IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 51/2025
on appeal from CA449/2023

In the matter of | Mō te take	a second appeal against convictions
Between | I waenga ia	**T (SC 51/2025)** Appellant | Te Kaipīra
And | me	**THE KING** Respondent | Te Kaiurupare

SUBMISSIONS FOR THE APPELLANT | NGĀ TĀPAETANGA MŌ TE KAIPĪRA

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JAMES OLSEN
BARRISTER

COUNSEL APPEARING:
J N OLSEN | A N GRUEBNER

JAMES@JAMESOLSEN.CO.NZ | JAMESOLSEN.CO.NZ | 022 612 1450
LEVEL 9, 115 QUEEN STREET, AUCKLAND 1010 | P O BOX 10 6217, CUSTOMS STREET, AUCKLAND 1143

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SUBMISSIONS FOR THE APPELLANT | NGĀ TĀPAETANGA MŌ TE KAIPĪRA

MAY IT PLEASE THE COURT | TĒNĀ, E TE KŌTI:

1. Psychological evidence concerning the behaviours of children who report sexual abuse has become ubiquitous in criminal trials. Ensuring a fair trial following its admission has taxed the courts since 1990. The tension arises because its purpose is to dispel misconceptions held by jurors, not to comment on the particular case. While the evidence incidentally restores a complainant's credibility to zero; it does not and cannot bolster it.

2. In 2015, this Court affirmed the admissibility of such evidence contingent upon five principles regarding the scope of such evidence, its proper use and, importantly, mandatory judicial directions to prevent misuse.[1]

3. Despite this, a recent line of authorities in the Court of Appeal—including the present case—has permitted significant departure from those requirements upon which the admissibility of this evidence is contingent.[2]

4. Cases involving sexual allegations ultimately turn on credibility, because often there is no other direct evidence. Counter-intuitive evidence is, by design, tailored to live issues in the case, but is not meant to say anything about the particular case. As was said in 1991, and affirmed by this Court in 2022, "[o]ne cannot know what influence [such evidence] will have on the jury".[3] Thus, without adherence to the proper limits, the risk of jury misuse is acute. It imperils the fairness of the trial.

5. The present case demonstrates the very real problems with a laissez-faire approach to this evidence. Presented by way of agreed fact, that document did not address the limits or proper use of the evidence. The Prosecutor linked the particular facts to the evidence. Fatally, the trial Judge, Judge LM Bidois, failed to give any of the mandatory directions, instead telling the jury what they made of the agreed fact was "for [them] to determine".[4] Justice miscarried.

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1 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30] (Appellant's Bundle, p 14). Also see *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833.

2 *T (CA449/2023) v R* [2025] NZCA 136 [CA judgment] (Case on Appeal, vol 1, pp 7 – 26).

3 *R v Crime Appeal (CA 244/91)* CA224/91, 20 December 1991 at 19 (Appellant's Bundle, p 245): cited with approval in *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338 at [232] (Appellant's Bundle, p 125).

4 Case on Appeal, vol 2, p 108.

Summary

6. Having affirmed the principles in 2015, this Court is again called on to consider the proper limits for the admission of counter-intuitive evidence. Those principles remain appropriate. They are well grounded, as this Court's survey of the predecessor provision in *Ellis v R* establishes. The Appellant, T,[5] seeks that the Court affirm the *DH* principles.

7. In his case, three key errors arose. Each engages the correct application of the *DH* principles.

8. First, while the evidence was presented by way of agreed facts, it strayed beyond the *DH* principles in several key respects. It did not state clearly that the research was generic and said nothing about the particular case. This was critical because, by design, the evidence was limited to only the live issues that arose in the trial, so it may inherently be used diagnostically. This was further compounded by references to offending being more likely committed by someone known, like a parent. These departures set the scene for the following two errors.

9. Second, the Prosecutor linked the circumstances of the particular case to the counter-intuitive evidence. In doing so, he risked the jury engaging in impermissible reasoning. This is prohibited by the *DH* principles. The Court of Appeal was wrong to hold that prosecutorial linkage will only be prohibited where the prosecutor uses it diagnostically; the concern is not about what the prosecutor does, but rather what the jury might do.

10. Third, while the earlier errors might have been salvageable by the trial Judge, what followed made matters worse. The trial Judge failed to give the mandatory directions regarding the purpose, proper use and caution against improper use as required by the *DH* principles. Instead of those directions, the Judge told the jury the admissions in the agreed facts were "for [the jury] to determine, bearing in mind all of the evidence presented to [them]". Thus, the jury were left to their own devices, primed to misuse the evidence.

11. Justice miscarried. The appeal should be allowed, and the convictions set aside.

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[5] This initial is adopted in lieu of the Appellant's name, consistent with the application by the Court below for the reasons it gives: CA judgment, above n 2, at fn 1 (Case on Appeal, vol 1, p 10).

Background

Allegations

12. The Complainant, C, is the biological son of the Appellant, T. C alleged that between 2015 and 2019, T sexually offended against him. C first complained to the Police in March 2020. However, it was not until June 2020 that C made the allegations which form the basis of the charges at trial. C alleged that the acts occurred across three addresses—address "A", address "B" and address "C"—as well as in T's car. All except address C were representative allegations. The acts alleged were:

    a. T touching C's penis (at addresses A and B, and in the car);

    b. C touching T's penis (at addresses A and B, and in the car);

    c. T inserting his finger into C's anus (at address A); and

    d. T inserting his penis into C's anus (at addresses A and C).

Procedural history

13. T was first arrested and appeared in the District Court in August 2020.

Trial (District Court)

14. The trial occurred in 2023. Before C's evidence, an agreed fact document was read. It contained general background information as well as the counter-intuitive evidence that was presented in the trial.

15. C's video interviews were played to the jury. In the first interview, C said that T had been doing "yuck" things.[6] The height of that interview was that T had put soap on his hand and touched C's penis.[7] C ended that interview. In the second interview, C gave the account that gives rise to the charges.[8]

16. In cross-examination, C resiled from his interview and said nothing happened at address B.[9] He also initially resiled from the allegations that he touched T's penis at address A.[10] However, in both instances, when re-examined, C said

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6 Case on Appeal, vol 4, pp 9-14.

7 Case on Appeal, vol 4, pp 11 and 13.

8 Charge 7, relating to address C, was severed during the trial: see Case on Appeal, vol 2, pp 66-69.

9 Case on Appeal, vol 3, p 27.

10 Case on Appeal, vol 3, p 33.

that his interview was correct, and he felt under pressure to give those answers in cross-examination.[11]

17. T's mother and C's grandmother, X, gave evidence. She gave evidence that on one occasion when T collected C, she observed T's hand moving towards C and C said "ow".[12] She did not see exactly where T's hand went.[13] X also gave evidence that C disclosed the allegations to her.

18. T's former partner and C's mother, Y, gave evidence. She explained that C had an issue with cleaning his penis due to having a foreskin.[14] She explained that T was going to show C how to do that.[15] There was nothing unusual in this from her perspective.[16]

19. T elected to give evidence. He said that none of the allegations happened.[17] T accepted he showered with C, but explained he always wore boxers.[18] In brief cross-examination, each allegation was not put; rather, it was asserted (three times) that C's account was the truth—T denied this.[19]

20. The jury returned mixed verdicts. The jury convicted T on all charges concerning address A and one charge in the car, but acquitted T on the two charges at address B and the other charge in the car.

First appeal (Court of Appeal)

21. T appealed his conviction and sentence. The appeal was heard in 2025.

22. The Court dismissed the conviction appeal. It considered that there was no error in the Prosecutor's use of the evidence.[20] While it considered the Judge's lack of directions was an error, it found justice did not miscarry.[21]

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11 Case on Appeal, vol 3, pp 42-43.
12 Case on Appeal, vol 3, pp 53-54.
13 Case on Appeal, vol 3, p 54.
14 Case on Appeal, vol 3, p 86.
15 Case on Appeal, vol 3, p 86.
16 Case on Appeal, vol 3, p 86.
17 Case on Appeal, vol 3, pp 128-129 and 137.
18 Case on Appeal, vol 3, p 140.
19 Case on Appeal, vol 3, pp 141-142, 143 and 146.
20 CA judgment, above n 2, at [26] (Case on Appeal, vol 1, p 18).
21 CA judgment, above n 2, at [27] and [30]-[34] (Case on Appeal, vol 1, p 18).

Counter-intuitive evidence—an introduction

23. It is convenient to begin with a brief background on the admissibility of counter-intuitive evidence, leading to the seminal decision of *DH v R*.

