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To the Honourable Anthony North QC

Victorian Law Reform Commission Referral - Improving the Response of the Justice System to Sexual Offences

Thank you for the opportunity to provide comments on the Victorian Law Reform Commission's (VLRC) Issues Papers - Improving the Response of the Justice System to Sexual Offences.

We have limited our comments to Issues Papers B, C, E and briefly G.

The key points in our submissions which we wish to highlight are:

- **Lack of transitional provisions**
  The failure to include transitional provisions in the *Crimes Amendment (Sexual Offences) Act 2016* has caused immense difficulties in prosecuting matters which overlap the July 2017 commencement date. It has led to some case being discontinued and other cases not proceeding to charge at all. This problem will continue to persist for many years, as has the lack of transitional provisions in the significant changes in 1981. We urge serious consideration be given to legislative amendment to remedy this situation and that any changes to offence provisions in the future contain appropriate transitional provisions.

- **Changes to offences or further offences**
  We don't support any further changes to substantive sexual offences or seek the introduction of any new offences.

  We note that even where transitional provisions are included with amendments to offences, every single change to an existing offence is problematic. The nature of this type of crime means that many charges need to be particularise as having occurred 'between dates'. Many of the prosecutions we deal with involve historical sexual offending and it can be very difficult to pinpoint the date when it occurred. Even where there are transitional provisions included in amending acts it can be difficult to determine which charge the accused should be indicted on, particularly where the evidence of dates and timing shifts during cross-examination.

In addition, where the offending occurred over an extended period it is possible to end up with an indictment which includes different offences (due to changes in legislation) which covers exactly the same sexual conduct but which have different elements which need to be proven. This creates potential problems for juries when they are faced with the task of considering different elements for different offences which cover the same conduct.

- **Evidence laws**
  We consider it appropriate for the evidence laws to be uniform throughout Australia. In this way, Victoria will get the benefit of developments in other states and any High Court consideration of those interstate cases.

- **Specialist courts**
  We do not support the idea of specialist courts in this space.

  There is already significant specialisation in Victorian courts in relation to sex offence prosecutions in terms of specialist mention and pre-trial lists. Further, OPP data reveals that the vast majority of criminal trials dealt with in the County Court are sex offence cases so in many respects the County Court is already a specialist court. According to our statistics in a normal year of sittings up to 60% of trials that proceed before the County Court in any given week are sex offence trials. When looking at the total numbers of prosecutions conducted by the OPP, sex offence prosecutions make up around 20% of those cases.

- **Delays**
  It is our view that the less role there is for committals in sexual offence matters, the less delay there will be in the system. While this may have resourcing implications in terms of the need to front end some of the work involved in a criminal prosecution, we believe over time there will be a significant reduction in delay. As such we maintain the DPP's position on committals as outlined in our earlier submission to the VLRC reference in relation to Committals in 2018.

  The existing committal test is quite a low bar and when a case is run to contested committal and the accused is committed to stand trial by a Magistrate, this can give complainants a false sense about the prospects of securing a conviction at trial. Where the committal evidence is later assessed post-committal and a decision made to discontinue the matter, a complainant may feel aggrieved or confused by this decision and point to the fact that a Magistrate found there was enough evidence to take it to trial.

  In this way the removal of the judicial committal decision would likely assist the prosecution with setting more realistic expectations of prospects of conviction in sexual offence matters.

- **Education**
  We support regular and ongoing specialist training to all levels of the judiciary in relation to the conduct of sexual offence matters.

- **Communicative consent**
  We hold some real reservations about how this is working in the wake of the recent Court of Appeal judgment of *Hubbard v The Queen*[1]. This decision appears to apply a low bar for communication of consent and one that is arguably not in the spirit of legislation. It renders the not-uncommon situation of a heavily intoxicated complainant being penetrated by an acquaintance or stranger very difficult to prosecute.

[1] *Hubbard v The Queen* [2020] VSCA 303

- **Judge-alone trials**
  We do not support the continuation of judge-alone trials on a permanent basis.

- **Viewing of the evidence in appeal proceedings**
  We urge for the introduction of a general power to allow for the Court of Appeal, when considering an appeal against conviction, to inform itself in any way it thinks fit, including by viewing any recording of any evidence given at trial.

