Improving the Response of the Justice System to Sexual Offences

1. The Supreme Court provides the following response to the Victorian Law Reform Commission's 'Improving the Response of the Justice System to Sexual Offences' inquiry.
2. The Court's response addresses the Commission's terms of reference regarding the impact of changes that have been implemented, data and trends, and actual and perceived barriers.
3. While it is possible for sexual offence cases to come before the Trial Division of the Supreme Court, trials of sexual offences are generally heard in the County Court. Accordingly, the Supreme Court's discussion of those terms of reference is confined to issues that arise in appeals in sexual offence cases, and the appeals process.

Impact of changes that have been implemented

4. There are two areas where significant impacts of change become most apparent in the Court of Appeal – jury directions and sentencing.

Jury directions

5. The *Jury Directions Act 2015* (JDA) has simplified jury directions to good effect. The Court has seen a significant decline in the number of appeals against conviction that succeed because of an error in the trial judge's directions.
6. Reflecting on the effect of the JDA, the conveners of the Jury Directions Advisory Group (JDAG), Maxwell P and Mr Greg Byrne, said:

> in the period 2005–12 there was an average of 24.8 successful appeals against conviction each year. Of those, appeals concerning jury directions made up 25–50 per cent. By contrast, between 1 January 2017 and 30 June 2020, when the JDA has been in force, there were on average only 11.7 successful appeals against conviction each year. Of those, appeals concerning jury directions made up 19.5 per cent and — importantly — none of them involved an evidentiary direction reformed by the JDA.
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> Since 2011, when the Court of Appeal introduced new rules governing criminal appeals, the number of appeals against conviction has dropped markedly. It seems clear, nevertheless, that the jury directions reforms have been a key factor in reducing the number of errors in directions that warrant setting aside a conviction on appeal. This is well illustrated by the formerly troublesome area of directions on post-offence conduct, mentioned earlier. Since the simplified direction on post-offence conduct came into force, there has only been one successful appeal on that subject, and it did not concern the content of the direction.
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> Of particular importance have been the simplifications to substantive evidentiary directions and the transparency of the jury directions request process, which illuminates in most cases why a judge did or did not give a direction. Further, since

> the commencement of the reforms, appellate decisions have not identified any deficiencies, errors, or unfairness in how the Act works.[1]

7. Appeals are an important safeguard in the criminal justice system, but they prolong finalisation of matters and therefore can have a negative impact on victims. Reducing error by providing clearer laws in relation to jury directions and therefore reducing appeals contributes to both the fairness of the system and reducing negative impacts on victims.

8. The Court is not aware of any successful challenges to the content of a simplified jury direction under Parts 4, 5 or 6 of the JDA. There has, however, been a limited number of successful appeals concerning failure to give a direction under the JDA. It is not considered that these appeals give rise to any systemic issues.

9. *Hudson v R* involved historical rape allegations, with offending alleged to have occurred in 1988. The applicant argued that the trial miscarried because the trial judge refused to give a direction under ss 14 and 32 of the JDA that the complainant's evidence might be unreliable on account of various factors. Those factors included the lapse of time, the complainant's drug and alcohol abuse, his poor mental health, and his evidence that he was drugged at the time of the alleged offending. The Court of Appeal found that the trial judge misapplied s 14 of the JDA, which requires the judge to give a requested direction unless there are good reasons for not doing so:

> The provisions of the Act, which we have set out above, have the effect that, where counsel makes a request under s 12 for a direction stipulated in s 32 of the Act, the judge must first consider whether the evidence, that is the subject of the requested direction, is 'evidence of a kind that may be unreliable', either because it comes within one of the categories prescribed by s 31 of the Act, or because of a circumstance or circumstances which have the effect that the evidence, given by a particular witness, may be of a kind that may be unreliable. If the judge reaches such a conclusion, s 14(1) of the Act requires the judge to give the requested direction 'unless there are good reasons for not doing so'. In the present case, it would seem, the judge conflated and inverted that process. Having concluded that the facts of the case did not come within any of the specific categories prescribed by s 31 or contained in the Bench notes, his Honour considered that he should not give the requested direction 'unless there is a good reason to give that direction'. By approaching the matter in that way, the judge did not, as he was required to do, first consider whether the evidence, in respect of which the direction was requested, was evidence of a kind that may be unreliable, and, if so, whether there were otherwise good reasons why he should not give the requested direction.
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> For those reasons, we consider that the judge erred in his consideration, and determination, of the request made by counsel for the applicant, under s 12 of the Act, that a direction be given to the jury, under s 32 of the Act, in respect of the evidence of CK.[2]

10. The Court went on to find that the requested direction should have been given to the jury.

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[1] C Maxwell and G Byrne, *Making Trials Work for Juries: Pathways to Simplification* [2020] 11 Crim LR 1034, 1054-5 (citations omitted).
[2] [2017] VSCA 122, [43]-[44].

