
IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 51/2025

BETWEEN T (SC 51/2025)

Appellant

AND THE KING

Respondent

SC 114/2025

AND BRIAN TIMOTHY MAHONEY

Appellant

AND THE KING

Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL

24 February 2026



**Te Tari Ture
o te Karauna
Crown Law**

PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:

M J Lillico | J M Pridgeon

Mark.Lillico@crownlaw.govt.nz | Jessica.Pridgeon@crownlaw.govt.nz

CONTENTS

T'S APPEAL.....	3
Issues	4
Suppression orders and Child Sex Offender Registration	4
Trial record and background	5
The offending.....	5
The counter-intuitive evidence	7
First appeal	8
Content of the s 9 agreement	8
Prosecutorial use of counter-intuitive evidence.....	9
The purpose of counter-intuitive evidence.....	9
How erroneous beliefs and assumptions are corrected in New Zealand	10
Prosecutors are not prohibited from using counter-intuitive evidence	13
The way prosecutors may use counter-intuitive evidence	15
Why prosecutors need to refer to counter-intuitive evidence	16
The risk presented by counter-intuitive evidence	17
Permissible reference by a prosecutor to counter-intuitive evidence	19
The prosecutor's closing in this case was proper: it educated, not diagnosed ..	23
The first reference	23
The second reference	24
Directions on counter-intuitive evidence.....	26
The imperfect direction in T's trial did not result in a miscarriage of justice	29
MR MAHONEY'S APPEAL.....	31
Suppression and registration	32
Trial record and background	33
The offending.....	33
Report to Police two decades later	34
The appellant at trial.....	35
The counter-intuitive evidence	35
First appeal	36
The prosecutor referred to the evidence, but not impermissibly	36
There was no misuse in cross-examination.....	37
There was no misuse in closing	37
The directions were sufficient in the circumstances	42

Questioning the complainant.....	44
Principle	46
This case.....	47

1. Common but erroneous assumptions about what “real rape” looks like, and how “real rape” victims are expected to behave, mean that complainants in sexual violence trials often begin their evidence from a materially disadvantaged position, with their credibility already unfairly diminished. The disadvantage is worsened when counsel invoke rape myths to attack a complainant’s credibility in cross-examination or closing submissions—for example, by suggesting that if the complainant had in fact been sexually violated, she would have complained immediately, and that her failure to do so indicates she is lying.
2. Counter-intuitive evidence aims to provide a counterweight. Its purpose is to restore a complainant’s credibility to a net-zero balance by correcting erroneous misconceptions which research shows jurors may hold. Counter-intuitive evidence is at the centre of T’s appeal and Mr Mahoney’s.

T’S APPEAL

3. T reprises his Court of Appeal position: that the prosecutor impermissibly relied on counter-intuitive evidence in closing, and that the Judge failed to give adequate directions about the proper use of that evidence. And more generally, he submits:
 - 3.1 Prosecutors must be categorically precluded from referring to counter-intuitive evidence in closing addresses; and
 - 3.2 Unless judges direct about counter-intuitive evidence in mandatory terms, miscarriage must almost always follow.
4. But criminal trials require nuance and contextual judgment, not the unduly rigid rules T advances. Prosecutors and judges must have sufficient flexibility to respond to trial evidence and trial realities. Specifically:
 - 4.1 A prosecutor’s closing reference to counter-intuitive evidence does not automatically transform the Crown’s reliance on the evidence into diagnostic reasoning. Provided the Crown does not invite the jury to use counter-intuitive evidence improperly, it is

entitled, like the defence, to refer to all admissible evidence in its closing address. In the two short references the prosecutor made to counter-intuitive evidence in his closing in T's case, he did not impermissibly reason that because the victim conducted himself in a counter-intuitive way, that in and of itself was indicative of truth telling.

- 4.2 While this Court in *DH v R* required Judges to issue a counter-intuitive evidence direction whenever that evidence is led at trial, whether a miscarriage of justice results from a failure to direct, or to direct in the precise terms of that case, is fact dependent.¹ In T's trial the Judge referred the jury back to the s 9 agreement (which began with a prominent caution: the evidence "does not prove or disprove" that abuse occurred in this case) and gave the orthodox s 127 direction on delayed reporting. And the jury returned mixed verdicts, showing careful, discriminating reasoning rather than any wholesale illegitimate use of counter-intuitive evidence.

Issues

Suppression orders and Child Sex Offender Registration

5. T's victim is his son, H. They share a common surname. H's name is suppressed under ss 203 and 204 of the Criminal Procedure Act 2011 (**CPA**).

¹ *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 at [30(e)] ("*DH*"): **Bundle for appellant in T(SC51/2025) ("T's bundle")** at 3.

²

6. Upon being sentenced to imprisonment for sexual offending involving a child, T was automatically registered on the Child Sex Offender Register.³

Trial record and background

The offending

7. T's son, H, was born on [year].⁴ T began sexually offending against H when he was about seven years old in [year] until he was about 12 in [year].⁵
8. H reported the offending sometime between September and November [year] to [redacted]⁶ and gave his first evidential video interview (**EVI**) to Police in March [year].⁷ H struggled to complete the first interview; he was able to tell the interviewer that his father touched his penis in the shower when he was six or seven years old but was otherwise too embarrassed to say more.⁸ A second interview was recorded in June [year], just after H turned 13.
9. In his second EVI, H said the offending happened at four separate locations: first at an address at [redacted]; next at an address in [redacted]; then at a [redacted] his father was living in as emergency accommodation; and finally, in a vehicle.
10. At the [address], when H was between seven and 11 years old, T made H shower with him.⁹ In the shower, T:¹⁰
- 10.1 touched H's penis (Charge 1, indecent act on a child, representative);

³ Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 7. The charges T has been found guilty of are qualifying offences: Child Protection (Child Sex Offender Government Agency Registration) Act 2016, Schedule 2.

⁴ Agreed Facts, T's CA Casebook at 44.

⁵ [Redacted].

⁶ Second EVI, T's Exhibits at 73. Appellant T's Notes of evidence (**NOE**) at 24, line 20; at 56–57. [Redacted].

⁷ First EVI, T's Exhibits at 4, line 30.

⁸ First EVI, T's Exhibits at 12–14.

⁹ Second EVI, T's Exhibits at 30.

¹⁰ Second EVI, T's Exhibits at 28–34, 38–43, and 60–65.

- 10.2 made H touch his penis (Charge 2, indecent act on a child, representative);
- 10.3 inserted his finger into H's anus (Charge 3, sexual violation, representative). In his second EVI, H said this happened "more than once"¹¹ later clarifying it happened twice;¹² and
- 10.4 inserted his penis into H's anus (Charge 4, sexual violation, representative). In his second EVI, H said this happened "only twice": once at [address] and a second time at [address] (charge 7).¹³
11. While in [redacted], when H was 12 years old, T grabbed and yanked H's testicles over his clothes (Charge 8, indecent act, representative).¹⁵
12. T was found guilty of the above five charges but acquitted of charges relating to:
- 12.1 making H touch his penis over clothes while in [redacted] over the same time period as Charge 8 (Charge 9, indecent act, representative);¹⁶ and
- 12.2 touching H's penis and making H touch his penis in the shower at [redacted] (Charges 5 and 6, indecent act, representative).¹⁷
13. T gave evidence denying the offending. He said H fabricated the allegations, but did not know why.¹⁸ Then [redacted] M, gave evidence for

¹¹ Second EVI, T's Exhibits at 31 and 70.

¹² Second EVI, T's Exhibits at 84.

¹³ Second EVI, T's Exhibits at 34, 38–41, 45, and 46–47.

¹⁴ [Redacted].

¹⁵ Second EVI, T's Exhibits at 31 and 66–67.

¹⁶ Second EVI, T's Exhibits at 66 and 68–69.

¹⁷ Second EVI, T's Exhibits at 56–63.

¹⁸ T's NOE at 144. [redacted] M, who gave evidence for the prosecution at trial. It was evident throughout the trial that T and M despised each other.

the Crown. During cross-examination, trial counsel put to M that she told H to falsely complain and told him what to say.¹⁹ This was the inference counsel asked the jury to draw in closing too.²⁰ It was evident during the trial that, in counsel's words, "there was no love lost" between T and [redacted], M.²¹

14. When asked in his second EVI why he did not report the offending sooner, H said he had been scared to do so until his father had "gone" and not returned. H thought his father would give him "a hiding" if he told sooner because T had threatened this.²²

The counter-intuitive evidence

15. Counter-intuitive material was introduced by consent in an agreed statement of facts pursuant to s 9 of the Evidence Act 2006 ("**s 9 agreement**"). The first paragraph told the jury the evidence was educative only and warned: "This evidence does not prove or disprove that the complainant was sexually abused by the defendant."²³
16. It then summarised general research on delay, incremental disclosure, familial offending, normalisation, lack of struggle, and continued contact. The statement was read aloud after opening addresses and provided in writing to the jury during deliberations.
17. In opening, the prosecutor stressed the evidence was general and "not about something specific in this case." Its purpose was to address misconceptions jurors might bring to a child sexual abuse case.²⁴ The

¹⁹ See T's NOE at 73 where M was being cross-examined and was asked "the truth of that is that you told him what to say didn't you?" because she "hated" him (NOE at 74–75).

²⁰ Defence closing address, T's CA Casebook at 87 and 90–91.

²¹ Defence closing address, T's CA Casebook at 90.

²² Second EVI, T's Exhibits at 73, line 27. He maintained this in cross-examination (NOE at 24, line 25). The Crown notes that although H provided an explanation for his delayed complaint, that in and of itself did not mean the issue ceased to be a live one. As in *DH*, above n 1 at [47]–[49], the explanation did not displace the usefulness of expert evidence about delay.

²³ Agreed statement of facts at [9], T's CA Casebook at 45.

²⁴ Crown opening, T's CA Casebook at 59.

appellant does not complain about the prosecutor’s reference to the evidence in his opening address.

18. As is explained at [65] below, the prosecutor then referenced the counter-intuitive material briefly twice in closing.²⁵ In summing-up, the Judge reminded the jury that the s 9 agreement formed part of the evidence and gave the statutory s 127 direction regarding delay: that delay may be for legitimate reasons and is not of itself an indicator of lies. He did not give a fuller *DH*-type instruction.²⁶

First appeal

19. The Court of Appeal dismissed T’s conviction appeal.²⁷ The Court rejected T’s argument that simple reference to counter-intuitive evidence in a prosecution closing address is erroneous. Nor did what the prosecutor say here amount to diagnostic use. And although the trial Judge failed to give the mandatory *DH* direction, that did not result in a miscarriage because given everything that happened in T’s case, there was no risk the jury used the evidence to illegitimately bolster H’s credibility or to diagnose abuse.²⁸

Content of the s 9 agreement

20. For the first time in this Court, T criticises the content of the s 9 agreement containing the counter-intuitive evidence produced at trial.²⁹ This is despite taking no issue about the content or the admissibility of the counter-intuitive evidence in the Court of Appeal,³⁰ and his counsel signing the s 9 agreement produced at trial.³¹
21. In the absence of a waiver and an affidavit from trial counsel and T, it can be assumed T was given competent advice and gave instructions about the

²⁵ Crown closing, T’s CA Casebook at 71–72 and 77–79.

²⁶ Summing up at [77]–[78], T’s CA Casebook at 108.

²⁷ *T (CA449/2023) v R* [2025] NZCA 136 at [55], (“**T’s CA judgment**”), T’s SC Casebook at 9.

²⁸ T’s CA judgment at [30]–[34], T’s SC Casebook at 20.

²⁹ T’s submissions at [8] and [39]–[62].

³⁰ T’s CA submissions at [38]. And T’s CA judgment at [11], SC Casebook at 12.

³¹ T’s s 9 agreement, CA Casebook at 44.

content and form of the s 9 agreement.³² The Crown also observes that the content of the s 9 agreement was not at issue in the Court of Appeal and consequently this Court does not have the benefit of the intermediate Court’s reasoning: the Court of Appeal noted “[no] issue is taken by the appellant about the content of the agreed facts”.³³ To the extent that any substantive issues arise from the arguments T’ makes under this heading, they are covered in answering the second and third grounds of appeal below.