- **Difficulties in maintaining convictions in historical sexual offence matters**
  We have noticed an increase in the numbers of convictions being set aside in the Court of Appeal involving offences over 40 years.

  For examples, see: *Mejia (a pseudonym) v The Queen*[2]; *Tyrell v The Queen*[3]; *Spurritt v The Queen*[4]; *Green (a pseudonym) v The Queen*[5] and most recently some comments in *Lucciano (a pseudonym) v The Queen*[6].

Issues Paper B: Sexual Offences: Key Issues in the Criminal Justice System

Question 1: Is there a need to improve attitudes towards victim survivors or the understanding of sexual harm within the criminal justice system? If so, how?

As discussed in the issues paper, significant progress has been made in this respect in recent years. The introduction of intermediaries and Ground Rules Hearings have contributed significantly to the understanding of lawyers and the judiciary of the impact of sex offending on children.

The standard jury directions in respect of delay in complaint[7] and differences in a complainant's account[8] also appear to have improved attitudes towards and understanding of sexual harm within the justice system.

We note that the Court of Appeal has raised[9] a potential issue with standard directions regarding "good reasons why a person may not complain" under s53 of the *Jury Directions Act 2015.* The application of this section may be more tightly confined as a result of future developments in case law.

The paper raises the issue of greater use of expert evidence in such matters. Experts are engaged by the prosecution on a case-by-case basis where it is determined that such evidence is required. However we wish to point out that there are only a limited number of appropriately qualified and experienced experts with respect to relevant issues, and there are not insignificant costs associated with engaging experts. Further, admissibility of experts in relation to sexual offence matters is quite limited. Inappropriate admission of expert evidence can be regarded as a substantial miscarriage of justice, resulting in convictions being overturned.[10] Such evidence must accordingly be used with some caution.

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[2] *Mejia (a pseudonym) v The Queen* [2016] VSCA 296
[3] *Tyrell v The Queen* [2019] VSCA 52
[4] *Spurritt v The Queen* [2021] VSCA 7
[5] *Green (a pseudonym) v The Queen* [2017] VSCA 277
[6] *Lucciano (a pseudonym) v The Queen* [2021] VSCA 12
[7] Part 5, Division 2 *Jury Directions Act 2015*
[8] Part 5, Division 3 *Jury Directions Act 2015*
[9] *Ford (a pseudonym) v The Queen* [2020] VSCA 162 at [63-67]
[10] As a recent example, see *Jacobs (a pseudonym) v The Queen* [2019] VSCA 285

With regard to specialisation, there are a number of specialist solicitors within the Office of Public Prosecutions (the OPP) who routinely conduct this work and focus on the most complex sexual offence prosecutions. Office-wide training on understanding trauma and working with complainants is regularly conducted, and conferences with complainants are often conducted with the assistance of social workers from the Witness Assistance Service or Child Witness Service.

In our view there remains occasional issues with excessive or inappropriate cross-examination of complainants in sexual offence matters. Recently, a complainant in a matter involving a single incident of rape was cross-examined over the course of three and a half days, primarily in relation to peripheral matters[11].

It would seem that despite the legislative protections in place[12], oppressive and belittling cross-examination still occurs. We appreciated there is a fine balance between the accused's right to a fair trial as exercised by a robust examination of the prosecution witnesses and the protection of such witnesses, but it is possible to point to examples where these rights and protection are significantly unbalanced.

We consider that appropriate frameworks are already in place to ensure that practitioners and the judiciary in this area are provided with the necessary information as to the impact of sexual offending on complainants and the respectful way to deal with such witnesses. However, in our experience these frameworks are not always applied in practice as intended.

Ultimately it is a matter for judicial officers to exercise their discretion to intervene in any inappropriate questioning. Therefore, greater specialised training that is conducted regularly may produce benefits in this respect. We would also support specialised training and education for all levels of the judiciary, not just those in the trial courts.

Question 2: Do you support introducing a specialist court for sexual offences? Why or why not?

We would not be in support of a proposal to introduce specialist courts to deal with sexual offence prosecutions.

Our data shows that the vast majority of criminal trials dealt with in the County Court are sex offence cases. In many respects the County Court is already a specialist court. According to our statistics in a normal year of sittings (i.e. not 2020) up to 60% of trials that proceed before the County Court in any given week are sex offence trials. When looking at the total numbers of prosecutions conducted by the OPP, sex offence prosecutions make up around 20% of those cases.