11. Refusal to give an unreliability direction under s 32 was again at issue in *Wade v R*. The applicant had been found guilty of two counts of indecent assault and one count of gross indecency with a person under 16. On appeal the applicant argued that a direction should have been given under s 32 because of the lapse of time since the alleged offending, the complainant's mental illness, and the complainant's evidence about his own thought processes and the making of notes to clarify certain facts before making his statement to police. The Court of Appeal held:

> Whether there are good reasons for declining to provide a s 32 direction will always be a matter of fact and degree. There will be some occasions when there is absolutely no need for a direction, some occasions when the need for a direction is compelling, and some occasions when minds may differ as to whether a direction is required. In our view, if there is any doubt in a judge's mind as to whether a s 32 direction ought be given, then prudence, and indeed the structure and language of s 32, requires that a direction should be given.
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> The reliability of the complainant underpinned the prosecution case in the appeal before us. The complainant was the only prosecution witness to the alleged sexual misconduct and there was little support for his account from external sources. The dispute concerning the complainant's reliability lay at the heart of the trial.
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> In our view, his Honour erred in declining to direct the jury in the manner sought. We consider that the combination of factors that were relied upon by the applicant in support of a 32 direction were of sufficient force as to call for a s 32 direction, no matter how thoroughly they had been ventilated in cross-examination.
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> …
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> We observe that the structure of s 32 is designed to encourage trial judges to give an unreliability direction where there is a reasonable possibility of unreliable evidence. The question then becomes, 'are there good reasons for declining the request?', rather than 'are there good reasons for giving the direction?'. The answer to the question will, of course, depend on the individual circumstances of the case, but it ought be borne steadily in mind that the default position is that the direction should be given.[3]

12. In *Ritchie v R*[4] the Court of Appeal allowed an appeal against convictions of gross indecency and incest because of certain comments and arguments made by the prosecutor in his final address. The Court found that there was a fundamental departure by the prosecutor from his duty of fairness, and that the trial judge ought to have given a direction under s 21 of the JDA even though counsel had not requested such a direction.

13. In *Jacobs v R*[5] the Court of Appeal allowed appeals in three proceedings. In one of those proceedings, the Court held that the trial judge erred in not giving a direction under s 43 of the JDA despite defence counsel requesting such a direction. That error did not itself result in a substantial miscarriage of justice.

Current sentencing practice

14. While there has been a number of legislative changes in relation to sexual offending, there has also been a significant common law based shift in sentencing

[3] [2019] VSCA 168, [35]-[37], [39] (citation omitted).
[4] [2019] VSCA 202.
[5] [2019] VSCA 285.

practice. In a number of cases the Court of Appeal has commented on the seriousness of sexual offending and called for an uplift in sentencing.

15. In *DPP v Dalgliesh*, the respondent had pleaded guilty to charges of incest, sexual penetration of a child under 16, and indecent assault. As a result of the offending giving rise to one of the incest charges, the victim fell pregnant. When the matter was before the Court of Appeal for the first time, the Court said:

> community values have an important role to play in assessments of the objective gravity of a particular offence. Sentencing for incest must reflect society's denunciation of the sexual abuse of children and the profound harm which it causes. The very high maximum penalty underlines the seriousness with which the offence is regarded.
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> Our review of sentencing for incest enables us to make a number of general observations about the current state of sentencing. Most sentences for incest with a dependent child under the age of 18 are around three years and six months or four years' imprisonment. Slightly higher sentences are imposed if the charge is a representative one involving high levels of repetition or victim impact, or if it involves other circumstances of aggravation, such as ejaculation, pregnancy, threats or overt violence. The highest recorded sentence in such circumstances is six years on a guilty plea and seven years following a trial. There is little evidence of any real differential where the victim is very young.
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> In our view, current sentencing for incest reveals error in principle. The sentencing practice which has developed is not a proportionate response to the objective gravity of the offence, nor does it sufficiently reflect the moral culpability of the offender. Sentences for incest offences of mid-range seriousness must be adjusted upwards. That is a task for sentencing judges and, on appeal, for this Court. The criminal justice system can be — and should be — self-correcting.
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> Incest is a crime of violence and must be so regarded. General and specific deterrence and denunciation must be given their proper emphasis. The long-term harm done to the victim, now better understood, must be given due weight in the sentencing calculus. Sentences must be commensurate with the seriousness of the breach of parental responsibility involved.
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> On the current state of sentencing, there is no sufficient differentiation between worst case and mid-range offending. As we have said, sentences for mid-category offending have been constrained by sentences for worst category offending, and the sentencing range for mid-range offences has been inappropriately compressed.[6]

16. When the matter returned to the Court of Appeal after the Director successfully appealed to the High Court, the Court increased the sentence on a single charge of incest from 3 years and 6 months to 7 years and 6 months.[7]

17. In *Shrestha v R* the Court of Appeal commented on sentencing practices in respect of rape involving digital penetration. The Court said:

> The High Court decision in *Dalgliesh* has made it clear that sentencing judges and intermediate appellate courts should not consider themselves constrained by current sentencing practice to impose a sentence they consider to be inadequate in the particular circumstances. We have considered the decisions included in the Director's survey. It is clear that the general run of sentences for digital rape is well

[6] [2016] VSCA 148, [126]-[130].
[7] [2017] VSCA 360.