Background

Common law

24. In the late 1980s, a body of psychological research had been established regarding what were seen as the behaviours of sexually abused children. Unsurprisingly, the courts were invited to admit such evidence; expert evidence had long been admitted under common law rules of evidence.[22]

25. However, in two judgments issued in the late 1980s, the Court of Appeal declined to admit such psychological evidence under the common law rules.[23] Rather, as McMullin J suggested, it was for Parliament to fashion "special statutory provisions".[24]

Section 23G of the Evidence Act 1908

26. Parliament did so. It amended the Evidence Act 1908, adding, from 1990, a series of new sections. Most critical for present purposes was s 23G.

27. In 2022, in *Ellis v R*, this Court acknowledged:[25]

> With the distance of years, and the benefit of experience, we can now say that [s 23G] proved to be a difficult provision for lawyers, witnesses and judges to apply.

28. This Court in *Ellis* succinctly summarised the issues that arose in the application of s 23G, including that such evidence:[26]

> … easily crossed over into commenting on, or appearing to comment on, the credibility of the complainant and hence of the allegations. Direct evidence as to the credibility of a witness, or the truthfulness of allegations, was inadmissible because it was for the jury to decide those issues.

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22 *R v B (an accused)* [1987] 1 NZLR 362 (CA) at 366-367 per McMullin J: citing *Buckley v Rice Thomas* (1555) 1 Plowd 118 at 124.

23 *R v B (an accused)*, above n 22; and *R v Accused (CA 174/88)* [1989] 1 NZLR 714 (CA).

24 *R v B (an accused)*, above n 22, at 369 per McMullin J.

25 *Ellis v R*, above n 3, at [109] (Appellant's Bundle, p 96).

26 At [116](b) (Appellant's Bundle, p 98).

29. Where evidence would exceed the bounds of s 23G, the *Ellis* Court explained that "the Court [of Appeal] would often look at the trial judge's summing up to see whether it had addressed problematic aspects of the evidence".[27]

30. These two points are made because, in this way, the judicial treatment of s 23G is no different to the judicial treatment of s 25 and the principles that developed, culminating in *DH*.

Section 25 of the Evidence Act 2006

31. The successor provision to s 23G was s 25 of the Evidence Act 2006. In recommending that provision, the Law Commission, led by Baragwanath J, explained that the purpose of counter-intuitive evidence was to "restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance".[28] But, it said, the purpose was "not diagnostic".[29]

32. The importance of counter-intuitive evidence not being used to strengthen (or bolster) the credibility of the complainant was made in each of the three key Court of Appeal decisions upon which the *DH* principles rely.[30]

33. Given the Law Commission's position it is unsurprising that Baragwanath J, who wrote for the Court in *RA v R*, said:[31]

> … it is legitimate for the Crown to adduce expert evidence to educate the jury on background facts which may be counterintuitive, provided that care is taken to avoid suggesting that such material *may* be used to strengthen the credibility of the particular complainant.

34. In *M (CA23/2009)*, Arnold J, writing for O'Regan P, Hammond J and himself, made two important points in respect of counter-intuitive evidence.[32]

    a. First, because the evidence says nothing about the credibility of the particular complainant and the abuse they allege, "prosecuting counsel should not attempt to link the evidence to the circumstances of the

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27 At [121] (Appellant's Bundle, p 100).

28 Law Commission *Evidence* (NZLC R55, Vol 2, 1999) at [C111] (Appellant's Bundle, p 483): cited in *DH v R*, above n 1, at [2] (Appellant's Bundle, p 9).

29 At [C110] (Appellant's Bundle, p 483).

30 See the cases cited at footnotes 31 to 34.

31 *RA v R* [2010] NZCA 57, (2010) 25 CRNZ 138 at [28]. (Emphasis added).

32 *M (CA23/2009) v R* [2011] NZCA 191 at [49] (Appellant's Bundle, p 194).

particular complainant as this *may* create a risk that the jury will use the evidence illegitimately, in a diagnostic or predictive way".[33]

b. Second, the trial judge should explain the purpose of the evidence and caution them against improper use of it (i.e. that if they accept the evidence, simply because it is present is not indicative that abuse occurred).

35. Building on those points, in *OY v Complaints Hearing Committee*, O'Regan P (as he then was), writing for the Court, articulated the five points that were subsequently developed by his Honour in *DH*.[34]

The* DH *principles

36. It is against this background that this Court in *DH* unanimously affirmed that counter-intuitive evidence *may* be admissible under s 25, subject to the following five points—or principles—that emerged from *M (CA23/2009)* and *OY v Complaints Hearing Committee*:[35]

(a) In many cases involving allegations of sexual abuse, the jury's verdict will depend critically on their assessment of the complainant's credibility. In such cases, there is a risk that unjustified behaviour assumptions may influence the jury's assessment, and expert evidence as to those assumptions may be admissible. The evidence should be directed at correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse. The objective is to allow the jury to consider the complainant's credibility on a neutral basis.[36]

(b) The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. The witness should make it clear that the witness is not commenting on the facts of the particular case.[37]

(c) The evidence must be relevant to a live issue in the case. Evidence about features in other cases of sexual abuse that are not raised in the particular case will not be relevant or substantially helpful in terms of s 25 of the Evidence Act.[38] Having said that, it must be acknowledged that

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33 Emphasis added.

34 *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629 at [59] (Appellant's Bundle, p 221).

35 *DH v R*, above n 1, at [30] (Appellant's Bundle, p 14): affirmed in *Kohai v R*, above n 1, at [18(a)] (Appellant's Bundle, p 43).

36 See *M (CA23/2009) v R*, above n 32, at [24]-[25] and [32] (Appellant's Bundle, pp 181-182, 186).

37 See *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194); and *OY v Complaints Hearing Committee*, above n 34, at [59] (Appellant's Bundle, p 221).

38 See *OY v Complaints Hearing Committee*, above n 34, at [59] (Appellant's Bundle, p 221).

when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.

(d) The witness should make it clear that the evidence draws on generic research in cases of sexual abuse and says nothing about the case in which evidence is being given. The witness should also make it clear to the fact finder that the purpose of the evidence is limited to neutralising misconceptions which may be held by the fact finder.[39]

(e) Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.[40]

Issues

37. In this case, three points are raised.

a. First, presentation of the evidence in breach of the second and fourth *DH* principles.

b. Second, prosecutorial misuse in breach of the second *DH* principle.

c. Third, judicial non-direction in breach of the fifth *DH* principle.

38. Each is addressed in turn. They naturally build on one another.

Presentation of counter-intuitive evidence

The principles

39. The purpose of counter-intuitive evidence is to educate the jury and dispel any misconceptions they may have held before the trial. This was promoted by the Law Commission and affirmed by this Court in *DH*.[41] Incidentally, this generic evidence allows the jury to consider a complainant's credibility on a neutral basis,[42] or, as this Court put it in *Kohai,* "to assess a complainant's

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[39] See *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194); and *OY v Complaints Hearing Committee*, above n 34, at [59] (Appellant's Bundle, p 221).

[40] See *M (CA23/2009) v R*, above n 32, at [32] and [49] (Appellant's Bundle, pp 186 and 194); and *OY v Complaints Hearing Committee*, above n 34, at [59] (Appellant's Bundle, p 221).

[41] *Evidence*, above n 28, at [C110] (Appellant's Bundle, p 483); and *DH v R*, above n 1, at [2] and [30](a) (Appellant's Bundle, pp 9 and 14).

[42] *DH v R*, above n 1, at [30(a)] (Appellant's Bundle, p 14); and *OY v Complaints Hearing Committee*, above n 34, at [59(a)] (Appellant's Bundle, p 221).

credibility free from the influence of these assumptions".[43] But the evidence says nothing about the complainant's credibility or their complaint.[44] The Court in *M (CA23/2009)* put it best—without reference to credibility:[45]

> Such evidence is directed at removing misconceptions that the jury might otherwise have about children alleging sexual abuse so they are able to consider fairly whether or not the particular complainant is to be believed.

40. It is for this reason that there are four things that the witness giving counter-intuitive evidence must make clear:

    a. the evidence draws on generic research in cases of sexual abuse;[46]

    b. the purpose of the evidence is limited to neutralising misconceptions which may be held by the jury;[47]

    c. they are not commenting on the facts of the particular case;[48] and

    d. the research says nothing about the case in which the evidence is being given.[49]

41. These requirements equally apply to such evidence when it is presented by way of agreed fact, rather than by a witness giving oral evidence.

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43 *Kohai v R*, above n 1, at [18](a) (Appellant's Bundle, p 43).