Prosecutorial use of counter-intuitive evidence

The purpose of counter-intuitive evidence

22. Sexual and family violence offending is commonly misunderstood by those without relevant training or knowledge. Research demonstrates that because of this, jurors may hold inaccurate assumptions about sexual and family violence offending and this can influence their assessment of evidence in those trials. In other words, misconceptions mean jurors sitting on those trials may engage in improper reasoning if those beliefs are left uncorrected.³⁴
23. In the commentary to the proposed Evidence Code in 1999, the Law Commission explained the purpose and use of counter-intuitive evidence:³⁵

[C110] ...The purpose of such evidence is not diagnostic. Rather, the purpose of the evidence is educative: to impart specialised knowledge the jury may not otherwise have, in order to help the jury understand the evidence of and about the complainant, and therefore be better able to evaluate it.

[C111] Part of that purpose is to correct erroneous beliefs that juries may otherwise hold intuitively ... The purpose of such evidence is to restore a complainant’s credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance. This is

³² See for example *Waters v R* [2018] NZCA 84 at [21]; and *E v R* [2010] NZCA 544 at [23].

³³ T’s CA judgment at [11], SC Casebook at 12.

³⁴ Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLC R136, 2015) at [6.12]: **Crown bundle, Tab 1**; and Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act* (NZLC R142, 2019) at [12.1], **Crown bundle, Tab 2**.

³⁵ Law Commission *Evidence Code* (NZLC R55, Vol 2, 1999) at [C110] and [C111], **T’s bundle at 483**.

similar to the use of expert evidence to dispel myths and misconceptions about the behaviour of battered women.

24. More recently the Commission noted “research has shown that jurors may believe myths and misconceptions about sexual and family violence, which can affect how they consider the evidence in sexual and family violence cases”.³⁶
25. Comparable overseas jurisdictions have also recognised the continued need for counter-intuitive evidence and directions. In *R v Barton* the Supreme Court of Canada said:³⁷

We live in a time where myths, stereotypes, and sexual violence against women — particularly indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society.

26. And in the United Kingdom, recent research from the Crown Prosecution Service summarised:³⁸

[C]lear themes emerged showing that the public continue to hold narratives around stranger rape as the primary model for rape, beliefs about what "real rape" looks like, how victims should behave, and a tendency to want to either exonerate the accused, find reasons for their actions, or set them apart from "ordinary" men. And many of the assumptions and misconceptions have moved into the digital age, for example surrounding the behaviour of victims on-line.

How erroneous beliefs and assumptions are corrected in New Zealand

27. Expert evidence designed to dispel common misconceptions about sexual offending has been admitted both prior to, and after the passage of the Evidence Act 2006.

³⁶ NZLC R142, 2019, above n 34, at [12.1].

³⁷ *R v Barton* [2019] 2 SCR 579 at [1].

³⁸ Crown Prosecution Service “Research into the public understanding of rape and serious sexual assault offences (RASSO) and consent” (24 January 2024) <[CPS and Equally Ours: Research into the public understanding of Rape and Serious Sexual Offences \(RASSO\) and consent | The Crown Prosecution Service](#)>.

28. Before then, evidence was admitted pursuant to former s 23G of the Evidence Act 1908. Evidence admitted under this provision was directed at the behaviour of the individual complainant. Experts were able to comment on whether a complainant's behaviour was consistent or not with the behaviour of sexually abused children generally.³⁹ Because of this, the expert evidence risked straying into directly endorsing a witness' credibility.⁴⁰ While the Law Commission recommended retaining s 23G in the Evidence Act, this was not carried through.⁴¹
29. Section 23AC of the 1908 Act did make its way into the 2006 Act via s 127. Section 127 of the current statute rewords but does not essentially alter the former s 23AC. It permits judges to tell a jury there can be good reasons why a victim in a sexual case may delay complaining. In *Bian v R* the Court of Appeal set out the purpose of s 127 as being "to neutralise the erroneous perception that a victim of a sexual offence would complain immediately".⁴²
30. Following the passage of the Evidence Act 2006, expert counter-intuitive evidence was then commonly adduced via a suitably qualified expert giving viva voce evidence. Sections 7, 8 and 25 of the Act governed admissibility. Admissibility of such evidence as a matter of principle was confirmed by the Court of Appeal in numerous cases⁴³ before this Court confirmed the same in *DH v R* and *Kohai v R*.⁴⁴ As this Court said in *Kohai v R*:

[18(a)] ... [Counter-intuitive] evidence will be admissible if the fact-finder is likely to obtain "substantial help" from it in understanding other evidence or ascertaining a fact in issue. Counter-intuitive evidence can be substantially helpful because it corrects erroneous

³⁹ *Ellis v R* [2022] NZSC 115, [2022] 1 NZLR 338 at [115]–[116], [124], **T's bundle at 52**.

⁴⁰ NZLC R55, Vol 2 1999, above n 35, at [C109]–[C113], **T's bundle at 483**.

⁴¹ At [C109] and [C113].

⁴² *Bian v R* [2015] NZCA 595, (2015) 27 CRNZ at [51], **T's bundle at 247**.

⁴³ *RA v R* [2010] NZCA 57, (2010) 25 CRNZ 138: **Crown bundle Tab 3**; *M(CA23/2009) v R* [2011] NZCA 191 **T's bundle at 172**; *R v K(CA106/2013)* [2013] NZCA 430: **Crown bundle Tab 4**; *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629 **T's bundle at 206**; *HKR(CA792/2012) v R* [2013] NZCA 372, [2013] NZAR 1202: **Crown bundle Tab 5**; *Lockhart v R* [2013] NZCA 549: **Crown bundle Tab 6**; *R v S(CA181/2009)* [2009] NZCA 195 was an appeal where the evidence was held to be inadmissible, although the Crown was able to adduce a revised brief: **Crown bundle Tab 7**.

⁴⁴ *DH*, above n 1; *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833.

assumptions about the likely conduct of victims of sexual abuse and allows fact-finders to assess a complainant's credibility free from the influence of these assumptions. ...

31. In *DH* this Court discussed the importance of expert evidence to correct erroneous jury assumptions about complainant behaviour so that the jury may consider the complainant's credibility on a neutral basis.⁴⁵ The Court also endorsed the use of s 9 statements and/or judicial directions to correct commonly held myths and misconceptions, especially where there is general acceptance of the evidence.⁴⁶
32. Judicial directions to counter misconceptions were also recommended by the Law Commission in 2015. The Commission recommended that judges sitting in sexual violence trials have available to them guidance on when to give counter-intuitive directions to juries and examples of how to frame such directions.⁴⁷ The Commission also encouraged parties to agree upon expert evidence or to produce a written statement which could be admitted by agreement.⁴⁸
33. Section 126A of the Evidence Act 2006 now makes it mandatory for judges to give directions to juries in sexual violence cases where misconceptions may be relevant. The provision was recommended by the Law Commission in 2019 and came into force on 21 December 2022.⁴⁹ Of course, the provision only confirmed in legislation what had already been established by this Court at common law.⁵⁰
34. The Law Commission also recommended that sample directions be developed to assist judges and that these be available in a publicly

⁴⁵ *DH*, above n 1, at [30(a)].

⁴⁶ *DH*, above n 1, at [110].

⁴⁷ See NZLC R136, 2015), above n 34, at [R28].

⁴⁸ See NZLC R136, 2015), above n 34, at [R29]. It repeated this recommendation, at least in relation to family violence cases, in its 2019 report: NZLC R142, 2019, above n 34, at [R20].

⁴⁹ NZLC R142, 2019, above n 34, at [R21] and [R22].

⁵⁰ *DH*, above n 1, at [110]; *Cameron v R* [2023] NZCA 157 at [18]–[19]: **Crown bundle Tab 9**.

accessible jury trials bench book rather than the Evidence Act itself.⁵¹ Chapter 7A of the Jury Trials Bench Book answers this recommendation.⁵²

Prosecutors are not prohibited from using counter-intuitive evidence

35. T argues *DH* and *Kohai* prohibit prosecutorial reference to counter-intuitive evidence after its admission. But they were cases about admissibility of the expert counter-intuitive evidence led in those trials. They were not cases about prosecutorial use of counter-intuitive evidence once admitted. The Court did not directly address that issue.
36. In both cases, Dr Suzanne Blackwell gave viva voce evidence at trial and the same counsel acted for both appellants before this Court. He argued the scope of Dr Blackwell's evidence was excessive and partly inadmissible because it dealt with matters irrelevant to the particular trials.⁵³ It was in that context that this Court in *DH* summarised the factors relevant to admissibility of expert counter-intuitive evidence.⁵⁴ In doing so, this Court said at [30(b)] of the judgment that:

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. T argues that [30(b)] means *prosecutors* may not refer to the evidence at all after its admission because to do so is to automatically diagnose abuse.⁵⁵

⁵¹ NZLC R142, 2019, above n 34, at [12.47].

⁵² Te Kura Kaiwhakawā | Institute of Judicial Studies "Chapter 7A: Evidence: Directions in sexual cases" (August 2023), Courts of New Zealand Criminal Jury Trials Bench Book <[Chapter 7A Criminal Jury Trials Benchbook](#)>.

⁵³ *DH*, above n 1, at [4]; *Kohai*, above n 44, at [3] and [17].

⁵⁴ *DH*, above n 1, at [30] (footnotes omitted).

⁵⁵ T's submissions at [67]–[76].

38. It is a novel proposition that there is a class of evidence that, while properly admissible and before the jury, cannot be accounted for in counsel's address to the jury.
39. In jury trials the prosecutor may make a closing speech at the end of the defence case pursuant to s 107(6) of the CPA. The speech should traverse the legal ingredients of the charges, and call the jury's attention to the evidence which the Crown says satisfies the onus and standard of proof in relation to each ingredient, and particularly those which are the subject of dispute.⁵⁶
40. Counter-intuitive evidence is not evidence that the Crown can call upon to directly satisfy the burden of proof. It is best understood as evidence to help explain other evidence. In *Bruce v R* the Court of Appeal rejected B's argument that prejudice had arisen due to the expert giving counter-intuitive evidence, in the context of allegations of family violence, just prior to the complainants giving evidence.⁵⁷ The Court observed that the expert was called to educate the jury about misconceptions, and it made obvious sense for her to testify before the jury heard the evidence to be given by the five complainants, which in each case might have given rise to the misconceptions that needed to be addressed.⁵⁸
41. It would be a radical departure from the current position if the Crown could not draw on evidence given during a trial to counter misconceptions the jury may hold about the evidence of a complainant the Crown is relying on. *DH* does not say anything to the contrary. It concerned the *admissibility* of expert counter-intuitive evidence, not its use by the prosecution. It was in that context that the Court identified the relevant factors about expert evidence admissibility at [30(a) – (e)]. There the Court addressed the role and evidence of expert witnesses, not the conduct of counsel.

⁵⁶ *R v Hodges* CA435/02, 19 August 2003.

⁵⁷ *Bruce v R* [2023] NZCA 159 at [34]–[35]: **T's bundle at 359**.

⁵⁸ [35].

42. Some reference to the complainant will be inevitable given the role of the prosecutor, the purpose of a closing and the pervasiveness of misconceptions about sexual abuse. The jury need to understand how the counter-intuitive evidence that they have heard relates to the case before them. Prosecutors are “entitled to contend forcefully but fairly for a verdict of guilty”.⁵⁹ From the prosecutor’s perspective this will focus on the fact that the particular complainant in the case they are presenting benefits from having their credibility restored to a neutral balance.
43. That is not to say that the prosecutor’s ability to comment on counter-intuitive evidence is unbounded. It cannot be diagnostic in the sense explained at [44] below. It is another boundary that must be observed by prosecutors at trial amongst many others: a prosecutor may use vivid terms to put forward the Crown case but cannot distort the facts;⁶⁰ a prosecutor is bound to confront a defendant’s credibility if it is in issue but repetition may become unfair;⁶¹ a prosecutor may comment on the failure of the defence to call a witness but only in narrow circumstances;⁶² a prosecutor may comment on the absence of a motive for the complainant to lie but cannot make it a special feature of the closing address.⁶³

The way prosecutors may use counter-intuitive evidence

44. Prosecutors may address counter-intuitive evidence along with all the other evidence produced at trial. But any submission should be directed at “correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse”.⁶⁴ So, counter-intuitive evidence can be used in a corrective or educative manner. It cannot be used in a diagnostic or predictive manner to argue that it enhances the complainant’s credibility or is indicative of sexual abuse having occurred.