> below what is necessary to reflect the objective gravity of that offence, and the moral culpability of the offender.
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> In each of its previous decisions calling for an uplift in sentencing for particular offences, the Court has confined its remarks to offences of the same type, or falling into the same category of seriousness, as the offending the subject of the appeal(s) before the Court. Consistently with that approach, we consider that there must be an upward adjustment in sentences for offences of digital rape committed in circumstances that are broadly similar in objective gravity to the offence of which the appellant was convicted.[8]

18. The Court noted in *Ivanov v R* that sentences for rape have increased, although in the unusual circumstances of that case a lower sentence was justified:

> It is true, as the judge said, that the decision in *MC* pre-dates *R v Kilic* and *DPP v Dalgliesh (a pseudonym)*, in which the High Court was critical of the approach to sentencing employed by this Court. It is also true that, since *MC* was decided, this Court, in *Shrestha v R*, has declared that 'there must be an upward adjustment in sentences for digital rape offences in this category of seriousness, that is, offences whose objective gravity is broadly comparable to that of the present case'. Without deciding whether the remarks in *Shrestha* apply to the types of offence prosecuted in the present case, sentences for rape in general have increased and, in light of the High Court's concern about this Court's approach in other cases, the judge was right not to consider her discretion constrained by *MC*.
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> However, in our view, the judge was wrong to say that it was not open to her 'to impose a sentence significantly less than was imposed in *MC*, even taking into account the mitigating features in [Mr Ivanov's] case, when the Court of Appeal has subsequently said that the sentences imposed for rape have been too low'.
>
> Sentences are not precedents to be applied or distinguished. The administration of the criminal law involves individualised justice. The imposition of a just sentence on an offender in any particular case is an exercise of judicial discretion concerned to do justice in that case. The need to have regard to current sentencing practices does not mean that the measures of manifest excessiveness and manifest inadequacy are capped and collared by the highest and lowest sentences for similar offences hitherto imposed.[9]

19. In *DPP v Za Lian* the Court surveyed recent sentences for rape and noted:

> There can be little doubt that sentences for rape (and other forms of serious sexual offending) have increased somewhat in recent years. That increase accords with, and respects community expectations.
>
> In a related context, sentences for incest have increased substantially since *Director of Public Prosecutions v Dalgliesh (a pseudonym)*. There, the High Court commented upon the approach to be taken to sentencing for that offence, given that 'current sentencing practices' appeared to have become entrenched at too low a level. It is to be noted that, when the matter of *Dalgliesh* came back to this Court, to be dealt with in accordance with the High Court's criticisms of sentencing practices for incest in this State, the sentence on a single charge of incest was increased from 3 years and 6 months to one of 7 years and 6 months.

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[8] [2017] VSCA 364, [30]-[31]. See also *DPP v Macarthur* [2019] VSCA 71.
[9] [2019] VSCA 219, [146]-[148] (citations omitted).

> To some degree, sentences for rape have also been increasing, albeit more incrementally. The reason why those sentences have not increased as dramatically as those for incest may be because sentencing for incest came off a far lower base.
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> …
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> The extent to which this Court's approach to sentencing for rape appears to have altered in recent years may be seen from an examination of *Director of Public Prosecutions v Werry*. There, a five member Court considered a Director's appeal against sentence on one count of rape, for which the respondent had received a sentence of 7 years' imprisonment, with a non-parole period of 5 years and 1 month.
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> … the Court observed that the sentence of 7 years' imprisonment was 'clearly within the range' reasonably available in the circumstances of that case. The Court ordered that the appeal be dismissed.
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> In the three years or so since the High Court delivered judgment in *Dalgliesh*, this Court has heard close to 20 appeals against sentences for rape. Most of these have been brought by applicants contending that the sentences in question were manifestly excessive. Several have been Director's appeals.
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> Not surprisingly, the outcomes in those cases have varied considerably. However, one thing can be said with confidence. The 7 year sentence imposed in *Werry* would almost certainly not be described today as 'clearly within range'.
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> That is not to say that sentences for rape have increased all that dramatically since *Dalgliesh*.[10]

20. In *DPP v Mokhtari*, the respondent had been sentenced to 6 years' imprisonment on each of the first two charges of rape and 6.5 years' imprisonment on each of the other two charges of rape. The Court of Appeal increased those sentences to 8.5 years and 9 years, noting that:

> The very act of rape is inherently serious, simply by virtue of the invasion of the victim's bodily integrity without consent. It is, quite simply, an act of violence, whether or not accompanied by other violent conduct. The violation is physical, emotional and psychological. It follows that, aggravating features apart, all acts of non-consensual penetration are objectively serious, irrespective of the form and the extent of the penetration.[11]

21. In *DPP v Patil*[12] the respondent had been sentenced to 6 years' imprisonment on each of nine charges of rape, and 7 years' imprisonment on one other charge of rape. The Court of Appeal resentenced the respondent to 9.5 years' imprisonment on each of six charges of rape, and 8.5 years' imprisonment on each of four charges of rape.

