HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Ryan Churchill (a pseudonym)
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. Evidence of the complainant's previous representation to another of having been sexually assaulted was adduced at trial under s 66 of the *Evidence Act 2008* (Vic) (the **EA**), and that other person gave evidence of the distressed demeanour of the complainant when making that representation. The prosecution relied on the distress evidence as a piece of indirect evidence that supported the charges relating to that sexual offending.
3. The first issue is whether the trial judge was required to give a warning to the jury that the distress evidence "generally carries little weight"?
4. The second issue is whether, in addition to giving general directions to the jury about indirect evidence and the drawing of inferences, the trial judge was also required to specifically direct the jury that they cannot use evidence of distress as support for the charges unless they first find a rational causal link between the distress and the alleged offending?

PART III: SECTION 78B NOTICE

5. The appellant does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISIONS BELOW

6. The reasons for sentence of the County Court of Victoria (**CAB**[1] **47–59**) are cited as: *Director of Public Prosecutions v Ryan Churchill (a pseudonym)* [2023] VCC 300 (**Reasons for Sentence**).
7. The decision of the Court of Appeal of the Supreme Court of Victoria (**CAB 64–84**) has not been reported. The medium-neutral citation is *Ryan Churchill (a pseudonym) v The King* [2024] VSCA 151 (the **judgment below**).

PART V: MATERIAL FACTS

8. The respondent was tried in the County Court of Victoria on indictment L12523592 charging him with two offences of incest against his former domestic partner's daughter, referred to as "the complainant" (**CAB 5–7**). At the time of the offences the complainant was aged 13 or 14 years, and the respondent was aged 36 or 37 years.
9. As the complainant was cognitively impaired, her evidence was given at a Special Hearing, which took place in October 2021. During the Special Hearing, the complainant adopted the contents of her Video and Audio Recorded Evidence (**VARE**), which had been recorded in 2018 (**CAB 67 [9]**).
10. On 12 September 2022, the respondent was found guilty by jury verdict on both charges. He was sentenced on 7 March 2023 to a total effective sentence of 8 years and 6 months' imprisonment, with a non-parole period of 5 years (**CAB 60**).
11. The circumstances of the offending are summarised at paragraphs 2–8 in the Reasons for Sentence (**CAB 48–49**) and paragraphs 4–8 of the judgment below (**CAB 66–67**).
12. In short compass, the complainant's mother Rachel Russo[2] (**RR**) entered into a de facto relationship with the respondent in 2003 and subsequently moved into the respondent's home with her three daughters, including the complainant (**CAB 66 [5]**).
13. In 2005, RR fell pregnant. One evening late in RR's pregnancy, the respondent entered the complainant's bedroom and sat down on her bed. The respondent told the complainant words to the effect, "Out of your sisters, I like you the most" and that she

[1] Core Appeal Book ('CAB').
[2] A pseudonym.

was an attractive girl. The complainant twice told the respondent that she wanted to go to sleep. The respondent became upset and pulled down the complainant's bedcovers. He climbed on top of her, pulled down her pyjamas and inserted his penis into her vagina. He continued to penetrate her for two to three minutes until he ejaculated outside her vagina (**CAB 67 [7]**). The complainant was in a lot of pain. After the offending, she stayed awake the whole night (**AFM**[3] **6–7**).[4] The next morning, she noticed she had been bleeding (**CAB 48 [5]**) (Charge 1).

14. On 15 October 2005, RR gave birth to her fourth child and remained in hospital for four to five days. The complainant and her sisters stayed at home with the respondent. On one occasion, the complainant observed the respondent at the doorway of the bathroom watching her whilst she was showering. She told the respondent to get out; he responded by telling her that he owned the house. That evening the respondent went into the complainant's bedroom when she was in bed listening to music. He again lay on top of her and inserted his penis into her vagina (**CAB 67 [8]**) (Charge 2).

15. The complainant also gave evidence that the respondent had told her that he was going to "go after her sisters",[5] that she was not to tell anyone about the offending, and that her mother would not believe her (**CAB 25**).

The complaint evidence

16. At trial, the prosecution adduced evidence from RR that on an occasion when she was at the Children's Court with the complainant in late 2006 or early 2007, after the complainant had run away from home, the complainant told her: that the respondent had "raped" her;[6] that he said if she told anybody he would go for her sisters next; and that it was her (RR's) fault because she had brought the respondent into their lives. RR gave evidence that when the complainant told her these things she (the complainant) was "very upset, very, very distressed".[7] At the time of the complaint, RR was no longer in a relationship with the respondent. She had moved, with her four children, out of his home.[8] The complainant's behaviour had deteriorated in that period (**AFM 26–27**).

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[3] Appellant's Book of Further Material ('AFM').
[4] Transcript of complainant's VARE, 14 September 2018, Q/A 91, 124 ('VARE transcript').
[5] Although she gave different accounts as to when this threat was made to her by the respondent (**CAB 49–50**).
[6] The complainant used the term "rape"; however, the respondent was charged with offences of incest (**CAB 5–7**).
[7] Transcript of Proceedings, *DPP v Churchill (a pseudonym)* (County Court of Victoria, CR-21-00893, Judge O'Connell, 5–12 September 2022), 86.15–87.24 (see **CAB 68 [13]; AFM 23–24, 27–28**) ('Trial transcript').
[8] Trial transcript, 85.16–86.10 (**AFM 22–23**).

