Judging the Judges: How the Victorian Court of Appeal is dealing with appeals against conviction in child sexual assault matters

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Introduction

> In the last 25 years there has been an unprecedented willingness on the part of appellate courts to control and regulate proceedings before juries ... The appellate courts have sown a minefield of legalism through which the trial judge must pick his way ... For all the effort that has been put into the matter by the judge, by the jury and by counsel, you might just as well have not had it at all (Lee 1991).

From the perspective of the accused, appeals against conviction are an important mechanism to identify any miscarriage of justice at trial, with the appeal court rectifying any such error by entering an acquittal or ordering a retrial. However, from the perspective of complainants and other witnesses, successful appeals against conviction may well represent a failure in the criminal justice system. It is problematic for a complainant to know that the entire adjudication process was fundamentally flawed by a serious 'error', often based on a legal technicality, and that they face the ordeal of giving their entire evidence and being cross examined again at a retrial. These negative dimensions to successful appeals against conviction are particularly felt by complainants and their families in cases of sexual offences against children.

Recent data from the New South Wales jurisdiction shows that for sexual offences against children, the rate of appeal against conviction was 61.3% in 2000, 59.3% in 2001, 49% for 2002 and 37.5% for 2003 — or an average of 51.8% (Hazlitt, Poletti & Donnelly 2004:45). These figures raise a number of important issues. For example, are there similar appeal rates for this category of offences in other jurisdictions? What is the outcome of such appeals in terms of re-trials or acquittals? And, perhaps most importantly, where serious error has been identified by the appeal court, who is responsible for the error?

Against this background, this paper describes the results of a study of all appeals against conviction in Victoria arising from all trials listed, for sexual offences against children, over an 18-month period from 1 January 2001 to 30 June 2002. The study explores the grounds

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* This article is based on a study undertaken by the author for her Bachelor of Laws Honours' thesis, completed in 2004 at La Trobe University. Dr Judy Courtin B App.Sci.(Chiro); Dip.Acup.; LLB(Hons); Grad.Dip.(Legal Practice).

relied upon in the appeals, appeal outcomes, and the source of error where error was identified by the Court of Appeal. The data examined show that the predominant cause of the trial miscarrying was some form of judicial error, especially in directions to the jury. Issues arising from these findings are also discussed.

The Study

Source of Data

The Victorian Office of Public Prosecutions (OPP) provided most of the data for this study. The OPP, utilising its database program, Prosecution Recording and Information Systems Management (PRISM), supplied:

1. The total number of child sexual assault trials listed to commence between 1st January, 2001 and 30th June, 2002. (The trials captured within this date range were based on the first trial hearing date listed. This does not mean the trial necessarily commenced or was completed within this date range. Many trials were adjourned to a later date, whilst others resolved to a guilty plea).

2. The names of those listed trials which resulted in a conviction. (The author conducted further research at the County Court of Victoria to determine whether these convictions were a result of a jury verdict or a guilty plea following the listing of the trial).

3. The names of those trials in which an appeal was filed with the Victorian Court of Appeal against convictions and/or sentences. These 'appeal cases' were heard between 3rd September, 2001 and 15th December, 2004.

4. A breakdown of the current status, as at 10th June, 2005, (whether heard, not heard or abandoned) of these appeal cases.

5. A breakdown of the status, as at 10th June, 2005, of the retrials ordered in these appeal cases by the Court of Appeal.

All judgments in the appeal cases were analysed and collated and the grounds for appeal examined, including how the Court of Appeal decided these grounds.

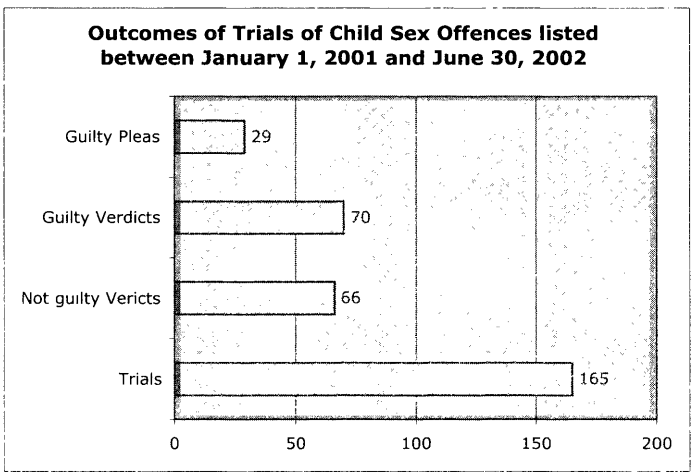
Whilst this study is based on a relatively short period of time over which the Court of Appeal cases were extracted (eighteen months), it nevertheless provides insight into the appeal grounds being relied upon for application for leave to appeal in child sexual offence cases, and the approach taken by the Court of Appeal in dealing with those appeal grounds, especially those in which there is found to be error on the part of the trial judge.

Trials and Outcomes

The author's study of Victorian cases of sexual offences against children showed that of the 165 trials from the target period, there were 99 convictions recorded (60% conviction rate). Of these 99 convictions, 70 were the result of a jury verdict at trial and 29 resulted from a guilty plea.

Of the 70 convictions from trial, 38 cases were appealed — giving a 53.4% rate of appeal against convictions for child sexual assault matters from all trials in the study period.[1] (See Figure1).[2]

Figure 1



An earlier NSW study (Poletti & Barnes 2002:5) identified sexual assaults (against all aggregates) as the category of cases in which convictions are most likely to be appealed. Between 1996 and 2000, the average appeal rate against convictions for sexual offences was 34.5%. This figure in NSW compares with an appeal rate of 17.9% for illicit drug offences, 12.4% for homicide and 10.6% for robbery.

Unlike the NSW rates of appeal against conviction of child sexual offences from 2000–2003 (average of 51.8%) cited above, the 1996–2000 average appeal rate of 34.5% includes both adult and child sex offences. Therefore, the true disparity between rates of appeal between child sex offences and other criminal offences is not accurately reflected in the 1996–2000 NSW figures. Another, and more general, measure of the appeal rate of sex offences (adult and child) in NSW is that it equals that of all appeals concerning all other violence against the person convictions (Boniface 2005:263).

Comparisons for appeals against conviction in other offence categories in Victoria were not readily available at the time of writing, but the author did obtain data from the OPP for the offences of armed robbery and theft. For armed robbery, the rate of appeal against convictions was 19.2%[3] and for theft the appeal rate was 20.2%.[4]

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1 One case involved two applicants in a joint appeal. Each applicant was considered separately by the Court of Appeal and the grounds for appeal were different for each applicant. The OPP allocated two separate case numbers for the applicants. Two retrials were ordered. It is unknown, of course, whether the 46.56 % of those convicted who did not appeal accepted their convictions as legally correct.

2 This is very similar to the NSW average rate of 51.8 percent of appeals against conviction of child sexual assaults between the years 2000 and 2003, as discussed earlier.

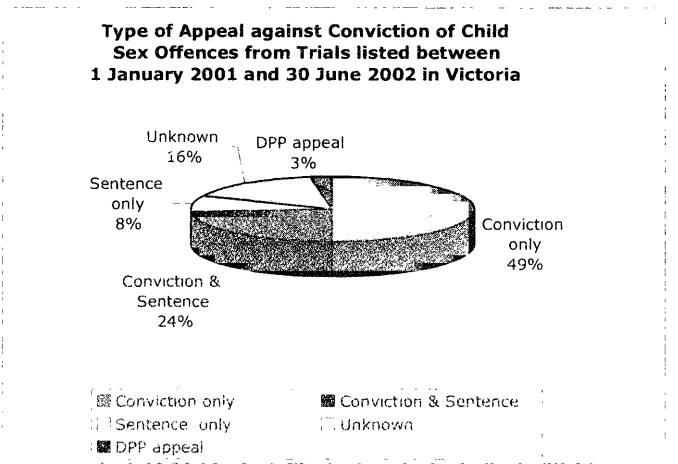
3 There were 79 trials in Victoria for armed robbery between 1st January 2001 and 30th June 2002. There were 52 convictions from these trials and 17 appeals. But of these appeals, nine were for sentence alone, five were for conviction and sentence combined and 5 were for conviction only. Taking all appeals against conviction, almost a fifth were appealed.

The available data on appeal rates against convictions for armed robbery and theft indicate that those appeal rates are considerably lower than appeal rates for convictions of child sexual assault and point to a significant likelihood that those convicted of child sexual assault will appeal their convictions and/or sentences. Further research would be needed for a more reliable comparison.