22. Overall increases in sentence length are evident in the data published by the Sentencing Advisory Council and the Court notes the Council is currently undertaking research regarding the impact of legislative and common law changes on sentencing for sexual offences.

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[10] [2019] VSCA 75, [60]-[62], [83], [87]-[90] (citations omitted).
[11] [2020] VSCA 161, [41].
[12] [2020] VSCA 337.

Data and trends

23. The Court regularly contributes to data sets prepared by the Sentencing Advisory Council, Australian Bureau of Statistics, and other organisations.

24. For the purposes of the Commission's inquiry the Court analysed appeals data in the current financial year up to 7 January 2021, and the previous five financial years. This analysis revealed that on average over that period:

    a. Applications for leave to appeal in sexual offence matters accounted for 18.8 per cent of all applications for leave to appeal (sentence and conviction appeals; this excludes interlocutory appeals).

    b. Successful appeals (appeal allowed in whole or in part) in sexual offence matters accounted for 24.6 per cent of all successful appeals.

    c. Interlocutory appeals in sexual offence matters[13] accounted for 36.1 per cent of all interlocutory appeals.

    d. Successful interlocutory appeals (appeal allowed in whole or in part) in sexual offence matters accounted for 50 per cent of all successful interlocutory appeals.

25. By allowing certain errors to be addressed before trial, the interlocutory appeal regime contributes to lowering the rate of successful conviction appeals in sexual offence matters. Accordingly, it is expected that the percentages in subparagraphs (a) and (b) above would be higher if not for the interlocutory appeal regime.

26. In terms of finalisation times, the Court notes that sexual offence matters in the Court of Appeal may take longer to finalise than other matters. Over the previous four financial years, the average time to finalisation:

    a. for all appeals was 7.75 months. Excluding 2019/20, the average time was 7.2 months; and

    b. for sexual offence appeals was 9.1 months. Excluding 2019/20, the average time was 8.5 months.

Actual and perceived barriers

27. There is a relationship between clarity of the law, time taken to complete trials and appeals, and the impact of the criminal justice system on victims. The Court considers that reducing complexity and increasing clarity in the law can reduce the:

    a. risk of error;

    b. rate of successful appeal; and

    c. length of trials.

28. This, in turn, may improve confidence in the administration of justice and assist with addressing barriers to bringing matters to trial.

[13] The Court notes that the sample size for interlocutory appeals in sexual offence matters is much smaller than that for conviction/sentence appeals in sexual offence matters.

29. The Court notes the below areas of law and practice that involve complexity or a lack of clarity.

Expert evidence and jury directions

30. Expert evidence about the nature and impact of sexual offences may be adduced in trials of sexual offences under s 388 of the *Criminal Procedure Act 2009* or by the operation of ss 79 or 108C of the *Evidence Act 2008*. Some of the matters that may be the subject of expert evidence under those sections may also form the basis of a jury direction under ss 52(4), 53 or 54D(1) of the JDA.

31. The scope of directions under s 53 of the JDA was discussed in *Ford v R*.[14] In that case the applicant had been found guilty of several charges of committing an indecent act with a child aged under 16. There was a delay in one of the complainants complaining about the alleged offending, and that complainant gave evidence that many of her memories had been blocked out or were only just coming back to her. The trial judge gave a 'good reasons' direction under s 53 of the JDA, which included that:

> one of the reasons why-one of the good reasons why there may be complaint [sic] is that victims often or sometimes employ psychological strategies to cope with the abuse, such as repression, suppression of those acts, disassociation, or an internal explanation such as the one that the prosecution says was given in this case.

32. One of the applicant's grounds of appeal was that the trial judge went beyond the directions required to be given under the JDA. The applicant argued that the trial judge gave 'psychological opinions that he was not qualified to give', which should have been the subject of expert evidence.

33. The Court of Appeal did not need to decide the ground, but said that it raised:

> a question of general importance concerning the appropriate content of judicial directions on delay in complaint, an issue which arises frequently in trials of sexual offences. What follows are, of necessity, provisional views only. Further consideration of the issues raised by this ground of appeal must await a case in which they fall for decision.
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> …
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> An obvious question for future investigation is whether, given the legislative history of s 53 and the line of authority concerning s 61(1)(b)(i) to which we have referred, Parliament is to be taken to have intended judges to have the same scope for giving directions under s 53 as they had under the predecessor provision. In that context, it would be necessary to consider whether the replacement of the word 'inform' in s 61(1)(b)(i) with the word 'direct' in s 53 is of interpretive significance (noting also that 'inform' is still used in s 52(4)). Similarly, it would be necessary to consider the absence in ss 52 and 53 of an express reference to the making of comments such as that found in s 61(2).
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> …
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> There is, we are inclined to think, force in the point made by Willis and McMahon, that a jury may be led to speculate if the judge goes beyond the evidence in the trial when suggesting possible reasons why a victim of sexual offending may not complain or delay in complaining. For example, 'being compelled to secrecy by

[14] [2020] VSCA 162.