17. At the time of her VARE the complainant did not have a recollection of telling her mother about the offending at the Children's Court, but she did recall that in the period leading up to her attendance at the Children's Court she had been running away from home because her family reminded her of the offending.[9] The complainant stated that the reason she could not remember telling her mother about the offending was because going to the Children's Court had been "pretty traumatic" for her and that the night before she had been at her friend's house and had been drinking quite heavily and had also smoked marijuana.[10]

18. The complainant stated in her VARE that she only ever told people about the offending when she was having a "meltdown", because when she was in a normal state of mind "it couldn't come out", and that she still struggled to talk about it.[11]

19. RR's evidence of complaint, which was admitted without objection pursuant to s 66 of the EA,[12] and evidence of the complainant's distress, were not challenged by the respondent's trial counsel. Rather, the respondent's case was that the complainant had fabricated the allegations at the Children's Court to deflect responsibility from her own behaviour and that there were other causes for the complainant's distressed state.[13]

The trial judge's directions

20. In accordance with s 12 of the *Jury Directions Act 2015* (Vic) (the **JDA**),[14] the prosecutor requested that the trial judge direct the jury in relation to the use they could make of the distress evidence. The respondent's counsel objected to the judge giving the direction on the basis that the causal connection between the distress and offending was "too remote" and "too tenuous" (**CAB 69 [19]**). During discussion, the judge observed that the model direction on distress, which had been amended following *Paull v The Queen*[15] (***Paull***), was "tied to the timing of the distress" and that the model direction was "not something that suits the circumstances here".[16]

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[9] VARE transcript, Q/A 153–158 (**AFM 10–11**).
[10] VARE transcript, Q/A 362–365 (**CAB 68 [16]; AFM 15**).
[11] VARE transcript, Q/A 160–162 (**AFM 11**).
[12] Section 66(2) of the EA relevantly provides that the hearsay rule does not apply to evidence of the representation that is given by the person who made the representation or a person who saw, heard or otherwise perceived the representation being made if: (a) the person who made the representation has been or is to be called to give evidence; and (b)(ii) the person who made the representation is a victim of an offence to which the proceeding relates and was under the age of 18 years when the representation was made.
[13] Transcript of Proceedings, *DPP v Churchill (a pseudonym)* (County Court of Victoria, CR-21-00893, Judge Brookes, 5 October 2021) 72.3–13; Trial transcript, 99.6–23, 226.6–227.7 (**AFM 21, 28, 39–40**).
[14] As in force at the time of the respondent's trial.
[15] [2021] VSCA 339 ('*Paull*').
[16] Trial transcript, 157.5–158.1 (**AFM 33–34**).

21. Ultimately, after hearing the closing addresses of both counsel, the trial judge foreshadowed that he would refer to the evidence of distress as an example of indirect evidence as part of the direction in relation to circumstantial evidence and the drawing of inferences. Both counsel indicated that they had no difficulties with the proposed direction and no further directions were sought.[17]

22. In the course of his charge, the trial judge directed the jury, without exception, in conventional terms about the difference between direct and indirect evidence. He then gave the following direction regarding the distress evidence (**CAB 13–14**):

> Now, to use one example that arises from the arguments presented to you today, you will recall that [the prosecutor] argued to you that [the complainant's] distress at the time that she had, as she described it, her meltdown at the Children's Court when she first claimed that [the respondent] had, to use her word, raped her, his argument was to the effect that that was indicative of the trauma of having been sexually penetrated by the accused.
>
> Now, [defence counsel] in response to that argument suggested that you could not draw that inference, you could not draw that conclusion at all and that is because [the complainant's] meltdown was no doubt the product of a whole host of difficulties she was experiencing at that time a year or so after the alleged events and those difficulties you will recall involved running away, using drugs and alcohol, being dealt with by the police, dealt with [by] the Department of Human Services, her psychological difficulties and the like. So that is one example where you are being invited to draw an inference to act upon indirect evidence.
>
> Now, you must take care when drawing conclusions from indirect evidence of that kind. You should consider all of the evidence in the case and only draw reasonable conclusions based on the evidence that you accept. Do not guess; while we might be willing to act on the basis of guesses in our daily lives, it is not safe to do that in a criminal trial. You may only convict an accused if you are satisfied that his guilt is the only reasonable conclusion to be drawn from the whole of the evidence both direct and indirect.
>
> If there is another reasonable view of the facts which is consistent with the accused's innocence, then the prosecution will not have proved his guilt beyond reasonable doubt and you must acquit him.

The judgment below

23. The respondent appealed against his conviction, alleging his trial miscarried by reason of the use the jury was invited to make of evidence of the complainant's distress and the

[17] Trial transcript, 239.4–240.3 (**AFM 41–42**).

directions given in relation to it. The Court of Appeal rejected the respondent's primary contention that it was not open for the jury to use the evidence of distress as circumstantial evidence supporting the complainant's account of the offences. However, the Court considered the causal link between the offending and the complainant's distress at the time of making complaint to RR was "weak", given that approximately 12 months had elapsed since the alleged offending (**CAB 77–78 [52], 78 [54]**).

