



New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

**NSW DEPARTMENT OF
COMMUNITIES AND JUSTICE**

**REVIEW OF SECTION 293 OF
THE CRIMINAL PROCEDURE
ACT 1986**

8 January 2021

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The Council for Civil Liberties (NSWCCL) thanks the Department for Communities and Justice for its invitation to make a submission concerning the Review of Section 293 of the Criminal Procedure Act 1986.

The NSWCCL appreciates the opportunity to express our view in relation to the Review.

We support option 3, a structured discretion:

Amend s 293 so that the accused may seek leave to adduce evidence of, or cross-examine a complainant about, prior sexual experience/activity, subject to a prescribed list of factors that must be taken into consideration when determining an application for leave.

The NSWCCL appreciates the tension between the competing interests which underpin the debate relating to reform of s293. On the one hand ensuring a fair trial and avoiding miscarriages of justice and on the other, protecting the privacy of complainants and reducing distress and humiliation associated with examination of prior sexual behaviour. We submit that the current provision fails to strike an acceptable balance in relation to these policy objectives and the balance can only be restored by allowing judicial discretion to admit evidence of prior sexual behaviour in appropriate circumstances.

It is important to note that independent of s293, the *Evidence Act* provides significant safeguards in relation to the admissibility of evidence of prior sexual behaviour. Evidence can only be admitted if the evidence could rationally affect the assessment of the probability of the existence of a fact in issue in the proceeding (s56). If only relevant to credibility, s102 provides a higher threshold to admissibility requiring the evidence to substantially affect the assessment of the credibility of the witness. The court may also refuse to admit the evidence of prior sexual history pursuant to s135 if it determines that the probative value is outweighed by the danger that the evidence may be prejudicial, misleading, confusing or cause an undue waste of time.

The court's power to control questioning provides procedural protections to complainants. In *Regina v TA* [2003] NSWCCA 191 in the context of upholding a trial Judge's discretion to disallow questioning pursuant to section 41 of the Evidence Act, 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. Lessons have been learnt in relation to the experience of sexual assault complainants in the courtroom and how complainants can be better protected through the Royal Commission into Institutional Responses to Child Sexual Abuse. Reforms relating to recording witness evidence, the use of intermediaries, and other protections in the Criminal Procedure Act in relation to giving evidence, are proof of the change in culture and attitudes in relation to how complainants should experience the criminal trial.

Discretion which is exercised within this modern understanding of a complainant's experience is significant factor in favour of allowing legislative change to admit evidence of past sexual experience, in appropriate circumstances.

One category of evidence is false complaint which have arisen in cases including *R v Jackmain*, as detailed in the consultation paper. The NSWCCCL submits that the inadmissibility of evidence of false complaint denies the fact finder the opportunity to be appraised of information which is relevant and in some cases critical to the assessment of the credibility of the complainant. Denying the jury of such evidence has the high potential to lead to miscarriages of justice.

In relation to the discretionary power, the NSWCCCL supports the proposed drafting by the NSW Bar Association at annexure C which is consistent with the structured discretion option 3.

It is submitted that rather than providing a specific exception in relation to false complainants (as proposed by option 2) it is more desirable to consider what the principles and objectives that are sought to be achieved by this reform, rather than reactive reform in relation to a single factual scenario. Each case will bring its own unique factual issues and circumstances. Specific exceptions will often fall short of adequately dealing with the breadth of circumstances and issues of particular cases. Rather, an appropriately drafted discretion has the capacity to deal with a broader range of cases, provide protections in relation to the factors which must be taken into account and prevent piecemeal reform as other issues and factual scenarios arise in the future.

Whilst a general discretion as proposed by option 4 would allow for greater flexibility, which is desirable in relation to dealing with a broader range of circumstances, it is accepted that requiring the court to turn its mind to the issues set out in proposed s293(4)(a) – (f)¹ requires the court to have specific regard to the key issues which underlie the tension related to the consideration of this reform.

This submission was prepared by Rebecca McMahon on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Department of Communities and Justice.

Yours sincerely,

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¹(a) *the probative value of the evidence, and*
(b) *the issue or issues to which the evidence is relevant, and*
(c) *the importance of the evidence in the proceeding, and*
(d) *any distress, humiliation or embarrassment that the complainant might suffer as a result of admission of the evidence; and*
(e) *the right of the accused to fully answer and defend the charge, and*
(f) *the need to respect the complainant's personal dignity and privacy.*