There is already significant specialisation in Victorian courts in relation to sex offence prosecutions. Both the Magistrates' Court and County Court conduct specialist lists for the preliminary stages of such matters. This ensures that matters are dealt with efficiently and that there is adherence to legislative requirements in terms of cross-examination of complainants.

In the trial courts all judges are capable of dealing with tendency and coincidence arguments, severance applications, child witnesses and ensuring that protection of vulnerable witnesses are adhered to as these are not issues that are unique to sexual offence trials.

[11] *Hubbard v The Queen* [2020] VSCA 303 at [16]. Per the Court of Appeal, an "inordinate" amount of time was spent "examining every conceivable nuance" of CCTV footage, in an attempt to establish an interpretation of conduct therein which was ultimately not relied upon at a post-conviction appeal.
[12] s41 of the *Evidence Act 2008*

If there is a perception that outdated thinking still persists in this space, be they held by the judiciary, their support staff or legal practitioners more broadly, then in our view specialist training would be a more effective and efficient way to tackle this issue than specialist courts. We suggest such training should be held regularly and address any emerging issues in this area and capture new learnings to help all those involved to conduct these proceedings in a manner most respectful to the complainant and with a deep understanding of the dynamics at play in sexual offending.

We also note the potential health and wellbeing issues associated with specialisation in this area which may well pose a risk to those working within a specialist court.

Question 4: Do you support changing the role or nature of the jury in trials for sexual offences? Why or why not?

Judge-alone

We would not support the introduction of judge-alone trials on a permanent basis.

Our experience with judge alone trials since the emergency measure were introduced in 2020 has not been an entirely positive one. We further note that the take-up of the judge-alone trials has been extremely limited.

Some sexual offences contain explicit elements of community expectations[13]. For example, the issue of consent under the modern framing of "reasonable belief" at least implicitly involves a community standard.[14] While the application of objective community standards is not a legislated factor here, unlike some other states[15], it has been accepted in Victoria that the application of a community standard tends in favour of a jury trial.[16] However, this is one of a number of factors.

In our view, where the elements of an offence to be tried require a consideration and application of objective community standards we do not think that judge alone trials are appropriate. This will likely be the case for a large number of sexual offence trials.

Professional juries

We would not support a proposal to introduce professional juries. In our view an accused is entitled to be judged by his or her peers.

Question 5: How well are reforms working to avoid delays in the criminal justice process, and what other reforms could address delay?

While the recent reforms to eliminate cross-examination at committal in matters involving child/cognitively impaired complainants[17] have caused matters to progress more quickly through the committal stream, it is difficult to assess any ultimate effect on the time to finalise these matters due to the lengthy suspension of jury trials due to the pandemic, and the subsequent resumption of trials at partial capacity.

Generally, we observe that the legislative requirement that a special hearing for a child/cognitively impaired complainant be conducted within three months of committal[18] is not often met. The

[13] For instance, Sexual assault of a child under the age of 16, per s49D of the *Crimes Act 1958*
[14] As discussed in *DPP v Glen Jacobs (a pseudonym)* [2020] VCC 1251 at [51] and [66]
[15] For instance, s132 *Criminal Procedure Act 1986 (NSW)*
[16] *DPP v Lionel Combo* [2020] VCC 726 at [63]
[17] s123 *Criminal Procedure Act 2009*
[18] s371 *Criminal Procedure Act 2009*

primarily issue in this respect seems to be limited judicial resources (i.e. judges and courtrooms), especially in regional locations from which a substantial number of sexual offence prosecutions emanate.

Despite the best intentions of the legislature, it is difficult to avoid at least some delays in progression of matters. While Court's resources and the existing backlog of matters are primary issues, other issues which might cause delays include:

1) A need for further investigations which becomes apparent once the brief is analysed by a solicitor.
2) Engagement of an intermediary, with time required to assess the complainant and produce a report.
3) Issuing of subpoenas, whether in respect of confidential communications or generally where the material is voluminous or there are claims of privilege.
4) An expert assessment of a complainant where their cognitive impairment is disputed.
5) Forensic analysis, especially where E-Crime material is involved.
6) Compulsory examinations of potential witnesses.
7) Availability of witnesses.
8) An accused changing their legal representation.

