfair to the accused, due to restrictions imposed by s 409B.³³ In both these instances, the operation of s 409B may not necessarily be brought to the attention of the trial judge or the general public, but both are examples of how the section may operate to the potential detriment of the complainant and the prosecution. As well, the recent explosion in the courts of sexual offence cases, in particular cases involving allegations of sexual abuse of children,³⁴ has put considerable strain on s 409B, and has created increased opportunity for the deficiencies in its operation to be exposed.

6.44 In relation to the claim that evidence of sexual experience is admitted more frequently in jurisdictions with a discretionary model, as demonstrated in empirical studies, caution needs to be exercised in drawing any particular conclusion from this. Clearly, there are likely to be more instances in which sexual experience evidence is admitted under a discretion than according to legislative rules. The issue is whether, in jurisdictions with a discretion, there are significantly more instances where evidence is inappropriately admitted, that is, where it does not have real relevance to the case.

6.45 A second argument against a discretion is that, in so far as s 409B attempts to balance the interests of the accused with the interests of the complainant and of the general public, the introduction of a judicial discretion would tilt the balance too far in favour of the accused. If a discretion were introduced in s 409B, there would be no defined limit to the evidence relating to sexual experience which might be admitted. Leave to lead evidence and cross-examine a complainant about prior sexual experience under a discretion would be more readily granted than under the existing strictly controlled scheme. A discretion would probably be used much more widely than originally intended, as judges would consider themselves primarily obliged to protect the interests of the accused over the interests of the complainant in a trial.³⁵

33. See para 4.46-4.50.

34. See P Gallagher, J Hickey, and D Ash, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales During 1994* (Monograph Series 15, Judicial Commission of New South Wales, Sydney, 1997).

35. See N Cowdery QC, *Submission* at 3; Crown Prosecutors, *Consultation*. This was also a concern expressed by some District Court judges: see District Court judges, *Consultation*.

6.46 It was argued that the legal system is already structured to protect the interests of the accused over the interests of the complainant in the trial context. The prosecution has only limited rights of appeal.³⁶ Moreover, the accused, it was argued, is protected from investigation in the courtroom into his or her previous criminal history. It was argued that the law in New South Wales, though not in some other jurisdictions,³⁷ excludes evidence indicating that the accused has previous convictions or has been previously charged with committing offences involving sexual violence or sexual misconduct. Such evidence may be highly relevant to a case, but is excluded on the basis that it would be prejudicial to the accused. The same protection is not necessarily given to the complainant, and if s 409B were amended to introduce a general judicial discretion, even the existing limited protection which now exists would be eroded. Such an amendment would cause the imbalance between the protection of the accused and the protection of the complainant in sexual offence trials to increase to an unacceptable level.

6.47 In fact, it is not completely accurate to state that the legal system protects the accused to such an extent that his or her past criminal activities can never be exposed in court, in contrast to the sexual experience of the complainant. As a matter of general principle, evidence of an accused person's past criminal or wrongful conduct is not admissible on the basis that it may prejudice the jury to convict based on that past conduct rather than on the facts of the current case. However, there are exceptions to this general principle. The law's protection of the accused is not absolute. Evidence of tendency or coincidence may be admissible; that is, evidence which suggests that the accused has a tendency to act in a particular way, such as a tendency to be sexually violent, or evidence of two or more similar incidents, such as two sexual assaults, which occurred in substantially similar circumstances, may be admitted as a basis for supporting an inference that the accused must be responsible for both acts. In this way, evidence of an accused person's

36. The Director of Public Prosecutions may lodge an appeal in relation to the inadequacy of a sentence, an increase of sentence after a person fails to cooperate with authorities, the quashing of an indictment, a stated case after an acquittal, and an appeal against an interlocutory judgment or order: see *Criminal Appeal Act 1912* (NSW) s 5A-5F.

37. See Rules 413-414 of the *Federal Rules of Evidence* (United States of America). A proposal has been put forward in the United Kingdom for legislation to permit evidence of the accused's history of sexual violence to be admitted whenever evidence of a complainant's sexual experience is admitted: see para 5.47.

past sexual misconduct may be admissible if its probative value is considered substantially to outweigh its prejudicial effect.³⁸

6.48 To the extent that some other jurisdictions have considered it appropriate to go further than this and introduce special legislation to admit evidence of the accused's sexual experience whenever evidence of the complainant's sexual experience is admitted, the Commission does not support this retributive approach. In our view, it is not appropriate to admit evidence which discredits the accused simply because evidence has been introduced by the defence which discredits the complainant. The admissibility of evidence should be assessed according to its own relevance to the case. Moreover, an accused with a criminal record should not be deterred from attacking the credit of Crown witnesses where this has real relevance to the charge against him or her.³⁹

6.49 In relation to the argument that the criminal justice system favours the accused by restricting the rights of the prosecution to appeal, there are sound reasons why, as a matter of fairness, it is undesirable to grant the prosecution wider rights of appeal. A criminal trial is focused on the task of determining the guilt or otherwise of a person accused of a crime. According to the long-established principle against double jeopardy, if that person is subsequently acquitted of a criminal charge, he or she should not be tried again for the same crime. This is an integral part of our legal system; it provides an important safeguard against an abuse of power by the government against the individual citizen.

6.50 A third argument against introducing a discretion is that, although it is true that, in general, the law entrusts individual judges in criminal cases to determine the admissibility of evidence, there are good reasons why different principles should be applied in relation to the admissibility of evidence of a complainant's sexual experience in sexual offence proceedings. There are special problems surrounding the prosecution of sexual offences, not least of which is the danger that prejudicial beliefs and uninformed assumptions about sexual behaviour will influence decisions about the relevance of evidence to determining guilt.⁴⁰ Section 409B was enacted because of the experiences of complainants in the courtroom, and the practices which were

38. See *Evidence Act 1995* (NSW) s 97, 98, 101.

39. See Australian Law Reform Commission, *Evidence* (Report 26, Interim, 1985) vol 1 at para 411.

40. See the strong dissent of Justice L'Heureux-Dube in the Canadian case of *Seaboyer v The Queen; Gayme v The Queen* [1991] 2 SCR 577 at 643-712.

generally tolerated by the courts of permitting questioning about a complainant's sexual experience and reputation as a basis for making ill-informed inferences. The deliberate decision by Parliament to regulate the admissibility of sexual experience evidence according to rules rather than a discretion was a response to these experiences.

6.51 It was disputed that the attitudes of lawyers and judges towards the conduct of sexual offence proceedings have changed in any significant way since the introduction of s 409B. Sexual assault counsellors were particularly concerned about what they perceive to be the continuing mistreatment of and lack of respect shown to complainants by some members of the legal profession. Some counsellors had had positive experiences of the courtroom, mostly in cases where the trial judge exercised close control over the cross-examination of the complainant.⁴¹ However, counsellors were not convinced that the legal profession as a whole, including the judiciary, were sufficiently informed and aware of issues relating to sexual assault to make appropriate decisions in all cases about the admissibility of sexual experience evidence. A number of other people in submissions⁴² cited the conclusions reached in the *Heroines of Fortitude* report⁴³ as an indication that the treatment of complainants by lawyers and judges had not improved to any great extent since 1981.

6.52 The *Heroines of Fortitude* report concluded that lawyers and judges continue to perceive women as “emotional, irrational, and profoundly sexual”, and that s 409B remained as necessary today as when it was first introduced. That conclusion was said to be based on the empirical results and case studies undertaken as part of the research for the report. The

41. Royal North Shore Sexual Assault Service, *Consultation*; Liverpool/Fairfield Sexual Assault Service, *Consultation*.

42. E Magner and M Kumar, *Submission* at 23; NSW Health Department, *Submission* at 2; NSW Council on Violence Against Women, *Submission* at 7 and 12; Department for Women, *Submission* at 23-27; Premier's Council for Women, *Submission* at 1; L Byrnes, *Submission* at 1-2; T Manson, *Submission* at 3; NSW Rape Crisis Centre Inc, *Submission* at 3-5; Fems Rea, *Submission* at 4; Dympna House, Incest Counselling and Resource Centre, *Submission* at 2; Office of the Status of Women, Department of Prime Minister and Cabinet, *Submission* at 2 and 7; Kingsford Legal Centre, *Submission* at 6 and 12-14; Women's Legal Resources Centre, *Submission* at 1 and 3; Redfern Legal Centre, Aboriginal Women's Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission* at 3-4, 8-9.

43. See para 4.55.

Commission has some concerns about the validity of this conclusion based on the findings presented in the *Heroines of Fortitude* report. We do not say that bias and prejudice do not exist in the legal system and among members of the legal profession. However, we do not find that the empirical data and examples given in the *Heroines of Fortitude* report provide persuasive support for the assertions made by its authors.

6.53 There are other readily available conclusions which may be drawn from the empirical findings in the *Heroines of Fortitude* report besides a conclusion that some judges and lawyers disregard the spirit and requirements of s 409B. For example, the high success rate in admitting sexual experience evidence (84% of instances in which it was raised) could indicate that counsel only raise such evidence if it is thought to have substantial relevance to the case, rather than that such evidence is routinely admitted regardless of its relevance. Similarly, as we noted in paragraph 4.88, there is an alternative explanation for the report's finding that there was no prior application to the trial judge in 35% of instances in which sexual experience evidence was admitted, other than that lawyers are ignoring or failing to recognise the procedural requirements in s 409B.