Breakdown of the 38 Appeal Cases

Of the 38 appeal cases, almost half, (19 cases), were appeals against conviction only. About a quarter, (9 cases), were appeals against conviction and sentence, and three cases were appeals against sentence only. Six cases were abandoned before listing and the type of appeal was not noted. One case was an appeal by the Victorian Director of Public Prosecutions (DPP) against sentence.[5]

Figure 2



For the purposes of this study, only appeals against conviction (including nine appeals against conviction and sentence) were analysed, that is, 28 cases. (For a complete list of these appeal cases, see Appendix 3.) The four applications for leave to appeal against sentence only and the DPP's appeal against sentence were not analysed.

Outcomes of Appeals against Conviction

Of the 28 appeals against conviction in the study period, in 15 cases (53.6%) the appeal was dismissed and in 13 cases (46.4%) the appeal was allowed. (See Figure 3).

Also, Appendix 1 sets out the appeal cases, the categories and outcomes of the appeal grounds, and the outcomes of the appeals themselves.

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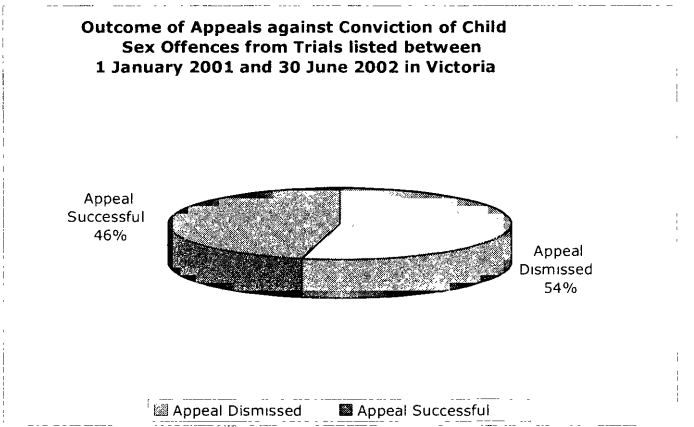
4 There were 282 convictions from 328 trials between 1st January 2001 and 30th June 2002, and a fifth (57 cases) of these convictions were appealed. The breakdown between appeals against convictions alone, convictions and sentences combined and sentence alone was not determined for this category of offence.

5 The DPP's power to appeal against sentence is found in the *Crimes Act 1958* s 567A.

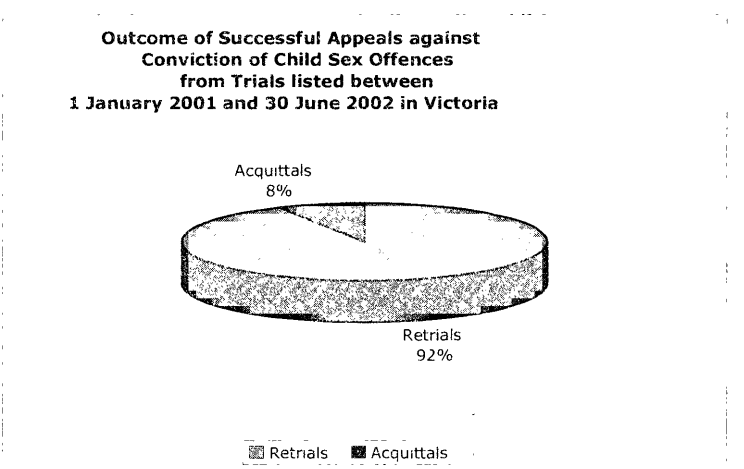
Figure 3



In NSW, the success rate for appeals against conviction for child sex offences was appreciably higher than Victoria during 2001–2003. In 2001, there were 32 appeals against conviction of child sexual assault of which 21 (65.6%) were allowed. In 2002, 14 out of the 25 appeals were allowed (56%) and 11 appeals out of 15 were allowed in 2003 (73.3%. This NSW study proffered no reasons for the high percentage of successful appeals against conviction of child sex offences (Hazlitt, Poletti & Donnelly 2004:46).

Of the 13 successful appeals of the author's study, retrials were ordered in 12 of the cases. An acquittal was entered by the Court of Appeal for one appeal. (See Figure 4). In comparison, the above NSW study (2004:47) revealed that during 2000–2003, 51.5% of successful appeals against conviction resulted in an acquittal and 48.5% resulted in an order for a new trial. It is beyond the scope of this paper to analyse the disparities between the rates of successful appeals and resultant retrials between the two jurisdictions.

Figure 4



Outcomes of Retrials

As at 10 June 2005, the outcomes of the 12 retrials ordered were:

- Acquittal 3
- Nolle Prosequi 4
- Convicted and sentenced 5

Grounds of Appeal

The 28 appeal cases gave rise to a total of 113 separate grounds of appeal against conviction. These grounds of appeal, and their outcomes, have been categorised as either 'Judicial Error', 'Jury Error' or 'Other Error'. These are reflected in Table 1. The latter category, comprising of a single ground, relates to the effect of the death of the applicant on the application for leave to appeal.[6]

Almost 88% of the appeals were based on the trial judge erring. More than half of these errors were based on misdirections to the jury. Twenty three were based on judicial error with regard to procedural rulings and 12 with regard to evidentiary rulings (these have been grouped together). There were 5 grounds of appeal on the basis of a miscarriage of justice due to an aggregate of errors.

Finally, there were 17 grounds of appeal asserting an unsafe jury verdict. These could be based on either trial judge error (4) or jury error (13).

Table 1:Categories of Grounds of Appeal and their Outcomes

Categories of Grounds for Appeal	Number of Grounds	Upheld	Failed	Not Necessary to Decide*	Part Upheld Part Failed
1. Judicial Error					
Misdirections to the Jury	55	14	40	1	
Evidentiary and Procedural Rulings	35	15	18	2	
Jury Verdicts Unsafe & Unsatisfactory	4		4		
Aggregate of Errors	5	2	2	1	
Sub total	**99**	**32**	**63**	**4**	
2. Jury Error					
Jury Verdicts Unsafe & Unsatisfactory	13	1	11		1
3. Other					
Effect of Death of applicant on Appeal	1		1		
Total	**113**	**32**	**76**	**4**	**1**

* In three cases, the Court of Appeal found it unnecessary to decide four grounds, as the appeal was allowed on other grounds. (See Appendix 1).

6 In this case, *R v Rimon* [2003] VSCA 136 (Unreported, Winneke, P, Vincent and Eames, JJA, 8 September 2003), the Court of Appeal dealt with the issue of what effect the death of the applicant (he died before the appeal was heard) had on his application for leave to appeal against his conviction and sentence. Section 567 of the *Crimes Act 1958* confers the right to appeal or make an application upon a 'person convicted on indictment', which, the court found, does not give the right to the accused's personal representative. His appeal was not allowed.

Judicial Error

Grounds for Appeal — 'Misdirections to the Jury'

Trial judges have an overriding duty to ensure a fair trial for the accused. In criminal trals the judge may, and sometimes must, give a warning to the jury as to the weight to be given to certain evidence, or inferences that may, or may not, be drawn. If the trial judge errs with such a warning or direction, there may be a miscarriage of justice, resulting in a new trial or acquittal being ordered by the Court of Appeal.

Judicial directions, or warnings, to the jury in child sex offence cases are many and complex and represent more than half of all grounds for appeal based on judge error in this study. The very nature of child sexual assault is that it is secretive and uncorroborated in that, mostly, there are no witnesses. Also, victims of child sexual assault commonly delay reporting the offences, or may not report them at all. It is precisely these two inherent characteristics of sexual assault that attract specific warnings to the jury. Three of these such warnings, typically referred to as the *Murray, Longman* and *Kilby* warnings, are the most frequently used and most controversial of jury warnings in sex offence cases.

In terms of this study, Table 2 outlines the type of judicial direction, or warning, to the jury, the number of cases in which it was used as an appeal ground, and their outcomes. There were five grounds based on a *Kilby* warning and seven based on a *Longman* warning. There were 14 grounds based on directions to the jury on procedural matters and 20 grounds based on directions to the jury on evidentiary matters.

The category of 'Other' includes a *Murray, Markuleski* and *Palmer* warning, 3 grounds based on 'recent complaint' and 3 grounds based on the trial judge's inadequacy in directng the jury on separate consideration of each count on the presentment.

All of these jury warnings, or directions, are discussed in detail below.