24. The Court of Appeal did not conclude that the trial judge had misdirected the jury as to the use they could make of the distress evidence. Instead, the Court reasoned that the trial judge was required to give two additional directions: first, to direct the jury about the need to be satisfied that there was a rational causal link between the distress and the alleged offending; and second, to warn the jury that distress evidence "generally carries little weight" (**CAB 77–78 [52]**).

25. For the latter of the two additional directions said to have been required, the Court of Appeal relied on several decisions of the Victorian Court of Appeal commencing with *Paull*[18] which, in turn, rely on *R v Flannery*[19] as authority for the proposition that distress evidence "generally carries little weight"[20] and that a jury is required to be so warned (**CAB 74 [40], 75 [42], 75–76 [46]**). In line with this authority, the Court stated that in many, if not the vast bulk of cases involving distress evidence, it might be appropriate for the trial judge to direct the jury that it is "the experience of the law … that evidence of observed distress is a weak type of evidence" and that the jury "should not give this evidence much weight". However, acknowledging that there may be cases where distress evidence carries greater weight (such as where the distress is observed immediately after the alleged offence, and no other possible cause for it can be identified), the Court concluded that the direction should be modified to warn the jury that they should "*generally* not give this evidence much weight" (**CAB 77 [50]**).[21]

26. The Court concluded that, even though these directions were not requested by the respondent's trial counsel, the trial judge was obliged to give them under s 16 of the JDA because there were substantial and compelling reasons to give the directions, and his failure to do so occasioned a substantial miscarriage of justice (**CAB 78 [53]**).

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[18] The decisions following *Paull* are *Seccull v The King* (2022) 69 VR 454 ('*Seccull*'); and *Nimely (a pseudonym) v The King* [2023] VSCA 20.
[19] [1969] VR 586 ('*Flannery*').
[20] *Flannery*, 590–591 (Winneke CJ for the Court).
[21] Emphasis in original.

PART VI: ARGUMENT

A. Summary

27. The Court of Appeal was wrong to hold that the trial judge had been required to give any additional directions in relation to the distress evidence. In summary, that is for the following reasons.

28. Firstly, on a proper construction of ss 14, 15 and 16 of the JDA, the Court of Appeal should have concluded that the trial judge's direction to the jury on distress evidence was all that was required. The trial judge was prohibited from giving any additional directions (including those the Court of Appeal held were required) in the absence of "substantial and compelling reasons": see **section B below**.

29. Secondly, the trial judge was not obliged to direct the jury that distress evidence "generally carries little weight". To the contrary, the judge would have been in error had he done so, because the direction: (1) impermissibly impinges on the role of the jury in determining what weight to give the evidence; (2) is misleading as it tends to suggest the weight of the distress evidence is to be determined in isolation, when its weight should be determined having regard to the other evidence in the trial, including the complaint evidence; and (3) carries the risk that the trial judge, in giving the direction or explaining the rationale of the direction, will state or suggest to the jury in some way that the law regards a complainant's distress when making a complaint of a sexual offence, other than immediately after that offence, as either inherently unreliable or lacking in credit, which are suggestions now prohibited by s 51 of the JDA. Given the substantial law reform that has occurred in relation to sexual offences and jury directions in the last five decades, the Court of Appeal erred in relying on *Flannery* as authority for the proposition that the warning was required: **see section C below**.

30. Thirdly, there was no risk the jury would use the distress evidence in support of the prosecution case if they were not persuaded that the complainant was distressed because she was remembering and recounting the offending. If there was such a risk, the judge's directions amply ameliorated it. An additional direction that the jury could not use the distress evidence unless satisfied it was causally linked to the offending was unnecessary: **see section D below.**

B. The trial judge's direction on distress complied with his obligations under the JDA

The statutory scheme

31. The obligations of the trial judge in directing the jury were governed by the JDA,[22] which "applies despite any rule of law or practice to the contrary": s 4.
32. When applying and interpreting the provisions of the JDA regard is to be had to the guiding principles in s 5,[23] including that:

    (a) Parliament recognises that "the law of jury directions in criminal trials has become increasingly complex",[24] and that this development: "has made jury directions increasingly complex, technical and lengthy"; "has made it increasingly difficult for trial judges to comply with the law of jury directions and avoid errors of law"; and "has made it increasingly difficult for jurors to understand and apply jury directions".[25]

    (b) The intention of the Parliament is that a trial judge, in giving directions to a jury in a criminal trial, should (a) "give directions on only so much of the law as the jury needs to know to determine the issues in the trial", (b) "avoid using technical legal language wherever possible", and (c) "be as clear, brief, simple and comprehensible as possible".[26]

33. In his summing up to the jury the trial judge was obliged to: explain only so much of the law as was necessary for the jury to determine the issues in the trial; refer the jury to the way in which the prosecution and accused put their cases in relation to the issues in the trial; and identify so much of the evidence as was necessary to assist the jury to determine the issues in the trial: s 65.
34. Other than the general directions[27] and directions mandated by statute,[28] the legal practitioners were required to request that the trial judge give or not give the jury particular directions: s 12.

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[22] As in force from 29 October 2018 to 31 December 2022.
[23] JDA, s 5(5).
[24] JDA, s 5(1)(b).
[25] JDA, 5(1)(c).
[26] JDA, 5(4).
[27] Set out at s 3 of the JDA (definition of 'general directions').
[28] Namely directions the trial judge was required to give or not give under any provision of the JDA or any other Act: JDA, s 10(1)(b).