Every case is unique, and it is difficult to place a firm timeframe on how long sexual offence prosecutions as a class should take to be finalised.

In addition, far from having any practical effect on the time to finalise matters, the unrealistic three month legislative timeframes for commencement of trials for adult complainants (see s212 *Criminal Procedure Act 2009*) simply result in rote extensions on a regular basis which are somewhat onerous for the court and prosecution to track. This has been an issue ever since this legislation was introduced.

In terms of other reforms that could address delay, we maintain the DPP's position on committals outlined in our earlier submission to the VLRC reference in relation to Committals in 2018.

It is our view that the less role there is for committals, the less delay there will be in the system. While this may have resourcing implications in terms of the need to front end some of the work involved in a criminal prosecution, we believe over time there will be a significant reduction in delay.

In addition, avoiding the committal process could have the potential to reduce the number of pre-trial discontinuances and assist in setting more realistic expectations in the minds of complainants in terms of prospects of conviction. The committal test is quite a low bar and when a case is run to contested committal and the accused is committed to stand trial by a Magistrate, this can give complainants a false sense about the prospects of securing a conviction at trial. Where the committal evidence is later assessed by the prosecutor post-committal and a decision is made to discontinue the matter at that point, a complainant may, understandably, feel aggrieved or confused by this decision and point to the fact that a Magistrate found there was enough evidence to take it to trial.

In this way the removal of the judicial committal decision would likely assist the prosecution with setting more realistic expectations of prospects of conviction in sexual offence matters.

Issues Paper C: Defining Sexual Offences

Question 1: Is there a need to change any of Victoria's sexual offences, or their application? If so, what changes?

We do not consider that any changes are needed to any sex offence provisions at this time.

However, we do wish to point out a serious defect with the amendments made in 2016 which has had serious implications for many recent prosecutions and will continue to do so if not remedied by legislative amendment. The failure to include transitional provisions in the *Crimes Amendment (Sexual Offences) Act 2016,* which repealed and replaced the sexual offences in the *Crimes Act 1958* from 1 July 2017, has caused immense difficulties in prosecuting matters which overlap this date.

It is very common for complainants to not be in a position to precisely identify the date of an incident of offending. It is also common that there will be little objective evidence to assist with this. Accordingly, charges may be framed as 'between dates charges' over a period of months if not years.

Due to the repeal and replacement of the offence provisions without transitional provisions, an offence which is said to have occurred around 1 July 2017 cannot have a range covering either side of that date. Instead, it must end on 30 June or commence on 1 July even where the offences have not changed in substance, for example Rape.

This issue has resulted in such prosecutions being discontinued or police being advised not to prosecute if the issue is identified pre-charging. It is always very distressing for a complainant where a discontinuance must be enter due to a technicality such as the lack of transitional provisions in the legislation.

We have never understood why transition provisions were not included in the 2016 legislation. The OPP certainly pushed for these provisions to be included but it appears there were considered and dismissed almost as a matter of principal. In our view transitional provisions should be introduced as a matter of urgency to rectify this problem and we understand that there is nothing which would prevent this amendment from being made.

If left unaddressed this is an issue which will persist. To this day, the OPP encounters similar difficulties with the amendments of the *Crimes (Sexual Offences) Act 1980,* which commenced on 1 March 1981 without transitional provisions. While there is one authority which worked around the issue in respect of those provisions,[19] it does not appear to have been revisited by the Court of Appeal. Its circumstances were unusual, and we consider it to have limited scope for application to other matters.[20]

We note that even where transitional provisions are included with amendments to offences, every single change to an existing offence is problematic. The nature of this type of crime means that many charges need to be particularise as having occurred 'between dates'. Many of the prosecutions we deal with involve historical sexual offending and it can be very difficult to pinpoint the date when it occurred. Even where there are transitional provisions included in amending acts it can be difficult

[19] *Dibbs v The Queen* [2012] VSCA 224

[20] Firstly, there was evidence which supported the charge being pre-1 March 1981, rather than post-1 March 1981 as run in the trial. Secondly, the earlier charge which was substituted was a much lesser offence, and this was cited as a factor in the Court's decision. Where the evidence is neutral regarding the timing, and/or the offences are of similar gravity (which will commonly be the case under the 2016 reforms, unlike 1981 where various forms of penetration were previously indecent assaults), the applicability of this authority is dubious.

to determine which charge the accused should be indicted on, particularly where the evidence of dates and timing shifts during cross-examination.