Table 2: Outcomes of Grounds for Appeal based on Judicial Error relating to Jury Directions/Warnings in the Victorian Court of Appeal Child Sex Offence Cases: 1 January 2001 to June 20 2002

Jury Warning/Direction	Number	Failed	Upheld	Not necessary to decide
Kilby	5	3	2	
Longman	7	4	2	1
Procedural	14	14		
Evidentiary	20	13	7	
Other	9	5	4	

See Appendix 2 for details on each of the 28 appeal cases, the appeal outcomes and he outcomes of the retrials.

Judge and Jury Error

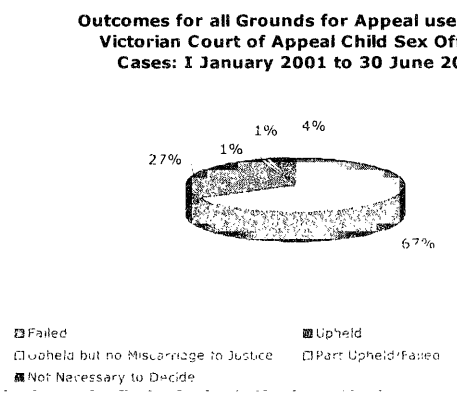
Grounds for Appeal — 'Unsafe Jury Verdicts'

There were 17 grounds for appeal against conviction based on an unsafe and unsatisfactory verdict. Of these, 11 were based on the jury verdict not being supported having regard to the evidence (as per *M v R*); four were due to the cumulative effect of errors (as per *R v Kotzmann*), and two were due to inconsistent verdicts (as per *Jones v The Queen*). Thirteen of these 17 grounds of 'unsafe jury verdict' were on the basis of jury error alone, whereas the four grounds based on cumulative effect of errors involved judge error. Of the thirteen appeal grounds based on jury error, only one was upheld whilst one other was partly upheld and partly failed. This latter case involved 4 counts on the presentment, and the Court of Appeal upheld the ground for only one of these counts.

Outcome for all Grounds for Appeal

Of the total 113 grounds for appeal in the author's study, a total of 76 failed, 32 were upheld (but there was found to be no miscarriage of justice for one of these grounds), one was partly upheld and partly failed, and, four were found to be unnecessary to decide.

Figure 5



Time taken to report offences

The time taken to report sexual offences to police may influence the assessment of the credibility of the victim, or complainant. Historically, a delay in reporting such offences gave credence to the notion that victims, mostly women and children, were lying — that is, if the victim did not make a complaint at the first available opportunity, their credibility was questioned. This principle is reflected in the *Kilby* warning which is discussed below.

In this study, the time taken to report the offences to police ranged from one day to 39 years. The period of time over which the offences were committed ranged from one day to about 10 years. See Appendix 2 for details on the relationship between delay in reporting and appeal outcome.

Discussion

During the study period, more than half of all convictions in the studied trials were appealed. When compared with appeal rates in relation to other offences such as theft and armed robbery, this rate is comparatively higher. A more comprehensive comparative study is needed to adequately determine if the rate of appeal of convictions for sexual offences against children is comparable with more serious offences such as murder and manslaughter. Nevertheless, it is important to consider why more than half of all child sexual assault convictions were appealed and why nearly half of these appeals were successful, and, of the 12 retrials ordered, why only 5 resulted in a conviction.

There are no 'benchmarks' in Victoria with which to compare the major findings of this study. It is difficult to know if a rate of 54.3% for appeals against conviction for child sexual assault is an acceptable or even unique figure. And what might be an 'acceptable' success rate on appeal? Also, is a conviction rate of 60% (an acquittal rate of 40%) acceptable? The same question applies for rates of retrials and acquittals.

It is significant that where grounds of appeal were based on all categories of error by the trial judge, about two thirds of these grounds were upheld in the successful appeals. What is it about trials for these offences that give rise to such allegations of judicial error at trial?

In addressing this question, this section examines jury error at trial as discussed by the Court of Appeal and contrasts it with what constitutes substantial judicial error. Jury directions and warnings, and the way in which delay in reporting sexual assaults to police influence these warnings will also be appraised. The outcomes of the appeals will be considered and the implications of the relatively high number of retrials (compared with acquittals) will be evaluated. Finally, other factors which contribute to judicial error a trial will be discussed.

Jury Error

Trial judge error *alone* was found to be responsible for a substantial miscarriage of justice in 11 of the 13 successful appeals. In one of the successful appeals, jury error *alone* was responsible for a substantial miscarriage of justice, whilst the other case, it was a combination of jury and judge error.

In the case of *R v JMV* the sole ground was an 'unsafe jury verdict' in that the nature and quality of evidence was such that the jury, acting reasonably and paying heed to the judge's directions, could not properly have convicted on that count. In this case there was a majority verdict of guilty in only one of 29 counts on the presentment. The count on which the jury convicted was also the oldest of all the 29 counts. The allegations were about 30 years old and the accused was 71 years of age at the time of trial.

This appeal case was the only case where the conviction was quashed and an acquittal entered. Also, it was the only case where the only ground for appeal against conviction was based solely on jury error.

The other case (in which jury error contributed to a substantial miscarriage of justice) was *R v WEB*. In this case six grounds were argued on appeal. Five were based on judge error and one was due to jury error in that, upon the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. The latter ground was upheld but related to only one of five counts, resulting in an acquittal for that count. The remaining convictions for the other four counts were quashed and a new trial was ordered. In this case the five other grounds based on judicial error were upheld.

Trial Judge Error

If the Court of Appeal upholds a ground of appeal, for the appeal to be allowed, the relevant ground must also have caused a 'miscarriage of justice' or 'substantial miscarriage of justice', (section 568(1) *Crimes Act 1958*). For a miscarriage to be *substantial*, it must go to the root of the trial [*Wilde v R* (1998) 164 CLR 365].

Error by the trial judge accounted for 43% of successful appeals. That is, in four out of ten of the studied trials, the Court of Appeal found at least one trial judge error that went to the root of the trial thus causing a *substantial* miscarriage of justice. By contrast, jury error caused a substantial miscarriage of justice in one of the 28 appeal cases, and contributed (along with judge error) to a substantial miscarriage of justice in one other case.

These findings may suggest a problem within our court system with a potential to undermine public confidence in the ability of the judiciary to carry out their functions effectively. According to Campbell and Lee (2001), a judge is accountable to not only the disputing parties, but also to the community, for the manner in which his or her judicial tasks are performed. Arguably, the community's expectation that justice will be delivered is not being met if, in the context of child sexual assault trials, errors by trial judges are found to have caused a substantial miscarriage of justice in nearly half of all appeals. The compelling question raised by these findings is whether they represent evidence of a struggling judiciary, or whether they are a product of the inherent complexity of child sexual assault trials and associated evidentiary rules? Perhaps cases involving child sexual assaults bring with them their own specialised consignment of evidentiary and procedural rules so weighty as to overtax the trial judge. This will be further discussed later in this article.

Impact on Reporting Rates

The report of the Victorian Law Reform Commission (VLRC) (2003:84–85) states that 1785 people reported 'penetrative sexual offences' (those sexual offences principally involving incest and sexual penetration of children and young people under 16 years of age) to the police during 1997–98 and 1998–99. During this same period, there were 258 prosecutions initiated by the police,[7] of which 116 were convicted (2003:92) — this equates to an overall conviction rate of 6.5% of reported cases.

With more than half of these convictions being appealed, nearly half of the appeals being successful, and about 60% of subsequent retrials resulting in no conviction, there exists a glaring disincentive for a complainant seeking justice through our criminal justice system to report offences to police. Also, such low rates of conviction may confound the general deterrence effect of sentences handed down in cases where the accused is convicted.

In New South Wales in 2004, criminal proceedings were not initiated in more than 80% of sexual offences (adult and children) reported to police. Of all reports to police for sexual offences against children, approximately 8% were ultimately proven in court (Fitzgerald, J 2006:11). This finding mirrors the 6.5% conviction rate in Victoria. In the NSW study, the major points for attrition were in the early stages of the criminal justice process. Although this NSW study is unable to provide reasons for such high rates of early attrition, other studies cited by Fitzgerald indicate that a major reason for early attrition is victims withdrawing their complaints. Also, the 'evidentiary' strength of a case will often determine if the prosecution proceeds — that is, proceedings are more likely to be initiated if there is a reasonable prospect of success.

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7 The Victorian Law Reform Commission notes that reported offences may not be prosecuted in the same year (2003.85).