35. The trial judge was obliged to give a requested direction unless there were good reasons not to do so: s 14(1).[29]

36. The trial judge was prohibited from giving any direction that was not requested under s 12 of the JDA, subject to the residual obligation to give directions if there were substantial and compelling reasons for doing so: ss 15 and 16(1).

37. Division 7 of Pt 4 of the JDA applied to the evidence of the complainant's previous representations (complaint evidence) that had been admitted in the respondent's trial. Those provisions make clear that the trial judge was not required to give a number of directions to the jury about previous representations, which were once required at common law.[30]

38. Further, Div 2 of Pt 5 of the JDA applied to the evidence of delay in complaint and the credibility of the complainant. Section 51, which is the key operative provision of Div 2, provides that the trial judge, the prosecution and defence counsel were prohibited from saying or suggesting in any way to the jury that: (a) the law regards complainants in sexual offence cases as an unreliable class of witness; or (b) complainants in sexual offence cases are an unreliable class of witness; or (c) complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants: s 51(1).

39. Pursuant to s 52(1), as the trial judge considered there would be evidence in the trial that the complainant delayed in making a complaint, he was obliged to inform the jury that experience shows that (a) people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and (b) some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and (c) delay in making a complaint in respect of a sexual offence is a common occurrence: s 52(4).[31]

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[29] In determining whether there are good reasons for not giving a requested direction to the jury, the trial judge was required to have regard to— (a) the evidence in the trial; and (b) the manner in which the prosecution and the respondent had conducted their cases, including whether the direction concerned a matter not raised or relied on by the respondent and whether the direction would involve the jury considering the issues in the trial in a manner that was different from the way in which the respondent had presented his case: s 14(2).

[30] Namely, a direction that repeating a complaint does not make it true (s 44B); a direction that a complaint does not independently confirm the victim's evidence of the commission of the offence (s 44C); and a direction not to substitute complaint evidence made in general terms for evidence relating to a specific charge (s 44D).

[31] In addition, the prosecutor could request under s 12 that the trial judge direct the jury that there may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence: s 53. Note, s 53 of the JDA has since been repealed.

40. Section 54 of the JDA abolishes any rule of common law under which a trial judge is required to direct the jury that a complainant's delay in making a complaint or lack of complaint may cast doubt on the reliability of the complainant's evidence, and the jury should take this into account when evaluating the credibility of the allegations made by the complainant.

41. In relation to distress evidence specifically, while there is now a mandatory direction in relation to a complainant's distress or lack of distress when *giving evidence*,[32] there is no express provision in the JDA obliging the trial judge to give or not give a direction in relation to evidence of distress at the time of making a complaint, nor was any such provision in force at the time of the respondent's trial.

The direction was in conformity with the trial judge's obligations

42. Once the prosecutor had requested that the trial judge direct the jury in relation to the use they could make of the distress evidence, the trial judge was required under s 14 of the JDA to give the direction unless there were good reasons not to.

43. Prior to *Paull*, juries in Victoria were routinely directed in relation to the use that could be made of evidence of distress at the time of complaint in terms similar to the following model direction:

> If you find that NOC was distressed when [*describe circumstances of recounting the alleged offence*], the prosecution invites you to use this as indirect evidence that supports the complainant's account that [*describe the issue the evidence may support (e.g.* "s/he did not consent to the penetration"). In other words, the prosecution says that the distress supports a conclusion that NOC was remembering and recounting a traumatic event. Given the circumstances, the prosecution say that the traumatic event was the alleged [*identify relevant offence*]. (**CAB 73–74 [39]**).

44. However, in *Paull*, the Court of Appeal observed in obiter that distress displayed by a complainant *shortly after an alleged offence* can be a form of circumstantial evidence that independently supports a complainant's account but, relying on *Flannery*, the Court said that such evidence will generally carry little weight. The Court deprecated the second and third sentences of the above model charge.[33] The model direction was then amended to limit the direction to circumstances in which distress is observed "soon after" the alleged offence (**CAB 74–75 [41]**).[34]

[32] See s 54K of the JDA, which was inserted by s 56 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022.* This provision was not in operation at the time of the respondent's trial.
[33] *Paull*, [40], [49] (Priest, Kaye and Niall JJA).
[34] The model direction was further amended following the judgment in *Seccull.* The word 'soon' in the second paragraph of the post-*Paull* charge was replaced with the word 'immediately', and a fourth paragraph was added to the model charge in the terms: "I must give you the following directions of law about this piece of

45. Acknowledging the constraints on the giving of the distress direction following *Paull,* the trial judge considered the prudent course was to simply direct the jury that they could use the evidence of distress as indirect evidence, rather than give the pre-*Paull* distress direction. There was no error in the trial judge taking that course.
46. The direction given adequately conveyed to the jury how they could use the evidence. The trial judge was prohibited by ss 15 and 16 of the JDA from giving any other type of direction about the evidence (as none had been requested), unless he considered there were substantial and compelling reasons to do so.
47. The Court of Appeal did not identify what substantial and compelling reasons enlivened the trial judge's residual obligation to give the two additional directions (see [24] above), even though they had not been requested (**CAB 78 [53]**).
48. As detailed in Parts C and D below, there was no reason for the trial judge to give any further direction about the distress evidence, let alone reasons of a kind that would meet the stringent test imposed by s 16 of the JDA.[35]
49. Further, to the extent the reasoning in *Paull* suggests that distress can only be used by the jury to support the prosecution case if observed shortly after the alleged offence, it is inconsistent with established authority, including from this Court,[36] and should not be followed. The pre-*Paull* direction appropriately directed juries as to the use they were permitted to make of evidence of a complainant's distress at the time of making a complaint.