44 *DH v R*, above n 1, at [30(b), (d) and (e)] (Appellant's Bundle, pp 14-15); *Kohai v R*, above n 1, at [18(a)] (Appellant's Bundle, p 43); and *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194); *OY v Complaints Hearing Committee*, above n 34, at [59(b) and (e)] (Appellant's Bundle, pp 221-222). Also see *Ellis v R*, above n 3, at [116(b)] (Appellant's Bundle, p 98), for the identical position under s 23G and fn 117 for the earlier authorities.

In this way, the New Zealand position readily contrasts with the High Court of Australia's recent judgment in *BQ v The King* [2024] HCA 29, (2024) 279 CLR 124. In *BQ*, the High Court considered that the evidence did say something about the credibility of the complainant: at [49]. The Court rejected that the evidence was merely "educative" and instead found that it fell into two legislative exceptions as a result of recommendations from a joint report of the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission: at [28]-[33] (citing Australian Law Reform Commission *Uniform Evidence Law* (ALRC R102, 2005) at 29 and 31 (recommendations [9-1] and [12-7])). The statutory exemptions to this evidence are the opinion rule (akin to s 25) and the credibility rule. Thus, the High Court concluded, the evidence was admitted under this rule to comment on "credibility", rather than be "educative" and so no such direction was required: at [33], [35] and [49]. For these reasons, *BQ* can be readily distinguished. Parliament, in enacting s 25 of the Evidence Act 2006, followed the Law Commission's recommendations that this evidence was educative and not diagnostic; Parliament was not seeking to depart from the position under s 23G.

45 *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194).

46 *DH v R*, above n 1, [30(d)] (Appellant's Bundle, p 14).

47 At [30(d)] (Appellant's Bundle, p 14).

48 At [30(b)] (Appellant's Bundle, p 14).

49 At [30(d)] (Appellant's Bundle, p 14).

This case

42. The counter-intuitive evidence in this case was presented by way of an agreed fact document.[50] The agreed fact document was read at the start of the trial, after the Crown's opening address, but before any evidence.

43. In his opening address, the Prosecutor said:[51]

> The final form of evidence that I want to talk to you about is a set of agreed facts. … Now some of those are going to be some pretty basic things, what [C]'s birthday is, but another part of that is going to be what I'll call counterintuitive or educative evidence and the point of this evidence is that it will talk about some of the misconceptions that we have about sexual offending against children and how people might respond to that. Again, this is agreed. This is general evidence though. It's not about something specific in this case, but rather it goes to address some misconceptions that we have by applying more general evidence that we do know to be true. That will be another part of the evidence.

44. The counter-intuitive section of the agreed fact document commenced with:[52]

> 9. The following admissions constitute educative evidence about the behaviour of sexually abused children. This evidence does not prove or disprove that the complainant was sexually abused by the defendant.

45. The following topics were then addressed:

    a. reporting patterns in child sexual abuse;

    b. delayed and non-reporting of child sexual assault (including relationships with the offender, normalisation of the offending and the impact of the child's age and development);

    c. lack of struggle or fear during the offending; and

    d. continued contact between victims and offenders.

46. On this final topic, it begins:[53]

> Children are most likely to be sexually abused by those well known to them, such as family members, friends and authority figures, and therefore it is possible that the offender will have been, or have become, close to the child.

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50 This was admitted under s 9 of the Evidence Act.

51 Case on Appeal, vol 2, p 59.

52 Case on Appeal, vol 2, p 45.

53 Case on Appeal, vol 2, p 47.

The errors

Limitations of the use of the evidence

47. In this case, the opening sentences of the counter-intuitive section of the agreed fact document (on which the Court of Appeal placed much weight) were woefully inadequate.

48. Neither sentence directly addresses any of the four matters required by *DH*. The document says the evidence is "educative" but not that it is limited to neutralising misconceptions. It does not suggest it is based on generic research. While it says it neither proves nor disproves sexual abuse in this case, this does not say it is *not* commenting on the facts of the case, nor that it says nothing about this case or of the complainant's credibility. At best, the sentence is equivocal on its use.

49. It is accepted that the Prosecutor's opening provided some more context to the agreed fact document at the time it was read. Even then, it did not go far enough. But the fundamental flaw with reliance on the Prosecutor's opening is that it was disjoined from when the jury received the agreed fact document in writing. It was also superseded by the Prosecutor's use of the evidence in his closing address.

50. Moreover, the absence of these limits in writing, even if mentioned in passing by the Prosecutor, suggests that they are not important. If they were important, a jury might properly ask: why would they not be recorded in the document, which is, of course, signed by the lawyers? It cannot be expected that a lay jury would have taken the Prosecutor's passing comments in the opening statement as anything other than that. It is unlikely the jury recalled those earlier remarks when they had reference again to the agreed fact document in the Crown's closing address and during their deliberations.

51. Therefore, the agreed fact document did not identify any of the key limitations on the use of the evidence, as required by *DH*.

Limitations of the evidence itself

52. In *OY v Complaints Hearing Committee*, O'Regan P, for the Court of Appeal, said: "[t]he expert witness giving the evidence should make it clear that the evidence is based on generic research in cases where there has been proven

sexual abuse and says nothing about cases where false allegations were made".[54]

53. However, in *DH*, his Honour, then writing for this Court, noted that "all of the studies referred to by Dr Blackwell are not able to be described as dealing with 'proven sexual abuse'".[55] For this reason, O'Regan J explained in *DH*, "that suggestion by the Court of Appeal would not have been appropriate in this case. It should not be followed except in cases where the studies relied on can fairly be described as dealing only with proven sexual abuse".[56]

54. Where the research, and thus the opinion, was not based on proven sexual abuse, O'Regan J explained:[57]

> … it would have been preferable if Dr Blackwell had described the research as involving studies based on cases of reported abuse, where the researchers have used different sampling and research techniques, meaning that not every case can be verified as a case of actual abuse. If her professional opinion was that the researchers have concluded that the sample provides a proper basis for their conclusions as to conduct exhibited by those who have actually experienced child sexual abuse, she could have added a statement to that effect.

55. Because this was an agreed fact document, the research that underpins it is not known. Regardless, the limits of the research itself were not explained.

    a. The plain reading of the wording of the agreed fact document is that it is based on proven abuse: "evidence about the behaviour of sexually abused children".[58] This is further buttressed by the opening of the agreed fact document, "[t]he following facts are true".[59] If it was purporting to be evidence of *proven* instances of child sexual abuse, then the *OY* caveat, approved in *DH*, was missing: it says nothing about cases where false allegations are made.

    b. Equally, if it could be read as being evidence of *asserted*, but not proven, child sexual abuse, the alternative caveat proposed in *DH* was also omitted.

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54 *OY v Complaints Hearing Committee*, above n 34, at [59(e)] (Appellant's Bundle, p 222).

55 *DH v R*, above n 1, at [40] (Appellant's Bundle, p 16). For context, see [37]-[38] (Appellant's Bundle, p 16).

56 At [40] (Appellant's Bundle, p 16).

57 At [41] (Appellant's Bundle, p 16).

58 Case on Appeal, vol 2, p 45.

59 Case on Appeal, vol 2, p 44.

56. Because of the limits on the research, these caveats were important and needed to be drawn to the jury's attention. This is because the research cannot assist with cases where there was no abuse,[60] or where the claimed abuse did not in fact occur.[61] The risk where this limitation of the research is not drawn to the jury's attention is that the evidence presents as if these factors themselves are indicative of abuse.

Unnecessary details

57. It is correct that research on asserted child sexual abuse establishes that the alleged perpetrator can be a parent, family member or other known adult. Equally, this can be a reason for delayed disclosure. No issue is taken with those statements so far as they go generally. However, in this case, the agreed fact document went much further:

    a. As to continued contact:[62]

        > Children are <u>most likely</u> to be sexually abused by those well known to them, such as family members, friends and authority figures, and therefore it is possible that the offender will have been, or have become, close to the child.

    b. As to delay:[63]

        > Reasons for delayed reporting include the relationship between the child and the offender, because children are <u>less likely</u> to report child sexual abuse by those whom they are familiar or have a close relationship, or upon whom they are dependent.

58. In *DH*, this Court said:[64]

    > But we think it was not then appropriate to go on to say "the large majority of perpetrators are family members, family friends, neighbours or authority figures" because the more irrelevant detail that is added, the greater the risk that jurors could consider the factors identified are diagnostic of sexual abuse. The point about the influence on delay of the relationship between victim and perpetrator could have been made without these additional details. However, we see this as unnecessary emphasis rather than something more serious. Mr

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60 If the studies are based on proven sexual abuse as suggested in *OY v Complaints Hearing Committee*, above n 34, at [59(e)] (Appellant's Bundle, p 222); and *DH v R*, above n 1, at [40] (Appellant's Bundle, p 16).