An 'attrition' of cases from police reporting to appeal and beyond is to be expected and, in fact, displays a necessary robustness of our criminal justice system. But, attrition rates of approximately 80% must invite rigorous investigation.

Jury Warnings/Directions

According to the NSW Parliament's Standing Committee on Law and Justice, (2002:139), a contributing factor to the frequency of appeals against conviction of sexual assaults and the success of such appeals in NSW is the number and complexity of requisite judicial warnings:

> As there is an abundance of case law pertinent to sexual assault matters and directions that are made by the trial judge, matters are frequently sent back for retrial on the basis that the judge misdirected the jury in the summing up.

This observation is also applicable to Victoria. The VLRC (2003:219) conducted preliminary research into the use of the *Longman* warning, focusing on Court of Appeal cases. This study found that of 16 appeals, two were based on the grounds that no warning was given (neither was successful) and in seven cases, the appeals were successfully argued on the basis of the warning being inadequate.

The Longman Warning

The *Longman* warning has its genesis in a case involving a delay of 23 years in reporting sexual offences. The High Court ruled that had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances of the case and thus adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. The jury should have been told that, as the evidence of the complainant could not be adequately tested after the passage of more than 20 years, it would be dangerous to convict on that (uncorroborated) evidence alone, unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy (*R v Longman* as per Brennan, Dawson and Toohey JJ at 87). That is, the *Longman* warning has two limbs or considerations. First, the forensic disadvantage to the accused arising from the delay, and, secondly, the effects this delay might have on the reliability of the complainant's evidence.

The *Longman* warning was entrenched and extended in two subsequent High Court cases, *Doggett v R* and *Crampton v R*. In *Crampton v R*, there was a delay of 19 years in making the complaint and the evidence was uncorroborated. The trial Judge's direction to the jury warned on, firstly, the lengthy delay and, secondly, that such a delay would potentially disadvantage the accused. There was no objection to this warning by defence counsel at the trial. The court held that the trial judge should have directed the jury that, because of the 19-year delay, it would be dangerous to convict the accused on the complainant's evidence alone without close scrutiny of the evidence. In addition, the majority in *Crampton v R* (at 180) held that where delay affects an 'honest but erroneous memory' it is also dangerous to convict.

The other High Court case that reaffirmed and extended the *Longman* warning, was *Doggett v R*. In this appeal from the Queensland Court of Criminal Appeal, there was corroborative evidence. Also, a *Longman* warning had not been requested by defence counsel, nor had forensic disadvantage been made an issue in the trial (which would normally support a Court of Appeal's decision to not uphold such a ground of appeal). The delay was 12 years after the last offence (offences were committed over a period of 7 years).

The majority held that, *despite the corroborative evidence* (my emphasis), the delay of 12 years required a full warning to be given. The trial Judge should have warned that it was dangerous to convict because the accused suffered forensic disadvantage due to the delay and was prejudiced due to the difficulties with the complainant's recollection of the events.

Such expansion of the *Longman* warning, as evidenced in *Crampton v R* and *Doggett v R,* was portrayed by Wood CJ at CL in *R v BWT* (at 14 and 15) as 'giving rise to an irrebuttable presumption that the delay *has* (not, might have) prevented the accused from adequately testing and meeting the complainant's evidence'. Wood CJ at CL goes further and claims that this proposition 'elevates the presumption of innocence....to an assumption that the accused was *in fact* innocent'. Also, according to the Tasmania Law Reform Institute (2006:19) the *Longman* warning is complex, uncertain and has an unsound basis. As such, it necessitates reform, not least because such warnings resurrect 'false stereotypes about complainants in sexual offence cases'.

Section 61(1)(a) of the *Crimes Act* amended the above common law requirement by prohibiting the trial judge from warning the jury that, as a general proposition, complainants of sexual assaults are an unreliable class of witness.[8] Despite this prohibition, the judge maintains a discretion to comment on the reliability of the complainant's evidence if they consider it appropriate 'in the interests of justice' — that is, the statutory amendment of the common law does not prevent such a warning from being given.[9] Although this prohibition stemmed from the High Court case of *Longman v R*, it only applied to the general proposition that complainants in sexual matters are an unreliable class of witness.

Notwithstanding such legislative reform, a failure to complain or a delay in complaining may still cast doubt upon the reliability of evidence given by a complainant due to the availability of judicial discretion — it is still well-established law in the case of sexual offence cases (*R v Rodriquez*). Also, the Australian Law Reform Commission (ALRC), New South Wales Law Reform Commission (NSWLRF) & Victorian Law Reform Commission (VLRC) (2005:612 and 616) argues that the *Longman* (and *Crofts* — see below) warning significantly undermines the legislative reforms by 'reinstating a mandatory warnings regime in respect of sexual assault complainants who delay in reporting' to the extent that it is 'remarkably close to the full corroboration warning previously required by the common law'.

Application of the Longman warning

The *Longman* warning is the subject of considerable judicial and academic debate and there is clear uncertainty as to its application. This uncertainty falls into two categories: firstly, when is a delay so great as to require a *Longman* warning, and, secondly, how strong must the warning be. According to Deane J in *Longman* (at 375), the ultimate issue for the Court

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8 Section 61(1) on the trial of a person.....:
   a) the judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual cases as an unreliable class of witness; and
   b) if evidence is given or a question is asked of a witness or a statement is made in the course of an address on evidence which tends to suggest that there was delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must inform the jury that there may be good reasons why a victim of sexual assault may delay or hesitate in complaining about it.

9 Section 61(2) states that nothing in sub-section (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice. Section 61(3) Despite sub-section (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which sub-section (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

of Appeal is whether the effect of a *Longman* warning, or the absence of such a warning, is such that there is a real risk that justice has miscarried resulting in an unsafe and unsatisfactory verdict for the accused.

Although jury warnings may not always be required in a particular case, trial judges will often employ them to avoid the possibility of a successful appeal against conviction, possibly resulting in a retrial — this is particularly so in relation to the *Longman* warning. (VLRC 2003:219). The suggestion is that the trial judge, out of self-preservation, may be casting a wide net in an attempt to make the trial 'appeal proof' and without paying strict heed to the facts and needs of the individual case. But, in seeking to make appeal-proof decisions, a conviction could be at risk. Also, an unintended effect could be the appearance that the judiciary is recasting complainants in sexual assault matters as a suspect class of witness (Tasmania Law Reform Institute 2005:2.1.11). With such a high rate of successful appeals in child sex matters being upheld due to faulty jury warnings, especially delay-related warnings, one must question the efficacy of any such 'appeal-proof' policy.

According Sully J in *R v BWT* (at 95), the only prudent approach for the trial judge, in determining the application of the *Longman* warning, would be, firstly, for the reasonable mind to regard any delay between offence and complaint to be so small as to be to be 'trifling', and secondly, that the risk of relevant forensic disadvantage to the accused would be seen by any reasonable mind as 'far-fetched or fanciful'. If this interpretation of Sully J were to guide the determination of the necessity of a *Longman* warning, judicial discretion would be compressed to the point where 'discretion' could almost be replaced with 'mandatory'.

In *Robinson v R* (at 25), a 3-year delay called for a *Longman* warning. But it was not the delay on its own deeming this so, rather, a combination of the delay and the age and reliability of the complainant (the second limb of the warning). Such 'conflation' by the High Court of the two limbs of the *Longman* warning has only exacerbated the uncertainty when considering what kind of delay is necessary for a *Longman* warning. Also, any forensic disadvantage suffered by the accused, due to delay, should be considered independently of the credibility of the complainant (ALRC, NSWLRC, VLRC 2005:617).

In the seven cases in the present study where the appellant argued that there had been a *Longman* warning error, the appeal was upheld in two cases. In four cases, the appeal was dismissed and in one case the Court of Appeal found it unnecessary to decide because the appeal was upheld on other grounds.

Table 3: Delay in reporting the alleged offences to Police and the outcome of the appeal, in cases where *Longman* warning error was the ground of appeal

Appeal Case	Delay in Reporting	*Longman* warning given	Application Dismissed	Appeal Allowed
R v GAM	6 months	No	Yes	
R v GTN	1 year 2 months	Yes	Yes	
R v Knigge	2 years 2 months	Yes		Yes
R v Olivar	8 years 10 months	Yes	Yes	
R v WEB	14 years	Yes		Yes
R v DCC	19 years	Yes	Yes	
R v MWL	20 years	Yes		Yes

As stated earlier, there are two situations identified in *Longman* as necessitating a warning that it is dangerous to convict. Firstly, where there is a 'loss of forensic advantage' caused by long delays (*Doggett v The Queen* per Kirby, J at 378), and, secondly, where delay affects an 'honest but erroneous memory' (*Crampton v The Queen* at 180). There are two types of forensic disadvantage — firstly, the delay between the happening of the alleged event and the first occasion on which allegations were brought to the attention of the accused, and secondly, the delay between the date of the alleged event and the trial (*R v GTN* at 10).