C. The trial judge was neither obliged nor permitted to warn the jury that distress evidence "generally carries little weight"

50. The Court of Appeal erred in holding that the trial judge had been required to direct the jury that the distress evidence "generally carries little weight". There are principled difficulties with the proposed direction. Further, the proposed direction creates the risk the trial judge will suggest matters to the jury that are prohibited by operation of s 51 of the JDA.

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evidence. First, you can use the evidence in the way the prosecution suggests. But you may only do so if you are satisfied there is no other reason why NOC could have appeared distressed at that time. Second, the experience of the law is that evidence of observed distress is a weak type of evidence and you should not give this evidence much weight". (**CAB 75 [43]**).

[35] See *Dunn (a pseudonym) v The Queen* [2017] VSCA 371, [84]–[85] (Maxwell P, Beach and McLeish JJA).

[36] See *IMM v The Queen* (2016) 257 CLR 300, 318–320 [65]–[74] (French CJ, Kiefel, Bell and Keane JJ) ('*IMM*'); *R v Bauer (a pseudonym)* (2018) 266 CLR 56, 99–104 [89]–[98] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Bauer*').

The proposed warning impermissibly impinges on the role of the jury

51. The first principled difficulty is that the proposed direction infringes on the jury's fundamental role as the "constitutional tribunal for deciding issues of fact".[37] That is because the effect of the proposed warning is to constrain the jury, as a matter of law, from placing any more than "limited weight" on the distress evidence.
52. Such a constraint is at odds with the long-recognised understanding that the determination of the weight to be placed on the evidence is as much a part of the fact-finding role of the jury as a decision whether or not to accept the evidence.[38] Further, a determination as to the weight a juror gives any piece of evidence is made after the juror considers that evidence in its place in the evidence as a whole, and following an assessment of witnesses after examination and cross-examination, weighing the account of each witness against each other.[39] A direction that distress evidence must be given limited weight irrespective of those considerations is incompatible with the requirement that jurors undertake their own assessment of the evidence.
53. Even where a type of evidence does require a specific warning — for example, where evidence is of a kind that may be unreliable — such directions must not be permitted "to obscure the division of functions between judge and jury. It is for the jury, and the jury alone, to decide the facts".[40] This distinction is maintained both under the JDA and at common law, by the trial judge warning the jury that the evidence may be unreliable, informing them of the significant matters that the trial judge considers may cause the evidence to be unreliable, and warning them of the need for caution in determining whether to accept the evidence and *the weight to be given to it*.[41] Importantly, the jury is not directed that they must give the evidence little weight; rather, after an appropriate warning is given, the weight to be given to that evidence remains a matter for the jury.[42]
54. The Court of Appeal's elevation of distress evidence to a category of its own, requiring

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[37] *McKell v The Queen* (2019) 264 CLR 307, 324 [49] (Bell, Keane, Gordon and Edelman JJ), citing *Hocking v Bell* (1945) 71 CLR 430, 440 (Latham CJ); *MFA v The Queen* (2002) 213 CLR 606, 621 [48] (McHugh, Gummow and Kirby JJ); *R v Baden-Clay* (2016) 258 CLR 308, 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ). See also JDA s 5(1)(a).
[38] *Doney v The Queen* (1990) 171 CLR 207, 214 (Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Doney*').
[39] *IMM,* 315 [51] (French CJ, Kiefel, Bell and Keane JJ).
[40] *RPS v The Queen* (2000) 199 CLR 620, 637 [41]–[42] (Gaudron A-CJ, Gummow, Kirby and Hayne JJ).
[41] See JDA ss 32(3), 36(3). See also *R v GW* (2016) 258 CLR 108, 130-131 [50] (French CJ, Bell, Gageler, Keane and Nettle JJ) ('*GW*').
[42] *Doney*, 214.

a specific direction as to weight, is unwarranted.[43] It creates an artificial and unprincipled distinction whereby the weight to be given to complaint evidence — even where it is made many years after the alleged offences — is wholly a matter for the jury,[44] whereas the weight to be given to distress evidence that accompanies the complaint is constrained by the trial judge.

Weight of the distress evidence not to be considered in isolation

55. The second principled difficulty with the direction is that it requires the jury to assign weight to the distress evidence in isolation. Such a direction is likely to mislead the jury in its fact-finding function because the probative force of the evidence is not to be determined in isolation, but after having regard to the totality of the evidence.[45] As Dawson J observed in *Shepherd v The Queen*,[46] "the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately".[47]

56. In concluding that the trial judge was required to direct the jury that distress evidence "generally carries little weight", the Court of Appeal failed to have regard to the weight that the jury could properly give the evidence of distress when considered in combination with the totality of the evidence in the trial, including the complaint evidence.