6.54 In addition to the empirical data, the *Heroines of Fortitude* report cites case studies to support its conclusions about the operation of s 409B. Again, in the Commission's view, these cannot be considered necessarily to lead to the conclusions which were reached. Examples are provided from the case studies of sexual experience evidence which was raised and/or admitted in the trials studied. The details of the evidence and the context in which it was raised are not set out in great detail. They are instead summarised in what, in some instances, are quite subjective and emotive terms, such as "allegations about her sexually provocative behaviour".⁴⁴ This makes it difficult for the reader to make a proper assessment of the relevance of the evidence to the particular case. Depending on the context, much of the evidence cited in the case studies could be regarded as highly relevant, such as evidence of the nature of the complainant's relationship with the accused.⁴⁵ The report is highly critical of the distressing and gruelling process of cross-examining complainants. However, it does not take into account the fact that, under the adversarial system, cross-examination generally is distressing and gruelling for any witness, and that it is usual and often crucial to the defence case to question the testimony and credibility of a Crown witness in order to raise

44. *Heroines of Fortitude* at 246.

45. *Heroines of Fortitude*, case 36 at 246.

reasonable doubt. It cannot be inferred that, because complainants in sexual offence proceedings are subjected to distress and to long hours of cross-examination, judges and lawyers are biased against women.

6.55 A fourth ground for opposing the introduction of a discretion in s 409B was that the operation of the section would become unpredictable. The admissibility of evidence concerning sexual experience would ultimately depend on the decision of the individual judge in each case. The section would be likely to be unevenly applied, according to which judge was exercising the discretion in a particular case.⁴⁶ Sexual assault counsellors expressed concern about the effects on their clients of such a lack of predictability. People facing the prospect of giving evidence in court as complainants could no longer be reassured with the knowledge that there were rules governing the admissibility of evidence concerning their sexual experience. This may cause particular anxiety in complainants from specific groups in the community, such as women from a non-English speaking background and Aboriginal women. These women may face particular pressure and scrutiny from their communities if details of their sexual experience are exposed, and may have a strong distrust that they will be treated fairly and humanely by the legal system. A possible consequence may be that fewer people will be willing to report and proceed in the prosecution of perpetrators of a sexual offence. Such a result would defeat one of the purposes for which s 409B was introduced.

6.56 Fifthly, it may be argued that resorting to a judicial discretion to determine the admissibility of sexual experience evidence is an easy but unsatisfactory way of resolving a difficult problem. From the point of view of the accused, most evidence concerning a complainant's sexual experience could be said to have some relevance to the case for the defence. Section 409B represents a deliberate decision by Parliament to exclude such relevant and otherwise admissible evidence, except in specific circumstances, for policy reasons. The exceptions to the general prohibition represent the situations in which Parliament has determined that, balancing the probative value of such evidence with the underlying policies of the section, sexual experience evidence should be admissible. To transfer the task of determining when such evidence should be admissible would be an abdication by Parliament of any attempt to formulate a clear and consistent policy approach to the difficult balancing act required to weigh the interests of the accused with the interests of the complainant.

46. See Crown Prosecutors, *Consultation*.

6.57 In the Commission's view, it was never the intention of Parliament to exclude evidence of sexual experience which had real relevance to a case. It is clear from the Parliamentary debates leading to the introduction of s 409B that Parliament attempted to foresee every situation in which such evidence would be relevant, and to provide for evidence to be admissible in these situations by the exceptions listed in s 409B(3). It is not then a question of Parliament making a clear policy decision to exclude relevant evidence, but rather an attempt by Parliament (arguably, unsuccessful) to ensure that only relevant evidence of sexual experience was admitted.

6.58 Lastly, a discretion is opposed on the basis of the indirect consequences which, it is said, may follow its introduction. These consequences would be undesirable from the point of view of the complainant. One possible consequence is an increase in the number of appeals by the accused against a judge's discretionary decision to exclude sexual experience evidence. This would carry with it an increased risk of retrials, which would obviously be distressing for a complainant and, arguably, would be contrary to one of the aims of s 409B. While the Commission acknowledges this concern, we do not consider it a proper basis for excluding a discretion from s 409B, if that is considered to be the fairest means of regulating sexual experience evidence. Clearly, the risk of retrials should be avoided wherever possible, in the interests of both the complainant and the accused, as well as the efficient administration of the courts. However, the concern to avoid retrials should not override the public interest in ensuring a fair trial.

6.59 It has also been suggested that the introduction of a discretion could provide greater opportunity for compelling complainants to give evidence in person at committal hearings.⁴⁷ At present, as we noted in paragraph 2.30, alleged victims of an offence involving violence usually give their evidence in committal hearings by way of written statements rather than in person. This procedure aims at reducing the trauma to victims in having to give evidence in person twice, at committal and at trial. The defence may require the witness to attend a committal hearing in person if it can be shown that there are "special reasons" for doing so, in the interests of justice.⁴⁸

6.60 The courts have made it clear that, in order to establish special reasons, the accused must show more than a mere disadvantage from loss of the

47. Liverpool/Fairfield Sexual Assault Service, *Submission* at 2; Crown Prosecutors, *Consultation*.

48. *Justices Act 1902* (NSW) s 48E.

opportunity to cross-examine or to find material to discredit a witness. There must be some feature of the case which makes it out of the ordinary and which establishes that it is in the interests of justice to call the witness. Examples from the case law of “special reasons” are where the complainant’s statement is vague as to the date on which the alleged offence occurred, or where the complainant has given significantly inconsistent versions of the alleged offence.⁴⁹ Following the courts’ interpretation of the requirement to show special reasons, the Commission can see no reason why the introduction of an overriding discretion in s 409B would provide greater opportunity than now exists for the accused to require the complainant’s attendance at committal.

6.61 Another concern⁵⁰ is that the introduction of a discretion in s 409B may have an impact on the sexual assault communications privilege which was recently enacted in legislation.⁵¹ Under this privilege, evidence of communications made by an alleged sexual assault victim to a sexual assault counsellor cannot be admitted in court proceedings, except with the court’s leave and with reasonable notice. The court must not grant leave unless it is satisfied that the evidence has substantial probative value, that other evidence of the communication is not available, and that the public interest in preserving the confidentiality of the communication and protecting the alleged victim from harm is substantially outweighed by the public interest in admitting the evidence. In weighing up the competing public interests, the court must take into account the likelihood, and nature or extent, of harm that would be caused to the alleged victim if evidence of the communication were admitted. It is interesting to note that Parliament considered it appropriate to grant the trial judge a discretion to balance these competing interests in relation to the communications privilege, in contrast to the rules-based approach in s 409B.

6.62 Sexual assault counsellors were particularly anxious that a discretionary provision in s 409B may make it easier for the accused to show

49. See *R v Kennedy* (1997) 94 A Crim R 341 (NSW CCA). See also *B v Gould and DPP* (1993) 67 A Crim R 297, which considered the now repealed s 48EA of the *Justices Act 1902* (NSW) (s 48EA imposed a similar test for requiring the attendance of an alleged victim of a violent offence).

50. Royal North Shore Sexual Assault Service, *Consultation*; Southern Area Health Service, Sexual Assault Services, *Consultation*; Crown Prosecutors, *Consultation*.

51. *Evidence Act 1995* (NSW) s 126G-126L, inserted by the *Evidence Amendment (Confidential Communications) Act 1997* (NSW) Sch 1.

grounds for admitting evidence of a confidential communication as an exception to the sexual assault communications privilege. It is true that, with the introduction of a discretion in s 409B, there would be greater scope for admitting sexual experience evidence than is currently available. This may provide additional grounds for introducing evidence of a confidential counselling communication, if it relates to the complainant's sexual experience or activity, and it is considered to be admissible in the exercise of the court's discretion, where now it would generally be excluded by s 409B.

6.63 To this extent, the Commission agrees that a discretionary provision in s 409B may provide increased scope for admitting evidence of a confidential counselling communication. However, it should be remembered that the court is still required to weigh up the competing public interests in deciding whether or not to waive the sexual assault communication privilege, and must only grant leave to admit such evidence where the public interest in admitting it outweighs the public interest in protecting it from admission. Moreover, the discretionary provision in s 409B could be drafted in a way to require consideration of a number of factors in deciding whether to admit evidence of sexual experience or activity, including distress to the complainant. This, together with the balancing exercise required in considering the sexual assault communication privilege, would provide strong protection against the admission of evidence of a confidential counselling communication which did not have substantial probative value to the issues in a particular case.

Models for formulating a discretion

6.64 If a discretion were introduced as an additional provision in s 409B(3), there are a number of ways in which it could be formulated.