⁵⁹ *R v Hodges*, above n 56, at [20]:

⁶⁰ *R v Mirams* [1987] 1 NZLR 51 (CA) at 53; and *R v Piri* [1987] 1 NZLR 66 (CA) at 74.

⁶¹ *Hazelwood v R* [2018] NZCA 44 at [15].

⁶² *R v Nobakht* [2007] NZCA 488 at [91]–[92].

⁶³ *Tuhaka v R* [2015] NZCA 540 at [14]–[18].

⁶⁴ *DH*, above n 1, at [30(a)].

Why prosecutors need to refer to counter-intuitive evidence

45. Primarily, the need to refer to counter-intuitive evidence is the misconception held by jurors referred to above: “Research has shown that jurors may believe myths and misconceptions about sexual and family violence, which can affect how they consider the evidence in sexual and family violence cases”.⁶⁵
46. In T’s trial, there were facts available on which jury misconceptions could alight. When H was asked in the second interview why he did not report the offending earlier, he said he was scared to do so until T had “gone” and not returned. He thought T would give him a “hiding” if he disclosed the offending earlier as T had threatened to do so.⁶⁶
47. Similarly, there were factors Mr Mahoney’s trial that could be misconstrued by a jury:
- 47.1 The complainant remained with Mr Mahoney even after it was apparent to her that he was not the 18–20-year-old she had been sent a photo of;⁶⁷
- 47.2 The complainant continued to meet up with Mr Mahoney in the weeks following the initial sexual assaults;⁶⁸
- 47.3 The complainant reported the offending to police some two decades after the event (albeit she had told her then boyfriend the same year as the offending).⁶⁹
48. Further, often misconceptions about sexual abuse are amplified by the defence during the trial. The reality is that subtle (and sometimes overt) reliance on misconception reasoning remains stubbornly embedded in

⁶⁵ NZLC R142, 2019, above n 34, at [12.1].

⁶⁶ T’s CA judgment, above n 27, at [6], SC Casebook at 11.

⁶⁷ *Mahoney v R* [2025] NZCA 490 (“**Mahoney CA judgment**”), Mahoney SC Casebook at [4]–[5].

⁶⁸ Mahoney CA judgment, above n 67, at [5]–[8]

⁶⁹ Mahoney CA judgment, above n 67, at [9].

adversarial trial culture.⁷⁰ New Zealand research shows that reliance on rape myths and stereotypical beliefs about rape victims remains a staple in defence closing statements.⁷¹ The conclusion of recent research considering 40 trials was that “In many cases, defence counsel sought to make meaning of aspects of the complainant’s behaviour in line with rape mythology, or relied on underlying (and erroneous) ideas about what “real rape” looks like.”⁷²

49. Rape myths are raised in T’s case albeit to a minor degree. As part of a wider submission about H lying at the behest of [redacted], the defence pointed out that it took H a long time to get out what he had to say (over two interviews), and even then, he could not remember details.⁷³
50. As is outlined at [116] below, the position is starker in Mr Mahoney’s trial where the defence case rested heavily on misconceptions.
51. The research, however, shows that the conduct of sexual abuse victims cannot be stereotyped. Fairness extends beyond the interests of the defendant to those of the community and the complainant.⁷⁴ Fairness requires that the prosecutor be able to respond by putting counter-intuitive evidence research before the jury and drawing on it in an educative way.

The risk presented by counter-intuitive evidence

52. To understand the distinction between diagnostic and educative use of counter-intuitive evidence it is useful to discuss the risk presented by counter-intuitive evidence.

⁷⁰ See too examples in E McDonald *Prosecuting intimate partner rape: The impact of misconceptions on complainant experience and trial process* (online ed, Canterbury University Press, Canterbury, 2023): **Crown bundle Tab 10**.

⁷¹ See E McDonald *Rape myths as barriers to fair trial process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (online ed, Canterbury University Press, Canterbury, 2020) at 390: **Crown bundle Tab 11**.

⁷² *Rape myths*, above n 71, at 390.

⁷³ Defence closing address, T’s CA casebook at 87 and 89.

⁷⁴ *Cameron v R*, above n 50, (**Crown bundle at Tab 8**), citing *Attorney-General’s Reference (No 3 of 1999)* [2001] 2 AC 91 (HL) at 118.

53. The risk centres on improper reasoning. A description of such a reasoning process was given in *M(CA23/2009) v R*:⁷⁵
- 53.1 delayed reporting (for example) is common where children have been sexually abused;
- 53.2 this is a case where there was delayed reporting by a child alleging sexual abuse;
- 53.3 given that there was delayed reporting, the child must have been sexually abused.
54. This is a logical fallacy. That there was a delayed report does not mean that the allegation is true. And counter-intuitive evidence tells us that delay does not mean the allegation is necessarily false either.
55. The risk presented by counter-intuitive evidence is shared with credibility-bolstering or “oath helping” evidence—expert or other opinion evidence as to the credibility of a witness. Although there is no absolute prohibition on such evidence⁷⁶ it is not usually thought to be substantially helpful.⁷⁷ This is because of the logical fallacy discussed above. But also because:
- 55.1 The jury may place too much weight on the evidence of experts and be “overwhelmed” on matters of credibility—a traditional reserve of the fact finder;⁷⁸
- 55.2 In many cases the credibility of a witness will be closely bound up with the ultimate issue in the case. The substantial helpfulness test is brought into sharp focus where expert evidence bears on the ultimate issue.⁷⁹

⁷⁵ *M(CA23/2009) v R*, above n 43, **T’s bundle at 172**.

⁷⁶ See for instance this Court’s decision in *Taitini v R* [2014] NZSC 122, [2015] 1 NZLR 409 at [63].

⁷⁷ *R v Evans* [2010] NZCA 340, (2010) 25 CRNZ 155 at [26]; *Tomo v R* [2015] NZCA 392, [2015] NZAR 1616 at [10].

⁷⁸ John Sopinka, Sidney N Lederman and Alan W Bryant *The Law of Evidence in Canada* (2nd ed, Butterworths, Toronto, 1999) cited in *RA v R*, above n 43, at [25] (**Crown bundle Tab 3**).

⁷⁹ *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [27]; *Kuru v R* [2024] NZSC 184, [2024] 1 NZLR 985 at [53].

56. In all cases where the prosecutor’s address is brought into question, the counter-intuitive evidence will have already been admitted and reflect on the ultimate issue. But these risks still illuminate the boundaries for counsel. There will be an error if the prosecutor’s jury address encourages improper reasoning or deploys the expertise behind the counter-intuitive evidence to bolster the complainant’s credibility on core trial issues.

Permissible reference by a prosecutor to counter-intuitive evidence

57. As a starting point, it will be permissible for a prosecutor to refer to counter-intuitive evidence where that reference is corrective and/or educative and does not invite impermissible reasoning.
58. Adapting this Court’s commentary in *DH* about the *admissibility* of counter-intuitive evidence then, a prosecutor’s address will be unobjectionable if it: reinforces the purpose of the counter-intuitive evidence—correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse and allowing the jury to consider the complainant’s credibility on a neutral basis.⁸⁰
59. T alleges the Court of Appeal has been inconsistent in its decisions as to how a prosecutor may refer to counter-intuitive evidence.⁸¹
60. But there is no real inconsistency.⁸² Scrutiny of the decisions shows that each case turns on its facts. Where the Court of Appeal has held that the prosecutor impermissibly linked the counter-intuitive evidence to the complainant’s evidence, that is because the Crown had in fact invited the jury to use the evidence diagnostically, to bolster the complainant’s

⁸⁰ *DH*, above n 1, at [30(a)] (T’s bundle at 3).

⁸¹ T’s submissions at [67].

⁸² C.f. the Court of Appeal’s obiter comment in *Wanden v R* [2024] NZCA 425 at [20]–[24] (T’s bundle at 382) that it was “possible there are two interpretations of” how a prosecutor may refer to the counter-intuitive evidence, albeit determining that it was not necessary to decide the point because the prosecutor misused the evidence regardless. Shortly later, in *G(CA505/2024) v R* [2025] NZCA 520 (Crown bundle at Tab 20) the Court of Appeal expressed the view at footnote 22 that it “favoured” the second *Wanden* interpretation, being that the prosecutor may link the counter-intuitive evidence with the complainant’s evidence to rebut misconceptions that arise, or appear to arise, on the evidence, thus permitting linkage provided the evidence is used as a shield rather than a sword.

credibility, not because the prosecutor had simply referred to it in closing.⁸³

60.1 *Jane v R*—among other impermissible linking invitations, the prosecutor submitted: “The experts tell you, ... that it is often the case that the disclosure is gradual over a period of time and that’s exactly what happened here”.⁸⁴

60.2 *Bruce v R*—most of the prosecutor’s closing addressed the expert’s viva voce evidence at length and described its similarities with the complainants’ evidence as “uncanny” twice.⁸⁵

60.3 *Wanden v R*—the prosecutor made “extensive reference” to the expert’s evidence in closing and suggested several times that it supported the complainant’s evidence. At one point, the prosecutor invited the jury to give the expert’s evidence “considerable weight because it will help you make assessments of the complainants and how they acted or how they didn’t act”.⁸⁶ And later, the prosecutor immediately followed reference to the counter-intuitive evidence with “and we have that here”.⁸⁷

60.4 *Tollemache v R*—the prosecutor repeatedly linked the counter-intuitive evidence to the complainant’s evidence, bolstering their credibility. For example, “in cases of child sexual abuse the offender is often well known and familiar to the victim. We see here it’s [a family relationship]” and “... it may be thought some people would not take the risk of sexually abusing children if

⁸³ See also *Banks v R* [2018] NZCA 120 (**Crown bundle at Tab 12**) where the Court found the prosecutor linked the counter-intuitive evidence to the complainant’s evidence impermissibly when she quoted the counter-intuitive expert’s evidence and said, “does that quote not fit perfectly with the defendant’s behaviour as described by [the complainant]?”. But that did not amount to an error giving rise to a real risk that the trial outcome was affected because the prosecutor’s submission was limited and because the Judge directed on it: at [18]–[23]

⁸⁴ *Jane v R* [2019] NZCA 384 at [26]–[27], **T’s bundle at 260**.

⁸⁵ *Bruce*, above n 57, at [59], **T’s bundle at 359**.

⁸⁶ *Wanden*, above n 82, at [26], **T’s bundle at 382**.

⁸⁷ At [27].

others were nearby. However, it's not uncommon for people to sexually offend against children when they are nearby, Such is the allegation here.”⁸⁸

61. By contrast, in the cases where the Court of Appeal has held that the prosecutor's reference to counter-intuitive evidence was permissible, the prosecutor did not use the evidence to bolster the complainant's credibility:

61.1 *Nancarrow v R*—after canvassing the reasons the complainants had given for delaying their complaint, the prosecutor said “So related to those reasons why each of them have explained why they didn't say anything back at the time, what I suggest are quite obvious grooming steps taken by the defendant in respect of the three boys and you have some information about this in that section 9 statement that was read to you about the counter-intuitive evidence”.⁸⁹

61.2 *Heke v R*—in her summary of the expert counter-intuitive evidence, the prosecutor periodically referred to the reason and purpose of the expert's evidence, being to disabuse the jury of misconceptions. She later said:⁹⁰

[27] Research tells us that in fact non-reporting or delayed reporting of the abuse is in fact the consistent finding, and then this issue of how something like this can become routine. We might struggle with that, but again Dr Ahmad's evidence can help us understand.

⁸⁸ *Tollemache v R* [2025] NZCA 256 at [54]–[55], **T's bundle at 442**.

⁸⁹ *Nancarrow v R* [2020] NZCA 636 at [49] (**T's bundle at 274**), leave declined in *Nancarrow v R* [2021] NZSC 21 (**Crown bundle at 14**). The prosecutor also noted where the complainants' evidence diverged from the counter-intuitive evidence, namely in terms of ending contact: at [50]. The Court accepted that the prosecutor had “certainly linked the counter-intuitive evidence to the circumstances of the case” but that that was not “using the evidence in ‘a diagnostic or predictive way’” at [51]. The Judge's direction was deficient in *DH* terms, but that was saved by the prosecution opening, the introductory paragraphs of the s 9 statement, and the defence closing: at [57].