> threats' would be a reason why a person might refrain from complaining, but to tell the jury that in a case where there was no evidence of such a threat might well invite the jury to speculate. On the other hand, there will often be evidence of a complainant's reasons for not complaining earlier, or evidence from which such reasons might be inferred (such as the existence of a family or special relationship). Often, the jury will be able to decide these questions based on their common sense and experience of life.
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> The present case involves a less clear-cut area, concerning 'psychological strategies … such as repression or suppression of the acts'. In this case, the judge elaborated by referring also to 'disassociation, or an internal explanation such as the one that the prosecution says was given in this case'. The latter referred to A's evidence that she had blocked out her memories and had not told anyone so as to avoid making it 'real'. The question whether expert evidence was needed in order to found an instruction to the jury that such 'strategies' are 'often or sometimes' employed by victims of sexual offending is an important one which was not addressed at the trial.[15]

34. By contrast, the Court of Appeal's decision in *Jacobs v R*[16] demonstrates that there may be circumstances in which a jury direction is preferable to expert evidence. In that case, the applicant had been found guilty of a number of charges of sexual offences in separate trials. In two of the trials the prosecution adduced expert evidence from a forensic psychiatrist explaining responses by some complainants to unwanted sexual conduct, and delay by some complainants in reporting that conduct.

35. The Court of Appeal described the purposes for which such expert evidence could properly be used:

> In an appropriate case in which it is alleged that an accused person has engaged in non-consensual sexual conduct in respect of a complainant, evidence of the kind given by Dr Sullivan, in the first proceeding, may be relevant for two possible purposes. First, it may explain conduct or reactions by the complainant at the time of the alleged offending, which, in the absence of such an explanation, might be considered to contradict or be inconsistent with the evidence of the complainant that the sexual conduct, complained of, was not consensual. Secondly, such evidence might be relevant to explain conduct by a complainant, during the period between the date of the offence and the time at which it is reported to the police, which, if not explained, might seem to contradict or be inconsistent with the evidence of the complainant that the sexual conduct, complained of, was not consensual. In either or both of such cases, the evidence would be relevant to explain counterintuitive conduct by a complainant which, if not properly understood, might lead a jury to erroneously conclude that the conduct, alleged against the accused, might have been consensual. In that way, the evidence would be directed to dispel misconceptions or 'myths' held as to the manner in which it might be expected that a victim of a sexual offence might react either at the time of the offending or in the period that followed it.[17]

36. The Court of Appeal noted that in the first trial defence counsel did not suggest that the complainant's conduct, either during the alleged offending or afterwards, contradicted her account of the alleged offending. There was no suggestion that the

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[15] Ibid [56], [64], [66]-[67] (citations omitted).
[16] [2019] VSCA 285 (*Jacobs*).
[17] Ibid [61].

complainant had engaged in any 'counterintuitive' conduct that was inconsistent with her evidence. Accordingly, there was no issue in the trial to which the expert evidence was relevant, and the evidence was therefore inadmissible.[18]

37. In response to the Crown's argument that the expert evidence was relevant in that it was necessary to preclude the jury from misusing, or misconceiving, aspects of the complainant's conduct, the Court of Appeal said:

> That proposition must be rejected for two reasons. First, as we have outlined, there was no aspect of the conduct of AR, either during the incident in question, or in the period before the police spoke to her, which the jury could have regarded as being counterintuitive conduct, or from which the jury could have drawn a conclusion (albeit erroneously) that might have been precluded by the evidence of Dr Sullivan. Secondly, if there was any reason to apprehend that the jury might, in some way, draw a conclusion from some counterintuitive conduct by AR, such an erroneous approach by the jury could be precluded by an appropriate direction given by the judge under s 52 of the *Jury Directions Act 2015*. It is almost a matter of routine, in criminal trials in this State, for judges to give cautionary directions to juries, in order to ensure that they do not misuse evidence that is put before them, or use such evidence for an impermissible purpose. Most often, such directions are given in order to preclude a jury from engaging in a line of reasoning that might be impermissible and unfair to an accused person. However, equally, it is appropriate for a judge to give such a direction, where necessary, in order to ensure that a jury does not engage in impermissible reasoning that might be to the disadvantage of the prosecution. It is for that precise reason that the legislature has specified the particular direction prescribed by s 52 of the *Jury Directions Act*.
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> The submission made by counsel for the respondent would, if accepted, have extraordinary consequences. In essence, as counsel properly conceded, if that submission were accepted in this case, then evidence, such as that which was adduced from Dr Sullivan, would be admissible in a very large number of criminal trials in this State involving sex offences, notwithstanding that there is no issue between the parties to which that evidence is relevant.[19]

38. The Court of Appeal went on to find that the admission of the expert evidence resulted in a substantial miscarriage of justice.[20] The second trial also miscarried due to the admission of the expert evidence.[21] In relation to the second trial, the Court of Appeal described the potential for juries to misuse expert evidence:

> it is the experience of the courts that juries may give undue weight to expert evidence. In the present case, the fact that Dr Sullivan was a highly qualified and experienced forensic psychiatrist, who gave evidence based on his long-standing expertise and studies of the literature, invested his evidence with a particular sense of authority and weight. It is those considerations which added to the potential for the jury to be persuaded by such evidence to substitute, for the explanations given by AF, the evidence of Dr Sullivan, in order to explain AF's conduct, both in engaging in the text messages with the applicant after the offending, and in not reporting the offending to the police for a month.[22]

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[18] Ibid [62]-[64], [70]-[71], [75].
[19] Ibid [73]-[74].
[20] Ibid [86].
[21] Ibid [132], [147].
[22] Ibid [149].