57. It is well established that, depending on the circumstances, complaint evidence may have substantial probative value when it is received as evidence of the truth of what is asserted by the complainant.[48] It is equally well established that evidence of distress observed at the time of making a complaint can properly add weight to the complaint evidence,[49] as

[43] As McPherson J observed in *R v Roissetter* [1984] 1 Qd R 477, 482: "At the foundation of the court's reluctance to allowing evidence of a distressed condition to be left to the jury without some particular warning as to its reliability there is evidently a fear that the condition in question may be feigned so that the jury may be led astray by a consideration of it. Such distrust hardly seems compatible with the traditional role of the jury as the assessors of matters of credibility and fact at a criminal trial. To require even that, unless the circumstances are "special", there be a specific warning in particular terms against relying upon evidence of distress as a possible form of corroboration has the effect of elevating to the status of a rule of law a matter which in the end, is necessarily and entirely one of fact or inference or simply credibility."

[44] *Bauer*, 101–102 [92] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[45] *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 535–536 (Gibbs CJ and Mason J).

[46] (1990) 170 CLR 573 ('*Shepherd*').

[47] Ibid 580 (Dawson J).

[48] *Papakosmas v The Queen* (1999) 196 CLR 297, 306–307 [22] (Gleeson CJ and Hayne J) ('*Papakosmas*'); *R v BD* (1997) 94 A Crim R 131, 139 (Hunt CJ at CL) ('*BD*').

[49] *Papakosmas*, 321 [78], 327–328 [98] (McHugh J); *BD*, 147 (Smart J).

it is a common human experience that the recounting of a traumatic or stressful event can be accompanied by outward indications of distress.[50]

58. In *IMM v The Queen*,[51] the Northern Territory Court of Criminal Appeal considered that the evidence of distress observed by the complainant's mother when the complainant was making a complaint of ongoing sexual abuse by the appellant between the ages of 4 and 12 years, at least 8 months after the last incident, was a "significant matter" for the jury when assessing the weight to be attached to the complaint evidence.[52]

59. On appeal to this Court, in *IMM v The Queen* (***IMM***) the majority dismissed the grounds of appeal alleging the complaint evidence had been wrongly admitted in the appellant's trial, holding:

> The complaint evidence was tendered for the purpose of proving the acts charged. Given the content of the evidence, *the evident distress of the complainant in making the complaint* and the timing of the earlier complaint, it cannot be said that its probative value was low. It was potentially significant.[53]

60. In *R v Bauer (a pseudonym)*, this Court observed that sub-s (2A) was inserted into s 66 of the EA to make clear that "freshness" in the memory is not confined to the time that elapses between the occurrence of the relevant event and the making of the representation about the event. The Court also observed that since the introduction of sub-s (2A) it has "rightly come to be accepted by intermediate courts of appeal that the nature of sexual abuse is such that it may remain fresh in the memory of a victim for many years. It depends on the facts of the case".[54]

61. In upholding the appellant's ground of appeal in relation to the admissibility of the complaint evidence in *Bauer*, this Court considered that there was evidence from which it could be inferred that the facts were "fresh in the memory" of the complainant [RC] when she made the complaint. After detailing the evidence given by the complaint witness, AF, the Court held:

> given the nature of the sexual acts alleged, the fact that they were repeated time and again over a period of years, the fact that it seems they continued up to less than a year before the conversation with AF, *and RC's highly emotional state at the time of the conversation with AF*, it is very probable that the events disclosed to AF were vivid in RC's recollection at the

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[50] *Davis v R* [2024] NSWCCA 120, [129], [146] (Adamson JA, with whom Price AJA and Garling J agreed); *R v Grattan* [2005] NSWCCA 306, [123] (McLennan AJA, with whom Simpson and Rothman JJ agreed).
[51] [2014] NTCCA 20.
[52] Ibid [27] (Riley CJ, Kelly and Hiley JJ).
[53] *IMM*, 320 [73] (French CJ, Kiefel, Bell and Keane JJ) (emphasis added) (citation omitted).
[54] *Bauer,* 99 [89] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (citation omitted).

time of the conversation and would remain so for years to come.[55]

62. This Court concluded that the jury was entitled to conclude that RC's representations to AF had "the compelling ring of truth and reliability about them", and that accordingly "AF's testimony significantly supported the credibility and reliability of RC's testimony concerning the charged offences".[56]

63. The Court of Appeal was wrong to disregard this Court's decisions in *Bauer* and *IMM* on the basis that those "were cases about the admissibility of tendency evidence" (**CAB 78 [53]**). As *Bauer* and *IMM* make clear, where there is evidence that a complainant is distressed when making a complaint, the logical connection between the distress and the alleged offending is the fact the complainant is recounting the alleged sexual abuse, which is then fresh in their memory. In combination, the evidence can be significant in determining whether the prosecution has proven the charges to the criminal standard.

64. To direct the jury that evidence of distress must, in effect, be isolated from the complaint it accompanies and given little weight, requires that they engage in an artificial process, and risks improperly diminishing the weight the jury might otherwise give to the complaint evidence. This in turn improperly impacts the jury's assessment of the complainant's account of the offences by diminishing the value of what they might otherwise properly regard to be evidence which significantly supports the credibility and reliability of that testimony.

The rationales underpinning the warning at common law have been abolished

65. The Court of Appeal, by its reliance on *Paull* and *Seccull v The King,* erred by, in effect, relying on *Flannery* as authority for the proposition that evidence of distress is of limited weight, and that a trial judge is required to warn the jury as such (**CAB 74–75 [40–44] and 77 [50]**).