6.65 One suggestion is that the legislation could provide the judge with a discretion to admit evidence of sexual experience or activity, or lack of it, if the judge were satisfied that the evidence has substantial relevance and outweighed any distress, humiliation or embarrassment the complainant might suffer if it is admitted.⁵² The Public Defenders supported this

52. Law Society, *Submission* at 1. See also Legal Aid Commission, *Consultation*; J Fleming, *Submission* at 2; NSW Council for Civil Liberties, *Submission* at 2; NSW Young Lawyers, *Submission* at 4. NSW Young Lawyers suggested that the section should also include a proviso that the judge grant leave to admit evidence where it is in the interests of justice to do so and to ensure a fair trial for the accused. The Women Lawyers' Association did not support the introduction of a discretion but submitted that, if a discretion were introduced, it should be framed in terms which require the probative value of the evidence

formulation but argued that the legislation should require “relevance” rather than “substantial relevance”, given that the accused has only to raise a reasonable doubt.⁵³ In response to the Public Defenders’ argument, however, it may be noted that the provision relating to cross-examination as to credibility in the *Evidence Act 1995* (NSW) also requires that evidence adduced in cross-examination have “substantial probative value” in order to be admissible. The word “substantial” imposes an important limitation on the admissibility of such evidence.⁵⁴

6.66 There has been some concern in the past about framing a discretion to require the court to take account of the “distress, humiliation or embarrassment” which a complainant may suffer.⁵⁵ It may be argued that it is difficult for a judge to estimate the degree of the complainant’s distress, humiliation or embarrassment, and then to weigh that distress against the possibility of a conviction and the consequent deprivation of the accused’s liberty if the evidence is excluded. However, a discretion which included consideration of the complainant’s distress would be no more difficult to exercise than any of the other evidentiary provisions requiring a judge to weigh up competing considerations in the exercise of a discretion in the criminal context.⁵⁶ This is part of a judge’s role in the trial process.

6.67 One submission proposed that the discretion be drafted to permit the court to admit evidence of sexual experience:

to outweigh the stress and humiliation which the complainant may suffer: Women Lawyers’ Association, *Submission* at 6.

53. Public Defenders, *Consultation*.

54. *Evidence Act 1995* (NSW) s 103. See *R v RPS* (NSW, Court of Criminal Appeal, No 60583/96, 13 August 1997, unreported).

55. See Mahoney JA in *R v Morgan* (1993) 30 NSWLR 543 at 552. See also E Magner and M Kumar, *Submission* at 13-14; District Court judges, *Consultation*. In contrast, the Public Defenders did not consider that there were any difficulties in applying the phrase “distress, humiliation or embarrassment”: see Public Defenders, *Consultation*.

56. For example, judges have to weigh up competing interests when deciding whether to exclude evidence which has been improperly or illegally obtained, or for which there is a claim of public interest immunity, or a claim for sexual assault communication privilege: see *Evidence Act 1995* (NSW) s 138, 130, 126B.

where the Court or Justice is satisfied there are substantial reasons why in the interests of justice the evidence ought to be admitted.⁵⁷

This formulation is similar to the English provision.⁵⁸

6.68 Another submission proposed that the legislation be formulated to require the judge to exercise his or her discretion to admit evidence of sexual experience or activity or lack of it if the judge is persuaded that there is an arguable case for the jury to consider.⁵⁹

Option 3: Specific judicial discretion to admit evidence in certain circumstances

6.69 Section 409B could be reformulated by omitting the list of exceptions in s 409B(3) altogether and introducing instead a judicial discretion to admit evidence of a complainant's sexual experience and/or reputation according to the circumstances of each particular case, if certain requirements were first complied with.⁶⁰

6.70 The reformulation could impose significant limitations on the exercise of the judge's discretion. For example, it could guide the exercise of the discretion by requiring consideration of a number of factors, including matters of policy, in a way which is similar to the Canadian legislation.⁶¹ Matters which could be required to be taken into account might include, for

57. Bar Association, *Submission* at 1.

58. See para 5.41.

59. J Nicholson SC, *Oral Submission*.

60. The defence lawyers, all of whom supported the introduction of a discretion, did not express particular views as to whether the discretion should be adopted according to the model set out in option two, or according to the model in option three. Some lawyers did emphasise, however, that whichever model was chosen, the legislation should continue to require counsel to seek leave before introducing evidence: Public Defenders, *Consultation*. One group, who were strongly opposed to the introduction of a discretion, submitted that if a discretion were introduced, the existing framework for s 409B should be retained, and a discretionary provision added to the end of s 409B(3): see Fems Rea, *Submission* at 8.

61. See para 5.33. See also E Magner and M Kumar, *Submission* at 31 and J Barga and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (Office of the Status of Women, Canberra, 1995) at 91-93.

example, consideration of the distress to the complainant, the need to respect the complainant's privacy, and the risk that the evidence may arouse discriminatory belief or bias in the jury.

6.71 The discretion could also be restricted by an express legislative provision stipulating that evidence of the complainant's sexual experience or activity is not admissible where it is relied on to draw an inference about the complainant's credibility or likelihood to consent to sexual intercourse. A provision to this effect has again been adopted in the Canadian legislation, as well as in other Australian jurisdictions.⁶² It addresses the main purpose which s 409B aimed to achieve, namely to overcome the inferences made at common law about consent and credibility.

6.72 Lastly, the exercise of the discretion could be restricted even further by the imposition of strict procedural requirements which must be complied with in order to admit sexual experience. This would assist in ensuring that both counsel and the trial judge put their minds to assessing the real probative value of the evidence, and that the discretion is not used as a means to admit evidence of sexual experience freely.

6.73 The fundamental arguments for and against this option are the same as those set out in relation to Option two. However, under this option, the judicial discretion would be much more significantly restricted and closely guided by the limitations outlined above than would the mere addition of a discretionary provision under Option two. This would address some of the concerns about introducing a judicial discretion into s 409B.

Option 4: A separate provision for child sexual assault cases

6.74 A number of submissions suggested that s 409B should be retained in its present form, but that it should apply only to adult complainants. A separate provision should be introduced to apply to child complainants.⁶³

62. See Chapter 5.

63. NSW Council on Violence Against Women, *Submission* at 3; Department for Women, *Submission* at 6; Women Lawyers' Association, *Submission* at 7; NSW Health Department, *Submission* at 3-5; Women's Legal Resources Centre, *Submission* 8; Kingsford Legal Centre, *Submission* at 4-5; Redfern

6.75 These submissions noted that the main problems in the operation of s 409B have arisen in cases involving child sexual assault. It was submitted that s 409B was not drafted with consideration to the particular issues arising in child sexual assault cases. Rather, it was specifically focused on protecting adult complainants in cases where consent is an issue. By law, consent can never be an issue in child sexual assault cases and therefore s 409B may be an inappropriate means of protecting child complainants from trauma in the courtroom.

6.76 Most of the submissions which supported this option did not make any specific suggestions as to how a separate provision for children should be formulated, nor the extent to which it should restrict evidence relating to sexual matters. Instead, it was proposed that a comprehensive research study should be undertaken into the prosecution of child sexual assault matters in order to identify the type of protection which is needed for child complainants, and the best way to formulate legislation to ensure that these needs are met. It was emphasised that children should be protected as much as possible from distressing courtroom experiences, and that, until a study of the kind proposed is conducted, s 409B should continue to apply to children as well as to adults.

Legal Centre, Aboriginal Women's Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission* at 5-6; Dympna House, Incest Counselling and Resource Centre, *Submission* at 3; Royal North Shore Sexual Assault Service, *Consultation*.

6.77 One submission suggested that a separate provision be enacted for child sexual assault cases, to permit evidence of previous sexual abuse to be admitted if it was relevant.⁶⁴ Alternatively, the provision could give the trial judge a general discretion to admit evidence of sexual matters relating to the complainant, but only in the context of child sexual assault cases. This provision could apply to sexual offence proceedings where the complainant is less than 16 or 18 years.

6.78 Several people opposed the suggestion to enact a separate provision for child sexual assault cases, either on the basis that this would be unnecessarily complicated and would not address all the problems arising from s 409B,⁶⁵ or on the basis that children should be protected to the same extent as adults when giving evidence in sexual offence proceedings.⁶⁶

6.79 Given that the problem cases have primarily involved child complainants, this option may seem an attractive compromise between complete reformulation of s 409B and no reform at all. However, the Commission considers that this option has some significant disadvantages. As a practical matter, it may prove quite complicated to have two regimes for the admissibility of evidence operating in sexual offence cases. For example, consideration would need to be given to which regime should apply to questioning an adult complainant who complains of being sexually abused as a child, or an adult complainant who complains of abuse as an adult but who was also sexually abused as a child.

6.80 At a more fundamental level, it is questionable whether the introduction of a separate provision for children would adequately resolve the problems which have arisen in the operation of s 409B. For example, evidence to suggest that a complainant has made previous false allegations of abuse may be equally relevant to a case involving an adult complainant as one involving a child. It is less likely that evidence of previous sexual abuse will be of such significance to a case involving an adult complainant as to a case involving a child, since adults are not generally expected to be sexually naïve. There may, however, be adult cases where it is relevant, such as in the

64. See Royal North Shore Sexual Assault Service, *Consultation*.

65. Public Defenders, *Consultation*; Legal Aid Commission, *Consultation*. One Public Defender gave limited support to this option if it established a separate provision for children which included a judicial discretion to admit evidence.

66. M Roberts, *Submission* at 3.

example given by the Crown Prosecutors of the complainant whose reaction to a sexual attack was affected by her memories of earlier abuse.⁶⁷

6.81 Lastly, it is difficult to envisage what sort of legislative provision would be favoured by those people who suggested this option in submissions. If the provision aimed to address the issues arising in the problem cases, then it seems likely that it would have to be formulated in a way which either contained a judicial discretion to admit sexual experience evidence, or included additional exceptions to those set out in s 409B(3). It is difficult to see, however, why the same objections to both those options would not apply equally to child sexual assault cases as to adult cases. For example, it seems illogical and artificial to entrust judges with a discretion to admit evidence in child cases, but not to do the same in adult cases.