39. Following *Jacobs*, it appears that expert evidence on counterintuitive conduct may not be admissible if the defence has not used the conduct to attack the complainant's credibility. However, it is noted that trial judges may be required to give the same or similar information regarding counterintuitive conduct in a jury direction under s 52(4), irrespective of the defence's case and whether the complainant has given an explanation for the conduct. Further, if the prosecution requests a direction under s 53, the trial judge must give the direction unless there are good reasons for not doing so. It is not clear whether good reasons for not giving the direction include that expert evidence on the same subject would be inadmissible.

40. The Court suggests that the Commission consider addressing the 'question for future investigation' referred to in *Ford* and the relationship between expert evidence and directions under the JDA. In particular, consideration could be given to:

    a. whether the presence or absence of expert evidence in the trial should affect the scope of directions that may be given under s 53;

    b. the conflict identified in *Jacobs* between the admissibility of expert evidence and the judge's obligation to give a direction under s 52; and

    c. when it is appropriate for general background information on responses to sexual offending to be the subject of:

        i. expert evidence only;

        ii. a jury direction only; or

        iii. both expert evidence and a jury direction.

Consent

41. The case of *Hubbard v R* illustrates issues that can arise when applying the law on reasonable belief in consent to circumstances where a complainant is asleep or unconscious, or in the process of waking up.

42. The applicant had been found guilty of one charge of rape. The complainant's evidence was that she was asleep, and when she woke she was being penetrated. Initially she thought it was her partner and she did not protest. When she saw it was the applicant she pushed him away and the applicant stopped touching her immediately.[23]

43. The applicant's evidence was that before he commenced penetrating the complainant, he had touched and caressed her, and she made moaning noises and moved into him, which led him to believe she was responding positively to his touching and consenting to it.[24]

44. The issue in the appeal was whether the jury was bound to have a reasonable doubt on the third element of rape, namely that the applicant did not reasonably believe that the complainant consented to sexual penetration. The applicant contended that 'the jury must have had a doubt about whether the applicant knew or believed the complainant was asleep at the time of penetration, and on all the evidence the jury,

[23] [2020] VSCA 303, [13].
[24] Ibid [19].

acting properly, could not have been satisfied of this element to the requisite standard'.[25]

45. T Forrest JA, with whom Weinberg JA and Lasry AJA agreed, said:

> The jury must have accepted [the complainant's] evidence; however in the unusual circumstances of this case, this acceptance does not demand rejection of the applicant's account of events said to have occurred before the moment of penetration. Whilst the complainant consistently and firmly rejected the propositions that became the applicant's evidence — namely that before penetration he had placed his arm around the complainant's waist and his head on her shoulder and caressed her breast, and that she had responded by moaning, moving her legs towards him, 'nuzzling into' him and assisting in the lowering of her tight pants by arching her back — her evidence of events commenced at the time that she first perceived that she was being digitally penetrated. She could not give direct evidence of the length of time for which the penetration had occurred before she became aware of it, nor what events had occurred prior to her becoming sufficiently awake to have awareness and therefore recall of surrounding events. Thus, unlike many cases of this sort, the complainant's evidence, taken at its highest, does not strictly contradict the evidence the applicant gave about the events leading up to penetration, nor the related proposition as to his belief in consent.
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> The state of being asleep is not binary in nature. It is a simple and well enough understood state of which judicial notice can be taken. It is plain that, as the normal English term 'asleep' is understood, there are various stages of sleep, ranging from deep sleep to something just short of full wakefulness. On this application, the applicant's case is that there is a realistic possibility that the complainant participated in all these pre-penetration activities, without any subsequent recall, and thus gave the impression of consent to the applicant's advances.
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> …
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> On the basis of the evidence I have reviewed, I consider that there is a reasonable possibility that the complainant carried out the activities attributed to her by the applicant while not sufficiently awake to recall doing so. Assuming this to be the case, without more, then I consider there is also a reasonable possibility that the applicant reasonably believed that the complainant was awake and consenting to his advances.[26]

46. Weinberg JA said:

> In my opinion, having regard to the evidence as a whole, it was not open to the jury to be satisfied, to the requisite standard, that the applicant did not reasonably believe, at the moment of sexual penetration, that the complainant consented to that act.
>
> Given the unusual circumstances of this case, and particularly the complainant's confusion as to where she was, and by whom she was being sexually penetrated, **the jury may well have reached this conclusion, but for the combined operation of s 36(2)(d) of the *Crimes Act 1958* and s 47(3)(a) of the *Jury Directions Act 2015***. Pursuant to those provisions, knowledge, or belief, on the part of the accused that a victim happened to be 'asleep' at the moment that an act of sexual penetration took place, is deemed to negate any reasonable belief in consent, and the jury were so

[25] Ibid [27].
[26] Ibid [38]-[39], [41].