66. The twin rationales that led the court in *Flannery* to the conclusion that, except in special circumstances, distress evidence will carry little weight and juries should be so warned were: (1) that the complainant might "put on an act and simulate distress"[57] and (2) that the complainant had not made an immediate complaint of having been raped.[58] The Court in *Flannery* considered the special circumstances in which evidence of distress could be

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[55] Ibid 102 [92] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (emphasis added) (citation omitted).

[56] Ibid 104 [98] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[57] *Flannery,* 590 (Winneke CJ for the Court).

[58] Ibid 591–592 (Winneke CJ for the Court).

given more than little weight were those similar to the circumstances in *R v Redpath*,[59] in which the complainant had been observed by an independent bystander in a distressed condition, a matter of *seconds* after the offence, and was not aware they were being observed.

67. The Court of Appeal failed to recognise that *Flannery* was decided at a time when:
    (a) complainants in sexual offence cases were a class of witness the law considered may be untruthful, requiring juries to be directed that it was unsafe to convict on their evidence in the absence of corroboration;[60]
    (b) distress was considered to be easily feigned;[61]
    (c) the prevailing view was that a genuine victim of a sexual offence would complain as soon as possible after the offence occurred and any delay was considered to cast doubt on the reliability and credibility of the complainant;[62] and
    (d) when complaint evidence was admitted, it could only be used by the jury in assessing the credibility of the complainant by reference to their consistency of conduct, not as evidence of the facts asserted.[63]

68. The reasoning that underpinned *Flannery* about the weight of distress evidence reflects assumptions about sexual assault complainants that are "outdated and empirically unsustainable".[64]

69. Plainly, the Court of Appeal's reliance on *Flannery* in determining the trial judge's obligations in directing the jury is unsound given the substantial law reform that has occurred in the last five decades regarding the rules of evidence, and the jury directions that are now mandated and prohibited in trials relating to sexual offences.[65]

70. Further, the Court of Appeal did not consider whether the trial judge could have given the proposed warning without making any of the prohibited statements or suggestions to the jury about the reliability and credibility of complainants in sexual offences cases set out in s 51 of the JDA or contradicting the direction on delayed complaint the trial judge was required to give under s 52 of the JDA.

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[59] (1962) 46 Cr App Rep 319.
[60] *Bromley v The Queen* (1986) 161 CLR 315, 323–324 (Brennan J), citing *Kelleher v The Queen* (1974) 131 CLR 534, 560 (Mason J).
[61] *R v Sailor* [1994] 2 Qd R 342, 344–345 (McPherson JA), cited in *Seccull* 467–468 [41] (Priest AP).
[62] *Kilby v The Queen* (1973) 129 CLR 460, 465, 472 (Barwick CJ) ('*Kilby*').
[63] *Kilby*, 466 (Barwick CJ). See also *Papakosmas,* 303–306 (Gleeson CJ and Hayne J).
[64] Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (ALRC Report No 102, NSWLR Report No 112, VLRC Final Report, December 2005) 640 [18.169].
[65] See JDA, s 51.

71. Sections 50–54 of the JDA were introduced to address concerns with the law regarding directions on delay and credibility in sexual offence cases.

72. Prior to the introduction of the JDA, trial judges were (subject to two qualifications)[66] required to instruct juries that a complainant's failure to report a sexual offence at the earliest opportunity may cast doubt on the reliability of the complainant's evidence, and that the jury should take this into account when evaluating the credibility of the allegations made by the complainant[67] (the '*Kilby* direction'). Judges were also required to deliver instructions that accorded with s 61 of the *Crimes Act 1958* (Vic) (as then in force) which (1) prohibited the trial judge from directing or suggesting in any way to the jury that the complainant's credibility was affected by the delay unless the accused asked for such a direction and there was 'sufficient evidence' to suggest that the credibility of the complainant was so affected to justify the giving of such a direction; and (2) prohibited the trial judge directing or suggesting in any way to the jury that it would be dangerous or unsafe to find the accused guilty because of the delay; and (3) required the trial judge to inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate to complain.[68]

73. In a 2015 review by the Victorian Department of Justice and Regulation, under the heading "Problems with the current law", it was observed that: directing a jury that it is entitled to take delay into account in assessing the complainant's credibility reinforces outdated assumptions about the behaviour of sexual assault complainants; that the current law required trial judges to give competing and apparently contradictory statutory and common law directions, which may confuse jurors and affect the integrity of their decision making; and that it was uncertain as to when a judge was required to give the *Kilby* direction.[69]

74. The Explanatory Memorandum accompanying the Jury Directions Bill 2015 noted the following in relation to Div 2 of Pt 5 of the JDA:

> This Division reforms directions on delay and credibility in sexual offence cases by replacing

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[66] Firstly, that the direction need not be given where the facts of the case and the conduct of the trial did not suggest the need for a direction to restore the balance of fairness. Secondly, that the direction must not be expressed in terms that suggested a stereotyped view that sexual assault complainants are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false.
[67] *Kilby*, 465 (Barwick CJ).
[68] Department of Justice and Regulation (Vic), *Jury Directions: A Jury-Centric Approach* (Report, March 2015) 91–92.
[69] Ibid 92–93, 97.

sections 61(1), (2) and (3) of the *Crimes Act 1958* and common law rules (in particular, the problematic "Kilby/Crofts" direction) with new provisions.