61 If the studies were simply based on reported allegations of sexual abuse as suggested in *DH v R*, above n 1, at [41] (Appellant's Bundle, p 16).

62 Case on Appeal, vol 2, p 47. (Emphasis added).

63 Case on Appeal, vol 2, p 45. (Emphasis added).

64 *DH v R*, above n 1, at [55] (Appellant's Bundle, p 19).

Pyke did not suggest that the jury would have seen this evidence as diagnostic of sexual abuse having occurred in this case.

59. In *DH*, Dr Blackwell gave oral evidence. The passing remark made by her would have been in the notes of evidence, but given the length of her evidence it would not have been readily available. Whereas the agreed fact document was shorter, and these references were readily available. The points made in this case go further than dispelling misconceptions that parents may sexually offend against their children and, in turn, children might delay. They proffer a likelihood which, incidentally, marries up entirely with the allegation at trial. Against this, no alternative explanation is noted, such as false complaints.[65] This risks diagnostic application.

60. This risk of diagnostic use is intensified when the counter-intuitive evidence only addresses possible misconceptions that arise in the particular case. This Court required that to be substantially helpful, the evidence needed to be tailored to the live issues in the case.[66] However, the very real risk with this is that it implicitly promotes diagnostic usage, because the only misconceptions that are addressed are those that arise on the complainant's account. It is not suggested that this should change, but the point is raised because, by its very nature, this evidence risks diagnostic use because it is solely limited to the issues arising in the particular case.

What the agreed fact document should have said

61. In this case, the evidence should have been presented in a way that simply stated the propositions without any additional detail about the frequency or intensity of those factors arising. The evidence could have been presented in a more straightforward and abridged way, as suggested in *DH*.[67]

62. Critically, the opening of the counter-intuitive section of the agreed fact document needed to specifically define the limits of the research and also the limits on its usage. The following opening wording is suggested:

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[65] Under the s 23G rules, the Court of Appeal initially objected to references to the intensity of a consistency: see *R v S* [1995] 3 NZLR 674 (CA) at 678. However, the Court of Appeal subsequently and this Court have suggested that intensity could be given conditional upon the expert stating that there were other reasons for the behaviour: *R v Aymes* [2005] 2 NZLR 376 (CA) at [113]; and *Ellis v R*, above n 3, at [124] (Appellant's Bundle, p 101).

[66] *DH v R*, above n 1, at [30(c)] (Appellant's Bundle, p 14); and *Kohai v R*, above n 1, at [18(a)] (Appellant's Bundle, p 43).

[67] *DH v R*, above n 1, at [112] (Appellant's Bundle, p 30). Also see *Kohai v R*, above n 1, at [18(b)] (Appellant's Bundle, p 44).

> The following information (contained in paragraphs 10-24) is educative. Its purpose is limited to addressing preconceived ideas you may have about the way children might react to sexual abuse. It is based on generic research of cases involving reported child sexual abuse; due to the research techniques, not every case could be identified as one of actual abuse. In this way, the research does comment on cases involving false allegations.
>
> The research does not relate to this case. That generic research about reported abuse cannot, and does not, comment on the allegations in this particular case. For this reason, the evidence cannot be used to strengthen or bolster the complainant's account or the Crown's case. Its purpose is solely educative.

Prosecutorial use in trial

The principle

63. The second *DH* principle, relevantly, provides:[68]

> The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure the evidence is not used in a diagnostic or predictive way.

Divergent approach below

The basis of the second DH *principle*

64. This Court was clear in *DH*. The genesis of this principle was the Law Commission itself, which said the purpose of this evidence was not diagnostic.[69]

65. Unsurprisingly, this proposition was affirmed by the Court of Appeal in both *M (CA 23/2009)* and *OY*.[70] In *M (CA 23/2009)*, the permanent Court was explicit that "prosecuting counsel should not attempt to link the evidence to the circumstances of the particular complainant as this may create a risk that the jury will use the evidence illegitimately, in a diagnostic or predictive way".[71] This limitation was clear: the foregoing principle from *DH* specifically footnotes *M (CA23/2009),* which relates *only* to prosecutors.[72]

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68 *DH v R*, above n 1, at [30(b)] (Appellant's Bundle, p 14).

69 *Evidence*, above n 28, at [C110] (Appellant's Bundle, p 483).

70 *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194); and *OY v Complaints Hearing Committee*, above n 34, at [59(b)] (Appellant's Bundle, p 221).

71 *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194).

72 *DH v R*, above n 1, at [30(b)] and fn 13 (Appellant's Bundle, p 14).

66. In *OY*, O'Regan P explained that the evidence should not be linked "to avoid the risk that the evidence will be used in a diagnostic or predictive way".[73] Later, his Honour in *DH* confirmed this was a "important limitation".[74] Unlike *M (CA23/2009)*, neither *DH* nor *OY* limit the application to any specific participant. Rather, as is evident, linkage between the evidence and the particular case is entirely prohibited by all participants—the witness, the prosecutor, defence counsel and the judge.[75]

The Court of Appeal's approach is inconsistent

67. Since *DH*, there has been some adherence to this requirement. But, in successive cases, the divisional Court has attempted to limit this principle.[76] Drawing on the Law Commission report, the divisional Court has held that it is permissible for a prosecutor to link the counter-intuitive evidence to the particular case if it is not used diagnostically or predictively,[77] and the jury is reminded of its generic nature.[78] This was the decision in the Court below in the instant case.[79]

68. This is wrong and contrary to *DH*. Six points are made.

69. First, the rationale for the admission of counter-intuitive evidence itself is to correct erroneous beliefs the jury might otherwise have.[80] As such, it is the *evidence*—and not the prosecutor's address—which corrects those misconceptions. As the first *DH* principle explains, the evidence "allow[s] the jury to consider the complainant's credibility on a neutral basis".[81] The evidence, as the Law Commission explains, is "educative".[82] Necessarily, by hearing the evidence, the jury is educated.

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73 *OY v Complaints Hearing Committee*, above n 34, at [59(b)] (Appellant's Bundle, p 221). Also see *RA v R*, above n 31, at [28].

74 *DH v R*, above n 1, at [30(b)] (Appellant's Bundle, p 14).

75 As to defence counsel, see *Moore v R* [2025] NZCA 132 at [20].

76 See the cases cited in footnotes 77 and 78.

77 *Nancarrow v R* [2020] NZCA 636 at [51] (Appellant's Bundle, p 291); *Heke v R* [2021] NZCA 34 at [34] (Appellant's Bundle, p 324); *Nevin v R* [2023] NZCA 378 at [47]; *Z (CA49/2023) v R* [2025] NZCA 337 at [42]; *Mahoney v R* [2025] NZCA 490 at [42]-[44]; and *G (CA505/2024) v R* [2025] NZCA 520 at [26]-[27].

78 *Nancarrow v R*, above n 77, at [53]-[54] (Appellant's Bundle, p 292); and *Heke v R*, above n 77, at [33] (Appellant's Bundle, p 324). Also see *Jane v R* [2019] NZCA 384 at [38] (Appellant's Bundle, p 271); *Bruce v R* [2023] NZCA 159 at [54]-[55] (Appellant's Bundle, p 378); and *Wanden v R* [2024] NZCA 425 at [29] (Appellant's Bundle, p 393).

79 CA judgement, above n 2, at [26] (Case on Appeal, vol 1, p 18).

80 *DH v R*, above n 1, at [30(a)] (Appellant's Bundle, p 14).

81 *DH v R*, above n 1, at [30(a)] (Appellant's Bundle, p 14).

82 *Evidence*, above n 28, at [C110] (Appellant's Bundle, p 483).

70. Second, allied thereto, there is no requirement for *continual* correction because it risks diagnostic use. Where counter-intuitive evidence is led (as in this case), in their opening address, the prosecutor explains the purpose of the counter-intuitive evidence. No issue is taken with the prosecutor raising that matter at this stage, as their opening address is circumscribed.[83] As identified above, the witness must then explain the purpose of the evidence, its limits and that it does not comment on the particular case.[84] Usually, as occurred here,[85] the counter-intuitive evidence is led before the complainant's evidence. Thus, misconceptions about "the likely conduct of *a victim* of sexual abuse" are corrected.[86] This is done in a neutral way that educates the jury and allows their assessment of the complainant's credibility free from influence of the assumptions,[87] without risking linkage with the particular case. Nothing further needs to be said in the trial.