Option 5: Abolition of s 409B

6.82 Section 409B could be abolished altogether. The admissibility of evidence relating to a complainant's sexual experience and reputation would then be governed by the general rules of evidence.

6.83 In general, evidence is admissible if it is relevant and not excluded by reason of an exclusionary rule,⁶⁸ such as the rule against hearsay evidence. In sexual offence proceedings, the following general rules may operate to restrict the admissibility of evidence of a complainant's sexual experience and reputation, in addition to the restrictions imposed by s 409B.

6.84 *The tendency rule.*⁶⁹ This rule states that evidence of a person's character, reputation, conduct, or tendency, is not admissible to prove that that person has or had a tendency to act in a particular way. For example, under the tendency rule, evidence that a complainant has a reputation for promiscuity would not usually be admissible to prove that she consented to intercourse with the accused. However, as an exception to the tendency rule,

67. See para 4.30.

68. See *Evidence Act 1995* (NSW) Part 3.

69. *Evidence Act 1995* (NSW) s 97.

evidence of character, reputation, conduct, or tendency is admissible if the court considers that it has significant probative value.⁷⁰

6.85 **The coincidence rule.**⁷¹ According to the coincidence rule, evidence of two or more events is inadmissible to prove that a person did a particular act or had a particular state of mind. However, such evidence may be admissible if the events in question are substantially and relevantly similar, and the circumstances in which they occurred are substantially similar, and the court considers that the evidence has a significant probative value.⁷²

6.86 **The credibility rule.**⁷³ As a general rule, evidence that relates only to a witness' credibility is inadmissible. The "credibility" of a witness includes matters such as his or her truthfulness, intelligence, bias or motive to lie, or ability to observe or remember events. However, evidence relating only to a witness' credibility is admissible if it has substantial probative value. For example, evidence that a complainant has told a lie in the past would not ordinarily be admissible. However, if the evidence suggests that the complainant falsely accused a person in the past of sexual abuse, it may be considered in some cases to have substantial probative value and therefore be admissible.

6.87 **Discretion to exclude evidence.**⁷⁴ The court has a general discretion to exclude evidence if its probative value is substantially outweighed by the danger that it might be unfairly prejudicial to a party, or be misleading or confusing, or cause or result in an undue waste of time.

6.88 **Discretion to disallow improper questions.**⁷⁵ The court has the power to disallow a question put to a witness in cross-examination, or inform the witness that the question need not be answered, if that question is misleading, or unduly annoying, harassing, intimidating, offensive, oppressive, or repetitive.

6.89 If s 409B were abolished altogether, the admissibility of evidence of sexual experience and sexual reputation would continue to be restricted by

70. Section 97(1)(a) also imposes a requirement that the party seeking to admit the evidence give reasonable notice of this intention to the other party.

71. *Evidence Act 1995* (NSW) s 98.

72. Section 98(1)(a) also requires that the party seeking to admit the evidence give reasonable notice of this intention to the other party.

73. *Evidence Act 1995* (NSW) s 102, 103, 106.

74. *Evidence Act 1995* (NSW) s 135.

75. *Evidence Act 1995* (NSW) s 41 and 103.

the general exclusionary rules such as those set out above. In light of these general rules, it could be argued that it is unnecessary to retain an additional legislative provision regulating the admissibility of evidence of sexual experience and reputation. However, only one submission supported the abolition of s 409B.⁷⁶ All other submissions considered that it was desirable to retain s 409B in some form, because of the special issues surrounding sexual offence cases. The Commission agrees that it is desirable to retain a special provision for sexual offence proceedings and for that reason we have recommended that s 409B be retained.⁷⁷

Option 6: A provision to stay proceedings

6.90 Legislation could be introduced permitting the court to stay proceedings on the basis that the accused is unable to have a fair trial, by reason of the operation of s 409B.⁷⁸ This would mean that the prosecution of the accused for the commission of the relevant sexual offence would be permanently discontinued. A legislative provision of this kind would reverse the effect of the decisions of the Court of Criminal Appeal and the High Court, which held that, under the existing law, judges have no power to grant permanent stays in these circumstances.⁷⁹

6.91 Although there are other rules which exclude relevant evidence in criminal cases, it would be possible to confine the scope of the proposed legislative provision to the operation of s 409B. This is because, as we note in paragraph 6.106, s 409B is quite unique in so far as it excludes otherwise admissible evidence, with no flexibility to do otherwise in cases where its admission is considered desirable in the interests of fairness.

6.92 One advantage of this option is that it provides a remedy for unfairness, but at the same time does not subject complainants to any additional trauma or distress by further investigation into their private lives in the courtroom. The scope of cross-examination of complainants would remain fairly predictable, in so far as s 409B would continue to set down defined limits or rules on questioning about sexual experience.

76. H di Suvero, *Submission* at 5.

77. See recommendation 1 and para 6.96-6.99.

78. This option was suggested by Mr Stephen Odgers, although it is not necessarily his preferred option.

79. See para 4.41.

6.93 A significant disadvantage of this option is that it may have the effect that some offenders are never prosecuted, because the operation of a law does not permit them to be tried fairly. This would be a highly undesirable result, both for the complainant and the general community.

6.94 One way of overcoming this problem, it was submitted, is for the court to give the complainant the choice of either having proceedings against the accused permanently stayed, or of agreeing to have the evidence relating to his or her sexual experience admitted so as to ensure that the accused has a fair trial.⁸⁰ It was suggested that vesting control over the proceedings in the complainant may bring benefits to the complainant's psychological well-being and enable him or her to deal with the potentially traumatic experience of having his or her sexual experience disclosed, if he or she decides to continue with the proceedings.

6.95 Traditionally, the State has been responsible for the prosecution of those accused of crimes. Victims are not a party to criminal proceedings; their role is generally limited to reporting the crime and appearing as a witness. The State's decision whether or not to prosecute may be informed by the attitude of the victim to the prosecution, but it does not depend on the victim's agreement.⁸¹ This is because the management of criminal prosecutions is regarded by the community as a matter of public interest, rather than a private matter between individuals. It would be contrary to the interests of both the victim and the public to place the responsibility and costs of prosecuting crime on the victim. Similarly, the Commission considers that it would be contrary to the interests of both the victim and the public to place the burden of deciding whether to continue with the prosecution of an alleged sex offender on the complainant. We do not agree that this approach would be any less distressing for the complainant. In fact, it may place even greater

80. See E Magner and M Kumar, *Submission* at 21, 23. See also M Kumar and E Magner, "Good Reasons for Gagging the Accused" (1997) 20 *University of New South Wales Law Journal* 311 at 330-331.

81. Victims of crime have a right to commence private prosecutions, but the Director of Public Prosecutions can at any time take over and discontinue these proceedings: see *Director of Public Prosecutions Act 1986* (NSW) s 9; New South Wales, Office of the Director of Public Prosecutions, *Prosecution Policy and Guidelines* (Sydney, March 1998) at 7-8.

stress on the complainant who is forced to decide whether to agree to a permanent stay.⁸²

THE COMMISSION'S RECOMMENDATIONS

RECOMMENDATION 1

Section 409B should be retained.

RECOMMENDATION 2

Section 409B should be amended to provide as follows:

409B.(1)(a) This section applies to criminal proceedings for a prescribed sexual offence, whether those proceedings are for that offence alone, or together with any other offence (as an additional or alternative count).

(b) This section applies to all stages of criminal proceedings, including bail, committal, summary hearing, trial, sentencing, and appeal.

(c) This section applies to an inquiry into a conviction for a prescribed sexual offence under Part 13A of this Act.

(d) In this section:

“the accused person”, in relation to any proceedings, means the person charged with a prescribed sexual offence;

“the complainant”, in relation to any

82. See Redfern Legal Centre, Aboriginal Women's Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, *Submission* at 5.

proceedings, means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person is charged is alleged to have been committed;

“prescribed sexual offence” means:

- (i) an offence under section 61B, 61C, 61D, 61E, 61I, 61J, 61K, 61L, 61M, 61N, 61O, 65A, 66, 66A, 66B, 66C, 66D, 66F, 73, 74, 78A, 78B, 78H, 78I, 78K, 78L, 78N, 78O, 78Q, 80A, 86, 87, or 89;**
- (ii) an offence (such as an offence under section 37 or 112) which includes the commission, or an intention to commit, an offence referred to in paragraph (i); or**
- (iii) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (i) or (ii).**

(2)(a) In proceedings to which this section applies, evidence relating to the sexual reputation of the complainant is inadmissible.

(b) Notwithstanding subsection (2)(a), evidence about any sexual experience or sexual activity, or lack of experience or activity, of the complainant shall not be inadmissible merely because it also relates to the sexual reputation of the complainant.

(3)(a) In proceedings to which this section applies, no evidence shall be admitted about any sexual experience or activity of the complainant, or lack of sexual experience or activity, except with leave of the court.

(b) For the purposes of subsection (3)(a), “sexual experience or activity” includes sexual experience or activity to which the complainant did not consent.