> directed. Yet, having regard to the state of the evidence, taken as a whole, no finding of that kind could, at least to the requisite standard, have been made.[27]

47. Section 36(2)(d) of the *Crimes Act 1958* provides:

> Circumstances in which a person does not consent to an act include, but are not limited to, the following —
>
> > the person is asleep or unconscious.

48. Section 47(3)(a) of the JDA provides:

> the prosecution or defence counsel may request that the trial judge —
>
> > direct the jury that if the jury concludes that the accused knew or believed that a circumstance referred to in section 36 of the **Crimes Act 1958** existed in relation to a person, that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act.

Sentencing schemes and historical offences

49. Frequent amendment of sentencing schemes within the *Sentencing Act 1991* creates complexity and consumes time and resources within the sentencing process. That complexity increases the risk of error by lawyers in their submissions and by courts in their application of the Act.

50. That being said, these kinds of errors are made in only a small number of cases. *DPP v Amaral*[28] provides an example. Although the DPP's appeal on the ground of manifest inadequacy was successful, the respondent successfully appealed against the sentence imposed in respect of one of the three counts of sexual penetration of a child under 16. On the first count, the sentencing judge had imposed sentence by reference to two erroneous guideposts:

    a. due to the date of the offence, the provision of the *Crimes Act 1958* identified in the indictment was incorrect. The maximum penalty for the incorrect provision was 15 years' imprisonment, whereas the maximum for the correct provision was 10 years' imprisonment; and

    b. both counsel informed the sentencing judge that the standard sentence scheme applied. Again, given the date of the offence, the scheme did not apply.

51. Another difficulty in historical sexual offence cases is the relevance and effect of historical sentencing practices. In *Thrussell v R* the Court of Appeal said:

> The fact that current sentencing practices are to be taken into account does not mean that sentencing practices at the time of the offending and sentencing practices between then and the present are irrelevant. On the contrary, the principle of equal justice may make them relevant.
>
> …
>
> This Court [in *Stalio v R*] held that the phrase 'current sentencing practices' in s 5(2)(b) refers to sentencing practices at the date of sentence, not at the date of the commission of the offence. It added that 'the concept of equal justice' requires regard to be had to sentencing practices at the date of the offence if those practices

[27] Ibid [63]-[64] (emphasis added).
[28] [2020] VSCA 290 (*Amaral*).

> can be demonstrated to have required the imposition of a materially lesser sanction for like offences than current sentencing practices would impose for the offence.[29]

52. The Court notes that the wider impact of complexity in sentencing is the time spent by lawyers and courts checking through various provisions and sentencing schemes as they apply to offences committed at different points in time, and reviewing historical and current sentencing practices, to ensure the Act is correctly applied.

53. It is considered that in future reforms to the *Sentencing Act 1991*, this wider impact should be kept in mind. Avoidance of frequent and iterative amendments assists with reducing the risk of error and time taken to navigate point-in-time legislation.

Charging practices

54. On a number of occasions the Court of Appeal has commented on the need for consistency in charging practices in situations where there are multiple allegations of sexual offences. As in explained in *Amaral*:

> the Crown variously deploys 'rolled-up' charges, 'representative' charges, and 'course of conduct' charges, as well as single charges 'with context' (as here). Typically, there is nothing to indicate why one form of charge was adopted rather than another.
>
> This is a matter of some importance, given that different sentencing principles will apply depending on which type of charge is used. Moreover, the variation in charging practice makes the sentencing task more complicated and increases the risk of confusion and error.[30]

55. The risk of confusion was evident in *Amaral*. The prosecution had relied on several uncharged acts of sexual penetration as providing context for the assessment of the charged offences. On appeal, the DPP initially argued that the trial judge fell into error by not imposing a heavier sentence on account of the uncharged acts. This argument was not pursued as the authorities it relied on related to representative charges, not single charges 'with context'. The Court of Appeal made the following observations in relation to the implications of the prosecution's approach to charging:

> the point highlighted the more favourable sentencing approach which must be adopted when — as here — a plea is settled on the basis that multiple other offences, which are admitted, are treated simply as 'uncharged acts', rather than being included within a representative charge. Their only potential relevance to the sentencing task in the present case was to preclude a defence submission that the offending was 'an isolated incident'. Since, however, no such submission would realistically have been available, the uncharged acts became effectively irrelevant. That seems a remarkable outcome, given the number and seriousness of the uncharged acts.[31]

56. In *Lugo v R* there was confusion between representative charges and rolled up charges:

> Charge 2 was described as a representative charge. That was the description used in the indictment, in the Summary and in the sentencing reasons. On closer

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[29] [2017] VSCA 386, [148], [150].
[30] [2020] VSCA 290, [41]-[42] (citations omitted).
[31] Ibid [40]. See also *DPP v Polat* [2020] VSCA 174, [27]-[32].