71. Third, the evidence relates to "generic research" about children who claim to have been sexually abused.[88] It says nothing about the instant case.[89] This is critical. The presence of a counter-intuitive issue, such as delay or continued contact, means nothing; it proves nothing.[90] It cannot be used to reason that the complainant is more credible, nor can it be used to suggest that there was sexual offending in that case. To do so would be to offend against the principle that the Law Commission and this Court make clear: it cannot be used diagnostically.[91] In this way, once the evidence is given, the counter-intuitive evidence has no further bearing on the case. Its educative function has been exhausted. It cannot, as is often wrongly suggested, be of "some significance in combating a central part of [the] defence"; to do so is to deploy

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83 *R v Mallory* (2007) 217 CCC (3d) 266 (Ont CA) at [338]: cited with approval in *R v Stewart (Eric)* [2009] NZSC 53, [2009] 3 NZLR 425 at [22].

84 *DH v R*, above n 1, at [30(b) and (d)] (Appellant's Bundle, p 14).

85 Case on Appeal, vol 3, p 4.

86 *DH v R*, above n 1, at [30(a)] (Appellant's Bundle, p 14). (Emphasis added).

87 *Kohai v R*, above n 1, at [18(a)] (Appellant's Bundle, p 43); and *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194).

88 It is important to observe, as this Court acknowledged, that it cannot be said that the research relies solely on "proven sexual abuse": see *DH v R*, above n 1, at [40]-[41] (Appellant's Bundle, p 16).

89 At [30(d)] (Appellant's Bundle, p 14).

90 The mandatory directions are clear that it cannot be used in this way: see *DH v R*, above n 1, at [30(e)] (Appellant's Bundle, p 15); and *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194).

91 *Evidence*, above n 28, at [C110] (Appellant's Bundle, p 483); and *DH v R*, above n 1, at [30(b), (d) and (e)] (Appellant's Bundle, pp 14-15).

it diagnostically.[92] What the jury makes of the issues in the particular case (such as delay), and any explanation provided, is, of course, a matter for the jury.[93] However, by referring to the counter-intuitive research in the closing address—as the divisional Court's approach permits—the prosecutor *is* seeking to link it to the particular case. This risks the jury thinking it is relevant to the particular case.[94]

72. Fourth, allied thereto, the prohibition against linkage between the counter-intuitive evidence and the case is not limited, as the divisional Court suggests, to only the expert.[95] Rather, the wording of the second *DH* principle is clear that the "evidence should not be linked". It does not state that the "witness" must not link, but that the "evidence" should not be linked. Neither *M (CA23/2009)* nor *OY*, from which the *DH* principle derives, are limited in this way. In fact, *M (CA23/2009)* explicitly applies to prosecutors.

73. Despite the suggestion in *Wanden* that there is uncertainty on the application to prosecutors,[96] *M (CA23/2009)* could not be more explicit. It was, of course,

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92 *Heke v R*, above n 77, at [32] (Appellant's Bundle, p 323); *H (CA90/2023) v R* [2023] NZCA 367 at [37]; and *Mahoney v R*, above n 77, at [42]. Respectfully, both the Court of Appeal and the Crown in this suggestion of being used as a "shield" and not a "sword" entirely misunderstands the premise for the admission of this evidence to "neutralise" generic misconceptions. It does not, and cannot, speak to the particular case, or complainant, at trial. Any attempt to link the *generic* evidence to the *specific* case risks the jury using the evidence diagnostically. In fact, to suggest that counter-intuitive evidence could assume "significance" to "combat" a defence is not only endorsing *direct* use by the jury and the Crown but condoning it.

Admitting this evidence does not remove these issues from the jury's purview: in the context of delay, see *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ 627 at [51] (Appellant's Bundle, p 257); and *H (CA308/2022) v R* [2023] NZCA 135 at [37]; and, in the context of counter-intuitive evidence, see *Radich v R* [2025] NZCA 210 at [46]-[48] (Appellant's Bundle, pp 439-440). Rather, it ensures that when they come to consider those issues in the particular case, they do so based on a fulsome understanding on the different way children react.

The Court and Crown's rationale overlooks that it will often be difficult for defence to advance these issues in the particular case once the jury's understanding is educated. But that does not mean the Crown can weaponise the counter-intuitive evidence to bolster its case in response to this. Even the Law Commission did not suggest such an approach; nor the permanent Court in *M (CA23/2009)*, above n 32, and *OY v Complainants Hearing Committee*, above n 34; nor did this Court in *DH v R*, above n 1. In fact, in all instances, this Court, the permanent Court and the Commission were emphatic: it cannot be used diagnostically.

Implicit in the Crown and Court's suggestion is that refence to the issues by defence counsel is wrong. It is not. It is entirely permissible as *Bian*, *H (CA308/2022)* and *Radich* establish. This evidence does not remove the ability to comment on issues such as delay and continued contact. If such a radical change was proposed, that is for Parliament and not the courts. But, as s 126A demonstrates, Parliament has not apprehended such a radical change, rather it has simply codified the suggestion of judicial directions in lieu of evidence, as proposed by this Court in *DH v R*, above n 1, at [105]-[109] (Appellant's Bundle, pp 28-29).

93 The Crown, of course, can properly close on the basis of the explanation that the complainant provides for the delay and continued contact. In this case, C proffered a reason for why he delayed: see Case on Appeal, vol 4, p 73. Equally, the defence can close on why the continued contact and delay means nothing happened. The jury will, of course, be aware of the generic research that addresses the preconceived ideas before the trial, but it does not assist them in the specific case.

94 *M (CA23/2009) v R*, above n 32, at [32(e)] and [49] (Appellant's Bundle, pp 187 and 194).

95 *Nancarrow v R*, above n 77, at [51] (Appellant's Bundle, p 291); cited in *Wanden v R*, above n 78, at [22] (Appellant's Bundle, p 390).

96 *Wanden v R*, above n 78, at [20] (Appellant's Bundle, p 389).

affirmed by this Court and the foregoing passage was footnoted as the basis for the second *DH* principle.[97] If this Court had intended to depart from *M (CA23/2009)*, it would have done so explicitly, as it did on other points.[98]

74. Fifth, a closing address is an exercise in persuasion[99] and reference to the counter-intuitive evidence within inherently risks improper use. The Crown's closing address must examine the evidence.[100] Necessarily, it promotes the credibility and reliability of the complainant. By weaving in the evidence, however innocuous its employment may be, the Crown is indirectly, if not directly, inviting the jury to use it diagnostically. The point, as *M (CA23/2009)* makes clear, is not about how the prosecutor *explicitly* uses it, but rather how the jury might *implicitly* use it.[101] By introducing it in the closing address, the prosecutor is explicitly stating that it is relevant to determining the complainant's credibility: it is not.

75. Sixth, in short, the divisional Court's approach is wrong because it focuses on *prosecutors* rather than the *jury*. The divisional Court has only been willing to accept prosecutorial misuse where the prosecutor has engaged in direct diagnostic use.[102] Where there has been non-direct linkage, as in *Nancarrow v R*, the divisional Court has countenanced that linkage on the basis that it was not being used by the *prosecutor* in a diagnostic or predictive way.[103] This rationale is wrong. It misapprehends who the focus is on with diagnostic or predictive use—it is not the prosecutor but rather the *jury*. This is made clear by the Court in *RA*, *M (CA23/2009)* and *OY*—it is to "avoid the *risk* that the evidence will be used in a diagnostic or predictive way", not that it actually was used in such a way.[104] As Arnold J, for the *M (CA23/2009)* Court, explained:[105]

> This is because there may be a tendency for the jury to reason that:

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97 *DH v R*, above n 1, at fn 13 (Appellant's Bundle, p 14).

98 See for example the way the Court addressed in *DH v R*, above n 1, at [40]-[41] (Appellant's Bundle, p 16) its departure from *OY v Complaints Hearing Committee*, above n 34, at [59(e)] (Appellant's Bundle, p 222).

99 *R v Mallory*, above n 83, at [339]: cited with approval in *R v Stewart (Eric)*, above n 83, at [22].

100 *Bruce v R*, above n 78, at [56] (Appellant's Bundle, p 378).

101 *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194).

102 *Banks v R* [2018] NZCA 120 at [19]; *Jane v R*, above n 78, at [38]-[39] (Appellant's Bundle, pp 271-272); *Bruce v R*, above n 78, at [52] (Appellant's Bundle, p 377); *Wanden v R*, above n 78, at [29] (Appellant's Bundle, p 393); and *Tollemache v R* [2025] NZCA 256 at [55] (Appellant's Bundle, p 456).

103 *Nancarrow v R*, above n 77, at [51] (Appellant's Bundle, p 291).

104 *RA v R*, above n 31, at [28]; *M (CA23/2009) v R*, above n 32, at [49] (Appellant's Bundle, p 194); and *OY v Complaints Hearing Committee*, above n 34, at [59(b)] (Appellant's Bundle, p 221).