(4) The court shall not grant leave under subsection (3)(a) unless:

- (a) the court is satisfied that the evidence has significant probative value to a fact in issue or to credit; and**
- (b) the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice, taking into account the matters set out in subsection (6); and**
- (c) the party seeking to admit the evidence has complied with the requirements in subsection (7).**

(5) Evidence of a complainant's sexual experience or activity is not admissible to support an inference that, by reason only of the fact that the complainant has engaged in sexual activity or has had sexual experience, the complainant:

- (a) is the type of person who is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or**
- (b) is less worthy of belief.**

(6) In determining whether the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice under s 409B(4)(b), the court shall take into account the following matters:

- (a) the interests of justice, including the right of the accused to make a full answer and defence;**
- (b) the distress, humiliation, or embarrassment which the complainant may suffer as a result of leave being granted;**
- (c) the risk that the evidence may unduly arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;**
- (d) the need to respect the complainant's personal dignity and privacy;**
- (e) whether there is a reasonable prospect that the evidence will assist in arriving at a just**

determination in the case;

(f) any other factor which the court considers relevant.

(7) The party seeking leave under subsection (3)(a) must do so by application to the court in writing and must:

- (a) set out:**
 - (i) the nature of the evidence sought to be adduced; and**
 - (ii) how the evidence has significant probative value to a fact in issue or to credit;**
 - (b) give a copy of the application to the other party within such time before the hearing of the application as the court may prescribe or considers to be appropriate in the interests of justice in the particular case.**
- (8) The court must hear an application to grant leave under subsection (3)(a) in the absence of the jury (if any) and the public.**
- (9) The complainant is not a compellable witness at the hearing of an application for leave under subsection (3)(a).**
- (10) At the conclusion of the hearing of an application for leave under subsection (3)(a), the court must make a determination whether or not to grant leave to admit the evidence and must record or cause to be recorded:**
- (a) the reasons for that determination;**
 - (b) where the court grants leave to question the complainant, the nature of the evidence which may be elicited.**
- (11) Where evidence of a complainant's sexual experience or activity is admitted at trial under this section, the judge shall give a warning to the jury to the effect that they must not infer, by reason only of the fact that the complainant has engaged in sexual activity or has had sexual experience:**
- (a) that the complainant is less worthy of belief;**
 - (b) where consent is an issue at the trial, that the complainant is the type of person who is more likely to have consented to the sexual activity that forms the subject-matter of the charge.**
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DISCUSSION OF THE COMMISSION'S RECOMMENDATIONS

Recommendation 1: Retention of a special provision for sexual offence proceedings

6.96 The Commission recommends that s 409B be retained and reformulated, rather than abolished. As we have already noted,⁸³ the recommendation to retain s 409B was supported in almost all submissions and consultations.

6.97 As we noted in paragraphs 6.83-6.89, the general rules of evidence provide some protection to complainants in sexual offence cases against distressing and irrelevant questioning about their sexual experience and reputation. Nevertheless, there are reasons why it is desirable to retain a separate legislative provision to provide additional protection to complainants in sexual offence proceedings against unnecessary disclosure of material relating to their sexual conduct.

6.98 In the Introduction to this report, the Commission referred to the special issues surrounding sexual assault and sexual offence proceedings. These relate to the nature of the crime itself, and the special vulnerability of complainants in the courtroom. A complainant's testimony and credibility will often be subject to particular scrutiny by the defence, because the outcome of the trial will largely depend on the acceptance or rejection of the complainant's word against the accused. As a result, complainants' experiences of the courtroom may be particularly traumatic and isolating. It is proper that the law ensure, as far as possible, that they are not unnecessarily subjected to further distress by irrelevant attacks and questioning about their sexual character and sexual lives. For this reason, the Commission considers that it is important to retain a special legislative provision requiring the court to give consideration to the possible distress suffered by a complainant by questioning of this kind. Moreover, the existence of a special legislative provision may offer some reassurance to complainants who feel apprehensive about reporting to the police and appearing publicly in court.

6.99 In addition, the history of the law's treatment of complainants of sexual assault has been a sorry one, revealing uninformed assumptions and

83. See para 6.89.

moral judgments about women generally. It is appropriate to retain a provision requiring the courts to pay special attention to the conduct of sexual offence trials to make sure the old practices and conduct towards complainants do not resurface.

Recommendation 2: Reformulation of s 409B

Introduction of a restricted discretion for evidence of sexual experience

6.100 We take the view that s 409B needs to be reformulated to resolve the problems which have arisen in some cases. The reformulation which we recommend introduces a restricted discretion for determining the admissibility of evidence of a complainant's sexual experience or activity, essentially in accordance with the model set out in option three above. This permits the court to admit or reject evidence of sexual experience or activity after balancing its probative value against a number of factors.

6.101 The Commission finds the arguments in favour of a discretionary model to be compelling. Essentially, we consider that it is the only means of ensuring a fair trial. It is true that s 409B has been most strongly criticised in specific types of cases involving specific types of evidence. However, we are not satisfied that it will be sufficient to overcome all the problems in the section's operation simply to amend it by adding more exceptions.

6.102 As the drafters of s 409B themselves recognised, there are occasions when material relating to a complainant's sexual experience is relevant to the issues in an individual case. If the rules-based approach for s 409B is retained, the danger remains that sexual experience evidence which is highly relevant will be excluded because it does not come within one of the exceptions to the prohibition. Parliament stated that the introduction of s 409B would not give rise to any injustice to the accused, because the exceptions in s 409B(3) provided for all the circumstances in which sexual experience evidence was relevant. The "problem cases" have shown that this was not so. In the Commission's view, it is not possible to foresee every situation in which evidence will be relevant to the facts of an individual case, in order to be satisfied that injustice will not be done by the imposition of inflexible rules.

6.103 We have sought to emphasise in this report that the notion of a fair trial for the accused is not merely a theoretical argument nor a matter of

favouring the accused over the victim, but is a matter of public interest. The right to a fair trial includes a right to present a full and fair defence and cross-examine prosecution witnesses on relevant material.

6.104 It is true that this is not an absolute right: it must be balanced against competing interests and policy considerations.⁸⁴ However, that balancing exercise is most effectively and fairly done by assessing the relevance of the evidence in each individual case against concerns for its prejudicial effect and possible trauma for the complainant, rather than by setting down rigid rules for admissibility. The absence of any satisfactory remedy against injustice caused by s 409B reinforces the importance of ensuring that the section is formulated in a way which ensures that it will not deny the individual accused a fair trial.

6.105 It is relevant to note that s 409B is now the only legislative provision regulating sexual experience evidence which continues to exclude absolutely any form of judicial discretion. In our view, the experiences of other jurisdictions are an indication that a rules-based model for admissibility cannot operate fairly in every case.

84. See M Kumar and E Magner, "Good Reasons for Gagging the Accused" (1997) 20 *University of New South Wales Law Journal* 311 at 331.

6.106 There are, of course, other rules of law which exclude evidence relevant to the defence case in criminal proceedings. For example, relevant evidence may be excluded because it is hearsay or it amounts to someone's opinion, or because it relates to privileged information or is covered by public interest immunity.⁸⁵ Examples such as these may be used to suggest that the exclusion of relevant evidence does not necessarily amount to a denial of a fair trial. However, these exclusionary rules differ from s 409B, both in their rationale and in their operation. Hearsay and opinion evidence is generally excluded because it is considered unreliable and potentially inaccurate. Evidence which is privileged or covered by public interest immunity is generally excluded because, as a matter of public policy, its admission would do more harm than good to the public interest. There is now, however, a great amount of flexibility in the operation of these exclusionary rules, particularly in the context of criminal trials: courts generally have some discretion to waive these rules in order to admit evidence which has a significant probative value. Section 409B is therefore quite unique in its absolute prohibition of relevant evidence.

6.107 The Commission is conscious of the concerns which some people have expressed about introducing a discretion into s 409B. Essentially, these concerns relate to, first, a possible increase in the distress and trauma faced by complainants, including greater apprehension about going to court because of the unpredictable operation of a discretion and the potential consequences this may have on reporting rates, and, secondly, a distrust of judges' ability to exercise a discretion properly.

6.108 The Commission agrees that there is greater scope with a discretion to lead evidence of a complainant's sexual experience, and this brings with it the possibility of additional distress for the complainant. It is the role of the defence, however, to try to raise reasonable doubt about a complainant's testimony and credibility, and so, to this extent, it is likely that cross-examination will always carry with it some element of distress.

6.109 The Commission does not consider that the introduction of a discretion is, as some people suggested in consultations, a step backward, or a withdrawal of the protection provided by s 409B. The fundamental aim of this section was to protect complainants against the distress of irrelevant and offensive questioning. Where the questioning is directly relevant to the case, then in any trial, whether or not it relates to a sexual offence, the significance

85. See *Evidence Act 1995* (NSW) Pt 3.2, 3.3, 3.10.

of its probative value must override the fear of distress and concern for any indirect consequences such as an effect on reporting rates. Ultimately, it must be remembered that the focus of a criminal trial is necessarily on the accused: the purpose of the trial process is to determine the question of the accused's guilt, and the outcome of a conviction in sex offence cases will likely be the deprivation of the accused's liberty.

6.110 In relation to the concern that judges cannot be trusted to exercise a discretion properly, the Commission acknowledges this concern but does not consider it a proper basis for imposing inflexible restrictions on the admissibility of evidence, when every other aspect of the criminal process relies to some extent on judicial discretion. This is the system which our society has chosen, on the ground that it is the fairest way of administering justice in individual cases. Moreover, a judicial discretion may be guided or controlled by various means. Our recommended reformulation places strong limitations on the exercise of judicial discretion.

