Note

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Report 87: Review of Section 409B of the Crimes Act 1900 (NSW)
New South Wales Law Reform Commission, Sydney, 1998, 188pp

Background

Traditionally, at common law, the prior sexual history of the victim of a sexual offence was considered relevant *per se* both to the issue of consent to the conduct complained of and to the victim's general credibility and reliability as a witness. On this basis, victims could be cross-examined about matters such as: their sexual reputation; sexual history with the accused; sexual history with persons other then the accused; whether the victim was a prostitute; any sexual activity following the commission of the sexual offence; and the victim's lack of sexual experience (eg, virginity). All jurisdictions in Australia have now reformed this outdated and discriminatory approach to sexual history evidence and have granted varying degrees of statutory protection to rape victims in "rape shield" laws,[1] though NSW was one of the last jurisdictions to do so.[2]

In a criminal trial for a "prescribed sexual offence proceeding"[3] in New South Wales, the admissibility of evidence of the victim's ("the complainant's") past sexual history - experience and reputation - is governed and restricted by s 409B of the *Crimes Act* 1900 (NSW). Section 409B *Crimes Act* 1900 (NSW) was introduced in 1981 as part of a

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1 A "somewhat misleading description": see T Henning and S Bronitt 'Rape Victims on Trial: Regulating the use and abuse of sexual history evidence' in P Easteal (ed) *Balancing the Scales: Rape Law Reform & Australian Culture* (Federation Press, Sydney, 1998) at 82.

2 See *Criminal Law (Sexual Offences) Act* 1978 (Qld) s 4; *Evidence Act Amendment Act* 1976 (SA) and *Evidence Act* 1929 (SA) s 34i; *Evidence Act (No 3)* 1976 (Tas) and *Evidence Act* 1910 (Tas) s 102A; *Rape Offences (Proceedings) Act* 1976 (Vic) and *Evidence Act* 1958 (Vic) s 37A; *Evidence Act Amendment Act* 1976 (WA) and *Evidence Act* 1906 (WA) and ss 36A, 36B, 36BA and 36C; *Sexual Offences (Evidence and Procedure) Act* 1983 (NT) ss 4-5; *Evidence (Amendment) Ordinance (No 2)* 1985 ACT and *Evidence Act* 1971 (ACT) s 76G. See also *Evidence Act* 1908 (NZ) s 23A; *Sexual Offences (Amendment) Act* 1976 (Eng and Wales) s 2; *Criminal Code* (Canada) ss 276-277; *Criminal Procedure (Scotland) Act* 1995 ss 273-274.

3 Defined in s 4(1) *Crimes Act* 1900 (NSW).

package of reforms to the law of sexual assault in that state.[4] There has been much judicial criticism of s 409B, culminating in the comments of the Chief Justice of the High Court in *Grills v The Queen*[5] 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

The essence of the criticism leveled at s 409B, judicially noted since 1990,[6] has been that the section is too restrictive in that it excludes not only *irrelevant* material but also *relevant* evidence concerning the complainant's sexual history. As a trial judge in NSW has no residual discretion under the section to prevent injustice, the result is said to be that an accused may be denied a fair trial.

Following the High Court decision in *Grills*, the NSW Attorney General referred the matter to the NSW Law Reform Commission in December 1996 to "review the operation of s 409B of the *Crimes Act* 1900 (NSW) taking into account the purpose for which it was enacted and recent case law". Following the publication of IP 14, receipt of 50 submissions and a series of consultations, the Commission's Report No 87, *Review of Section 409B of the Crimes Act 1900 (NSW)*, was produced in November 1998.[7] The Report examines the history of the section, s 409B's current operation, the cases that have interpreted it, the legislation in other jurisdictions, arguments for and against reform of the section together with options for modifying the section's operation. In its conclusions, the Commission makes recommendations for the reform of s 409B. The Commission's Report was tabled in the NSW Parliament on 22 June 1999.