The significant factors relevant to the question of whether 'in all the circumstances' of the case a direction was required can include, the delay in prosecution, the nature of the allegations, the age of complainant at time of events, and, whether or not the complainant complained to another person, such as the mother of the complainant. These factors, however, would call for the trial judge to make a 'comment', not a warning (*R v GTN* at 58).

According to the Court of Appeal in *R v GTN* (Eames, JA, at 89), a *Longman* warning may be required in cases where delay has been much shorter that in *Longman* itself (about 20 years). The greater the delay, the more likely a warning will address all or most of the factors concerning reliability of evidence and forensic disadvantage.

In the case of *Crofts v The Queen* (at 450 per Toohey, Gaudron, Gummow and Kirby, JJ), there was a delay of about 6 years, or an 'objectively substantial' delay, being a matter of years. In *R v GTN* (Eames, JA, at 93), it was held that a delay of 16 months was not so objectively substantial as to require a *Longman* warning.

In *Jones v The Queen* (at 454 per Gaudron, McHugh and Gummow, JJ.) a four-year delay caused a forensic disadvantage which hampered the accused in a way which contributed to an unsafe jury verdict. The opportunities of obtaining a defence were 'significantly reduced' by the delay in making a complaint.

In the second of the seven cases in the author's study which used the *Longman* warning as an appeal ground, *R v GAM* (at 25), it was held that the circumstances of this case, a delay of six months in reporting to the police, did not require a *Longman* warning, and in fact one was not given by the trial judge.

Thirdly, in *R v Knigge* (at 31) it was held unnecessary to decide the ground based on an inadequate *Longman* warning, as the appeal was allowed on other grounds. In this case though, a full *Longman* warning was argued to be necessary on the basis of a delay of 2 years and 2 months, and the alleged inadequacy of the evidence of the child witness, which was given by way of a 'VATE tape' procedure according to s37B of the *Evidence Act 1958* (Vic).[10] The President cautioned the courts to:

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10 This provision permits the use of recorded evidence-in-chief in a legal proceeding other than a committal proceeding, that relates (wholly or partly) to a charge for, inter alia, a sexual offence. The evidence-in-chief of a witness for the prosecution may be given (wholly or partly) in the form of an audio or video recording of the witness answering questions put to him or her by a person prescribed for the purposes of this section if the witness is a person with impaired mental functioning or is under the age of 18. Please refer to the discussion on page 286 regarding the legislative amendments of this provision.

> ...be astute to the fact that such technology, and the legislation which facilitates its use in criminal trials, has a capacity to distort the adversarial aspects of the criminal justice system which the common law rules of criminal procedure regarded as indispensable to a fair trial.

Winneke P then highlighted the disadvantage for the accused in being deprived the opportunity to challenge such VATE 'evidence' as it was given, to object to questions put and to 'shape' the nature of the case made against him. It was put that there were aspects of the evidence (the VATE tape), and the manner in which it was procured, which rased questions as to its reliability. The President stopped short of actually upholding this ground, as 'it is strictly unnecessary for me to decide this ground of appeal', because a retrial was necessary on other grounds. However, the President made it clear that the trial judge, if a retrial was held, should take his comments into account. Although Winneke P found it unnecessary to decide this *Longman* warning ground of appeal, it seems, for all intents and purposes, to have been upheld. Although the retrial for *R v Knigge* did not go ahead due to a nolle prosequi, the above comments by Winneke P mirrored the High Court case of *Robinson v R*. That is, the Victorian Court of Appeal combined the delay, less than the 3-year delay in *Robinson v R*, and the alleged inadequacy of the evidence of the child witness, as conjoined factors to consider in determining whether to give a *Longman* warning.

The second consideration regarding the application of the *Longman* warning is the degree of emphasis, or strength, the trial Judge must give to the warning. It is argued that the words 'it is dangerous to convict' only encourages the jury to acquit the accused, risking a conviction, and that such words are unnecessary as the jury need only be referred to the factors which might reasonably be regarded as creating forensic disadvantage' (ALRC, NSWLRC, VLRC 2005:618; *R v BWT* at 34 per Wood CJ at CL).

In the case of *R v MWL* (at 14), the *Longman* warning was held to be inadequate as he trial judge did not directly relate the words 'it is dangerous to convict' to a handicap for he accused in mounting his defence after a delay of about 20 years.

In the case of *R v Olivar* (at 54), the delay in reporting to the police after the first offence was nearly 9 years, and about eighteen months after the last offence. The ground based on an inadequate *Longman* warning in this case failed. The trial judge did not use the words 'it is dangerous to convict' even though the accused suffered a forensic disadvantage due to an almost 9 year delay from the earliest offence. This trial was in fact a retrial.

The case of *R v DCC* involved three complainants who were siblings. The applicant was their stepfather at the time of the alleged offences. The delay in reporting to police after he first offence was about 19 years. The trial judge in this case preceded the *Longman* warning by directing the jury that it was not necessary, as a matter of law, for there to be confirmatory or supportive evidence, and that without such confirmatory evidence the jury may consider the potential for error to be greater especially when coupled with delay and absence of fresh complaint. The trial judge then went on to give a full *Longman* warning and repeated it the next day. This case differs from the others in this study which used he *Longman* warning as the basis for a ground for appeal, in that counsel for the applicant argued that if the jurors found there was confirmatory evidence, then they may not have to concern themselves with the issue of delay and its effect upon the reliability of recollecton of the complainants — that is, it was not the wording of the *Longman* warning itself that was of concern, rather the possible confusion surrounding the directions about confirmatory evidence which preceded the *Longman* warning, and thus, may have influenced its meaning or impact. This appeal ground was found to have no substance by the Court of Appeal.

Finally, in *R v WEB* (at 33), in which the delay after the first offence was 14 years and 6 months, the trial judge's *Longman* warning was held to be inadequate. There were two complainants in this case. The trial judge did warn the jury 'it would be dangerous to

convict the accused on the evidence of JR or NF alone as the case may be.... You should only convict the accused if you are satisfied of the truth and accuracy of JR *and* NF's evidence...' (my emphasis). According to Charles JA in this same case, the trial judge erred in that he should have said that 'unless the jury were satisfied of the truth and accuracy of the evidence of *each* complainant', (my emphasis) they were positively obliged not to convict the accused.

An analysis of the above seven cases in which the *Longman* warning was used as a ground of appeal, reveals the uncertainty and confusion, for the trial judge, attached to the use of the *Longman* warning in a child sexual assault trial. The question as to when a delay is long enough to warrant such a warning remains vexed. In *R v Knigge*, a delay of 2 years and 2 months warranted such a warning, whereas in *R v Olivar*, a delay of 8 years and 10 months from the first offence did not.

On the other hand, delay on its own, and the forensic disadvantage it may bring to the accused, is not the only consideration in determining the use of a *Longman* warning. 'The circumstances of the case' must also be analysed to determine the need for a *Longman* warning. With the circumstances of every case differing and the need for the actual wording of the jury warning to reflect those circumstances, there are inherent difficulties for the trial judge. As Winneke P in *R v Olivar* (at 7) stresses, the nature of any jury warning is 'very much a matter for the trial judge who is familiar with the atmosphere of the trial, and who has the primary responsibility for ensuring that the trial is fair'. One of the issues raised by the present study, is whether the Court of Appeal is paying heed to this sound advice.

The Kilby Warning

The *Kilby* warning assumes that a prompt complaint about a sexual assault is consistent with an assault having taken place and, thus, may bolster the complainant's credibility, whilst a delay in complaint may reflect adversely on the credibility of the complainant. In cases of delay in complaint, there is also a legislative requirement that the judge inform the jury that there may be good reasons why a victim of sexual assault may delay or hesitate in making a complaint (*Crimes Act 1958* s 61(1)(b)). In 1996 in the High Court case of *Crofts v R*, it was held unanimously that this legislative requirement did not prevent the trial judge from giving a *Kilby* direction, in that a delay in complaining of sexual assault could affect the credibility of the complainant and that such a warning must be given if the particular circumstances of the case warrant it. This has become known as the *Crofts* warning. Not only does it counterbalance, and some would argue, undermine, the legislative requirement, it may present as a contradiction for the jury, and, given with other requisite sexual offence warnings, may result in jury 'overload and confusion' (Tasmania Law Reform Institute 2006:12). Legislative reforms in relation to the *Crofts* warning are discussed below.