6.111 We are not convinced that the empirical studies referred to in this report necessarily indicate that discretionary schemes for restricting sexual experience evidence do not work.⁸⁶ Most of these studies have tended to measure the success of the relevant provision solely according to whether or not it reduces the admission of all sexual experience evidence, not the extent to which it reduces the admission of irrelevant sexual experience evidence. The two studies which attempted a detailed qualitative analysis of the types of situations in which sexual experience evidence was admitted under a discretionary regime were the studies of the Tasmanian and Scottish provisions.⁸⁷ They concluded that the discretion was not exercised as effectively as it was originally intended to be in every case. However, they did support the basic discretionary model, with recommendations, among others, for amendments to the legislation to provide greater guidance on how the discretion was to be exercised. This issue is addressed in the Commission's recommended reformulation.

6.112 We are conscious of the fact that sexual offence proceedings have been particularly susceptible in the past to sexist assumptions by the judiciary about what is "relevant". For this reason, although we maintain that a discretion is the fairest means of assessing admissibility, we have adopted an approach in our recommended reformulation which guides the exercise of the

86. See Z Adler, *Rape on Trial* (Routledge and Kegan Paul, London, 1987) at 143.

87. See para 5.20-5.22, 5.52-5.53.

judicial discretion in order to guard against inappropriate decisions. Strong restrictions are placed on the exercise of the discretion by:

- a prohibition on reliance of evidence of sexual experience to draw a general inference about the complainant's consent or credibility (that is, the old "common law" inferences);
- a requirement that the court weigh up the relevance of the evidence with competing considerations set out in recommended s 409B(6);
- detailed procedural requirements which must be complied with in order to admit sexual experience evidence.

6.113 Because the Commission has adopted a new approach in our recommended reformulation of s 409B, in which strong legislative restrictions are placed on the exercise of the judicial discretion, we consider it desirable to replace the existing section with an entirely new one, rather than simply add an additional provision for a discretion at the end of the existing provisions.

Prohibition on making general inferences about consent or credibility

6.114 Recommended s 409B(5) is drawn from the Canadian legislation.⁸⁸ It prohibits the admission of evidence of a complainant's sexual experience or activity, where that evidence is sought to be relied on to make an inference that the complainant is the type of person who is more likely to have consented, or is less worthy of belief. It aims to preclude the common law practice of admitting sexual experience evidence to infer that, because the complainant has engaged in sexual activity in the past, she or he is more likely to have consented to the sexual activity which is the subject of the current charge, or is a less credible witness. A provision to this effect reflects the fundamental purpose for which s 409B was enacted.

6.115 The Commission is aware that the Canadian provision is currently the subject of a constitutional challenge in the Canadian Supreme Court. The challenge has been brought on the basis that the provision prohibits the admission of evidence of a complainant's sexual experience, including sexual experience with the accused, whenever that evidence is said to be relevant to the question of consent. Since evidence of previous sexual experience with the accused can have substantial relevance to the question of consent, it is

88. *Criminal Code* (Canada) s 276(1). See para 5.33.

argued that the provision may deny the accused a fair trial and is therefore unconstitutional, according to the Canadian *Charter of Rights and Freedoms*.⁸⁹

6.116 In the Commission's view, the wording of our recommended s 409B(5), which differs from the Canadian provision, does not support an interpretation of the kind which forms the basis of the Canadian constitutional challenge. The recommended provision aims to prohibit general inferences which rely only on the previous sexual experience of the complainant as a reason for suggesting that she or he is a type who is more likely to consent or is less worthy of belief. It does not prohibit the admission of evidence from which specific inferences are sought to be drawn, such as evidence that the complainant had consensual sexual intercourse with the accused in the past in similar circumstances which make it relevant to the question whether she or he consented to intercourse with the accused on this occasion.

“Significant probative value” of the evidence sought to be admitted

6.117 As one of the preconditions to admissibility, recommended s 409B(4)(a) requires that evidence of sexual experience or activity, or lack of it, have “significant probative value” to a fact in issue or to credit. Inclusion of the term “significant probative value” is consistent with the existing provisions regulating the admissibility of tendency and coincidence evidence in the *Evidence Act 1995* (NSW).⁹⁰ In the context of those provisions, “significant probative value” has been interpreted to require that evidence be “important” or be “of consequence” to the issues, that it be more than merely relevant but that it not necessarily be substantially relevant.⁹¹ The case law which has developed as to the interpretation of this term should assist the courts in applying the recommended reformulation of s 409B.

89. The hearing of an appeal to the Supreme Court of Canada in the case of *R v Darrach* is pending. See also D Paciocco, “The New Rape Shield Provisions in Section 276 Should Survive *Charter* Challenge” 21 CR (4th) 223.

90. Sections 97 and 98. See para 6.84-6.85.

91. See *R v Lockyer* (1996) 89 A Crim R 457 (NSW CCA); *R v Lock* (1997) 91 A Crim R 356 (NSW CCA); *R v AH* (1997) 42 NSWLR 702; *R v Fordham* (NSW, Court of Criminal Appeal, No 60697/97, 2 December 1997, unreported) per Howie AJ at 15.

Weighing probative value against the danger of prejudice to the proper administration of justice: matters to be considered

6.118 Even if sexual experience evidence or activity, or lack of it, is found to have significant probative value, recommended s 409B(4)(b) provides that the court must not grant leave to admit it unless its probative value substantially outweighs the danger of prejudice to the proper administration of justice. Recommended s 409B(6) sets out matters which the court must consider as part of this balancing exercise.

6.119 The term “substantially outweighs” is again familiar to the courts because of its inclusion in a number of provisions in the *Evidence Act 1995* (NSW).⁹² It places a heavy onus on the party seeking to admit the sexual experience evidence.⁹³

6.120 The matters to be considered under recommended s 409B(6) reflect the main concerns about admitting sexual experience evidence which have been discussed in this report and which the existing s 409B seeks, unsuccessfully, to resolve. They essentially require the court to balance considerations of fairness to the accused, with the risk of unfair prejudice arising from the admission of the evidence in question, as well as the need to protect the complainant, as much as possible, from distress, humiliation or embarrassment resulting from an invasion of his or her sexual privacy. The recommended reformulation makes it clear that this is not necessarily an exhaustive list of matters to be considered by the court in exercising its discretion.

Application to evidence of non-consensual sexual experience or activity

6.121 The Commission intends that the recommended reformulation of s 409B apply to evidence of non-consensual sexual experience or activity, as well as consensual experience or activity. Since there seems to be some uncertainty as to whether the term “sexual experience or activity” in the existing s 409B should be interpreted to include non-consensual experience or activity,⁹⁴ we considered it prudent to define the term in subsection (3)(b)

92. See, for example, s 101, 135.

93. See S Odgers, *Uniform Evidence Law* (3rd edition, LBC Information Services, Sydney, 1998) at para 135.2.

94. On appeal to the High Court in *HG v The Queen*, counsel for the appellant submitted that “sexual experience or activity” should be interpreted to apply only to experience or activity which is consensual, that is, that it not include evidence of previous sexual assault or other sexual abuse. This argument had

of the reformulation to make it clear that the section applies equally to evidence of sexual experience or activity to which the complainant did not consent.

6.122 It may be true that the original rationale of the section was aimed more at protecting women from investigation into their previous consensual sexual encounters. However, we consider that survivors of sexual abuse should be offered the same protection from investigation into their sexual history as other complainants. The court may, of course, exercise its discretion to admit evidence of sexual abuse in cases where its probative value substantially outweighs the danger of prejudice to the proper administration of justice. This may occur particularly in child sexual assault cases, where the evidence relates to the same sort of matters as arose in the “problem cases”.

Application to evidence of a lack of sexual experience or activity

6.123 Recommended s 409B(3)(a) makes it clear that the section applies to restrict the admissibility of evidence of a lack of sexual experience or activity, as well as evidence of sexual experience or activity. Evidence of a lack of sexual experience will include, for example, evidence of a supposedly false allegation of sexual assault.

6.124 The Commission agrees that the original rationale of the existing s 409B was more particularly aimed at protecting women from comments about their “promiscuity”. However, we consider that the section should seek to protect complainants as much as possible from distressing investigation into their sexual lives generally, which includes investigation into their lack of sexual experience. It should also require the court to scrutinise the relevance of any evidence relating to a complainant’s sexual conduct, including a lack of experience, in order to ensure that inappropriate assumptions are not being made about the relevance of that evidence. We consider, however, that evidence of a lack of sexual experience will more readily be admitted than evidence of sexual experience, because it is less likely that the relevance of such evidence will be based on inappropriate assumptions about “promiscuous” women.

been previously rejected by the NSW Court of Criminal Appeal in *R v G*: see para 2.6. The High Court’s judgment in *HG v The Queen* has not yet been delivered: see transcript of proceedings No S67/98 on 8 September 1998.

6.125 The concerns which have been expressed about admitting evidence of “false” allegations of sexual abuse reinforce the advantage in applying the restrictions in our recommended reformulation of s 409B to evidence of a lack of sexual experience. Under the recommended reformulation, the court will have to consider the probative value of such evidence and be required to weigh this against the danger of prejudice to the proper administration of justice. In doing this, the court may have to take into account many of the issues which were raised in submissions and consultations, such as the difficulty in determining whether the allegation was false, the risk that the evidence may arouse prejudice or assumptions in the jury about the “unreliability” of complainants, and the possible distress which the complainant may suffer.