Sexual history evidence: a balancing of interests

Rape shield legislation forces an acute focus on the dilemma of balancing two strongly competing rights in trials for sexual offences. Those competing rights may be put as follows:

- On the one hand, the right of the accused to receive a fair trial, most emphatically endorsed by the High Court in *Dietrich v R*,[8] which encompasses the presumption of innocence, the right to have all relevant evidence before the court and the right to cross-examine fully any witnesses; and

- On the other hand, the rights of the victim, the complainant, as a witness for the prosecution, to be treated with dignity, compassion and respect as required in the interests of justice, by common decency and by the *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power*:[9] the complainant

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4 See *Crimes (Sexual Assault) Amendment Act* 1981 (NSW).

5 *Grills v The Queen*; *PJE v The Queen* (Unrpt High Ct of Australia, No S8/96; S154/95, 9 September 1996) refusing special leave to appeal from NSW CCA.

6 See NSWLRC *Report 87: Review of Section 409B of the Crimes Act 1900 (NSW)* (NSWLRC, Sydney, 1998) ("NSWLRC Report 87") at para 4.1.

7 Both the Report and the Issues Paper may be accessed on the NWSLRC web site at *<http://www.lawlink.nsw.gov.au/lrc>*.

8 (1992) 177 CLR 292; see also *International Covenant on Civil and Political Rights* (1996) Article 14.

9 In Queensland, for example, these rights have been enshrined as "Fundamental Principles for Victims of Crime" in the *Criminal Offences Victims of Crime Act* 1995 (Qld).

> should not be subjected to distressing and unnecessary investigation into his/her sexual history and moral character.

Clearly, s 409B was an attempt by the NSW legislature to refocus attention on the real issue in sexual offence trials, which must obviously be the determination of guilt or innocence of the accused. Certainly, the NSW Law Reform Commission perceived its function on this Reference as being to strike the appropriate balance between

> ...[minimising] a complaintant's distress without intruding to an unexceptable extent on the rights of the accused and the fairness of the trial.[10]

Section 409B: a "rules-based" approach

As NSW s 409B currently stands, it is unique amongst the Australian provisions in that it adopts, what has been called, a "rules-based" approach to restricting evidence of sexual experience. That is, rather than creating a *discretion* to admit or exclude certain evidence as relevant or irrelevant, s 409B creates a *rule* that prohibits such evidence except in the specific circumstances listed in the section. There is no residual discretion allowed to the trial judge to admit evidence outside the listed exceptions. Section 409B(2) then absolutely prohibits evidence of "sexual reputation". Neither of the terms "sexual experience" nor "sexual reputation" is defined in the legislation, though the former has been subject of judicial comment. The section applies equally to both prosecution and defence, a matter of itself that has caused some difficulty.

It is s 409B(3)(a)-(f) that set out the circumstances in which evidence of a complainant's sexual experience or activity (or lack of it) may be admissible as an exception to the general exclusion. Should the evidence come within one of the listed matters, before it may be admitted, two further requirements under s 409B(3) must be met:[11]

- That the evidence is otherwise admissible according to the ordinary rules of evidence;[12] and
- That the "probative value [of the evidence] outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission".

In the Canadian decision of *Seaboyer v R; Gayme v R*[13] (discussed further below), the Canadian Supreme Court examined the then *Criminal Code* (Canada) s 276, a rules-based provision similar to NSW s 409B. The *Seaboyer* Court criticised s 276's approach of defining in advance the categories of "relevant" evidence and automatically excluding other, potentially relevant, evidence. It is noteworthy that, at a fundamental level of principle, the Canadian Court drew attention to the evil sought to be addressed by this type of provision: namely, the misuse of evidence of sexual activity for irrelevant and misleading purposes. The NSWLRC also noted that "the fundamental aim of [s 409B] was to protect complainants against the distress of irrelevant and offensive

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10 NSWLRC Report 87 *supra* n 6 at 1.10.
11 *Ibid* at para 2.7.
12 See *R v Morgan* (1993) 30 NSWLR 543.
13 [1991] 2 SCR 577.

questioning."[14] It is critical that this purpose be borne in mind when examining the efficacy of NSW s 409B and like provisions.