In five of the cases in the present study, the appellant argued that the trial judge had erred with respect to the *Kilby* warning. In two of the cases the ground was upheld; but only in one case did the Court of Appeal conclude that the error had resulted in a miscarriage of justice. (In the second case the appeal succeeded on other grounds.) In two of the three cases in which the *Kilby* warning ground failed, the appeal succeeded on other grounds.

Table 4: Delays in reporting the alleged offences to Police (after the first offence) and the outcome of the appeal, in the 5 cases in this study in which the *Kilby* warning was used as the basis for a ground for appeal

Delay in Reporting	Application Dismissed	Appeal Allowed	Appeal Case	*Kilby warning given*
1 year and 3 months	Yes		*R v VST*	Yes
3 years and 8 months		Yes	*R v Alexander*	No
14 years		Yes	*R v WEB*	Yes
20 years		Yes	*R v MWL*	Yes
20 years and 6 months		Yes	*R v Pidoto*	Yes

In *R v VST*, there was a delay in reporting after the first offence of one year and six months and about three months after the last offence. Although the ground in this case failed, the trial judge did give a *Kilby* warning, despite the relatively short delay in reporting.

In *R v Alexander* and *McKenzie*, it was held that a *Kilby* direction should have been given, especially having regard to the age of the complainant (who was 14 years at the time of the alleged offences) and the fact that she had previously denied that the alleged offences occurred. However, according to Winneke P, failure to give a *Kilby* direction, by itself, did not cause any substantial miscarriage in the trial.

In *R v WEB* (at 26), where the delay after the first offence was 14 years, the actual *Kilby* warning delivered by the trial judge was ' ... the jury must consider the circumstances of the delay in making a formal complaint to the police as that matter would be relevant to your evaluation of [their] evidence'. This direction followed an earlier warning addressing the requirements of section 61 of the *Crimes Act 1958* and ' ... in the present case there was no complaint made at the time of the alleged offences. If there had been, you might have used that evidence to help support a conclusion that the complainant was telling the truth, ... but that is not the case here'. This ground was upheld because the trial judge did not inform the jury that 'failure to complain or delay in complaining may cast doubt upon the reliability of the their evidence ...'. (*R v WEB* at 27). It was held by the Court of Appeal that there was a considerable imbalance between the *Kilby* warning and the section 61 requirements.

In *R v MWL*, the delay after the first offence was 20 years and the appeal ground based on a *Longman* warning was upheld. The *Kilby* warning in this case, according to the Court of Appeal, was balanced with the section 61 requirement and the ground failed.

In *R v Pidoto*, the delay was 20 years and six months after the first offence. The ground of appeal was that the trial judge had failed to direct the jury in accordance with the *Kilby* requirements. But, the basic tenet of the *Kilby* warning — that a prompt complaint is consistent with the assault having taken place — was not discussed. Rather the discussion by the Court of Appeal related more to a *Longman* warning.

Unlike the discussion in the Court of Appeal cases surrounding the *Longman* warning, there was no discussion in these same cases as to what length of delay is necessary for a *Kilby* warning. Discussion focused more on the (im)balance between the *Kilby* warning and the legislative requirement in section 61 *Crimes Act 1958*.

In response to recent recommendations of the VLRC (2004:383), and to address, firstly, the inconsistency between the *Kilby* warning and s61 *Crimes Act 1958* and, secondly, to counter the stereotypical view that delay in complaining makes a non-credible witness, there has been legislative reform which involves the *Crimes (Sexual Offences) (Further Amendment) Bill* 2005 further amending the *Crimes Act 1958* (assented to 10 October 2006). Now, the judge must not warn, or suggest in any way to, the jury, that the credibility of the complainant is affected by a delay in reporting sexual assault, unless on the application of the accused, the judge is satisfied that there exists sufficient evidence tending to suggest that the credibility of the complainant is so affected to justify the giving of such a warning (section 61(1)(b)(ii) *Crimes Act 1958*). Also, the judge must not warn, or suggest in any way to, the jury that it would be dangerous or unsafe to find the accused guilty because of the delay (section 61(1)(b)(iii) *Crimes Act 1958*).[11]

Other Warnings

Murray Warning

The *Murray* warning, also known as the 'corroboration warning', requires the jury to be warned that it is dangerous to convict on the uncorroborated evidence of a complainant in a sexual assault trial (*R v Murray*). This was the basis of a ground for appeal in one case, *R v MTP*, which failed, as did the appeal. According to the ALRC, NSWLRC and VLRC (2005:606) the corroboration warning has remained standard practice in many jurisdictions, despite legislative changes removing the corroboration warning requirements.

Markuleski Warning

A *Markuleski* warning was the basis for an unsuccessful ground of appeal in one case, *R v Trainor*. This warning directs the jury that 'where they entertain a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally' (*R v Markuleski*).

Palmer Warning

A *Palmer* warning requires the trial judge to warn the jury that they should not speculate as to the complainant's motive to lie, as the accused is not required to suggest or establish a motive, and, it would be unfair for the accused to do so. Whether or not the accused can suggest a motive for the complainant to lie is also irrelevant. This jury warning was the only successful ground of appeal in the case of *R v Cupid*.

Warnings in relation to complaint evidence

In sexual offence cases, an exception to the general prohibition against the admission of prior consistent statements or evidence of complaint may apply. An example of complaint evidence might be a child disclosing the abuse to a third party such as her or his teacher. Normally, this evidence would be inadmissible due to the hearsay rule. The exception in cases of sexual offences arises if the complaint is 'recent' or the complaint was made at the first available opportunity. The jury directions relating to 'recent complaint' were the bases of grounds for appeal in two cases (*R v Knigge* and *R v Pidoto*) both of which were successful.

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1 Similar legislative amendments were passed recently in New South Wales (Section 294(2)(c) *Criminal Procedure Act 1986*) so that a Judge must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.

The warnings relating to *Longman*, *Kilby*, *Murray* and *'recent complaint'* all deal with delay in reporting and uncorroborated evidence — issues casting doubt on the reliability of evidence of the complainant.

Jury Directions on Evidentiary and Procedural Matters

Jury directions on evidentiary and procedural matters combined with 'special warnings', represented about half of all grounds for appeal. Although about 70% of these failed as grounds, 46% of appeals were allowed.

Interestingly, not one ground based on a judicial direction to the jury relating to a procedural matter, was upheld, despite this category of grounds representing nearly a quarter of all grounds based on judicial directions to the jury. This compares with 35% of grounds for appeal relating to evidentiary matters being upheld, and 44% of grounds for appeal in the 'other' category.

That trial judges' performance relating to jury directions on procedural matters, in this study, is unblemished, compared with other warnings, reinforces the perception that warnings based on delay in complaining about child sexual assaults are inherently problematic for the trial judge.

Delay in reporting

Of the 7 cases in this study which involved a delay in reporting the offences of less than two years, 3 appeals were allowed. Eight cases involved a delay of between 2 and 9 years, of which half of were successful. Finally, of the 8 cases involving a delay of between 14 and 39 years, 5 were allowed by the Court of Appeal.

Table 5: Effect of delay in reporting the alleged offences to Police (after the first offence) on the outcome of the appeal.

Delay in Reporting	Appeals Dismissed	Appeals Allowed
Less than 2 years:	7	3
Between 2 years and 9 years:	4	4
Between 14 years and 39 years:	3	5
Unknown delays:	1	1

Although these findings point to a trend — the greater the delay in reporting the higher the chance of a successful appeal — the existence of such an association would need to be statistically tested. Such a trend is, however, consistent with the profound and inherent difficulties in child sexual assault cases — a child will either delay in reporting, or not report at all.

Retrial or Acquittal?

The Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial to be had (section 568 *Crimes Act 1958*). Such power to grant a new trial is discretionary and is only to be exercised where the interests of justice require it. The court must also consider the public interest in the sound administration of justice and the interests of the accused (*Director of Public Prosecutions (Nauru) v Fowler*).

It is contrary to the interests of justice to order a new trial where the evidence at the original trial was, or at the new trial would be, insufficient to warrant a conviction. In deciding whether a retrial should be ordered or a verdict of acquittal entered, the court must determine if a reasonable jury could have convicted upon the evidence of a case, and if so, whether there are any circumstances which might render it unjust for the appellant to stand trial again (*King v R*; *Director of Public Prosecutions (Nauru) v Fowler*; *R v Ryan*).