The Division aims to address common misconceptions about the behaviour of sexual offence victims generally, by prohibiting certain statements about sexual offence complainants as a class and by requiring trial judges to give corrective directions in certain cases. In particular, the Division addresses the misconceptions that a genuine sexual offence victim would complain about the offence soon after it happened and that sexual offence complainants are unreliable.

However, the accused may still argue how delay in complaint or lack of complaint affects the credibility of the particular complainant. The parties may also continue to call expert evidence.[70]

75. The Court of Appeal's conclusion that the jury was required to be warned that distress evidence "generally carries little weight", creates a specific practical difficulty, as a jury cannot be expected to know whether the evidence they are considering falls within the general rule or the exception. Here the trial judge could not have identified the matters that are said to cause the distress evidence to generally be a "weak type of evidence" that "carries little weight" or the circumstances giving rise to the exception when distress evidence can be given more weight according to the criteria in *Flannery*, without suggesting *in any way* that complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants, or that the law regards complainants in sexual offence cases as an unreliable class of witness — statements and suggestions prohibited by s 51(1) of the JDA

76. The effect of the Court of Appeal's decision is to reinforce the outdated assumptions jurors may have about the behaviour of sexual assault complainants that the provisions within the JDA were designed to eliminate, and returns the law in Victoria to a position where trial judges are required to give competing and contradictory statutory and common law directions.

D. No need for the jury to be directed that they must find a causal link

77. The Court of Appeal did not identify why the trial judge was required to specifically direct the jury that they needed to be satisfied there was a rational causal link between

[70] Explanatory Memorandum, Jury Directions Bill 2015 (Vic) 30.

the distress and the alleged offending — beyond the general direction for the drawing of inferences, which the judge gave — nor how the judge's obligation to do so arose under the JDA.

78. When regard is had to the directions the trial judge gave the jury regarding the drawing of inferences, there was no requirement for the judge to give a further direction of a need to be satisfied of a causal connection before using the distress evidence in support of the charges. The causal link between evidence of distress when making a complaint about a traumatic event is one of common human experience.

79. Judges are only required to give particular warnings "for the purpose of alerting juries to particular difficulties with particular classes of evidence with which they are unlikely to be familiar." [71] Complaint evidence accompanied by distress is well within the province of the jury to assess. In *IMM* the majority considered there was little risk the jury would misunderstand the use to which the complaint evidence, which was accompanied by distress, was put,[72] and in *Bauer* the Court considered there was little if any risk the jury would reason improperly from the complainant's representations, also accompanied by distress, to a conclusion of guilt.[73]

80. The jury were also correctly directed as to the requirement to decide the issues in the case solely on the evidence (**CAB 11.7–13.3**), the onus and standard of proof (**CAB 15.2–16.13**), their assessment of witnesses (**CAB 22.4–23.31**), delay in complaint (**CAB 24.1–26.16**) and the use of the complaint evidence (**CAB 26.17–28.23**).

81. When regard is had to the directions given by the trial judge, there was no realistic risk the jury would use the distress evidence if they did not conclude that it was connected to the offending. There was simply no other basis on which they might have reasoned the complainant's distress was probative of the respondent's guilt on the charges.

E. Conclusion

82. The Court of Appeal did not: (1) find that the jury had been misdirected in relation the way they could use the evidence of distress; (2) identify any impermissible path of reasoning in which the jury might have engaged; or (3) identify any relevant consideration the jury may have neglected to take into account in determining whether

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[71] *Filippou v The Queen* (2015) 256 CLR 47, 66 [52] (French CJ, Bell, Keane and Nettle JJ). See also *Melbourne v The Queen* (1999) 198 CLR 1, 53–54 [144] (Hayne J).
[72] *IMM,* 320 [74] (French CJ, Kiefel, Bell and Keane JJ).
[73] *Bauer,* 104 [100] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

to accept the evidence or the weight to be given to it. In those circumstances, there was no basis for the Court to conclude that the trial judge erred in failing to find that there were substantial and compelling reasons to give the additional directions, and that the absence of those directions occasioned a substantial miscarriage of justice

PART VII: ORDERS SOUGHT

83. The orders sought by the appellant are:

   (a) Appeal allowed.

   (b) Set aside the order of the Court below made on 28 June 2024 granting leave to appeal, allowing the appeal to that Court and quashing the respondent's convictions and, in its place, order that the respondent's appeal to the Court below against conviction be dismissed.

Part VIII: ESTIMATE OF TIME

84. It is estimated that the appellant will require up to 2.5 hours for oral submissions.

Dated: 9 December 2024

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: **The King**
Appellant

and

Ryan Churchill (a pseudonym)
Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
1.	*Crimes Act 1958* (Vic)	249D (as in force prior to 29 June 2015)	s 61
2.	*Evidence Act 2008* (Vic)	26 (as in force from 1 July 2020 to 24 March 2024)	s 66
3.	*Jury Directions Act 2015* (Vic)	11 (as in force from 29 October 2018 to 31 December 2022)	ss 3, 4, 5, 10, 12, 14, 15, 16, 32, 36, 44A, 44B, 44C, 44D, 44E, 48, 49, 50, 51, 52, 53, 54, 65

4.	*Jury Directions Act 2015* (Vic)	Current	s 54K
5.	*Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic)	No. 38/2022	s 56