105 *M (CA23/2009) v R*, above n 32, at [32(e)] (Appellant's Bundle, p 187).

- delayed reporting (for example) is common where children have been sexually abused;
- this is a case where there was delayed reporting by a child alleging sexual abuse;
- given that there was delayed reporting, the child must have been sexually abused.

To use the language of Dr London, the risk is that what is descriptive or observational information (some sexually abused children act in this way) is used as a predictive or diagnostic tool (a child who acts in this way must have been sexually abused).

76. In this way, it is not whether the prosecutor goes too far, but the fact that prosecutorial linkage (without judicial correction) risks the jury using the evidence impermissibly.

This case

77. In the Crown's closing address, the Prosecutor said:[106]

> What about the type of allegation itself? Now for many of you on Sunday night before you were coming to court and thinking about it you probably, hopefully, never had to think about whether this type of offending occurred, and you know from the agreed facts that it does, that family members and people close to children sexually offend against them. The type of allegation is not something that means this could not have happened.
>
> What about could it have happened and then [C] just kept quiet, didn't go running out immediately and told Mum, kept quiet for years until the relationship with Dad was drifting away, he was visiting less and less? Well you've got the agreed facts that I read to you at the beginning of the case, and you know that children are sometimes not in a position for various reasons to make a complaint, and you will have a copy of those agreed facts and that counterintuitive evidence correcting some of the misconceptions that we might have had on Sunday night to take into account.

78. Later in the closing, the Prosecutor outlined five points that supported C's credibility.[107] He then went on to specifically tie one of those points to the counter-intuitive evidence:[108]

> He is 12, he is talking about something which on any view of it would be deeply upsetting, it is a secret he has kept a long time, and he's doing so in a foreign environment, and <u>you know from those agreed facts that children's complaints are often delayed and they can be incremental</u>, they come out bit

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[106] Case on Appeal, vol 2, pp 71-72.

[107] Case on Appeal, vol 2, p 77.

[108] Case on Appeal, vol 2, pp 78-79. (Emphasis added).

> by bit as they feel more comfortable, that's an agreed fact, but in looking at those interviews, the fact of him coming along and the way in which his story came out you can assess that as part of whether he's telling the truth.

What the Prosecutor did wrong

79. The Prosecutor made three references to the counter-intuitive evidence in his closing address. The first two references were in the context of rhetorical questions about whether the allegations could happen. The Court of Appeal considered that these references did not involve a direct link and were aimed at restoring the complainant's credibility.[109]

80. There was, however, no credibility to restore by this point. C's credibility—to the extent it required restoration—had already occurred at the commencement of the trial when the counter-intuitive evidence was read. The jury was then disabused of any misconceptions. There was nothing in the trial that suggested this general idea that a parent could sexually offend against their children or that children might delay was in issue. Nor could it be; the counter-intuitive evidence, after all, was an *agreed* fact. Thus, the rationale for the reference to the counter-intuitive evidence did not exist.

81. There are obviously contentions about the specific facts. In this case, T denied the allegations against his son, C. The defence also pointed to the delay.[110] But those points that would be made in closing did not suggest that the generic and *agreed* counter-intuitive position was in issue.[111] Rather, the defence closing was directed at the specifics of this particular case.[112] In this way, the counter-intuitive evidence cannot assist. Therefore, the only purpose of repeated reference in the closing address to the counter-intuitive evidence was reinforcement that it *could* assist in the particular case. But it could not.

82. The first reference was inherently linked to the facts: T was C's father. This particular part of the agreed fact document was particularly problematic

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[109] CA judgment, above n 2, at [26] (Case on Appeal, vol 1, p 18).

[110] The defence was not prohibited from commenting on this: see the discussion in footnotes 92 and 93 above; and *Bian v R*, above n 92, at [51] (Appellant's Bundle, p 257).

[111] The defence was not suggesting that a father could not sexually abuse their child, or that because a sexually abused child delayed there could not have been abuse. This would obviously undermine the counter-intuitive evidence and would require correction from the judge. Rather, the defence was clear that *T* did not offend, and that *C's* delay and continued contact was evidence of the lack of offending in *this* case.

[112] Case on Appeal, vol 2, pp 86-88.

because it went too far in suggesting that "[c]hildren are *most likely* to be sexually abused by … family members".[113]

83. The second reference was explicitly linked to the facts: "then [C] just kept quiet, didn't go running out immediately and told Mum, kept quiet for years until the relationship with Dad was drifting way, he was visiting less and less? We'll you've got the agreed facts".[114]

84. While the Prosecutor went on to say, "and you will have that counterintuitive evidence correcting some of the misconceptions that we might have had on Sunday night to take into account",[115] this did not salvage matters. He did not say that it was limited to countering *generic* misconceptions and did not say anything about the *specific* case. In fact, by contrast, he has just drawn explicit links with the specific case. This was prohibited linkage. It risked the jury using this evidence diagnostically. The Court's suggestion that it simply restored the complainant's credibility was misplaced.

85. But it got worse with the third instance. By this stage of the closing, the Prosecutor had explained that the "issue in this case … is going to be the assessment of people's credibility".[116] He then turned to five topics on why the jury should find C was credible.[117] It is at this point that the Prosecutor again weaved in the counter-intuitive evidence.

86. After referring to the agreed facts that "children's complaints are *often* delayed and they can be incremental",[118] reaffirming, "that's an agreed fact".[119] He then directly contrasts the position in this case, continuing, "in looking at those interviews, the fact of him coming along and the way in which his story came out you can assess that as part of whether he's telling the truth".[120] The Prosecutor, thus, makes a direct link. He employs the counter-intuitive evidence to support C's credibility. Critically, he draws on and emphasises the frequency of delayed complainants.

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[113] Case on Appeal, vol 2, p 47. Also see discussion at 57 to 60 above.

[114] Case on Appeal, vol 2, p 72.

[115] Case on Appeal, vol 2, p 72.

[116] Case on Appeal, vol 2, p 75.

[117] Case on Appeal, vol 2, p 77.

[118] Emphasis added.

[119] Case on Appeal, vol 2, p 79.

[120] Case on Appeal, vol 2, p 79.

87. The Court of Appeal accepted that this reference may be seen as "strengthen[ing] [C's] credibility".[121] But the Court considered that because the reference "was not direct and it was fleeting in nature" there was no issue. Rather, the Court suggested that the Prosecutor's reference was not to the effect that the complainant should be believed because of the consistency, but rather it was merely a reference but not in a diagnostic way.

88. Respectfully, the distinction the Court seeks to draw is not available.[122] The only purpose of reference, at this late point during the discussion of the reasons that support C's credibility, was to bolster C's credibility by reference to consistency with the research. This was not merely fleeting. There were the five reasons the Prosecutor identified as supportive of C's credibility, which meant the jury could put aside T's denials and convict. In this portion alone, the Prosecutor specifically referred to and relied upon the "agreed facts" twice. This reference is then buttressed by the two earlier references to the counter-intuitive material that was woven into the facts of this case.

89. Highlighting the consistency between the agreed facts and the particular case at these three points was then strengthened when the Prosecutor moved to his next topic: consistencies. While that was largely about the consistencies between C's account and other people, the Prosecutor went on to note that it is about whether "he lines up with all the other evidence that you've got".[123] It is, of course, no coincidence that C's account lines up entirely with the counter-intuitive issues identified because they are tailored to the very issues in the case.

90. Plainly, the Prosecutor made a link between the particular facts of the case and the counter-intuitive evidence. This was not just one fleeting occasion, but three occasions where the evidence was tied directly to the facts of the

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[121] CA judgment, above n 2, at [26] (Case on Appeal, vol 1, p 18).

[122] It is noted that a differently constituted divisional Court arrived at a different conclusion on near identical usage in *Tollemache v R*, above n 102. Like this case, the Prosecutor identified credibility as the key issue then linked the counter-intuitive evidence to the facts of the case. The only real difference between the two is that in *Tollemache* the prosecutor identified the relevant paragraph numbers in the agreed fact document. However, this is a distinction without a difference.

[123] Case on Appeal, vol 2, p 81.

case.[124] In fact, on the third occasion, it was employed as part of the five reasons why C was credible. This plainly infringes the second *DH* principle.

The correct approach

91. The Prosecutor should have made no reference to the counter-intuitive evidence in his closing address. To do so, as *M (CA23/2009)* makes clear, risks the jury using the evidence diagnostically or predictively. This risk was heightened in this case, where the presentation of the counter-intuitive evidence did not comply with the other *DH* principles.