⁹⁰ *Heke v R* [2021] NZCA 34 at [26]–[27], **T's bundle at Tab 315**. For a similar point made in reference to how the complainant's relationship with the defendant seemed fine, see [28]. The Judge's direction was not regarded as deficient in *DH* terms: at [53].

62. The above cases reinforce the point the Court of Appeal made in T’s appeal: “A prosecutor can refer to counter-intuitive evidence in its closing address without using it diagnostically.”⁹¹ If the prosecutor does not by their address encourage illogical reasoning and does not draw on the expertise behind the counter-intuitive evidence to bolster the complainant’s credibility, then there is nothing objectionable.
63. The *M (CA23/2009) v R* decision, approved by this Court in *DH (SC9/2014)*,⁹² cautions prosecutors against *linking* counter-intuitive evidence to the circumstances of the complainant.⁹³ But that is because it “*may create a risk*” of diagnostic/predictive use of the evidence by the jury.⁹⁴ Linking is not necessarily diagnosing. That authority does not stand, as T suggests, for the proposition that any prosecutorial reference in closing inevitably diagnoses abuse.⁹⁵ Indeed, in *M (CA23/2009)*, “prosecuting counsel made considerable use of the expert evidence in her closing address”, which made it “arguable that the jury might have seen the expert evidence as involving comment on this particular case”.⁹⁶ Nevertheless, and notwithstanding that the Judge did not clarify the scope of the expert evidence nor emphasise that it said nothing about the complainant’s credibility, there was no risk of a miscarriage there.⁹⁷

⁹¹ T’s CA judgment at [24], T’s SC Casebook at 9.

⁹² *DH*, above n 1, at [30], **T’s bundle at 3**.

⁹³ *M(CA23/2009) v R*, above n 43, at [49], **T’s bundle at 172**. See also *Jane v R*, above n 84, at [38]–[39], **T’s bundle at 260**, where the Court said the prosecutor should not make any link between the counter-intuitive evidence and the circumstances of the complainant. But that comment should be confined to the factual circumstances of that case where the Crown invited the jury to use the evidence in a diagnostic or predictive way. See also *Banks*, above n 83, at [18].

⁹⁴ *M(CA23/2009) v R*, above n 43, at [49] (emphasis added), **T’s bundle at 172**. The Court explains the meaning of “diagnostic or predictive use” at [32](e):

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).

⁹⁵ T’s submissions at [65]–[66].

⁹⁶ *M(CA23/2009) v R*, above n 43, at [44], **T’s bundle at 172**. For example, the Crown addressed the complainant’s evidence that she loved her father, referred to the expert evidence “ringing in your ears” and that the expert evidence “really does cement what is a somewhat unusual response”, as well as linking back to the evidence of the complainant: at [39]–[40].

⁹⁷ At [44]–[45].

The prosecutor's closing in this case was proper: it educated, not diagnosed

64. In closing, the prosecutor in T's trial referenced the counter-intuitive material only twice.

*The first reference*⁹⁸

65. First, when addressing the preliminary question, "*Could* this have happened?", the prosecutor noted that intrafamilial abuse does occur,⁹⁹ and that reporting may be delayed,¹⁰⁰ as the counter-intuitive evidence established. He said:¹⁰¹

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 [H] 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 counter-intuitive evidence correcting some of the misconceptions that we might have had on Sunday night to take into account.

Could it have happened? Yes. But that is not enough, it is not enough for the Crown to say it's possible, the Crown must make you sure... So what would you need to be sure?

66. This first reference to the s 9 agreement was plainly educative. The prosecutor was not dealing with the question: did the offending in this

⁹⁸ T's submissions suggest there were three references. Technically that is correct—the counter-intuitive evidence was mentioned three times. But the first two references came in close proximity and under the same discussion about *could* this have happened. The respondent therefore deals with them together.

⁹⁹ Crown closing, T's CA casebook at 71–72.

¹⁰⁰ Crown closing, T's CA casebook at 72.

¹⁰¹ Crown closing, T's CA casebook at 71–72.

particular case happen. Instead, he dealt with the logical prior question: whether this category of offending “could” have occurred at all.

67. As is well-established jurors may bring misconceptions to court with them (such as what it means when a family member is the perpetrator of sexual abuse, or what it means when there is a delay in complaint).¹⁰² It is proper to correct those misconceptions. *DH* explicitly allows this use. That is all that happened here.
68. The Court of Appeal was right to describe this first reference as returning the complainant’s credibility to a “neutral balance.” That is because all the prosecutor did was neutralise lay misconceptions. He returned the complainant’s credibility to a net zero. He did not elevate it by suggesting that H’s account somehow ‘matched’ the way victims commonly behave and H was therefore more credible. That is what *DH* prohibits.¹⁰³

The second reference

69. After discussing H’s demeanour when giving evidence (and warning about its limits),¹⁰⁴ the prosecutor noted the agreed material informed the jury that children’s accounts may emerge incrementally, with pauses and hesitancy, particularly when disclosing intimate abuse to strangers. He did not suggest the counter-intuitive research improved this complainant’s truthfulness.¹⁰⁵ He said:¹⁰⁶

One thing you can say about [H’s] demeanour though, is that you had an opportunity to see the manner in which he gave his complaints to the police on his DVD. He has [on the defence theory] come forward to tell a lie, and when you first saw him – actually in both of those videos – it’s a matter for you to determine whether you thought he was, in wanting to get this lie across, forthcoming, fulsome, trying to get the story that he really wanted to tell out, or whether he looked like he just didn’t want to be there, was embarrassed talking about this, found it really difficult to talk about, and whether that makes perfect sense if you are [redacted] talking about being sexually

¹⁰² *DH*, above n 1, at [43] and [53], **T’s bundle at 3**.

¹⁰³ *DH*, above n 1, at [30].

¹⁰⁴ Crown closing, T’s CA casebook, at 77.

¹⁰⁵ Crown closing, T’s CA casebook, at 78–79.

¹⁰⁶ Crown closing, T’s CA casebook, at 78–79.

abused by your father, that the circumstances, you know, long pauses, people not answering our questions and long pauses day-to-day, we might find unusual, and we might sit there and think: well why can't they answer that question? You might have thought under these circumstances there might be pretty obvious reasons for [redacted] to have apparent difficulty in talking to a person, to a stranger, a police officer, about these things, and that makes sense doesn't it?

Talking about sexual matters is hard, even as a grown-up. ... It makes [sic] sense doesn't it, when you think about it that way, that the way in which H came across in those videos might be a bit different to a person just providing an explanation of something ordinarily [sic] that happened. He is [redacted], 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 you know from those agreed facts that children's complaints are often delayed and they can be incremental, they come out bit 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.

(emphasis added)

70. This second reference was also unobjectionable. The prosecutor had warned the jury about the limitations of demeanour assessment. He then explained, as *context*, why a child discussing sexual abuse with police may present hesitantly. The point was not that this complainant fit a research pattern and was more credible because of it. Nor was it that there were alignments between this complainant and the research. Instead, it was that jurors should avoid drawing immediate adverse inferences from this complainant's delay and incremental reporting. They should not be surprised by hesitancy. The defence, after all, did suggest negative inferences be drawn about H's credibility from his incremental and hesitant reporting.¹⁰⁷ What the prosecutor said was education, not diagnosis. It aligned with *DH*.¹⁰⁸

¹⁰⁷ Defence closing address, T's CA casebook, at 86–87, 89.

¹⁰⁸ What happened here can be contrasted with *Jane v R*, above n 84, at [40], **T's bundle at 260**; *Bruce*, above n 57, **T's bundle at 359**, and *DH*, above n 1, **T's bundle at 3**. Those cases all involved direct diagnostic linkages where the prosecutor said the complainant behaved exactly as the research predicted and urged the jury to rely on that alignment. See the discussion at [60] above.

71. For the sake of completeness, if the Court was to disagree and consider that the prosecutor’s comments transgressed permitted boundaries, the Crown maintains that none of the prosecutor’s comments raise a real risk that the outcome of the trial was affected.¹⁰⁹

Directions on counter-intuitive evidence

72. When this Court summarised the factors relevant to admitting counter-intuitive evidence in *DH*, it required judges to direct juries about the counter-intuitive evidence whenever it is admitted. The relevant direction must tell the jury:¹¹⁰

72.1 The purpose of the evidence;

72.2 That the evidence says nothing about the complainant’s credibility;

72.3 Not to misuse the evidence. That is, not to use it to diagnose abuse by “...reasoning that the fact that the complainant behaved in one of the ways described by the expert witness ... is itself indicative of the complainant’s credibility or that sexual abuse occurred”.¹¹¹

73. The failure to direct in this way can be an error capable of affecting the result.¹¹² But whether a miscarriage of justice has in fact occurred will depend on the circumstances of the case. That was the approach the Court of Appeal took before *DH*, this Court took in *DH*, and the Court of Appeal has taken in subsequent cases.

74. In the pre-*DH* decision of *M(CA23/09) v R* for example, the Judge did not direct the jury about (i) the purpose of the counter-intuitive evidence; (ii) that it said nothing about the complainant’s credibility; or (iii) its scope. Yet the Court found there was no risk of a miscarriage of justice because in

¹⁰⁹ See for example *Banks*, above n 83, **Crown bundle at 12** where the same outcome arose.

¹¹⁰ *DH*, above n 1, at [30(e)], **T’s bundle at 1**

¹¹¹ *DH*, above n 1, at [30(e)], **T’s bundle at 1**.

¹¹² *Wanden*, above n 82, at [31], **T’s bundle at 382**.

the circumstances of that case, the jury “can have been in no doubt that [the expert’s] evidence was general in nature and did not go to the credibility of this particular complainant”.¹¹³

75. In *DH* the trial Judge did not expressly caution the jury against reasoning that, because the complainant behaved in a way consistent with other victims of sexual abuse, the offending must have occurred (the caution contemplated at [72.3] above). This Court observed that while such a direction would have been beneficial, omission of that formula of words did not result in a miscarriage.¹¹⁴ That is because nothing that any of the parties had done or said in that case suggested to the jury the possibility of reasoning in that way.¹¹⁵ Therefore, the risks to which such a direction would have been aimed did not arise on the facts.¹¹⁶ That was so even though the evidence was lengthy and given viva voce by the expert.
76. Since *DH*, the Court of Appeal has considered several cases where directions in summings-up have failed to be in *DH* terms or were not given at all.¹¹⁷ A survey of those cases demonstrates what the Court of Appeal in

¹¹³ *M(CA23/2009) v R*, above n 43, at [44]–[48], **T’s bundle at 172**.

¹¹⁴ *DH*, above n 1, at [117]. **T’s bundle at 3**.

¹¹⁵ At [117].

¹¹⁶ In *BQ v R* [2024] HCA 29, (2024) 98 ALJR 1008, **Crown bundle at Tab 13**, the High Court of Australia recently considered the requirement for specific judicial direction following expert counter-intuitive evidence at trial. It rejected that any particular formulation of words was required and endorsed the notion that whether a particular direction is adequate is fact specific, depending on whether risks of illegitimate reasoning need to be corrected (at [51] and [56]).