In addition, where the offending occurred over an extended period it is possible to end up with an indictment which includes different offences (due to changes in legislation) which covers exactly the same sexual conduct but which have different elements which need to be proven. This creates potential problems for juries when they are faced with the task of considering different elements for different offences which cover the same conduct.

Question 2: How well is Victoria's model of communicative consent working? Should there be any changes?

The recent Court of Appeal judgment of *Hubbard*[21], in which a complainant alleged she woke to being penetrated after attending the home of a new acquaintance while intoxicated, is a troubling application of the model. The accused claimed that the complainant had, to his mind, demonstrated consent by moving into him and responding (through moaning/breathing) to his touching before telling him to stop, saying that she'd thought he was her partner.

Despite the Court accepting that the complainant gave credible and cogent evidence that she woke to being penetrated, and that independent evidence (CCTV) reflected only friendly interactions with the accused before the incident, the Court determined that the prosecution could not exclude the reasonable possibility that the complainant may have reacted in the way the accused alleged, and not recalled it. Ultimately the Court of Appeal overturned the conviction returned by the jury and entered an acquittal.

This appears to apply a low bar for communication of consent in such circumstances, and one that is arguably not in the spirit of legislation designed to ensure that sex 'only take[s] place where there has been communication and agreement between the parties'. It renders the not-uncommon situation of a heavily intoxicated complainant being penetrated by an acquaintance or stranger very difficult to prosecute.

Question 4: Are new offences or changes to offences needed to address existing or emerging forms of sexual harm? If so, what new offences or changes?

We do not recommend the introduction of any new offences at this time. In our view the conduct outlined in the examples given in the Issues Paper are capable of being charged under existing offences.

Issues Paper E: Sexual Offences: The Trial Process

Question 1: How well are charging and prosecution decisions for sexual offence cases working? How can they be improved?

Discontinuances are the product of careful analysis of the prosecution case as a whole conducted by experienced legal practitioners. The views of complainants are taken into account in this decision, and they can be persuasive in some cases. However, such views, however strongly and genuinely held, cannot overcome fundamental flaws in a prosecution case.

The decision whether or not to discontinue a prosecution must ultimately be made dispassionately, and in accordance with the evidence and applicable law.

[21] *Hubbard v The Queen* [2020] VSCA 303

As is noted in the paper, there is a process of internal review for discontinuances. This was introduced in accordance with recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse and the Victorian Law Reform Commission. The views of complainants are sought before a decision to discontinue a matter is made. The framework for such decisions is publicly available[22], and is linked from the OPP's Victims and Witnesses website[23]. Reasons are provided to complainants for these decisions[24].

Question 2: How well are ground rules hearings for sexual offence cases working? How can they be improved?

The effectiveness of ground rules hearings depends on the information available to assist the parties, and their level of participation.

Where there is a matter in which a ground rules hearing is required but no intermediary is engaged (for instance, where the complainant is a child in their late teens without identified difficulties in communication), a ground rules hearing may be perfunctory.

However, in matters where an intermediary is involved, such hearings can be useful. Where both prosecution and defence counsel actively engage with the intermediary, for instance workshopping proposed questions for the complainant, the benefits can be significant.

As the process becomes more established, and counsel have the opportunity to experience it in practice, it is hoped that there will be a higher level of active engagement by practitioners.

Question 3: How well are special procedures and alternative arrangements for giving evidence in sexual offence cases working? How can they be improved?

Use of VARE

The paper raises the prospect of the expansion of VAREs to complainants who do not meet the present criteria for eligibility.

We acknowledge there may be some advantages in reliance on VARE, namely:

- that the complainant can give their evidence in a non-courtroom setting
- that evidence is given more contemporaneously to the offending which is alleged; and
- it provides more certainty for the prosecution case, in that the evidence in chief which will found the charges is essentially settled.

However we do not support the extended use of VAREs beyond children and cognitively impaired adults. In our experience the benefits of VARE are often outweighed by the disadvantages, namely:

- VARE evidence can be difficult for a jury to follow and allegations of multiple incidents are often conflated. A VARE is often not in chronological order, and may return to the same incident several times, while examination in chief is able to be more focused and segmented.