Mandatory judicial directions

The principle

92. In the fifth *DH* principle, the Court addresses the directions that the trial judge is required to give. There are three matters which the "judge must instruct the jury", being:[125]

    a. "the purpose of the evidence";

    b. "that it says nothing about the credibility of the particular complainant"; and

    c. to "caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delay in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred".

Divergent approaches below

93. The failure to give any of the three mandatory directions is an error. However, the pivotal issue then arises whether that gives rise to a miscarriage of justice, either in the sense of the real possibility of a different verdict or an unfair trial.

The approaches summarised

94. Divergent approaches have arisen. This Court in *DH* demonstrated that failure to give all three directions together will not be fatal to the convictions.

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[124] It is also noted that this was in the context of a brief closing address, which following a short trial. The trial was four days duration, yet the counter-intuitive evidence was mentioned on four occasions during that time: Prosecutor's opening address, when the agreed facts were read, Prosecutor's closing address and the Judge's summing up.

[125] *DH v R*, above n 1, at [30(e)] (Appellant's Bundle, p 15).

In that case, the trial Judge had given the first and second directions but omitted the third direction (caution against misuse).[126] What has resulted in appeals where no directions were given is difficult to reconcile; in some cases, the appeal is allowed,[127] in others—like the present—the appeal is dismissed.[128]

95. In several cases, the Court of Appeal has held that the failure to give the mandatory directions is fatal to the convictions; this is particularly so where there is prosecutorial misuse,[129] but not exclusively so.[130]

96. In several others, the Court has held that the failure to give the mandatory directions does not give rise to a miscarriage if those are adequately conveyed by other participants in the trial, including in the agreed fact document.[131] It is this line of reasoning that was adopted in the present case.[132]

Critical aspects of the directions

97. The critical issue with this evidence, as heralded at the outset of these submissions, is that without adequate directions the evidence risks misuse by the jury to bolster a complainant's credibility.

98. The outcome in *DH* suggests that the most critical aspect of the directions is that it does not bolster the complainant's credibility, together with the jury being told the limits of the evidence and that it does not relate to the case. This was, of course, made plain by the trial Judge in *DH* for which this Court considered no miscarriage arose.[133] This is consistent with the Law Commission's view that the purpose of this evidence was not diagnostic.

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126 At [114]-[117] (Appellant's Bundle, p 31). Also see *Heke v R*, above n 77, at [53]-[54] (Appellant's Bundle, p 330).

127 See the cases cited in footnotes 129 to 130 below.

128 See the cases cited in footnote 130.

129 *Jane v R*, above n 78, at [40] (Appellant's Bundle, p 272); *Wanden v R*, above n 78, at [35] (Appellant's Bundle, p 396); and *Tollemache v R*, above n 102, at [60] (Appellant's Bundle, p 457). Also see *Bruce v R*, above n 78, at [58] (Appellant's Bundle, p 379).

130 *H (CA337/2021) v R* [2021] NZCA 547 at [42]-[44] (Appellant's Bundle, pp 352-353); *Gounder v R* [2021] NZCA 544 at [28]; *McCaskill v R* [2025] NZCA 327 at [55]-[60] (Appellant's Bundle, pp 476-477); and *Chapman v R* [2024] NZCA 569 at [33] (Appellant's Bundle, p 421).

131 *Nancarrow v R*, above n 77, at [56]-[57] (Appellant's Bundle, p 293); *Mahoney v R*, above n 77, at [55]-[56]; *Moore v R*, above n 75, at [17]-[20]; and *Doell v R* [2025] NZCA 312 at [13]-[16].

132 CA judgment, above n 2, at [31]-[33] (Case on Appeal, vol 1, p 20).

133 *DH v R*, above n 1, at [114] (Appellant's Bundle, p 31).

99. Put another way, *DH* establishes that if the trial judge makes plain that this evidence says nothing about the credibility of the complainant and is not specific to the case, then there cannot be a miscarriage of justice.

Miscarriage of justice

100. The introduction of this evidence inherently gives rise to the risk of misuse by the jury, as the Court in *M (CA23/2009)* observed.[134] This point was similarly made by Hardie Boys J, for the Court of Appeal, in 1991, where he said "[o]ne cannot know what influence it will have on a jury".[135] An observation explicitly and unanimously approved by this Court in *Ellis v R*.[136] It is no doubt this inherent risk of misuse that sits behind the mandatory directions in *DH*, which had earlier been heralded in *M (CA23/2009)* and *OY*.

101. Necessarily, this risk of misuse by itself introduces the reasonable possibility that had the jury been properly directed, they may have returned a different verdict.[137] Equally, it may give rise to an unfair trial.[138] Thus, where there is a complete failure to direct, the starting point must be a miscarriage of justice. There may not be a miscarriage, however, if the directions are accurately conveyed in the agreed fact document and there has been no impropriety in the trial (such as misuse by the prosecutor).[139] However, the imprimatur of a judge cannot be overlooked.[140]

102. As *DH* establishes, if there is substantial direction that makes clear the evidence does not apply to this case and does not bolster the credibility of the complainant, then a miscarriage might not arise.[141]

103. Even if there is full judicial direction (or a substantially compliant direction), depending on the infractions by the participants on other *DH* requirements, it may be that failure to adequately address those infractions results in a miscarriage of justice. This will likely arise if a witness, prosecutor or the

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134 *M (CA23/2009) v R*, above n 32, at [32(e)] (Appellant's Bundle, p 187).

135 *R v Crime Appeal (CA 244/91)*, above n 3, at 19 (Appellant's Bundle, p 245).

136 *Ellis v R*, above n 3, at [117] and [232] (Appellant's Bundle, pp 99 and 125).

137 Criminal Procedure Act 2011, s 232(2)(c) and (4)(a). See *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [48]; and *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [67].

138 Section 232(2)(c) and (4)(b) and New Zealand Bill of Rights Act 1990, s 25(a). See *R v Howse* [2005] UKPC 30, [2006] 1 NZLR 433 at [33]-[34]; *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78]; *R v Stewart (Eric)*, above n 83, at [31]-[32]; and *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1 at [26]-[28].

139 See, for example, *Moore v R*, above n 75, at [17]; and *Doell v R*, above n 131, at [13].

140 *Moore v R*, above n 75, at [17].

141 *DH v R*, above n 1, at [114]-[117] and [135] (Appellant's Bundle, p 31). Also see *Heke v R*, above n 77, at [53]-[54] (Appellant's Bundle, p 330).

judge links the counter-intuitive evidence to the facts of the case,[142] or misstates the effect or scope of the evidence.[143] In these circumstances, the standard *DH* directions would likely be insufficient to remedy the impropriety.

This case

104. In his summing up, the Judge said:[144]

> [77] I want to talk to you about the "delay in complaint". In sexual abuse cases a complaint may be made immediately, being soon after the event, or sometimes after a delay. In this case there was a delay in complaint. I am required by law to tell you that there are delays in complaint and very often very good reason for such delays. It is recognised that there are legitimate and accepted reasons for not telling. That position is the law and it is supported by research.
>
> [78] It has been felt that there is a risk jurors may reason, because there was a delayed complaint, therefore, the complainant cannot be believed for that reason only. The section 9 admissions cover this matter in some detail. That is for you to determine, bearing in mind all the evidence presented to you in this case.

105. The direction given by the Judge was entirely directed to delay and arises from the discretionary direction in s 127 of the Evidence Act. Read in that context, the reference to the agreed fact document is about the document providing greater detail about the issue of delay.

106. There was no direction as required by *DH*. The height of the trial Judge's direction so far as it concerned the counter-intuitive evidence was to say it "is for [the jury] to determine". This alone is deeply troubling. It is a complete abdication of judicial responsibility. It did not affirm what the Crown prosecutor said in the opening, nor the opening lines of the agreed fact document (deficient as they were).[145] Rather, it left it entirely to the jury, the very antithesis of what is required.

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[142] *Bruce v R*, above n 78, at [59] (Appellant's Bundle, p 380); and *Wanden v R*, above n 78, at [37] (Appellant's Bundle, p 396).

[143] *Radich v R*, above n 92, at [46]-[47] (Appellant's Bundle, p 439).

[144] Case on Appeal, vol 2, p 108.

[145] In *Nancarrow v R*, above n 77, the Court of Appeal suggested that the Judge might affirm what is in the agreed facts or said by counsel: at [56] (Appellant's Bundle, p 293). It is not accepted that this is sufficient unless the agreed fact itself contains the mandatory directions.

107. Quite properly, the Court of Appeal found that the Judge erred.[146] But the Court proffered three reasons why a miscarriage did not arise:[147]

a. First, the caution at the commencement of the summary of facts.

b. Second, the Prosecutor's opening address.

c. Third, the Judge's remarks on delayed complaint.