6.126 The Commission considered including in the recommended reformulation a specific provision dealing with evidence of “false” allegations of sexual abuse, possibly adopting one of the proposals set out in paragraph 6.24-6.28. We came to the conclusion that it is not possible to draft such a provision in a way which is sufficiently flexible to allow consideration of all the facts in an individual case. The recommended reformulation is sufficient to allow proper consideration of the concerns about the admissibility of such evidence. It may be the responsibility of the Crown Prosecutor, in opposing an application by the defence to admit evidence of a complainant’s previous allegation of abuse, to direct the court’s attention to matters which may tend to lessen the probative value of such evidence or which suggest that the probative value of that evidence does not substantially outweigh the danger of prejudice to the proper administration of justice.

Requirement to give a warning to the jury

6.127 Recommended s 409B(11) applies in cases where leave is granted to admit evidence of a complainant’s sexual experience or activity. It requires the judge to give a warning to the jury against inferring that, by reason only of the fact that the complainant has engaged in sexual activity or has had sexual experience, she or he is less worthy of belief, and, where consent is an issue at the trial, that he or she was the type of person who is more likely to have consented. Like recommended subsection (5), this recommended subsection aims at preventing the use of sexual experience evidence for the purpose of making one of the common law inferences about a person’s credibility or propensity to consent to sexual activity based solely on the fact that that person has had previous sexual experience. It is directed at ensuring that, where sexual experience evidence is admitted for a legitimate purpose, it

is not misused by the jury to make baseless assumptions about the complainant's moral character.

6.128 The requirement to give a warning in recommended subsection (11) does not apply in relation to the admission of evidence of a lack of sexual experience or activity. In this situation, there is not the same risk that a jury may base a decision on an inappropriate moral judgment about a "promiscuous" or sexually active complainant.

Application to evidence for the prosecution

6.129 Unlike some other jurisdictions,⁹⁵ the Commission's recommended reformulation of s 409B is not limited to apply only to evidence sought to be admitted by the accused. Consistent with the approach taken in the existing s 409B, our recommended reformulation also restricts the admissibility of sexual experience evidence raised by the prosecution.

6.130 Although s 409B was particularly intended to protect complainants from unnecessary attacks by the defence, the Commission considers that the section should continue to apply equally to the prosecution. The section ensures that the relevance of all sexual experience evidence, whether raised by the defence or by the prosecution, is properly scrutinised by the court before it is admitted. In this way, it prevents the return of the common law practices of using sexual experience evidence as a basis for making moral judgments about "chaste" and "unchaste" women.

6.131 Unlike the existing s 409B, however, the Commission's recommended reformulation will not operate to exclude relevant evidence raised by the prosecution, where its exclusion may be detrimental to the prosecution's case and, consequently, to the complainant. This is because the court will have a discretion to grant leave for the prosecution to admit sexual experience evidence where it can be shown to have significant probative value to the issues in the case and where its probative value is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Application to all stages of criminal proceedings

6.132 Recommended s 409B(1)(b) makes it clear that the section is to apply to all stages of criminal proceedings for a prescribed sexual offence.

95. See Chapter 5.

6.133 As we noted in Chapter 2, it is arguably unclear whether the existing s 409B applies to committal proceedings, although it has generally been interpreted to do so. Moreover, it was recently argued in the High Court that the wording of s 409B excludes its application to hearings on appeal.⁹⁶ If this argument is accepted, it would have the result that evidence relating to a complainant's sexual experience may be admitted on appeal which was inadmissible at trial.

6.134 Given the existing ambiguities, the Commission considers it desirable to spell out the scope of the application of s 409B in our recommended reformulation. We can see no reason in principle why the section should not apply to restrict the admissibility of evidence at all stages of criminal proceedings.

6.135 In recommended s 409B(1)(c), the Commission extends the application of the section to inquiries into a conviction under Part 13A of the *Crimes Act*. Under Part 13A, a review of a person's conviction may be conducted by a judicial officer or a Justice of the Peace if there is doubt as to the convicted person's guilt, or any mitigating circumstances, or any part of the evidence in the case. Following the recent argument in the High Court referred to above, it may be uncertain whether the existing s 409B applies to restrict the admissibility of evidence in inquiries under Part 13A.

6.136 If s 409B is reformulated to include a judicial discretion, the Commission can again see no reason in principle why the section should not apply to inquiries of this kind. To avoid any uncertainty, we have expressly provided to this effect in our recommended reformulation. However, we take the view that the discretion under the reformulated s 409B would more generally be exercised to permit the admission of evidence in these inquiries, given that, by reason of the inquisitorial nature of such proceedings, the person conducting the inquiry may inquire into matters which an appellate court may not be able to consider in determining whether a conviction was unsafe or unsatisfactory.⁹⁷

96. See transcript of proceedings in *HG v The Queen* (High Court of Australia, No S67/98, 8 September 1998). Counsel for the appellant argued that the use of the word "charged" in s 409B and in s 4(1) of the *Crimes Act 1900* (NSW) means that s 409B does not apply to a person who has already been convicted and appeals that conviction.

97. See *Grills v The Queen*; *PJE v The Queen* (High Court of Australia, No S8/96, 9 September 1996, unreported); *R v Morgan* (1993) 30 NSWLR 543.

Procedural requirements

6.137 Recommended s 409B(7)-(10) imposes important procedural requirements on both counsel and the court in making and hearing an application for leave to admit evidence of sexual experience or activity, or lack of it. These provisions follow the approach taken in Canada and in Victoria, in which the exercise of the judicial discretion is restricted by detailed procedures which must be complied with before leave may be granted. Tight procedural requirements are an important safeguard against the inappropriate exercise of a judicial discretion, because they require counsel and the court to apply their minds to assessing the real relevance of the evidence sought to be admitted, and to justify why it should be admissible.

6.138 The procedural requirements recommended by the Commission include a requirement that counsel make an application for leave in writing, and that the application be given to the opposing party before the hearing of the application. This forces counsel to address specifically the way in which the evidence sought to be admissible is relevant to the issues in the case. It also gives the opposing party notice of the application, and allows time to prepare any arguments which he or she may wish to make in opposition to that application. The recommended reformulation requires that a copy of the application be given to the opposing party within such time as the court may prescribe or considers to be appropriate in the interests of justice. This allows the courts to set down the time limits which they consider to be the most appropriate.

6.139 The inclusion of a notice provision was supported by the Crown Prosecutors in consultation, but was opposed by the Public Defenders on the basis that it is not always known until the middle of a trial that issues relating to s 409B arise.⁹⁸ District Court judges were not generally opposed to a requirement to give notice, although they did not favour any provision which would require the formal filing of a Notice of Motion.⁹⁹ The Commission considers that the Public Defenders' concern is satisfactorily addressed by a provision which gives the court a degree of flexibility in setting down time limits, where it is in the interests of justice to do so.

6.140 The recommended reformulation also requires the court to give reasons for its decision whether or not to grant leave, and if leave is granted to question the complainant, to state the nature of the evidence which may be elicited by that questioning. This last requirement addresses a concern raised

98. See Public Defenders, *Consultation*; Crown Prosecutors, *Consultation*.

99. See District Court judges, *Consultation*.

by some Crown Prosecutors, which was that when the court grants leave now to cross-examine the complainant under one of the exceptions to the prohibition on sexual experience evidence, the scope of the questioning for which leave has been granted is not necessarily specified. This may have the result that questioning of the complainant extends beyond the scope of the evidence which, in the Crown Prosecutor's view, was initially ruled to be admissible.¹⁰⁰

6.141 Recommended s 409B(8)-(9) provides that an application for leave must be heard in the absence of the jury and the public, and that the complainant is not a compellable witness in the hearing of the application. This means that a complainant cannot be forced to give evidence in the hearing of an application for leave. These provisions are designed to minimise unnecessary distress to the complainant. Under the existing provisions of s 409B, it may not be certain whether a complainant may be compelled to give evidence on an application for leave to admit evidence under the existing exceptions in s 409B(3).¹⁰¹ Arguably, it defeats one of the purposes of s 409B to subject a complainant to distressing questioning in a leave application for the purpose of determining whether the complainant should be protected from the distress of such questioning at trial.

6.142 The recommended reformulation does not stipulate any express sanctions for non-compliance with the procedural requirements. It does provide, however, that the court shall not grant leave to admit the evidence in question unless the party complies with the procedural requirements. The Commission considers that, in cases where a party seeks to admit evidence without first following the procedures, the court will usually grant an adjournment to allow time to comply.

Evidence of sexual reputation

6.143 In the recommended reformulation of s 409B, the discretion to admit evidence applies only to evidence of sexual experience or activity, or lack of it. There continues to be an absolute prohibition on admitting evidence relating to the complainant's sexual reputation.

6.144 Most submissions supported an absolute prohibition on evidence of sexual reputation.¹⁰² In contrast, the Public Defenders considered that it may

100. See Crown Prosecutors, *Consultation*.

101. See *R v Morgan* (1993) 30 NSWLR 543 per Mahoney JA at 552.

102. See Public Defenders, *Submission* at 10.

be prudent to apply a discretion to the admissibility of such evidence, in case it was relevant in a particular trial.

6.145 In most instances, evidence of the way in which a complainant's sexual behaviour is regarded by others will have little or no relevance to the facts of the case, and any limited probative value it has will be greatly outweighed by its possible prejudicial effect.