¹¹⁷ Inadequate direction *and* prosecutorial misuse led to a miscarriage of justice in *Jane v R*, above n 84, **T’s bundle at 260**; *Bruce*, above n 57, **T’s bundle at 359**; *Wanden*, above n 82, **T’s bundle at 382**; and *Tollemache*, above n 88, **T’s bundle at 442**. For cases in which there was no prosecutorial misuse and the Judge’s inadequate direction did not result in a miscarriage of justice in the circumstances: see *Nancarrow*, above n 88, at [51]–[57], **T’s bundle at 274**; *Doell v R* [2025] NZCA 312 at [12]–[19], **Crown bundle Tab 15**; and *Moore v R* [2025] NZCA 132 at [20]–[27], **Crown bundle Tab 11**. For cases where there was no prosecutorial misuse and Judge’s direction was adequate: see *Heke*, above n 90, at [27] and [53], **T’s bundle at 315**; *Rankin v R* [2019] NZCA 443, **Crown bundle Tab 17**; *Drewet v R* [2023] NZCA 192; *Suli v R* [2025] NZCA 123 at [27]–[34], **Crown bundle Tab 18**; *Z(CA49/2023) v R* [2025] NZCA 377, **Crown bundle Tab 19**; *G(CA505/2024) v R*, above n 82, **Crown bundle Tab 20**; and *Wright v R* [2025] NZCA 502, **Crown bundle Tab 21**. A number of cases in which a miscarriage was made out where there was no prosecutorial misuse also turn on the facts: *H(CA337/2021) v R* [2021] NZCA 547 at [14], **T’s bundle at 341** (inadequate direction not saved on the facts, not set out in s 9 statement, only set out in prosecutor’s opening but that was nine days before Judge’s summing up); *Goundar v R* [2021] NZCA 544 at [21]–[33], **Crown bundle Tab 22** (“counter-intuitive information” provided by way of Judge’s direction concerning how otherwise heterosexual male prisoners engage in homosexual acts when it should have been provided by an expert to allow for cross-examination, as well as no counter-intuitive direction nor propensity direction). *Radich v R* [2025] NZCA 210 at [48]–[52], **T’s bundle at 425** (inadequate direction, but crucially, the Judge mischaracterised the expert evidence and its use in trial); *Chapman v R* [2024] NZCA 569 at [24]–[48], **T’s bundle at 411** (inadequate direction and the Judge “linked the misconception

Wanden v R observed: whether counter-intuitive “directions are sufficient in any particular case will, of course, depend on the circumstances of the case.”¹¹⁸

77. The question must always be: given the judge’s failure to direct in *DH* terms, what impact has the error had in *this* trial. That must necessarily be answered by reviewing everything else that happened in the trial and querying whether there remains any risk of the jury misusing the counter-intuitive evidence in the way contemplated at [52]—[55] above.
78. Mr Mahoney suggests that a direction to juries about not misusing the evidence is “seldom given”.¹¹⁹ But there is no evidence of that. It is not an answer to point to a collection Court of Appeal decisions where that direction has not been given.¹²⁰ Those cases go before the Court of Appeal for a reason. They do not represent what happens weekly in jury trial across New Zealand.¹²¹
79. Moreover, assuming trial judges rely on the Jury Trials Bench Book for suggested directions, that publication recommends juries are explicitly told they “... cannot use [the evidence] to strengthen [the complainant’s] evidence”.¹²² Without evidence to the contrary, it has to be assumed jury trial judges are, on the whole, following this Court’s instruction in *DH*.

to the complainant in a diagnostic way” impermissibly bolstering the complainant credibility); and *McCaskill v R* [2025] NZCA 327 at [34]–[60], **T’s bundle at 461** (inadequate direction and the Judge impermissibly elicited expert counter-intuitive evidence from a police officer who also linked that opinion to the complainant “[o]n this occasion, she caved before charges were laid”).

¹¹⁸ *Wanden*, above n 82, at [32], **T’s bundle at 382**.

¹¹⁹ Mr Mahoney’s submissions at [25].

¹²⁰ For example: *Doell*, above n 117, **Crown bundle Tab 15**; *H (CA337/2021)*, above n 117, **T’s bundle at 341**; *Heke*, above n 90, at [27] and [53], **T’s bundle at 315**.

¹²¹ Counsel has not been able to find statistics on how many sexual violence trials are prosecuted in New Zealand per year. But Ministry of Justice data suggests there were 1,154 people with “finalised charges” for sexual offending in the 2024-2025 year. Numbers are also available for the previous 10 years. See: <[MOJ data on number of finalised charges.xlsx](#)>

¹²² Te Kura Kaiwhakawā | Institute of Judicial Studies “Chapter 7A: Evidence: Directions in sexual cases” (August 2023), Courts of New Zealand Criminal Jury Trials Bench Book, at [7.7.3]. See: <[Specimen benchbook direction](#)>

The imperfect direction in T’s trial did not result in a miscarriage of justice

80. The Judge in T’s trial said:¹²³

[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.

81. The Crown acknowledges the Judge did not clearly instruct the jury on the purpose and use of counter-intuitive evidence in the way *DH* mandates. The Court of Appeal found this was an error. But having reviewed the circumstances of this case, the Court found no miscarriage of justice followed.¹²⁴
82. That was the correct outcome. In this trial, several factors meant there was no risk the jury used the evidence to illegitimately bolster H’s credibility or to diagnose abuse.
83. First, when the prosecutor opened—three days before the Judge’s summing up—he informed the jury that it would hear agreed “counter-intuitive or educative evidence”, emphasising that this was general evidence, not directed to “something specific in this case”.¹²⁵ He explained that the purpose of the evidence was to address any misconceptions the jury might hold about sexual offending against children and responses to it.¹²⁶ The jury was therefore oriented from the outset as to the nature and proper use of the counter-intuitive evidence, and how it

¹²³ T’s CA casebook at 108.

¹²⁴ T’s CA judgment at [27]–[28].

¹²⁵ Crown opening, T’s CA casebook at 59.

¹²⁶ Crown opening, T’s CA casebook at 59.

should inform (but not determine) their assessment of the issues in dispute.

84. Second, the evidence was adduced in the s 9 agreement (read to the jury before H's evidence), not by an expert witness giving viva voce evidence in court. That in and of itself will have lessened the impact of the evidence on the jury. Especially given the significance with which juries are taken to treat expert evidence (whether viva voce or read out formal written statements).¹²⁷
85. Third, the s 9 agreement itself carried the clearest possible caution: that the educative evidence did *not* prove or disprove the allegations in this case.¹²⁸ Thereafter the counter-intuitive evidence was expressed in generic, cautious terms. The agreed facts referred to "some victims" and behaviour they "may" exhibit. These factors will have further removed the risk that the jury would have seen the evidence as diagnostic of sexual abuse in this case.
86. Fourth, the Judge's directions in summing up referenced the agreed facts document which made clear the purpose of the counter-intuitive evidence and limits on its proper use. In doing so, the Judge ensured that the cautionary guidance contained in that document was brought squarely back to the forefront of the jury's attention during the summing up. Moreover, as is standard practice, the jury had the agreed facts document with it during deliberations. The written warning was therefore before the jury in clear and accessible form at the point they were assessing the evidence and reaching their verdicts.
87. Fifth, the counter-intuitive evidence assumed minimal significance in this trial. Its introduction was understated, it did not feature in the Judge's opening remarks, and the prosecutor referred to it only briefly in opening

¹²⁷ See *Ellis*, above n 39, at [116(a)], **T's bundle at 52**. [116(a)]. Compare this case with *DH, Bruce, and Wanden* where the evidence was adduced by experts giving viva voce evidence in court.

¹²⁸ It said "this evidence does not prove or disprove that the complainant was sexually abused by the defendant". See s 9 agreement at [9], CA casebook at 45.

and closing. Defence counsel did not rely on it at all. This case is therefore readily distinguishable from cases like *Jane v R*, where the prosecutor made impermissible and extensive use of the evidence in closing, and the trial Judge compounded the error by repeating the Crown’s mistaken submission in the summing up.¹²⁹ That did not occur here.

88. It is similarly distinguishable from *Wanden v R*, where the prosecutor again relied heavily on the evidence in closing, urged the jury to give it “considerable weight”, and drew an explicit link to the facts with the remark “and we have that here”. In that case, the Judge’s failure to give an adequate *DH* direction resulted in a miscarriage of justice. No such circumstances arose in the present trial.¹³⁰
89. Finally, the jury in this case returned a mixed verdict outcome. This is a powerful indicator of careful, discriminating reasoning rather than any wholesale acceptance of H’s account. In *Rankin v R*, the Court of Appeal agreed the mixed verdicts were a factor suggesting the counter-intuitive evidence did not have an undue influence on the jury.¹³¹

MR MAHONEY’S APPEAL

90. Mr Mahoney’s appeal in this Court raises the same issues presented in T’s appeal, as well as one additional ground.¹³² He argues that the prosecutor misused the counter-intuitive evidence admitted by agreement under s 9 of the Evidence Act (“**s 9 agreement**”), and that the Judge’s counter-intuitive evidence directions were inadequate. His additional ground alleges the prosecutor asked the complainant (“**C**”) leading and

¹²⁹ *Jane v R*, above n 84, at [40], **T’s bundle at 260**

¹³⁰ *Wanden*, above n 82, **T’s bundle at 382**.

¹³¹ *Rankin*, above n 117, at [36], **Crown bundle Tab 17**. Only *Bruce*, above n 57, **T’s bundle at 359**, is the other Court of Appeal case post-*DH* where a mixed verdict outcome was reached. It is obvious why the Court in *Bruce* rejected the argument that mixed verdicts were indicative of no impermissible reasoning. Beyond the counter-intuitive evidence, the prosecutor in that case failed to engage at all with the evidence or identify reasons why the Crown said the charges were proved beyond reasonable doubt. The Court said, therefore, the only point the prosecutor made to the jury, beyond the general, was an impermissible one: at [61] – [62].

¹³² Other grounds of appeal were pursued but dismissed in the Court of Appeal and were not pursued in Mr Mahoney’s application for leave to this Court.

unnecessarily repetitive questions during evidence-in-chief and this was unfair.

91. While he referenced the counter-intuitive evidence when cross-examining Mr Mahoney and in closing argument, the prosecutor did not use it to bolster C's credibility or to diagnose abuse in this case. In cross-examination, the prosecutor put the Crown's allegations of grooming and manipulation to the appellant by referring to definitions in the s 9 agreement, which he was entitled—and obliged—to do. In closing, the prosecutor referred briefly to the counter-intuitive evidence to dispel misconceptions the defence had repeatedly relied on during trial—such as why C did not flee, why she maintained contact with Mr Mahoney, and why she delayed reporting—and he repeatedly reminded the jury that the evidence was educative and not about the facts of this case.
92. The Judge's summing up covered everything that was necessary. It told the jury the counter-intuitive evidence was drawn from relevant literature and experience, was not about Mr Mahoney or C, and was admitted to ensure the jury was not misled by misconception.¹³³ All this would have reinforced what had already been made plain to the jury:¹³⁴ the evidence was not specific to this case, not about C or Mr Mahoney, and was neutral evidence only. Overall, there is no realistic risk that the jury illegitimately used the counter-intuitive evidence here. They were thoroughly warned about its purpose and proper use when the s 9 agreement was read out to them, by the prosecutor (twice) in closing, and by the Judge.

Suppression and registration

93. C has automatic name suppression under s 203 of the CPA. No other suppression orders are known to apply. The parties are unrelated and do not share a surname.

¹³³ Summing up at [42]–[43], Mr Mahoney's CA casebook at 131–132.

¹³⁴ From the s 9 agreement itself and the prosecutor's closing address.

94. Upon being sentenced to imprisonment, Mr Mahoney was automatically registered on the Child Sex Offender Register.¹³⁵

Trial record and background

The offending

95. In 2000, C was 15 years old and in high school. She suffered depression, was disconnected from her family, and turned to online chat rooms for help.¹³⁶ She began communicating with Mr Mahoney, who introduced himself as Brian.¹³⁷ Because of what he said and a false photograph he sent, she thought he was about 18–20 years old; in fact, he was in his mid-to-late 30s, in a relationship, and operating a truck-driving business.¹³⁸
96. *First incident (at the reserve):* After gaining her trust online, Mr Mahoney arranged to meet C outside school. When C got into his car, she realised the young man she thought she was meeting was someone much older.¹³⁹ He provided alcohol and cannabis, drove to a nearby secluded reserve, and indecently assaulted her (touching her breasts under her bra, kissing her neck, and rubbed her groin over clothing) before returning her to school.¹⁴⁰
97. *Second incident (at [redacted]):* About a week later, Mr Mahoney again met C outside school, gave her alcohol and cannabis, drove to a secluded area and sexually assaulted her. He touched her breasts, kissed her, digitally penetrated her, and made her rub his penis over his underwear.¹⁴¹ He gave her a SIM card for further contact and returned her to school.
98. *Third incident (at the motel):* One to two weeks later, after giving her a prescription drug and alcohol, Mr Mahoney drove C from school to a motel where he sexually assaulted her by kissing her, touching her breasts,

¹³⁵ Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 7.