Of the 13 successful appeals against conviction for sexual offences against children, the Court of Appeal ordered 12 new trials and one acquittal (see Appendix 2). Implicit in the decision to order a new trial is a determination that the available evidence against the accused, if accepted, is at least capable of supporting a conviction by a reasonable jury.

Outcomes of retrials

Of the twelve retrials in this study, five resulted in conviction and sentence, three resulted in acquittal and four did not proceed due to a *nolle prosequi* being entered by the OPP. A *nolle prosequi* is a decision by the Director of Public Prosecutions (DPP) not to continue with the prosecution, although it does not establish the innocence of the accused. (Refer to Appendix 2).

Of significance are the reasons for the DPP's entry of a *nolle prosequi* in a third of the cases sent for retrial, especially when the Court of Appeal, in ordering a retrial, implied that there was sufficient evidence for a reasonable jury to convict. The difficulties faced by the complainant and his or her family cannot be discounted in determining why these cases are withdrawn. According to Chief Justice Wood *R v BWT* (at 37):

> ... it does remain particularly burdensome for any such person to be called on to give evidence for a second trial ...The risk of harm to a true victim is only multiplied in such a case ... Particularly if, by reason of the trauma potentially involved ... a decision is made to no bill the proceedings.

Because the DPP is not required to publicly state the reasons behind the discontinuation of the prosecution case, it is not known if such potential trauma to the victim drives these decisions. More research into this area is necessary. According to the NSW DPP, Mr Cowdery, QC, if some retrials do not proceed for this reason, 'this has to have ramifications in terms of the administration of justice and child protection' (Standing Committee on Law and Justice, NSW Legislative Council 2002:139).

One of the cases that did go to retrial was, in fact, a second retrial. The presentment contained 12 counts of sexual offences against the daughter of the accused's then de facto wife. The alleged offences were committed between February 1979 and December 1981. The defendant was convicted on nine of the twelve counts (*R v Clarke*). The conviction from the first trial in July 2000 was appealed in September 2001 and a retrial was ordered. The 17 appeal grounds on this first appeal were primarily based upon judicial error. The second trial (first retrial), in July 2002, also resulted in a conviction, but was successfully appealed on the ground of a procedural irregularity. The jurors were separated (left for their deliberations) without being sworn as required by s50(2) of the *Juries Act 2000* (Vic). A third trial (second retrial) resulted in an acquittal for the accused.

The burden and trauma for a victim, referred to by Wood CJ above, would be stark in this case. The victim experienced pre-trial interviews with police, cross examination at committal proceedings, three trials including evidence-in-chief and cross examinations at each, and two successful appeals — all this to confront a final acquittal of the accused.

Certainly, a procedural irregularity that goes to the root of the proceedings denies the defendant a fair trial — but it does not necessarily equate with innocence.

Recent legislative changes in Victoria aim to address some of the problems suffered by child complainants in the courts. Such problems are commonly referred to as 'secondary victimisation' or 'legal abuse' of the child victim of sexual assault (Eastwood & Patton 2002:62; ALRC 1997:14.111). Some examples of the recent reforms in Victoria include a new section 41E of the *Evidence Act 1958* which provides for a child complainant (or a person with a cognitive impairment) to give evidence through alternative arrangements that include the giving of evidence from outside the court room via CCTV, or with the use of screens if inside the court and in the presence of a support person of the complainant's choice. These alternative arrangements are compulsory, unless the complainant is aware of these rights but wishes and is able to give evidence in the court room and the prosecution makes an application for the alternative arrangements not to be utilised.

A new section 41F of the *Evidence Act 1958* provides for greater protection of the child witness (or person with a cognitive impairment) from improper questioning.[12] Any such questions must be disallowed by the court, or, the complainant must be told that he or she does not have to answer the question.

A new section 41G of the *Evidence Act 1958* creates a presumption in favour of pre-recording of the evidence of a child (or person with a cognitive impairment) who is a complainant in a sexual offence case. Such evidence is to be recorded at a special hearing within 21 days of the accused being committed to stand trial. The accused and his or her legal representative must be present at this special hearing. The court may direct that the complainant give direct testimony before the jury where the prosecution makes an application for this to occur and where the court is satisfied that the complainant is aware of his or her right to utilise the special procedure and wishes and is able to give direct testimony.

With regard to the trauma suffered by the child witness having to give evidence at one or more retrials, section 41H of the *Evidence Act 1958*, will provide that the evidence obtained pursuant to section 41G, will be treated as if it were given through direct testimony and that it may be admitted in subsequent proceedings such as a retrial, appeal or in proceedings for other charges arising out of the same circumstances. The complainant will not have to attend the trial unless required to do so by the court for the purposes of giving further evidence.[13]

Whilst it is hoped that these reforms will reduce 'secondary victimisation' or 'legal abuse' of child complainants in sexual assault cases, the degree to which this happens is yet to be evaluated.

Other factors contributing to judicial error at trial

This study of 18-months of Victorian trials of sexual offences against children revealed a 54% appeal rate from convictions resulting from a jury verdict. When compared with other crimes, this appeal rate is very high. Of the 28 appeals studied, the Court of Appeal ruled that the trial judge was responsible for a substantial (in the legal sense) miscarriage of

12 Improper questioning includes a question that is confusing, misleading, annoying, harassing, intimidating, offensive, oppressive or unduly repetitive, having regard to matters such as the age, cultural background, education and personality of the child.

13 There have been similar and recent legislative changes in NSW. See Chapter 6, Part 5, Division 4 of the *Criminal Procedures Act 1986*.

justice in more than four out of ten cases, and more than nine out of ten successful appeals. Trial judge error formed the basis of nearly 90% of all grounds for appeal, half of which were based on directions and warnings to the jury, including directions relating specifically to delay in making complaints in sex offences. These findings paint a picture of trial judges being closely monitored, and often being found to have erred. The trial judge is facing harsh scrutiny:

> The task of charging a jury on the relevant facts and law in a criminal trial...is a daunting one for many judges, knowing as they do that their every word will be scrutinised for appealable error, and their charge will be examined for omission against checklists or relevant matters identified in appellate decisions (Eames 2003:35).

But has the trial judge become the scapegoat? In Victoria, as in NSW, there are many complex judicial warnings and directions which make the job difficult not only for the judge but also for the jury which is faced with 'a bewildering array of considerations', highly technical and often inconsistent (*R v BWT* per Wood, CJ at CL at 34). This view is supported by Cowdery (2002):

> There is an abundance of case law pertinent to sexual assault matters and directions that are to be made by the trial judge ... and matters are frequently sent back for retrial on the basis that the judge misdirected the jury in the summing up.

The study's findings relating to error by the trial judge are open to different interpretations. Is it a function of the complexity of the special jury warnings pertinent to child sexual assault cases that make the trial judge's task onerous, or judicial incompetence, or both? Perhaps the duties of judges are so many today that the extra duties have added to the risks 'that mistakes will creep in' (Kirby 2002:12). The trial judge, in managing the jury, counsel, the accused, witnesses and a plethora of evidentiary and procedural law, is certainly tested as the alleged crime is played out on the curial stage. But the trial itself is not the only concern for the trial judge. In determining what else lies behind what is being 'marketed' as solely (significant) trial judge error, it is necessary to look at the role of the Court of Appeal — is it being generously ardent in its efforts to control jury outcomes? Is it placing requirements on the trial judge so stringent that appealable error is almost certain? As well as the contributing factors of the appellate courts, the role of trial counsel calls for some investigation.

According to Eames J (2003:44), it is the requirements imposed by the appellate courts which lead to lengthy and confusing charges. Such charges are unnecessarily complicated by the multiplicity of requisite warnings — there are eight distinct categories of warnings to be considered by the trial judge in sexual assault cases in NSW (*R v BWT* at 34). Certainly, judicial directions and warnings in sexual offence cases have provided fertile ground for appeal as evidenced by this study, and others (ALRC, NSWLRC & VLRC 2005:641). Also, jury directions, initially intended to be flexible and functional, have become 'numerous, complex and formulaic' (Boniface 2005:270).