[22] https://uploads-ssl.webflow.com/582e2f6cf5562dd3132af43a/5f63ef326792cf1c69b975d9_Discontinuance-Review-Framework.pdf
[23] https://victimsandwitnesses.opp.vic.gov.au/victims/requesting-reasons-for-decisions
[24] Pursuant to s9 and s9C of the *Victims' Charter Act 2006*

- The “live” nature of a VARE makes it less easy to control the flow of a narrative compared to a statement, which means that some matters may be overlooked (such as exploring the detail of a specific allegation which is raised amid a number of others).
- VAREs are conducted at a time when the charges and issues in a matter may not be clear. Examination in chief at a trial is more readily able to directly address the elements of charges and issues in a matter.
- Admissibility issues may arise and inappropriate matters (such as confidential communications, or prior sexual history) may be raised and disclosed as part of the VARE transcript.
- A VARE may be more difficult for a complainant to use to refresh their memory prior to giving evidence, as it is substantially longer and less structured than a statement.
- There are also resourcing issues which flow from having to provide facilities for interested parties to view the VARE and the additional burden of editing inadmissible parts of the VARE in readiness for trial.

Alternative arrangements

As to alternative arrangements generally, these appear to be effective and complainants appreciate having the option. There are ongoing difficulties with limited remote witness facilities at the courts; this can have a substantial effect on the timing of a committal being listed, for instance.

Discretionary applications for non-complainant witnesses who may benefit from alternative arrangements are raised, where appropriate, and are generally acceded to.

Question 4: How well are jury directions for sexual offence trials working? How can they be improved?

As noted in response to Issues Paper B, the scope of directions given under s53 of the *Jury Directions Act* has been called into question by the Court of Appeal. Future developments in this respect will need to be assessed as they arise.

Question 5: Is there a need to change any laws on evidence or procedure for sexual offences? If so, what should be changed?

Several specific issues are raised as part of this topic and are addressed in turn.

Sexual history

We find that the legislative requirement for written notice in advance of such an application[25] is often not met, especially in committal proceedings. Applications are frequently dealt with orally[26]. While the lack of notice is not necessarily prejudicial, the failure to set out and receive approval for questions which are set out in writing can lead to questioning which is less confined and potentially more oppressive than it could have been had the legislation been complied with.

[25] s344 *Criminal Procedure Act 2009*

[26] An application can be made out of time per s345 *Criminal Procedure Act 2009.* The test is whether it is in the interests of justice. Where there is merit to the proposed questioning, it would rarely be considered in the interests of justice to prohibit such questioning. The requirement for a written application can then be waived under s347, and this is often done in such circumstances.

Joint trials and tendency & coincidence

The OPP has provided feedback during the development of the Model Bill and in response to its most recent draft. We consider it appropriate for the evidence laws to be uniform throughout Australia. In this way, Victoria will get the benefit of developments in other states and any High Court consideration of those interstate cases.

While the recent High Court authorities of *Hughes*[27] and *Bauer*[28] have significantly enhanced the admissibility of tendency[29] in Victoria, there remain significant limitations. The High Court's later judgment of *McPhillamy*[30] often arises where there is a temporal gap in alleged offending and/or a difference in the relationship between the accused and the respective complainants.

Lingering uncertainty regarding the application of tendency is perhaps neatly illustrated in two judgments of the Court of Appeal from December 2020. In *Cano*[31], it was held that:

> *…the fact that an accused can be shown to have a tendency towards taking a sexual interest in girls under 16, must, logically, enhance the strength of the prosecution case as regards the applicant's belief that Hannah was under 16.*[32]

In *Larson*[33], however, it was held that:

> *Properly understood, evidence that L on one previous occasion engaged in sexualised communications with a girl he knew to be 15 has very little probative force on the issue of how old he believed T to be. The evidence therefore falls well short of the 'significant probative value' threshold in s 97(1)(b).*[34]

The fact that the previous conduct was a single instance was not a factor in the decision[35]. While there were some distinguishing factors between the matters, they are not clearly set out as *Larson* does not refer to *Cano* at all.