¹³⁶ Evidential video interview (EVI), Mr Mahoney's exhibits at 7. Mr Mahoney's Notes of evidence (NOE) at 25, lines 15 – 35.

¹³⁷ EVI, Mr Mahoney's exhibits at 7 and 79. She found out his last name was "Mahoney" after hearing him say it during conversation once they had met (at 80).

¹³⁸ EVI, Mr Mahoney's exhibits at 7, 15 and 82.

¹³⁹ EVI, Mr Mahoney's exhibits at 7.

¹⁴⁰ EVI, Mr Mahoney's exhibits at 7, 15–23.

¹⁴¹ EVI, Mr Mahoney's exhibits at 7, 25 – 28.

touching her genital area, making her touch herself, and raping her. He photographed C and video-recorded parts of the assaults. He told C he would give the videos and photographs to someone who would be pleased with them. Mr Mahoney then dropped her home where she became distraught, self-harmed, and told him she did not want to see him again.¹⁴²

99. *Fourth set of incidents (at the apartment):* Because of threats to use the images against her and his repeated presence outside her school, C agreed to meet Mr Mahoney again.¹⁴³ She left home and Mr Mahoney arranged for her to stay at an apartment to which he had access.¹⁴⁴ There he again raped her and forced her to perform oral sex on him.¹⁴⁵ Mr Mahoney left but returned days later with camera equipment. He recorded himself digitally penetrating C, raping her, and forcing her to perform oral sex on him.¹⁴⁶ Two days later, he raped her twice more, again recording it.¹⁴⁷ About a week after C left home, Police located her and returned her to her family.

Report to Police two decades later

100. C did not report the offending at the time. But in 2020, after seeing Mr Mahoney's online profile referencing camera use,¹⁴⁸ C reported the offending to Crime Stoppers out of fear that he would target other young women.¹⁴⁹

¹⁴² EVI, Mr Mahoney's exhibits at 8, 31 – 32, 35, 39 – 45.

¹⁴³ EVI, Mr Mahoney's exhibits at 8, 32 – 33.

¹⁴⁴ EVI, Mr Mahoney's exhibits at 9, 33. The apartment belonged to his partner at the time, and wife by the time of trial, who gave evidence at trial that she knew about the complainant going to stay at the apartment (Mr Mahoney's NOE at 247) but did not meet the complainant herself (Mr Mahoney's NOE at 248).

¹⁴⁵ EVI, Mr Mahoney's exhibits at 10, 55 – 56.

¹⁴⁶ EVI, Mr Mahoney's exhibits at 11, 65 – 66.

¹⁴⁷ EVI, Mr Mahoney's exhibits at 67 – 71.

¹⁴⁸ The online profile was produced in evidence, Mr Mahoney's exhibits at 142.

¹⁴⁹ EVI, Mr Mahoney's exhibits at 13. She wanted to do so anonymously as her aim was to protect other women; not to make a complaint about herself: Mr Mahoney's NOE at 31. She reported to Crimestoppers on 15 August 2020 (Mr Mahoney's NOE at 96).

The appellant at trial

101. Mr Mahoney gave no pre-trial interview but gave evidence at trial. He accepted meeting C who he said presented as an 18-year-old young woman. He said he assisted her because she was threatening self-harm and agreed he met with her in a public place only and agreed he had arranged for her to stay in his wife’s apartment. He denied the offending; he said no sexual activity happened, he did not give C alcohol or drugs, and he did not record her.¹⁵⁰

The counter-intuitive evidence

102. Counter-intuitive evidence was introduced at trial by consent in the s 9 agreement.¹⁵¹ It was read to the jury towards the end of the Crown case, immediately before the officer-in-charge gave evidence.¹⁵²

103. The s 9 agreement explained that counter-intuitive evidence is educative only, admitted to correct misconceptions the jury may hold about the likely behaviour of sexual abuse victims. It twice emphasised—once at the beginning and once at the end—that it did not prove or disprove whether sexual offending occurred in this case.¹⁵³ In other words, the relevant evidence was sandwiched between these clear instructions.

104. The prosecutor did not refer to counter-intuitive evidence during his opening address. But he said when cross-examining the appellant that the evidence was “obviously general”.¹⁵⁴ And in closing, he gave the jury more than one explicit reminder about the generality of the evidence: first, he said, “this evidence is about the behaviour generally of children or adolescents who’ve been sexually abused... it doesn’t tell us anything about this case in particular”. And after discussing the counter-intuitive

¹⁵⁰ The defence made this clear from the first day of trial: Mr Mahoney’s opening address, CA casebook at 58. See also Mr Mahoney’s NOE at 197.

¹⁵¹ SC casebook at xx.

¹⁵² Mr Mahoney’s NOE at 156.

¹⁵³ At the beginning ([1.1] – [1.3]) and at the end ([1.25]).

¹⁵⁴ Mr Mahoney’s NOE at 236, line 18.

evidence, he said “this document...is not able to speak to this case but it is an educative document...”.¹⁵⁵

105. In summing-up, the Judge made clear the evidence was drawn from research and experience, was not about C or Mr Mahoney, and served only to prevent the jury being misled by common misconceptions about how complainants may behave.¹⁵⁶ The Judge did not explicitly tell the jury how the evidence must not be used.

First appeal

106. The Court of Appeal held the prosecutor did not misuse counter-intuitive evidence in closing. Any reference was contextual, aimed at rebutting defence-advanced misconceptions, and bookended by express generality reminders.¹⁵⁷ And while the prosecutor’s limited use of the s 9 agreement to provide definitions when cross-examining Mr Mahoney was “unwise”, it was not erroneous and did not produce a miscarriage of justice.
107. As to directions, the Judge’s guidance was adequate in the context of this case. No miscarriage of justice arose from the failure to tell the jury how not to use the evidence.
108. On the prosecutor’s supplementary questioning during evidence-in-chief and re-examination of the complainant, while some repetition was undesirable, it was not impermissible and caused no miscarriage.

The prosecutor referred to the evidence, but not impermissibly

109. Mr Mahoney says the prosecutor linked the agreed counter-intuitive evidence to the facts diagnostically in cross-examination and closing. The record shows otherwise: the prosecutor reminded the jury of sections of the evidence vulnerable to erroneous misconceptions and what the relevant research said about those.

¹⁵⁵ Crown closing, Mr Mahoney’s CA casebook at 68 – 70.

¹⁵⁶ Summing up at [42] and [43], Mr Mahoney’s CA casebook at 131 – 132.

¹⁵⁷ *Mahoney v R* [2025] NZCA 490 (**Mr Mahoney’s CA judgment**) at [39] – [45], SC casebook at xx.

There was no misuse in cross-examination

110. During cross-examination, the prosecutor referred the appellant to two paragraphs of the counter-intuitive evidence in the s 9 agreement.
111. First, he pointed Mr Mahoney to the definition of “grooming” at paragraph [1.12] of the s 9 agreement and suggested that the appellant satisfied that definition.¹⁵⁸ The mere fact that the definition was drawn from the s 9 agreement does not mean the prosecutor impermissibly linked the counter-intuitive evidence to the facts. He did not suggest C was more credible because her behaviour was “counter-intuitive”, nor did he use the material to diagnose abuse. That is what *DH* prohibits. Indeed, the prosecutor made no reference at all to counter-intuitive behaviour in his questions. He simply put the Crown case—that Mr Mahoney groomed C—which he was entitled, and obliged, to do. That is not drawing an impermissible link.
112. The same applies to the prosecutor’s later questioning, referring to paragraph [1.15] of the s 9 agreement, which stated that offenders may manipulate a child through bribery, incentives, threats or intimidation. The prosecutor put to Mr Mahoney that he had engaged in such conduct.¹⁵⁹ Mr Mahoney denied it. This was not an express or implied attempt to diagnose abuse, nor was it an effort to reason that C was more credible. The questioning did not concern C’s behaviour; it concerned acts the Crown alleged the appellant committed and which the prosecutor was required to put to him.

There was no misuse in closing

113. In closing, the prosecutor suggested the jury refer to the counter-intuitive evidence during deliberations. This reference appeared within a thorough discussion—spanning six pages—of matters central to both the Crown and

¹⁵⁸ Mr Mahoney’s NOE at 235, line 28 to 236, line 17.

¹⁵⁹ Mr Mahoney’s NOE at 236, line 18 – 28. Before asking these questions, the prosecutor reminded the jury that the counter-intuitive evidence was “obviously general” at 236, line 18.

defence cases.¹⁶⁰ After noting the counter-intuitive evidence, the prosecutor then spent seven pages advancing four reasons to accept C's evidence,¹⁶¹ explained why the jury should reject Mr Mahoney's account, and identified the evidence relied on to prove the charges.¹⁶² He did not return to the counter-intuitive evidence.

114. The context of the prosecutor's remarks is critical. When the closing address—and the evidence as a whole—is read fairly, it is clear the prosecutor did not invite the jury to use the counter-intuitive evidence impermissibly, nor could his comments have led the jury to bolster the complainant's credibility on that basis. His submissions were directed at dispelling potential misconceptions, particularly because the defence had repeatedly invoked such misconceptions to its advantage during the trial.
115. The entirety of what the prosecutor said about the counter-intuitive evidence in closing is set out in full below:¹⁶³

...The Crown says that perhaps **one document that could assist you** as you go out and start to deliberate would be to look through the agreed facts document and **to make sure that you're not carrying or holding potentially assumptions about what someone should or shouldn't have done, and we know that this evidence is about the behaviour generally of children or adolescents who've been sexually abused, the dynamics of that.**

It doesn't tell us anything about this case in particular, only talks to us as an informative, educative document, but we know from that, 1.5 for instance, that more often than not, adolescents do not tell anyone about sexual abuse during childhood. We know that reviews of literature indicate that only one third of adults who were victims of

¹⁶⁰ Topics included the age C objectively appeared to be at the time she met the appellant (important because Mr Mahoney claimed he thought she was 18 years old but the Crown said that was unlikely given how she appeared in a photograph of her when she was around 14 and which was produced at trial – see COA at 61 - 63); the emotional and vulnerable state C was in at the time she met Mr Mahoney and the reasons she did not turn to her own parents for help, instead turning to Mr Mahoney, a stranger to her (see COA at 63 – 65); the reasons she did not tell her parents about the offending (see COA at 65); an explanation of why, after 20 years, she finally felt able to come forward to report the offending (COA 65 – 66).

¹⁶¹ Crown closing, Mr Mahoney's CA casebook at 70 – 77: the first reason is she was a credible and reliable witness because of the level of detail and plausible account she provided and because she made concessions. The second reason is she was consistent on key details throughout. The third reason is she had a believable reason for her delay in complaint and why she chose now to come forward. The fourth reason is she had no reason to lie.

¹⁶² Crown closing, Mr Mahoney's CA casebook at 77 – 80; and 80 – 88.

¹⁶³ Crown closing, Mr Mahoney's CA casebook, at 68 – 70.

sexual abuse as adolescents and children ever report the sexual abuse to anyone during childhood, and for those who do, many delay reporting.

7.1, we know that despite being presented with the opportunity to report sexual abuse (inaudible 10:41:20) as a child, adolescent, may be reluctant to tell someone about the offending, may not report it.

You might say: "Well, police show up to the [redacted] apartments. Why didn't you tell them straight away?" and [redacted] talked to us in her evidence about how at that particular point in time she didn't feel like she could, for the reasons that she explained.

1.12 talks about grooming, which the Crown says the definition, as I spoke to Mr Mahoney about yesterday, that fits with what it is that took place here.

1.13, many sexual offenders identify vulnerable children and use that vulnerability to initiate a friendship as an avenue to eventually sexually abuse the child or adolescent, often with increased physical contact over time.

The general facts about sexual abuse; the Crown says that sadly, it has taken place here, again, a matter for you about what you decide.

1.13, an offender may employ a range of controlling or manipulative strategies to gain their compliance and maintain secrecy or avoid disclosure. They may try and manipulate or threaten someone by using bribery or incentive or threats, acts of intimidation, and obviously the Crown says, as I put to Mr Mahoney, that some of those were at play here. There's alcohol and drugs that are provided and there's an apartment that's provided, that there's threats of what's going to happen with these photos if there's not ongoing compliance.