> examination, however, that characterisation was quite inappropriate. Charge 2 should have been treated as a rolled up charge.
>
> As the authorities make clear, a representative charge is a single instance of conduct that occurred in a wider context. Here, charge 2 was said to have two parts, or particulars, each constituting a separate offence. That is, two offences were 'rolled up' into one charge which, of course, can only occur with the consent of the defence.[32]

57. In *Schembri v The Queen*, the Court of Appeal reiterated previous comments that the expression 'composite charge' should not be used given its potential to cause confusion. The Court said:

> Notwithstanding the warning given at that time about the potential for confusion, the same term was used by the prosecution in its opening in the present case in October 2019. As in *Holland*, the parties to this application accepted that, for sentencing purposes, a 'composite charge' was to be approached in exactly the same way as a 'rolled up charge'. That is, the sentence to be imposed should take into account the criminality of all of the conduct covered by the composite charge.
>
> Although it should not be necessary, we repeat the observation that the phrase 'composite charge' should not be used. To add a different term to the existing and well — understood lexicon of 'representative', 'rolled up' and 'course of conduct' charges is apt to confuse.[33]

Approach to reform

58. When reforming areas of law that are complex or unclear, it is important to adopt a process that:

    a. involves genuine consultation with courts where relevant. While members of the judiciary do not offer views on policy matters, they are able to provide insights on practical and technical matters informed by their observations of the working of the law in matters before them;

    b. promotes good drafting; and

    c. avoids the need for a cycle of appeal judgments to resolve issues in new legislation.

59. The Court considers that the process adopted to develop the JDA may be seen as a model when undertaking significant reforms to the criminal justice system. In the case of the JDA the Court played a key role in initiating the reform, but the process could be adapted appropriately to reforms initiated by the VLRC or Government. The process for the JDA involved:

    a. a working group of judges and practitioners recommending legislative simplification of jury directions;

    b. a VLRC inquiry;

    c. the Attorney-General approving the Department of Justice to establish JDAG;

    d. JDAG comprising judges of the Court of Appeal, trial judges from the Supreme Court and County Court, representatives of the Office of Public

[32] [2020] VSCA 75, [49]-[50].
[33] [2020] VSCA 217, [58]-[59].

Prosecutions, Criminal Bar Association, Victoria Legal Aid and the Judicial College of Victoria, and academics with expertise in jury research; and

e. JDAG closely reviewing each of the Department's proposals for simplified directions, both at the policy development stage and in draft legislation.

60. The JDA addresses an area that is a core aspect of the judicial function which was once purely addressed by the common law. The involvement of trial and appellate judges in JDAG brought valuable experience and expertise to the task of developing legislative forms for jury directions. It contributed to an outcome that was informed by practical experience including the need for trial judges to have flexibility to tailor directions to the particular case.

61. The introduction of intermediaries and ground rules hearings similarly involved a process which brought together the judiciary and profession with international experts and professionals from other fields to build understanding of the process and integrate it into the practical workings of the criminal justice system and remove barriers.

62. The benefits of these collaborative efforts have been demonstrated and within the bounds of the appropriate role of members of the judiciary, the Court is pleased to be able to contribute to them. The Commission may wish to consider which of its recommendations would be well suited to a similar model of implementation.

Judicial education

63. The Judicial College of Victoria provides continuing education and training for Victoria's judicial officers. Judges are strongly encouraged to participate in continuing professional development activities hosted by the College.

64. Over the last 10 years the College has held the following programs relevant to sexual offence matters:

a. 'Cyber, Courts and Community: Technology-Facilitated Abuse' in August 2020.

b. 'Modern Forensic Evidence Series: Child Sexual Abuse and Non-Accidental Injury' in August 2019.

c. 'Power, Control and Domestic Abuse' in July 2019.

d. 'Historical Sexual Offences' in August 2016.

e. 'Major Reforms for Sex Offence Trials' in September 2015.

f. 'Key Legislative Reforms and Recent Cases in Sexual Offences' in October 2014.

g. 'Resilience, Trauma and the Judicial Role' in April 2014.

h. 'Current Issues in Criminal Law Twilight: Tendency and Coincidence' in August 2013.

i. 'Current Issues in Sexual Offences' in May 2012.

j. 'Understanding Digital Evidence and Cybercrime' in June 2012.

k. 'Sexual Assault' in June 2010.

65. The programs cover technical legal issues as well court craft, such as the appropriate use of language when speaking to and about victims of crime, and managing the process of victims giving impact statements.

66. The College has also developed a 'Victims of Crime in the Courtroom' guide for judicial officers. The section dedicated to 'Victims of Sexual Offences' includes information that challenges a number of myths or misconceptions about sexual offending and the behaviour of victims when giving evidence.

67. The Court notes that the College's judicial portal contains a section with sexual offence resources, including guides to certain legislation, an overview of historical sexual offences, links to historical legislation, case notes on some key issues in sexual offence cases, and information regarding child witnesses.

68. There is an ongoing need for professional development programs, and for educational materials and charge books to be regularly updated. It is therefore important that the College has sufficient resources to do this important work. If the College is not properly resourced it becomes more difficult for judicial officers to maintain awareness of current issues and best practices in sexual offence cases.