THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/EErg:1775035

19 September 2019

The Hon. Mark Speakman SC MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Dear Attorney,

Section 293 *Criminal Procedure Act 1986*

We write to you to seek a review of section 293 of the *Criminal Procedure Act 1986*.

The recent decision of *R v RB: Attorney-General (NSW) as Intervenor* [2019] NSWDC 36, has highlighted issues with the rigid exclusionary rule contained in section 293. His Honour Judge Grant commented that *"The statute occasions significant unfairness to the accused. That unfairness is real and not illusory"*. We are aware that you have referred the judgment to the Office of the General Counsel for review.

We support the policy objective of section 293, which is to reduce the distress, humiliation and embarrassment experienced by complainants who testify at trial for a prescribed sexual offence. However, the way the section has been interpreted in the instant case appears to have prevented the admission of evidence relevant to a fact in issue.

In New South Wales the judicial officer does not have a residual discretion to admit sexual experience evidence. We note that in all other Australian jurisdictions admissibility is a matter for the judicial officer's discretion, the exercise of which is subject to legislative criteria.[1] We consider this approach an appropriate balance between protecting the complainant on the one hand, and ensuring the defendant receives a fair trial on the other.

Reports by the former Model Criminal Code Officers Committee of SCAG, the New South Wales Law Reform Commission and the Australian Law Reform Commission variously considered whether the statutory exception approach of New South Wales or the discretion-based approaches of other jurisdictions were preferable. Each report recommended a structured discretionary model.[2]

Over the 35 years since section 409B of the *Crimes Act 1900* (the predecessor to section 293) was introduced, judicial training has improved enormously, including the establishment of the Judicial Commission of NSW in 1986 and the development of an online Criminal Trials Bench Book. There is also an obligation to prevent offensive and humiliating questioning

[1] *Criminal Procedure Act 2009* (Vic) ss342, 349; *Criminal Law (Sexual Offences) Act 1978* (Qld) s4; *Evidence Act 1906* (WA) s36BC; *Evidence Act 1929* (SA) s34L; *Evidence Act 2001* (Tas) s194M; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s7.

[2] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person*, 1999, 243–45; New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87, 1998, [6.100]–[6.113]; Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114, 2010, [27.54].

(section 41 *Evidence Act 1995*). In *Regina v TA* [2003] NSWCCA 191 in the context of upholding a trial Judge's discretion to disallow questioning pursuant to section 41, the NSWCCA made the following remarks at [8]:

> ... in my opinion, his Honour was entitled to reject the line of cross-examination by applying s41 of the *Evidence Act*. The difficulties encountered by complainants in sexual assault cases in the criminal justice system has been a focus of concern for several decades. Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused.

The courts clearly recognise the unique experience of sexual assault complainants and exercise their discretion to protect complainants from improper questioning.

The Royal Commission into Institutional Responses to Child Sexual Abuse has continued to highlight for lawyers and the judiciary the vulnerability of sexual assault complainants, and complainants are now far better supported from first complaint to police and through the trial.

In light of the recent judgment, the changes over the past 35 years, and previous and repeated recommendations for reform, we consider that it is an appropriate time to again review the operation of section 293.

We agree with the findings of the New South Wales Law Reform Commission in relation to the need to amend section 409B:

> 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.
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> 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.[3]

We recommend a carefully curated amendment, and would welcome the opportunity to assist with drafting options.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who is available on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa

Elizabeth Espinosa
President

[3] New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87, 1998,[6.101] – [6.102].