Notwithstanding that the *Jury Directions Act 2015* appears to provide for tendency and coincidence evidence to be established on the balance of probabilities[36], some trial judges decline to direct juries on this basis. In *Dempsey*[37], the Court of Appeal indicated that while it may not be "strictly" necessary for the prosecution to prove a fact relied upon for tendency and/or coincidence beyond reasonable doubt

> *…if directions were given to the jury, regarding the use that might be made of the evidence on charge 1 as coincidence or tendency evidence on charge 2, by reference to a standard of proof lower than the criminal standard, that would confuse, and would be calculated to*

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[27] *Hughes v The Queen* [2017] HCA 20
[28] *The Queen v Dennis Bauer (a pseudonym)* [2018] HCA 40
[29] Coincidence, meanwhile, remains something of an unexplored frontier. Aside from *DPP v Bobby Alexander (a pseudonym)* [2016] VSCA 92, it has been rarely examined in Victoria in the context of joint trials for sexual offence complainants, likely due to the higher bar of similarity required which will be uncommonly met for such allegations.
[30] *McPhillamy v The Queen* [2018] HCA 52
[31] *Cano (a pseudonym) v The Queen* [2020] VSCA 308
[32] *Cano* at [73]
[33] *Brodie Larson (a pseudonym) v DPP (Cth)* [2020] VSCA 335
[34] *Larson,* at [7]
[35] *Larson,* at [32]
[36] s61 & s62 Jury Directions Act 2015. See also *Bauer* at [80]
[37] *Dempsey (a pseudonym) v The Queen* [2019] VSCA 224

undermine, the criminal standard of proof that must be applied by the jury for it to convict the applicant on charge 1.[38]

It is hoped that the Model Bill, if introduced in Victoria, will lead to greater certainty in the application of tendency.

The process of joinder or severance in practice is queried by the paper. Typically, this can be broken into the following stages:

1) **The initial decision to charge**. It is for police to determine whether or not to file charges, and how they do so. Where there are allegations of a somewhat similar nature made against an accused, they will usually be presented as a joint brief.

2) **The authorisation of indictments**. Assuming that the accused is committed to stand trial in respect of allegations by multiple complainants, it is for a Crown Prosecutor to determine whether the prosecution seeks to join some or all of the complainants on an indictment. This decision is usually made in conjunction with an assessment as to whether tendency and/or coincidence evidence are available. Severance will often occur at this stage if it is thought that there is not a viable argument for the complainants to be joined.

3) **Legal argument**. If complainants are jointly presented on an indictment, defence may apply for severance. This is a forensic decision, but it will be made in most cases. This is often dealt with in the course of the trial listing, which can have a significant impact on the strength of the prosecution case, which may affect whether charges resolve or are discontinued, at a very late stage. It also affects the practical aspects of the matter such as the duration of the trial(s) and when witnesses are called. It is noted that the County Court is presently trying to deal with such pre-trial issues well in advance of trial listings.[39]

Where complainants emerge after a prosecution has commenced, they may be added to an existing prosecution depending on the stage of that matter and the prospects of joinder. For instance, a trial may be delayed so that a committal involving a further complainant can occur, with the complainants eventually joined on a new indictment.

While there is a legislative presumption of joinder even where tendency and coincidence are not led[40], this has little practical effect where severance is sought. This is primarily due to the presumed prejudice arising from having multiple complainants on a single indictment, with the resulting risk to a fair trial[41]. While a study conducted as part of the Royal Commission into Institutional Responses to Child Sexual Abuse suggested that jurors in mock trials were capable of separately considering charges without being affected by prejudice, the study has been the subject of criticism and an attempt to cite them in the High Court in relation to tendency was not favourably received.[42]

This can lead to particularly unfortunate situations where the complainants are inextricably linked, for instance where they are related to each other, were offended against in the same setting and – most troublingly – need to be called as witnesses in each other's trials (for instance, as complaint witnesses). This results in numerous problems such as:

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[38] *Dempsey* at [76]
[39] Emergency Case Management Model phase five, item 6.1(a)(ii)
[40] s194 *Criminal Procedure Act 2009.*
[41] Notwithstanding developments in both legislation and common law, the principles set out in *R v TJB* [1998] 4 VR 621 at 630 are still cited in this respect
[42] *McPhillamy v The Queen* [2018] HCATrans 141,

- significant duplication of evidence in separate trials (for instance, witnesses called to describe circumstances in the setting where offending occurred);
- the lengthening of proceedings, resulting in greater expenditure of resources by the court, prosecution, police and defence;
- a substantial risk of a jury having to be discharged if offending associated with a severed trial is inadvertently raised in evidence;
- heavy editing of the accused's interview (potentially to the point that it invites speculation from the jury, and/or renders it significantly less coherent);
- a misleading impression given to the jury that, for instance, only one of multiple children of similar characteristics present in a setting allege abuse, when in fact that there are several.