Section 409B "Problem Cases" identified by the NSWLRC

In its Report, the Commission identified the common features of certain "problem cases" where the potential for injustice to the accused because of s 409B had received attention from the courts. Those cases were generally where:[15]

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

The Commission described the evidence which had generally be excluded in those cases as falling into two broad categories (at para 4.10):

- evidence of sexual abuse of the child by someone other than the accused;
- evidence that the child made "false" allegations of sexual abuse on other occasions.

The Commission recognised that the danger of injustice may not be limited to these types of cases,[16] though it also noted that the NSW Public Defenders submitted that, *generally*, 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 occurred at all).[17]

Section 409B: The alternate view in support

The NSWLRC also recognised that many submissions expressed strong support for the current operation of s 409B and that a number of submissions suggested that s 409B be made even more restrictive.[18] Support for the relatively beneficial implementation of s 490B may also be found in two empirical studies of s 409B's impact on the conduct of sexual offence proceedings in NSW. Both studies found that s 409B has successfully reduced the instances in which material relating to a complainant's sexual experience and reputation 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.[19]

In the later of those two reports, the influential 1996 *Heroines of Fortitude*, however, it was also found that many complainants were still subjected to distressing and traumatic

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14 *Supra* n 10 at para 6.109.

15 *Ibid* at paras 4.8-4.20.

16 *Ibid* at para 4.21.

17 *Ibid* at para 4.23, though, the Public Defenders submitted also that this did not mean that s 409B never operates unfairly in these types of cases.

18 *Ibid* at paras 4.51-4.89.

19 *Ibid* at para 4.53-4.56: see 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) and 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*").

experiences when giving evidence in court. The study was based on all sound recorded sexual assault hearings in the District Court of NSW over a one-year period from May 1994 to April 1995, where the accused was charged with sexual assault and the victim was an adult female. The *Heroines of Fortitude* findings revealed that many women were interrogated about their sexual history despite such questions being inadmissible under the NSW s 409B, and that evidence as to sexual reputation was still being admitted despite the absolute prohibition in s 409(2). The report made 16 recommendations on reform of legal policy and law administration, as well as education of legal personnel. The report recommended, *inter alia*, that there be *greater* restrictions in respect of certain aspects of s 409B, particularly that:

- the exceptions to the prohibition against sexual experience evidence in s 409B(3) were not necessarily protecting complainants adequately;
- the term "sexual reputation" should be defined in the legislation; and
- the procedures for making an application to admit evidence under s 409B be tightened up.[20]

The Canadian Experience

In 1991, s 276 *Criminal Code* (Canada) was also a rules-based provision, similar to NSW s 409B, in that it excluded evidence that did not come within listed exceptions and had no residual judicial discretion to admit relevant evidence. In the decision of *Seaboyer v R; Gayme v R*,[21] the Canadian Supreme Court criticised the existing s 276 for its inability to distinguish between the different purposes for which the sexual experience evidence may be raised.[22] The Canadian Supreme Court held by majority that s 276 was unconstitutional as it infringed the right of the accused to a fair trial; a right enshrined in Canada in the Canadian *Charter of Rights and Freedoms*. On the other hand, Canadian s 277, which prohibits admission of sexual *reputation* evidence, was found not to infringe the right to fair trial and so not to violate the Canadian *Charter of Rights and Freedoms*. The Court held that it was the lack of any means of evaluating the importance or relevance of the sexual experience evidence in the particular case that was fatal to s 276's validity and went on to discuss in detail the legitimate and illegitimate uses of sexual history evidence. In its current form, s 276 *Criminal Code* (Canada) has substantially enacted the guidelines set out by the Supreme Court in *Seaboyer*. That provision makes it incumbent on the trial judge to consider a range of matters before exercising the discretion to admit or reject the evidence, specifically:

> ***276(3) Factors that judge must consider***
> (3) In determining whether evidence is admissible under subsection (2), the judge...shall take into account
> a) the interests of justice, including the rights of the accused to make a full answer and defence;
> b) society's interest in encouraging the reporting of sexual assault offences;

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[20] See generally M Kumar and E Magner 'Good Reasons for Gagging the Accused' (1997) 20(2) *UNSW Law Journal* 311; also K Elgar 'Law Reform: An incident, a body of research, then proposals for reform' (1998) 36 (10) *LSJ* 60.