6.146 The one situation in which, theoretically, sexual reputation evidence could have greater relevance is in a case where the accused claims to have honestly, though mistakenly, believed that the complainant was consenting to the sexual advance. It could be argued that the complainant's reputation concerning her sexual practices may, if it was known to the accused, be relevant to the question of whether the accused honestly believed that there was consent. In fact, it could be argued that it is inconsistent for the law to recognise a defence of honest but mistaken belief (rather than requiring that belief to be reasonable), but on the other hand prohibiting evidence of sexual reputation, which may have contributed to that honest belief.

6.147 While the Commission acknowledges the theoretical argument for admitting sexual reputation evidence, as a matter of policy we take the view that such evidence should never be admissible, even in cases of honest but mistaken belief. Although the law recognises a defence of honest belief, the prohibition on sexual reputation evidence is a compromise between the principle of fairness to the accused and society's concern that consent to a sexual act never be assumed from hearsay reports about a person's sexual disposition. This approach is consistent with the approach in most other jurisdictions, where there are absolute bans on sexual reputation evidence.

6.148 Recommended s 409B(2) includes a provision which makes it clear that evidence of sexual experience or activity, or lack of it, is not to be automatically excluded merely because it also relates to the complainant's sexual reputation. This provision addresses the problem raised in paragraph 4.29, namely, that the current wording of the prohibition on evidence relating to sexual reputation may wrongly exclude relevant and otherwise admissible evidence of sexual experience if it can be shown to relate also to reputation. This may raise particular difficulties for the prosecution in cases involving alleged sexual assault of a sex worker by a client. In such cases, the fact that the complainant was a sex worker may be an essential part of the context in which the assault was committed, yet it may be excluded on the grounds that it relates to the complainant's reputation as a sex worker. Such a result is undesirable and may be unfair from the point of view of the prosecution and

the complainant. To avoid difficulties of this kind, we have included recommended s 409B(2)(b) in the recommended reformulation.

Definition of “prescribed sexual offence”

6.149 As we noted in Chapter 2, s 409B applies to proceedings for “prescribed sexual offences”, not to sexual offences generally. The term “prescribed sexual offence” is defined as one or more of a number of specified offences which are listed in s 4(1) of the *Crimes Act 1900* (NSW).

6.150 Not all sexual offences against the person are included within the list of offences under the definition of “prescribed sexual offence” in s 4(1). Consequently, where a person is accused of committing a sexual offence which does not amount to a prescribed sexual offence, s 409B will not operate in criminal proceedings for that offence.¹⁰³ Sexual offences which are not included within the definition of a prescribed sexual offence are:

- procuring carnal knowledge by fraud (*Crimes Act 1900* s 66)
- carnal knowledge by a teacher or father (*Crimes Act 1900* s 73)
- attempted carnal knowledge by a teacher or father (*Crimes Act 1900* s 74)
- incest (*Crimes Act 1900* s 78A)
- incest attempt (*Crimes Act 1900* s 78B)
- homosexual intercourse by a teacher or father (*Crimes Act 1900* s 78N)
- attempted homosexual intercourse by a teacher or father (*Crimes Act 1900* s 78O)
- act of gross indecency with or towards a male person (*Crimes Act 1900* s 78Q)
- abduction of a woman against her will (*Crimes Act 1900* s 86)
- abduction of a woman against the will of her parents (*Crimes Act 1900* s 87)

103. However, it has been held that where sexual offences which are not covered by s 409B are heard in the same proceedings as a sexual offence which is covered by the section, then s 409B will apply to all offences heard in those proceedings: *R v ARS* (NSW, Court of Criminal Appeal, No 60684/95, 25 September 1997, unreported).

- forcible abduction of a woman (*Crimes Act 1900* s 89)

6.151 Although it may be rare that a person is charged with any of the offences outlined above, the Commission can see no reason why they should not be included within the list of sexual offences to which s 409B applies. In consultation, lawyers agreed that s 409B should apply to all sexual offence proceedings.¹⁰⁴

6.152 One way to widen the application of s 409B to cover the offences above would be to amend the section to state that it applies simply to “sexual offence proceedings”, with no attempt to define that term by reference to specific offences arising out of the *Crimes Act 1900* (NSW). This approach would have the advantage that it would not require subsequent amendments if, in the future, specific sexual offences were added or abolished under the *Crimes Act*. However, the danger of adopting this approach is that it may give rise to disputes and uncertainty as to what exactly is a “sexual offence” so as to attract the operation of s 409B.

6.153 In the Commission’s view, a preferable approach is to amend the meaning of “prescribed sexual offence” for the purposes of s 409B, so that it includes those offences listed above. We concede that this is perhaps more awkward than a simple reference to “sexual offence proceedings”, because it may require subsequent amendments. However, it is the most certain means of ensuring that there are no ambiguities about the application of s 409B.

6.154 The Commission has recommended that a definition of the term “prescribed sexual offence” be included within the recommended reformulation of s 409B, rather than rely on an (amended) definition of that term in s 4(1) of the *Crimes Act 1900* (NSW). The only reason why we have recommended this is because there are other provisions in the *Crimes Act* which refer to a “prescribed sexual offence”.¹⁰⁵ Any change to the definition of “prescribed sexual offence” in s 4(1) of the *Crimes Act* would therefore have an impact on those other provisions. The terms of the Commission’s reference do not allow us to make recommendations for reform beyond the operation of s 409B. Consequently, we have confined our recommendation for amendment to the definition of “prescribed sexual offence” to its application to s 409B.

104. Crown Prosecutors, *Consultation*; Public Defenders, *Consultation*.

105. See, for example, *Crimes Act 1900* (NSW) s 77A, 578A.

APPENDIX A — SUBMISSIONS RECEIVED

Ms L Byrnes, Member of Council on Violence Against Women, Chair of Working Party on Heroines of Fortitude, 26 August 1997

Mr D Turney, 11 December 1997; 9 February 1998; 12 March 1998

Dr S Pertot, 16 December 1997

Mr DH Peek, Chairman, Criminal Law Committee of the Law Society of South Australia, 22 December 1997

Confidential, 2 February 1998

Mrs P Wagstaff, 16 February 1998

Mr E Whitton, 25 February 1998

Mr N Cowdery QC, Director of Public Prosecutions, 25 February 1998

Ms J Betts, Magistrate, Sutherland Local Court, 26 February 1998

Ms J Fleming, Magistrate, Waverley Local Court, 26 February 1998

Mr D C Milovanovich, Relieving Magistrate, Western Metropolitan Region, Sydney, 26 February 1998

The Hon J Saffin MLC, 27 February 1998

Mr J Gallagher, Legal Aid solicitor, 3 March 1998

Mr H di Suvero, barrister, 4 March 1998

Mr T Molomby, barrister, 18 March 1998

Ms M Roberts, Statewide Educator, Education Centre Against Violence, 23 March 1998

Macquarie and Far West Sexual Assault Services, 23 March 1998

Ms M Curtis, Manager, Victims of Crime Bureau, 24 March 1998

Ms T Manson, Westmead Sexual Assault Service, 25 March 1998

Westmead Sexual Assault Service, 27 March 1998

Ms P Williams, 29 March 1998

Richmond Sexual Assault Service, Northern Rivers Health Service, 30 March 1998

Associate Professor S Egger, Mr J Gans, 30 March 1998

Kingsford Legal Centre, 30 March 1998

NSW Health Department, 30 March 1998

Women's Legal Resources Centre, 30 March 1998

Victims Advisory Board, 30 March 1998

Dympna House, Incest Counselling and Resource Centre, 31 March 1998

NSW Rape Crisis Centre Inc, 31 March 1998

Fems Rea, University of New South Wales Law School, 31 March 1998

Office of the Status of Women, Department of the Prime Minister and Cabinet, 31 March 1998

Liverpool/Fairfield Sexual Assault Service, 31 March 1998

Redfern Legal Centre, Aboriginal Women's Legal Resources Centre, Campbelltown Legal Centre, Intellectual Disability Rights Service, 31 March 1998

NSW Young Lawyers, 31 March 1998

Ms M Kumar, Professor E Magner, 1 April 1998

Child Protection Unit, New Children's Hospital, 1 April 1998; (oral) 28 April 1998

Ms L Martin, Macarthur Sexual Assault Service, 1 April 1998

Ms R Westland, 2.4.98

NSW Council on Violence Against Women, 3 April 1998

Department for Women, 6 April 1998

NSW Public Defenders, 8 April 1998

Women Lawyers' Association of NSW, 21 April 1998

NSW Law Society, Criminal Law Committee, 23 April 1998

Newcastle/Hunter Sexual Assault Service, (oral) 23 April 1998

Southern Sydney Sexual Assault Service, (oral) 5 May 1998

Mr J Nicholson SC, Public Defender, (oral) 6 May 1998

NSW Council for Civil Liberties Inc, 8 May 1998

NSW Bar Association, 11 May 1998

Premier's Council for Women, 20 May 1998

Sex Workers Outreach Project, 17 June 1998

APPENDIX B — CONSULTATIONS

Royal North Shore Sexual Assault Service, 28 April 1998

Eastern and Central Sexual Assault Service, 29 April 1998

Southern Area Health Service, Sexual Assault Services,
1 May 1998

NSW Public Defenders, 5 May 1998

NSW Crown Prosecutors, 6 May 1998

NSW Legal Aid Commission, 7 May 1998

Forbes Chambers, 11 May 1998

District Court judges, 18 May 1998

DPP Witness Assistance Service, 19 May 1998

Liverpool/Fairfield Sexual Assault Service, 27 May 1998

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Tasmania

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Art 14 1.9

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