Again, it is hoped that the Model Bill will assist with some of these issues. Failing that, consideration of amendments to s193 *Criminal Procedure Act* may be warranted.

We note one final aspect. There is no prescribed process for leading evidence of previously prosecuted relevant allegations as tendency or coincidence witnesses. In past matters, some prior victims have been called as witnesses and re-challenged on their allegations, notwithstanding that the accused has been convicted of them. This presents obvious difficulties in terms of practically leading such evidence, as it depends on the willingness of victims to give evidence again, and risks re-traumatising them. While the Model Bill provides for greater admissibility of tendency and coincidence evidence, this issue may serve as a limitation on leading such evidence in practice.

Confidential communications

We, in conjunction with the OPP Victims and Witness Assistance Service or Child Witness Service, usually advise complainants when such an application for confidential communications is made.[43] Views expressed by the complainant are conveyed to the court by a prosecutor appearing on an application.[44] Producing parties do not commonly seek to appear, aside from the Centres Against Sexual Assault (CASA). It is perhaps unrealistic to expect that they would, as many producing parties are small operations or individuals with little experience of the legal system or the inclination/ability to fund such representation.

CASA representatives have produced affidavits in matters setting out general principles regarding the relationship between counsellors and complainants, and the effect of disclosure. It may be that such submissions could inform a revision of the guiding principles in the Act[45] therefore reducing the need for CASA to be actively represented in such applications and filling the void where other producing parties do not seek to be represented.

In many cases, the most efficient course is for the court to order production of the material to itself[46] rather than essentially operating in the dark. A possible reform to the current process may be for this to be granted on the papers where a sufficient threshold is met, rather than the current unwieldy multi-stage process.

[43] While the legislative responsibility to notify the protected confider is with the informant, per s32C(4) *Evidence (Miscellaneous Provisions) Act 1958,* we have adopted this task in practice.
[44] While the prosecution is not a party to such applications, a prosecutor appears to assist the court.
[45] s32AB *Evidence (Miscellaneous Provisions) Act 1958*
[46] s32C(6) *Evidence (Miscellaneous Provisions) Act 1958*

Question 6: What are some of the challenges with the appeals process for sexual offence cases? How can these be addressed?

Two important issues are worth noting here:

Viewing of evidence by the Court of Appeal

In our view there should be a general power introduced into the *Criminal Procedure Act 2009* which allows for the Court of Appeal, when considering an appeal against conviction, to inform itself in any way it thinks fit, including by viewing any recording of any evidence given at trial.

We imagine this would be a relatively simply legislative change which, in our view, has the potential to have a significant impact on the outcome of some appeals.

Historical sexual offence appeals

We have noticed an increase in the numbers of convictions being set aside by the Court of Appeal for offending which occurred over 40 years ago.

For examples, see: *Mejia (a pseudonym) v The Queen*[47]; *Tyrell v The Queen*[48]; *Spurritt v The Queen*[49]; *Green (a pseudonym) v The Queen*[50] and most recently some comments in *Lucciano (a pseudonym) v The Queen*[51].

Issues Paper G: Restorative and Alternative Justice Models

It is a matter for government as to whether restorative justice models are introduced into Victoria. We don't propose to comment further on this Issues Paper.

Thank you again for the opportunity to provide comments on these important Issues Papers. If you have any further questions, please contact me via email: [redacted]

Yours faithfully

[redacted]

Suzanne Penhall
Manager, Policy and Specialised Legal
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[47] *Mejia (a pseudonym) v The Queen* [2016] VSCA 296
[48] *Tyrell v The Queen* [2019] VSCA 52
[49] *Spurritt v The Queen* [2021] VSCA 7
[50] *Green (a pseudonym) v The Queen* [2017] VSCA 277
[51] *Lucciano (a pseudonym) v The Queen* [2021] VSCA 12