[21] [1991] 2 SCR 577.

[22] *Ibid* at 618.

c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
d) the need to remove from the fact-finding process any discriminatory belief or bias;
e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
f) the potential prejudice to the complainant's personal dignity and right to privacy;
g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
h) any other factor that the judge...considers relevant.

The NSWLRC's Recommendation

The NSWLRC ultimately recommended that s 409B be retained but also recommended that s 409B should be reformulated to resolve the problems that had arisen in some cases. The Commission found the arguments in favour of the discretionary model (cf a "rules-based model) to be "compelling" as the only means of ensuring a fair trial for the accused. At para 6.104, the Commission said:

> It is true that this [right to fair trial] is not an absolute right: it must be balanced against competing interests and policy considerations. 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.

Hence, the reformulation proposed by the Commission introduces a restricted discretion for determining the admissibility of evidence of a complainant's sexual experience or activity. The recommended provision essentially permits the court to admit or reject evidence of sexual experience or activity after balancing its "significant probative value"[23] against the "danger of prejudice to the proper administration of justice"[24] taking into account the matters set out in proposed s 409B(6). The probative value must "substantially outweigh" the danger of prejudice.[25] The matters set out in proposed s 409B(6) that must be taken into account to determine the question of "substantially outweighing" are quite similar to those set out above in s 276(3) *Criminal Code* (Canada). The proposed s 409B(6) lists:

(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;

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[23] Proposed s 409B(4)(a).
[24] Proposed s 409B(4)(b).
[25] *Ibid.*

(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.

The Commission stated that these factors which guide the exercise of the judicial discretion have been included "in order to guard against inappropriate decisions".[26]

In summary, while the NSWLRC has recommended the introduction of a discretion which inevitably waters down the strong protection provided by the current s 409B, it has also placed significant restrictions on the exercise of that discretion by:

- the precondition of "*significant* probative value" which has been interpreted as requiring that the evidence be "important" or "of consequence" to the issues and not merely relevant;[27]
- requiring that the probative value "*substantially* outweighs" the danger to the proper administration of justice – this is said to be a "heavy onus";[28]
- requiring the court to weigh up the relevance of the evidence with the (non-exhaustive) list of competing considerations set out in proposed s 409B(6);
- a prohibition in proposed s 409B(5)[29] 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);
- providing for detailed procedural requirements in proposed ss 409B(7)-(10) which must be complied with in making and hearing an application for leave to admit sexual experience evidence.[30]

Finally, the reformulation proposes to retain the current application of the section to both *prosecution* and defence,[31] nor could it see the necessity to amend the current s 409B by defining the term "sexual reputation".

Relevance of NSWLRC Report 87 to Queensland

The release of this Report by the NSWLRC is timely for the current Queensland reform agenda. In November 1998, a 20 member "Taskforce on Women and the Criminal Code" was established by the Minister for Justice and Attorney-General, Matt Foley and the Minister for Women's Policy, Judy Spence. The Taskforce has been requested to report and make recommendations by October 1999 on the operation of the Criminal Code as it impacts on women. A total of six Issues Papers have been released by the Taskforce, culminating in a substantial *Discussion Paper* issued in September 1999. IP3, *Sexual Violence*, released in May 1999, *inter alia*, sought comments on sexual

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[26] NSWLRC Report 87 *supra* n 6 at para 6.112.
[27] *Ibid* at para 6.117 and 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.
[28] *Ibid* at para 6.119.
[29] Drawn from s 276(1) *Criminal Code* (Canada): *Ibid* at para 6.114.
[30] *Supra* n 26.
[31] For the reasons set out in NSWLRC Report 87 at paras 6.129-6.131.

history evidence. The September 1999 *Discussion Paper*[32] examines the Queensland position on the admission of sexual history evidence in detail and seeks final comments prior to the preparation of the Taskforce's Final Report.