A consistent finding in research studies is that a child or adolescent's expectations of the likely reaction from a person to whom they report the sexual abuse is central, and we know in this particular case, as talked to us, that she wasn't close with her parents. That means that for whatever reason, that relationship had broken down. For whatever reason she didn't feel like she could talk to them, and we know, for instance, in terms of the sexual offending that happened with [redacted] it seems like she doesn't tell her parents about that at all, and then the way in which it comes out is over the family dinner table when he's potentially, the wider family's making arrangements for him to come back and stay in the family home and study (inaudible 10:43:43). That's the trigger point for her, when she says: "No, I don't want him in the house." That's the context of the disclosure to the parents.

1.12, a child or adolescent may experience different ranges of emotions as a result of sexual abuse; shame, embarrassment, the fear they will not be believed, and we heard the evidence from [redacted] about saying: "Well, it was just my word versus his."

1.12 – sorry, 1.13, some people may think someone who is sexually abused would resist the offender, call out for help, try and avoid; that does not take into account the dynamics that surround child or

adolescent sexual abuse. It is not uncommon for a child or adolescent to continue having contact with someone who has sexually abused them. **This document, of course, is not able to speak to this case but it is an educative document, the Crown says, perhaps helpful to start with. A matter for you.**

(emphasis added)

116. The Crown accepts the prosecutor drew limited links to the counter-intuitive evidence.¹⁶⁴ But none were improper. He neither diagnosed abuse nor bolstered credibility. He deployed the evidence for its legitimate purpose: to counter the misconception themes the defence repeatedly relied on—through sustained cross-examination and through the appellant’s own evidence—to undermine C’s reliability. Those themes were:

116.1 *Failure to flee*: The defence repeatedly suggested that C’s decision to remain in Mr Mahoney’s vehicle upon discovering his deception (about his appearance and age) when she met him the first time was inconsistent with genuine fear or abuse.¹⁶⁵

116.2 *Continued contact*: A central defence theory was that C’s communications with Mr Mahoney after the first incident undermined her account. Counsel pressed this relentlessly—“*She keeps going back. Why does she keep going back?*”—arguing that continued contact was incompatible with abuse.¹⁶⁶ This theme ran through cross-examination of C¹⁶⁷ and the defence closing.¹⁶⁸

¹⁶⁴ The passages bolded are highlighted to point out the two times the Crown reminded the jury about the general nature of the evidence.

¹⁶⁵ Cross-examination of complainant, Mr Mahoney’s NOE at 55, line 18 to 56, line 5. Defence closing Mr Mahoney’s CA casebook at 95.

¹⁶⁶ Defence closing, Mr Mahoney’s CA casebook at 96, 103.

¹⁶⁷ Cross-examination of C, Mr Mahoney’s NOE at 56, lines 10 – 15: “... after that you... get out of the car and you go back home thinking I’m never gonna have anything to do with that guy again ‘cos he’s just touched me sexually ... so why do you start messaging him again?”; see also NOE at 56, 58, 60, 62 – 63, 65, 69, 73, 77, at 79: “You were more than happy to come back despite him taking more photographs of you and having sex with you”; at 81: “You were able to walk away...”.

¹⁶⁸ Defence closing, Mr Mahoney’s CA casebook at 95, 96, 97, 102; and at 103, at 106 and 108: “why on earth after two occasions that she’s met with him in the car would she get into that car again? ... Where ... is the evidence that shows she was compelled to do this?”. The Judge reminded the jury of this submission in summing up the defence case at [87], COA at 144.

116.3 *Delayed complaint*: The defence also claimed C’s failure to complain immediately, including to Police, rendered her account false.¹⁶⁹ For example, counsel asked why C did not complain to the Police officers who found her at the apartment: “it doesn’t occur to you that you can tell these police officers immediately that this man has been raping and filming you according to you?”¹⁷⁰ Counsel suggested her 20-year delay in complaint essentially proved fabrication,¹⁷¹ and the appellant himself advanced the same theory in his evidence.¹⁷² The defence returned to this repeatedly in closing, asserting C should have reported the offending to Police, teachers, counsellors, or family if it were true.¹⁷³

117. Given the defence’s sustained reliance on common misconceptions about how sexual abuse victims behave, the Crown was obliged to respond firmly. A passive reference to the s 9 agreement would have been inadequate in the face of a defence strategy built on those very misconceptions. The prosecutor’s response remained responsible and properly confined. He made his points while expressly sandwiching everything he said between two clear reminders that the counter-intuitive evidence was general, not case-specific, and could not be used to determine whether C was truthful.

¹⁶⁹ Cross-examination of C at 70, line 16 Mr Mahoney’s NOE: “Did you think of telling your parents what you say was happening?”; at 77, lines 10 – 16, suggesting the complainant had “lots of people” she was talking to on the internet and could have told one of them; See too NOE at 86 to 87: “On your evidence you’re saying that this man was filming and videoing you at that apartment... these two police officers arrive... and you don’t think to tell them about this awful man and what he’s done to you?”. Again later at 93, line 29; at 94, line 18; at 96, line 17. See also the assertion in Closing that she had the opportunity to complain but did not do so: COA at 102.

¹⁷⁰ Cross-examination of complainant, Mr Mahoney’s NOE at 87, line 4 to 9. See also Cross-examination of complainant, Mr Mahoney’s NOE at 96, line 19: “

¹⁷¹ Cross-examination of complainant, Mr Mahoney’s NOE at 88: “all the information there at your fingertips to tell Police about what was happening”; Cross-examination of complainant, NOE at 96, line 19: “The reason I suggest... it took 20 years to make is because it’s false”.

¹⁷² Cross-examination of the appellant, Mr Mahoney’s NOE at 201, line 29: “God, she was picked up by the Police the next day so I mean why didn’t she make a complaint then if any of this ... sort of conduct happened”.

¹⁷³ Defence closing address, Mr Mahoney’s COA at 97 – 98 and 102: “Why doesn’t she tell her parents... what about the counsellor that she was seeing, what about the teachers, what about some other form of authority?”; COA at 115: “where does she ... talk to the teachers, the counsellors, talk to her family about it after the first incident that she alleges”?

That is the orthodox “shield, not sword” use recognised in *Wanden v R*,¹⁷⁴ *Nancarrow v R*,¹⁷⁵ and *Heke v R*.¹⁷⁶

118. Overall, nothing in the prosecutor’s address invited the jury to believe C because her behaviour matched “victim-like” conduct. He never suggested that any aspect of her actions should be treated as corroborative. He expressly disavowed any such use—twice—making it unmistakably clear that the counter-intuitive evidence was general, non-diagnostic, and not to be applied to the facts of this case. His remarks could not, in substance or in form, be understood as endorsing C’s credibility on the basis of counter-intuitive behaviour.

The directions were sufficient in the circumstances

119. Although the trial Judge told the jury the purpose of the counter-intuitive evidence and that it was not about the appellant or C,¹⁷⁷ Mr Mahoney says a miscarriage of justice arises because the Judge did not also explicitly caution the jury not to use the evidence to diagnose abuse.
120. But the circumstances of the case here mean the directions were sufficient. The Judge explained the educative purpose; noted the experts had not seen the parties; referenced the agreed statement; and reminded the jury that the ultimate assessment turned on C’s evidence, meaning the focus

¹⁷⁴ *Wanden*, above n 82, at [23], **Mr Mahoney’s bundle at Tab 3**. Note in *G(CA505/2024) v R*, above n 82, (**Crown bundle at Tab 20**) the Court of Appeal recently expressed the view at footnote 22 that it “favoured” the second *Wanden* interpretation, being that the prosecutor may use the evidence as a shield rather than a sword.

¹⁷⁵ *Nancarrow*, above n 88, at [51]–[53], **Mr Mahoney’s bundle at Tab 13**.

¹⁷⁶ *Heke*, above n 90, at [27]–[33]. **Mr Mahoney’s bundle at Tab 14**. The prosecutor in *Heke* said: “When you heard Dr Ahmed’s evidence at the start of the trial, it may not have made much sense before you had heard, heard all of the evidence but as you have now heard the evidence and the questioning, it may – and you may have wondered why didn’t she just tell... her parents ... or her brother...? So the expectation or idea that she should have said something straight away... is a misconception or an idea ... which is actually not supported by ... research. Research tells us that in fact non-reporting or delayed reporting of the abuse is in fact the consistent finding, and then this issue of how something like this can become routine. We might struggle with that, but again, Dr Ahmed’s evidence can help us understand... There have been quite a lot of questions in this trial asked about [the complainant’s] relationship with the defendant and how it appeared to all be fine... you might have thought, “Oh, but if this was happening to her then surely she would, she’d be miserable or she’d be upset, or something like that.” Again, Dr Ahmad’s evidence can help us understand how this can become routine, how it can become normalised and what the relationship between the ... offender, and the abused young person can become.

¹⁷⁷ Summing up at [30] – [43] Mr Mahoney’s CA casebook at 131–132, and [70] Mr Mahoney’s CA casebook at 140.

should be on her evidence.¹⁷⁸ The Judge’s messages reinforced the cautions already given in the s 9 agreement and twice by the prosecutor.

121. As noted at [75] above, in *DH* the trial Judge did not expressly give the warning also absent in this case. The Judge did not warn the jury against using the evidence to diagnose abuse. Yet this Court found that omission did not occasion a miscarriage—even though the expert evidence in *DH* was given viva voce, at length, and because of this received far greater prominence than here.
122. Analogy with *Nancarrow* is also apt. There, counter-intuitive evidence was admitted in an agreed statement of facts, the prosecutor linked (but not impermissibly), and the Judge gave no direction at all. The Court of Appeal upheld the convictions because the framing of the evidence—by counsel and in writing—made the limits clear. The same is true here. This Court declined leave to appeal in *Nancarrow*, holding there was no error of principle in the Court of Appeal’s decision.¹⁷⁹ Nothing about this case suggests a different view.
123. The issue on appeal is whether there is any real risk that the jury misused the counter-intuitive evidence. There is none. From the moment the evidence was introduced at the end of the Crown case to the start of deliberations four days later (including a weekend),¹⁸⁰ the jury received repeated and consistent directions about its limited purpose: twice in the s 9 agreement itself, during the prosecutor’s brief reference in cross-examining the appellant, twice again in the Crown closing, and finally in the Judge’s summing up. In that context, there is no possibility that the jury misapplied the evidence.

¹⁷⁸ Summing up, Mr Mahoney’s CA casebook at [39]–[43].

¹⁷⁹ *Nancarrow* SC, above n 89, at [4], **Crown bundle at Tab 14**.

¹⁸⁰ The evidence was introduced on a Friday. The closing was on the afternoon of Tuesday 28 November. The prosecutor’s file indicates verdicts were returned mid-afternoon on Wednesday 29 November.

Questioning the complainant

124. After playing and producing C’s evidential video interview (EVI), the prosecutor asked C additional questions. Most were directed to the exhibits. That was appropriate; their relevance needed to be adequately explained to the jury and had not been previously.

125. The prosecutor also sought clarification and elaboration from C on certain aspects of her evidence. This occurred in the context of Mr Mahoney having given no pre-trial statement, leaving the Crown without a certain understanding of the defence position at the time of C’s evidence.¹⁸¹ The prosecutor therefore asked focused questions on a small number of topics, including:

125.1 *As to the first incident at the reserve:* the prosecutor asked whether C and Mr Mahoney had discussed him touching her beforehand, whether she had encouraged it,¹⁸² and whether his hand made skin-to-skin contact with her breast. None of these matters had been directly addressed in her EVI.¹⁸³

125.2 *In respect of the second incident at* : whether C consented to or encouraged the connection between Mr Mahoney’s fingers and her genitalia¹⁸⁴ and clarification on

¹⁸¹ The Crown acknowledges a brief defence opening statement had been given at the start of the trial.