108. None of these reasons withstand scrutiny.

109. First, the remark in the agreed fact document that "[t]his evidence does not prove or disprove that the complaint was sexually abused by the defendant", is for the reasons discussed above, not consistent with the *DH* principles.[148] This phrase is ambiguous in its meaning. Proof, in a criminal context, is associated with proof beyond reasonable doubt. In this way, it leaves open for the jury to use the agreed fact to bolster the complainant's account, provided that it is not the only basis on which they either find the charges proven or disproven. Equally, it could embody the sense promoted by the Crown and the Court of Appeal that it does not say anything about the particular case. Obviously, the latter is what is required to be conveyed by *DH*. However, clear and unambiguous language should be employed, not "prove or disprove". It is difficult to see how the Court can rely on that opening sentence (which itself fails to meet the second and fourth *DH* principles) to assert a remedy to the breach of the fifth principle.

110. Second, the Prosecutor's opening address was correct as far as it went. But, for the reasons discussed above, it did not accompany the agreed fact document.[149] Thus, the most important limits on the use of the evidence—as required by the second and fourth *DH* principles—were omitted from the agreed fact itself. Even if the Prosecutor's opening could salvage matters, his use in closing (which was fresh in the jury's mind at the time of deliberations) undid that given he linked the facts of the particular case to the counter-intuitive evidence three times.

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146 CA judgment, above n 2, at [27] (Case on Appeal, vol 1, p 18).

147 At [30]-[34] (Case on Appeal, vol 1, p 20).

148 See paragraph 48 above.

149 See paragraph 49 above.

111. Third, the Judge's remarks were directed at a s 127 delay direction. In so far as it was related to the agreed fact document, the Court of Appeal was apt to overlook the last sentence: "[t]hat is for you to determine, bearing in mind all the evidence presented to you in this case". For the reasons discussed above, this was a complete abdication of responsibility.[150] This did not somehow remedy the situation. In fact, it made it worse. This is particularly so because the Judge told the jury that they were required to follow his directions on the law,[151] and that they did not have to accept what counsel said—it was their interpretation of the facts which was important.[152]

112. Four other matters require comment, which were raised by the Crown in the Court below and will no doubt be pressed in this Court.[153]

113. First, the Crown suggested that the jury had the agreed fact document with them in deliberations. To the extent they did, this aggravates the fact that the document did not contain the appropriate limitations (as would have been required of a witness *viva voce* and, thus, recorded in the notes of evidence). Presentation in this way, unlike oral evidence, risks the jury using the evidence like a tick list. There was nothing that suggested they could not do this. In fact, the Judge told them to make of it what they will, and the Crown invited them to have regard to it, at various points, when considering the case against T. Thus, the mode of presentation did not lessen the prejudice. The document could have only mitigated the prejudice if the agreed fact document itself contained the mandatory directions. It did not, nor did it comply with the other requirements of the *DH* principles.

114. Second, the Crown suggest the counter-intuitive evidence had little significance because it was not mentioned by defence counsel. The Crown, of course, opened on it, read it to the jury, closed on it and the Judge referred it in summing up (linked, as it was, to the delay in the case). The fact that the defence did not comment on it was irrelevant, because such evidence should not be commented on by either party, because it is not related to the

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150 See paragraph 106 above.

151 Case on Appeal, vol 2, p 96 (at [3]).

152 Case on Appeal, vol 2, p 97 (at [5]).

153 CA judgment, above n 2, at [29] (Case on Appeal, vol 1, pp 19-20).

particular case.[154] In this regard, the Crown's submission is misplaced. Plainly, the evidence did assume some significance being repeated, as it was, on four occasions throughout the four-day trial.

115. Third, the failure of trial counsel to seek a direction is irrelevant.[155] This is not a case where the direction was optional, and counsel may have avoided seeking a direction for tactical reasons.[156] The direction was mandatory. The trial Judge was responsible for ensuring the jury were properly directed. Given its mandatory nature, both counsel should have raised the issue. The Crown's submission overlooks the experienced prosecutor's failure to seek the direction. Thus, nothing comes of this point.

116. Fourth, the mixed verdicts. The Crown's reliance on this is misplaced.[157] The Court of Appeal has accepted that mixed verdicts relating to the same complainant cannot give the Court any confidence that the error did not influence their decision on the other charges.[158] This Court in *Ellis* reached a similar conclusion, where there were also mixed verdicts in respect of the same complainants.[159] The same reasoning is apposite here: it is simply not

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[154] As noted in footnote 111 above, the defence were never suggesting this *could* not happen (in the sense of a father sexually offending against his son), but that this *did* not happen. There was, thus, no need to comment on the agreed facts, because T did not dispute them as far as they (generically) went.

[155] See *Plumridge v R* [2023] NZCA 667 at [49]; and *W (SC 120/2022) v R* [2023] NZSC 50 at [15].

[156] Compare, for example, the s 122(2)(e) direction which might not be sought in circumstances where the defence is plainly that this was a lie and such a direction might muddy the waters of the defence: *R v R* [2023] NZSC 132, [2023] 1 NZLR 507 at [52] per Winkelmann CJ, O'Regan and Williams JJ.

[157] The authority cited by the Crown of *Rankin v R* [2019] NZCA 443 is readily distinguishable. In that case, Dr Ahmad gave evidence. The jury acquitted on all of the sexual charges and some of the physical charges, but convicted on some physical charges. The Court of Appeal in that case considered that the jury would not have been unduly influenced by Dr Ahmad's evidence because of the acquittals on the sexual charges, and what counter-intuitive evidence she gave on the physical violence would have added, in the Court's view, little to what the jury already knew: at [36].

[158] In *Bruce v R*, above n 78, Cooper P, writing for the Court, concluded the Crown was right not to rely on the proviso if the Court reached that point. His Honour continued: "while Mr Bruce was found not guilty of eight charges, we are not satisfied the error did not influence the jury's assessment of the 33 charges on which Mr Bruce was found guilty": at [61] (Appellant's Bundle, p 380).

In *Chapman v R*, above n 130, the Court similarly concluded that "[t]he range of verdicts (guilty, not guilty, and not in agreement) shows that the jury neither categorically accepted nor rejected the complainant's credibility": at [36] (Appellant's Bundle, p 421).

In *McCaskill v R*, above n 130, the Court also concluded that "the four not guilty verdicts indicate the jury did not simply accept or reject the complainant's evidence in whole": at [64] (Appellant's Bundle, p 478).

[159] This Court in *Ellis v R*, above n 3, said: "We cannot know why the jury found the appellant not guilty on some of the charges – there could be many reasons for those verdicts. We do not consider it is possible to reason from those verdicts. We do not consider it is possible to reason from the discriminating verdicts that the jury was not influenced by the evidence of Dr Zelas in relation to the guilty verdicts": at [232] (Appellant's Bundle, p 125).

known what impact the errors had on the jury's assessment of the remaining charges. There is plainly no pattern to the verdicts.[160]

117. The Judge failed to give the mandatory directions and instead told the jury what they made of the agreed facts was for them. This compounded the errors in the agreed fact document and the Prosecutor's use of the evidence. The errors all went uncorrected. One cannot know the impact that this evidence had on the verdicts, despite being mixed verdicts. For this reason, there was a miscarriage of justice because there was the reasonable possibility, had there been compliance with the *DH* principles, that T could have been acquitted on all charges.

Conclusion

118. This Court should affirm the *DH* principles. There is no proper basis to depart from them as the Court of Appeal has done.

119. In T's case, the appropriate limits of the evidence were not conveyed by the agreed fact document, there was linkage by the Prosecutor and, critically, there were no mandatory directions given by the trial Judge. Instead, the jury were told to make of it what they will. These compounding errors resulted in a miscarriage of justice.

120. The appeal should be allowed. T's convictions should be set aside.

Auckland, 27 November 2025
Tāmaki Makaurau, 27 Whiringa-ā-rangi 2025

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J N Olsen | A N Gruebner
Counsel for the Appellant | Rōia mō te Kaipīra

Counsel for the Appellant certifies that, to the best of their knowledge, these submissions contain no suppressed information and are suitable for publication.

[160] Even though C suggested in cross-examination that there was no offending at address B (on which the not guilty verdicts were entered), he also suggested that there was no touching of T's penis at address A (for which T a guilty verdict was returned). This is despite, in both instances, C clarifying in re-examination that he felt under pressure to make those concessions and what he said in his interview (that they did happen) was true. The other not guilty verdict did not arise from any concession initially made by C. In this way, there is no rhyme or reason to the verdict pattern.