In Queensland, this evidence is regulated by s 4 of the *Criminal Law (Sexual Offences) Act* 1978 (Qld) which applies both to the defence and the prosecution. Essentially, s 4 operates in relation to "prescribed sexual offences"[33] to restrict evidence and cross-examination about the complainant's sexual activities with persons other than the accused. In those cases, the leave of the court is required and the evidence must have "substantial relevance to the facts in issue or [be] a proper matter for cross-examination as to credit".[34] There are no restrictions at all on evidence and cross-examination about the complainant's sexual activities with the accused, though for these offences there is an absolute prohibition on evidence relating to sexual reputation, "general reputation...with respect to chastity" as it is described in s 4.[35]

The *Criminal Law (Sexual Offences) Act* 1978 (Qld) is clearly in need of urgent review and reform, particularly regarding the complainant's sexual history with the accused, the basis for the exercise of discretion and the procedural requirements for seeking leave. The NSWLRC Report 87 and its detailed consideration of all the issues should be of great assistance to the Taskforce in its deliberations. While it is tempting, on behalf of women complainants who have historically been treated very shabbily by the criminal justice system, to demand a Queensland equivalent of current NSW s 409B with the even more restrictive additions suggested by *Heroines of Fortitude* and other commentators,[36] it is not irrelevant to note that NSW s 409B is now the *only* legislative provision regulating sexual experience evidence which continues to exclude absolutely any form of judicial discretion. As the NSWLRC observed, this experience of other jurisdictions must be some "indication that a rules-based model for admissibility cannot operate fairly in every case".[37]

The Queensland Taskforce will undoubtedly consider carefully the NSWLRC's proposed section and the delicate balance it seeks to strike between the two conflicting interests involved in these cases. Two further matters also worthy of consideration include first, the necessity in Queensland of extending the definition of "prescribed sexual offences" to include *all* sexual offences beyond the limited definition at present and, secondly, the desirability of defining "sexual reputation evidence", despite the NSWLRC finding that this was not necessary.[38] For this definitional purpose, a useful precedent is to be found in the two NSW empirical studies referred to above. There, Bonney defined "sexual reputation evidence" as consisting of

> ...references to the complainant's prostitution, assertions that the complainant was believed or known to be promiscuous, or other references to

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32 Office of Women's Policy *Taskforce on Women and the Criminal Code: Discussion Paper* September 1999, Ch 2 Pt 4 at 121-141.

33 Defined s 3 *Criminal Law (Sexual Offences) Act* 1978 (Qld), as rape, attempt rape, assault with intent to rape and QCC s 337. Other cases of incest, sodomy, or indecent dealing are not mentioned.

34 *Criminal Law (Sexual Offences) Act* 1978 (Qld) s 4 Rules 2-4.

35 *Criminal Law (Sexual Offences) Act* 1978 (Qld) s 4 Rule 1.

36 For example see Kumar and Magner *supra* n 20.

37 NSWLRC Report No 87 *supra* n 6 at para 6.105.

38 Cf *Report of the Task Force on Sexual Assault and Rape in Tasmania 1998* Recommendation 116, at 40 recommended that the difference between "experience" and "reputation' be clarified.

> the complainant's sexual proclivities which were asserted to be commonly known.[39]

Conclusion

The NSWLRC Report 87 is a very detailed and carefully considered document that is deserving of its own careful consideration in turn. While the solution it proposes to this sensitive issue will not please all vested interests, it is a genuine attempt at reconciling the competing rights and is to be commended on that basis. It should certainly be the starting point for any reform considered in this area in Queensland.

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[39] See Bonney *supra* n 19 at para 1.4.4.