¹⁸² Note: the prosecutor referred to this topic twice in his follow up questions: first, Mr Mahoney’s NOE at 10, line 21 and second Mr Mahoney’s NOE at 15. But the record makes clear why this happened: immediately after asking this line of questions the first time, Court appears to have adjourned for the day because of technical issues (see Mr Mahoney’s NOE at 10 – 11). When the trial resumed the next day, it is unsurprising that the prosecutor asked the questions again given the technical (microphone) issues from the previous day.

¹⁸³ Although what she said in her EVI allowed the jury to *infer* that there was skin-on-skin contact between the appellant’s hand and her breast, the evidence had not actually been given. The closest the complainant came to saying skin-on-skin contact happened was when she said the appellant “got under my bra and grabbed at my breasts” (EVI, Exhibits booklet at 22). She maintained throughout that she was still wearing her school uniform and bra. There was also room for confusion because of the way the complainant was asked questions (see particularly EVI, Exhibits booklet at 22–23 where the interviewer asked about grabbing “over clothing” and “over your bra” more than once despite the complainant already saying “under my bra”).

¹⁸⁴ Mr Mahoney’s NOE at 19.

exactly what he made her do when he put her hand on his penis.¹⁸⁵

125.3 *As to the third incident at the motel:* the prosecutor questioned C about her level of sobriety immediately before and after the offending,¹⁸⁶ and whether she consented to, encouraged, or initiated any of the sexual acts.¹⁸⁷ He also asked why she met Mr Mahoney again after the motel incident.¹⁸⁸ These matters had not been squarely addressed in C's EVI and required clarification.

125.4 *In respect of the fourth incidents over several days at the apartment:* additional questions were directed to whether the complainant consented to any of the acts.¹⁸⁹

126. Mr Mahoney argues the prosecutor's additional questions of C breached ss 85 and 89 of the Evidence Act 2006 as it meant she unnecessarily repeated her EVI evidence which added an illusory layer of consistency to her evidence. This, he says, was unfair because C effectively gave her evidence twice.
127. The Court of Appeal rejected this argument. It found that while parts of the prosecutor's questions were repetitive, they were not impermissible and did not render the trial unfair.¹⁹⁰
128. The Crown endorses this finding and submits it was entirely unremarkable—and appropriate—that the prosecutor asked C further questions on the topics he did. While some questions may have been repetitive or leading as signposts, they were not needless and were

¹⁸⁵ Mr Mahoney's NOE at 19. The complainant had said in her EVI that the appellant held her hand onto his penis over his underwear and forced a rubbing action (EVI, Mr Mahoney's Exhibits at 27 – 28). She elaborated on this in her trial evidence "He put his hand over my hand and rubbed his genitals with my hand in between", it happened for "three to five minutes", and she had not wanted or invited it (Mr Mahoney's NOE at 19).

¹⁸⁶ Mr Mahoney's NOE at 22, line 2 and line 24.

¹⁸⁷ Mr Mahoney's NOE at 22, lines 17 – 22.

¹⁸⁸ Mr Mahoney's NOE at 23, line 1.

¹⁸⁹ Mr Mahoney's NOE at 27, line 11 to p 28, line 17.

¹⁹⁰ Mr Mahoney's CA judgment at [64].

oriented to precision rather than advantage. Experienced trial counsel did not object, the experienced trial Judge did not intervene, and realistically, nothing prejudicial emerged.

Principle

129. Section 85 of the Evidence Act 2006 requires a judge to prevent questions which are improper, unfair, misleading, needlessly repetitive, or expressed in language too complicated for the witness. It replaced s 14(a) of the Evidence Act 1908, which prohibited scandalous or indecent questions being asked of witnesses.¹⁹¹ The provision advances the 2006 Act's purpose by protecting fairness to witnesses¹⁹² and by ensuring that evidence is not admitted if its probative value is outweighed by its prejudicial effect.¹⁹³
130. Section 89 prohibits leading questions being asked in examination-in-chief and re-examination except when the question relates to introductory or undisputed matters, is put with the consent of all other parties, or the judge allows the question. The provision codified existing law which generally considered evidence is more reliable if witnesses testify in their own words.¹⁹⁴ The rationale of the section is thus to preserve the integrity of the witness's narrative, thereby reducing the risk that answers are suggested rather than recalled.¹⁹⁵ In turn, this allows the fact-finder to better assess the witness's veracity and accuracy.¹⁹⁶ Where s 89 is breached and a court is considering the appropriate remedy, it is relevant to examine whether the leading question(s) complained of invited or influenced the witness's critical answers.¹⁹⁷

¹⁹¹ NZLC R55, Vol 2, 1999 at [[C321], above n 35, **Crown bundle Tab 23**.

¹⁹² Evidence Act 2006, s 6(c).

¹⁹³ Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [EVA85.1].

¹⁹⁴ Law Commission *Evidence Code* (NZLC R55, Vol 1, 1999) at [397], **Crown bundle Tab 24**. See also *The 2013 Review of the Evidence Act 2006* (NZLC R127) at [11.47], **Crown bundle Tab 25**.

¹⁹⁵ See *Evidence Code* (NZLC R55, Vol 1, 1999) above, n 191, at [397].

¹⁹⁶ *Singh v R* [2020] NZCA 487 at [23], application for leave to appeal dismissed: *Singh v R* [2021] NZSC 10.

¹⁹⁷ *Singh v R* [2020] NZCA 487 at [25] – [26], **Crown bundle Tab 26**, application for leave to appeal dismissed: *Singh v R* [2021] NZSC 10.

This case

131. Mr Mahoney’s central criticism appears to concern the prosecutor’s *technique* in introducing the supplementary questions. The prosecutor referred to what the complainant had said in her EVI, asked brief orienting questions such as “do you recall saying that?” or “is that what happened?”, and then immediately followed with open questions asking her to elaborate. That approach is plainly permissible as a means of orienting a witness. A prosecutor is entitled to ask a witness to clarify or expand on earlier evidence, and limited leading used merely as a signpost—to anchor the witness to a particular topic—is not improper. The leading here was minimal, functional, and directed only at orienting C to specific aspects of her allegations. It was neither needlessly repetitive nor suggestive in any way that risked inflating her credibility. None of it could have given the jury a false impression of her accuracy or truthfulness, so the rationale underlying the restriction on leading questions was not engaged.
132. The record also shows no intervention from the experienced trial Judge and no objection from senior defence counsel, Mr Hamlin. That silence is telling. It reinforces that the prosecutor’s questions fell well within ordinary and proper bounds and did not distort the trial or prejudice Mr Mahoney.
133. While it did not think the result unfair, the Court of Appeal found that some of the prosecutor’s questions resulted in repetitive answers.¹⁹⁸ But repetitive *answers* are not what ss 85 and 87 prohibit. That repetitive *answers* might have been elicited from proper questioning misses the point. Sometimes questions seeking to clarify or elaborate on evidence result in a repeated answer. That does not mean the *question* should not have been asked. The answers, even if repetitive, may nevertheless clarify what was previously confused or required explanation. That was the case here.

¹⁹⁸ Court of Appeal judgment at [64], Mr Mahoney’s SC casebook.

134. Counsel for Mr Mahoney also attacks the prosecutor’s questions from another perspective. He submits that the “prosecutor’s approach added an illusory layer of consistency” to C’s evidence, which the Crown relied on as an indicator of credibility.¹⁹⁹
135. But the reality is different. At the time the prosecutor asked the questions, Mr Mahoney had not yet given evidence. The Crown did not know for certain what his defence would be. And several aspects of C’s EVI required precision or clarification to ensure the Crown could properly discharge its onus of proof. The prosecutor asked additional questions as an essential measure to ensure the Crown was able to meet its high evidential burden.
- 135.1 *First incident:* The circumstances in which C ended up in a secluded location with Mr Mahoney could reasonably have left the jury questioning whether there had been prior discussion about it or whether C encouraged it.²⁰⁰ Clarifying this was legitimate and necessary. Moreover, the interviewer’s questioning in the EVI regarding whether there was skin-on-skin contact between Mr Mahoney’s hand and C’s breast left ambiguity on the issue.²⁰¹ The prosecutor was entitled to resolve it. His decision to return to the clarification in closing underscores that he considered it an important point requiring accuracy.²⁰²
- 135.2 *Second, third, and fourth incidents:* Many of the additional questions went directly to two elements of the charges: consent

¹⁹⁹ See Mr Mahoney’s submissions at [57]–[58].

²⁰⁰ She had only recently met him in an online chatroom, got into his vehicle willingly and remained there despite the man not matching the description or photo he had provided to her during their online meet (see cross-examination on this point at 46 – 49 and 55 NOE). She then accepted the alcohol and cannabis he gave her and did not do anything to stop him when he started the touching by putting his hand on her knee (see EVI, Exhibits booklet at 17, 19 – 25). When asked in her EVI why the appellant stopped indecently touching her, the complainant said he had asked if she was okay and that she did not say much in response. She said that he did not then try to do anything more and did not “ask” if she wanted to do anything more (see EVI, Exhibits booklet at 23). These circumstances could have left the jury with the impression that the complainant and appellant had spoken about the touching and/or that she had encouraged it.

²⁰¹ See particularly EVI, Exhibits, at 22 – 23 where the interviewer asked about grabbing “over clothing” and “over your bra” more than once despite the complainant already saying “under my bra”.

²⁰² Crown closing address, Mahoney CA casebook at 80–81.

and reasonable belief in consent. Consent questions had not been explicitly asked in the EVI. Given the Crown’s high burden of proof—and the absence of a pre-trial statement from Mr Mahoney—it was entirely understandable that the prosecutor sought explicit clarification, even at the cost of some repetition.²⁰³ His decision to address these matters again in closing reinforces their necessity.²⁰⁴ In any event, the limited repetition did not bolster C’s credibility nor distort the trial in any way capable of producing a miscarriage.

136. Mr Mahoney relies on the Court of Appeal’s (pre-Evidence Act) comments in *R v E(CA308/06)*²⁰⁵ to support his argument. But that case must be understood in its unique context. As the Court of Appeal more recently explained in the *Smith v R*,²⁰⁶ *R v E(CA308/06)* involved a child complainant who could not recall many aspects of the alleged events during her EVI. The concerns in *R v E(CA308/06)*—repetitive evidence prompted by extensive leading questions, compounded by further leading questions in re-examination—arose from those particular difficulties. The volume and nature of the leading questions in *R v E(CA308/06)* were far more significant than anything in the present case. None of those problems existed in *Smith v R* resulting in the Court dismissing the appeal even though the prosecutor had asked leading questions, including some that “arguably went further than they should have” and led to the complainant

²⁰³ At trial, defence counsel put to the complainant that she entered an “R18 chatroom” late at night, behind her parents backs, and introduced herself on there as “an 18-year-old”: NOE at 35. And there was insinuation that she instigated and initiated all initial contact with the appellant (NOE 45 – 46). The complainant’s motives for going onto the chatroom, what she and the appellant discussed on there, and what she might have had in her mind when meeting the appellant would have been issues the jury had to consider. As was why the complainant agreed to meet the appellant again after she said he had sexually assaulted her. Indeed, she was cross-examined on this point too (NOE at 56: “why do you start messaging him again”; and at 58: “between the first time you met him and the second time you met him we know you’re messaging, did you think about deleting his account?”; NOE at 63: “You make arrangements to go with him for a third time... when you don’t know where you are going”; NOE at 73: “So on your version this is the man that sexually violated you, taken all these photographs of you and you’re talking about going and staying in an apartment that he was going to provide to you...?”; NOE at 79 “You were more than happy to come back despite him taking more photographs of you and having sex with you?”).

²⁰⁴ Crown closing address, Mr Mahoney’s CA case on appeal at 81–82.

²⁰⁵ *R v E(CA308/06) v R* [2007] NZCA 404, [2008] 3 NZLR 145.

²⁰⁶ *Smith v R* [2022] NZCA 448 at [28], **Crown bundle at Tab 26**.

repeating “large parts of her EVI”.²⁰⁷ The present case is materially closer to *Smith*: occasional, focused leading questions used to clarify evidence, not the extensive and problematic questioning seen in *R v E(CA308/06)*.

137. Overall, the prosecutor’s questions in this case were focused and used to clarify topics that may otherwise have been unclear or incomplete. The absence of objection or judicial concern supports that assessment.

24 February 2026

M J Lillico | J M Pridgeon
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

²⁰⁷ At [26].