It is also argued that appellate courts are displaying an increasing reluctance to exercise the power of the proviso in relation to warnings to the jury (ALRC, NSWLRC and VLRC 2005:641). That is, if the Court of Appeal has upheld a ground of appeal, it may dismiss the appeal if it considers there has been no substantial miscarriage of justice (Section 568(1) *Crimes Act 1958*). In the author's study, although the Court of Appeal found it unnecessary to decide 4 of the 113 grounds of appeal (the appeal was allowed on other grounds), only one ground, which was upheld, was found *not* to have caused a miscarriage of justice — although the appeal was still allowed, but on other grounds. This was a faulty *Kilby* warning

in the case of *R v Alexander & McKenzie*. That is, apart from this single ground of appeal the power of the proviso was dispensed with by the Court of Appeal in Victoria in al appeals against conviction of child sexual assault in the author's study.

Another consideration in determining why the trial judge is facing harsh scrutiny may b the growing willingness of appellate courts to interfere where the appeal relates t misdirections or non-directions that were neither raised nor objected to by defence counse during the trial (ALRC, NSWLRC and VLRC, 2005:642) — something appellate court are, generally, reluctant to do (*Vakuata v Kelly*). In *Doggett v R*, not only did defenc counsel not request a *Longman* warning, forensic disadvantage was not raised as an issu during the trial. Also in *Crampton v R,* defense counsel did not object to the *Longma* warning. The High Court has given its imprimatur to this 'trend' by stating that a *Longma* warning may be required, irrespective of whether counsel has requested one (*R v DBG* a 333). Also, concern is expressed that a 'forensic culture' is developing, whereby tria counsel, in attempting to maximise opportunities for avenues for appeal, are remainin silent on matters of jury directions during the trial (*R v MM* per Levine J at 36; Tasmani Law Reform Institute 2005:3.1.1).

Unfortunately, not all appeal judgments in the author's study indicated the presence o absence of trial counsel objection to specific warnings, therefore, no precise assessment ca be made. But, of those that did, the following observations can be made: *R v Alexander* — 2 successful grounds of appeal based on jury warnings given (including a *Kilby*) an defence counsel did not object to either during the trial. *R v GTN* — forensic disadvantag was not raised at trial as an issue although a faulty *Longman* warning was used as successful ground of appeal. *R v Knigge* — defence counsel did not object to the admissio of complaint evidence at the trial — this was a successful ground of appeal. *R v MWL* — whereas an objection was made at trial with respect to the *Longman* warning (groun upheld), no objection was made in relation to the *Kilby* warning, and this ground failed.

Another important consideration in the appraisal of judicial error involves the appea hearing itself. To re-iterate the acumen of the President of the Court of Appeal, it is th responsibility of the trial judge who is familiar with the 'atmosphere of the trial' to ensur the trial is fair. Winneke P also refers to the inherent limitations for appeal judges i determining the accuracy of the directions given to the jury and whether those direction were appropriate to the circumstances of the case, 'insofar as these circumstances can b gleaned from the transcript' (*R v Olivar* at 7). The Court of Appeal receives a 'cleaned-up' or sterile version of the trial, which is further clinically dissected and analysed under the appellate microscope (and necessarily out of context). It is effectively a trial by appellat judges who have neither heard evidence nor experienced any of the atmosphere, tensions nuances or the reality of the trial (*Dietrich v The Queen* (1992) per Deane J at 525). This may carry the risk of undermining the trial judge and his/her responsibility in carrying out a fair trial may be compromised.

The appellate court operates within an hermetically-sealed bubble. Three sitting judges and counsel arguing the law in a highly technical way and far removed from the real characters. What may have been days or weeks of legal 'sweat and tears' at trial, have been reduced to a few dry and technical legal arguments. Such legal arguments, though, are far from innocuous. Appeal court outcomes carry great weight and influence future decisions of trial judges, including at retrials. The Court of Appeal, in judging the judges, wields a persuasive, and pervasive, power within our criminal justice system.

As cautioned by Lee (1991:699):

> If the willingness of the appellate courts to try to control juries' verdicts continues unabated, it will not be long before the jury system will suffocate under the legalism forced upon it...

Conclusion

In summary, the complexity and idiosyncratic nature of the child sexual assault trial, coupled with the threat of appellate scrutiny (due to the strict requirements of the jury warnings) are not the only factors to consider when trying to understand the source, or sources, of what is, ultimately, significant trial judge error. The willingness of the appeal courts to review points of error in the absence of objection from counsel at trial, on the one hand, and their reluctance to utilise the proviso, on the other, must also be propelling successful appeals. Also, if tactical trial counsel is structuring the trial to maximise any chance of appeal (a safe bet when more than half of child sexual assault convictions are appealed and about half of the appeals are allowed), the risk of spiraling appealable error from trial is assured.

Certainly, the data in this study do confirm that in Victoria, as elsewhere, warnings to the jury in child sexual assault trials (including delay-based warnings) are problematic and judicial error is significant. The data also reveal that convictions in child sexual assault are low and appeals are high. That almost half of the appeal decisions found judicial error had gone to the root of the trial and caused a substantial miscarriage of justice, is significant.

Following recommendations by the VLRC (2004), the *Crimes (Sexual Offences) (Further Amendment) Bill* 2005 has very recently amended the *Crimes Act 1958* (assented to 10 October 2006) in that it substitutes and expands section 61 *Crimes Act 1958*. A new section 61(1E) of the *Crimes Act 1958* will basically abrogate the use of the *Longman* warning. Unless, on the application of the accused, the judge is satisfied that the accused has suffered a significant forensic disadvantage due to the delay in making a complaint, the judge must, in any terms that the judge considers appropriate having regard to the circumstances of the case -- (a) inform the jury of the nature of the forensic disadvantage suffered by the accused; and (b) instruct the jury to take that disadvantage into consideration (section 61(1A) *Crimes Act 1958*). However, despite this, a judge must not warn, or suggest in any way to, the jury that it would be dangerous or unsafe to find the accused guilty because of the delay (section 61(1B) *Crimes Act 1958*). Also, for the purposes of section 61(1A), the passage of time alone is not to be taken to cause significant forensic disadvantage (section 61(1C) *Crimes Act 1958*). Nothing is sub-section (1A) requires a judge to give a warning referred to in that subsection if there is no reason to do so in the particular proceeding (section 61(1D) *Crimes Act 1958*).[14]

It will be interesting to see if such amendments bring about one of the intended effects of the legislation -- a reduction in significant judicial error in cases of child sexual assault. Based on current trends of the appeal courts, though, there remains some concern that these

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14 Similar legislative amendments were passed recently in New South Wales. Section 294 *Criminal Procedure Act 1986* has been amended by the *Criminal Procedure Amendment (Sexual and Other Offences) Act 2006*, to further provide that the Judge must not warn the jury that delay in complaining is relevant to a victim's credibility unless there is sufficient evidence to justify such a warning. But, if the delay is significant and the Judge is satisfied that the accused person has suffered a significant forensic disadvantage caused by the delay, the Judge may warn the jury (but only if a party to the proceedings so requests) of the nature of the disadvantage and the need for caution in determining whether to accept or give any weight to the evidence or question suggesting the absence of a complaint or delay in complaining.

legislative provisions will be interpreted such that they will continue to provide the necessary appellate fodder for ongoing successful appeals in convictions of child sexual assault — appeals which are disproportionately greater in number when compared to all other types of crimes.

Whatever the impact of the new legislation, the onus for a reduction in judicial error at trial should not be on the trial judge alone. The appeal courts also need to share this responsibility — a responsibility that is fundamental to the integrity our criminal justice system. A fair trial for the accused is but one element in ensuring this integrity. The victim, or child sexual assault complainant, is also deserving of fairness and balance in the criminal trial system. If the discretionary powers of a trial judge, who is intimately familiar with the trial, continue to be undermined, such justice will not be forthcoming.

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Appendix 1: Appeals Allowed and Applications Dismissed Grounds for Appeal and their Outcomes for the 28 Court of Appeal Cases

Appeal Allowed	Application dismissed
R v Alexander Judicial Error: Jury Directions – 6 (5 upheld, 1 failed) Judicial Error: Rulings* – 4 (upheld) Judicial Error: Jury Verdicts U/U – 1 (failed) Judicial Error: MOJ/Aggregate of errors – 1 (upheld)	***R v ALP*** Judicial Error: Jury Directions – 3 (failed) Judicial Error: Rulings – 4 (failed) Judicial Error: Jury Verdicts U/U – 1 (failed)
R v BAH Judicial Error: Rulings – 1 (upheld) Jury Error: Jury Verdict U/U – 1 (failed)	***R v Barnes*** Judicial Error: Rulings – 2 (failed)
R v Clarke (a retrial) Judicial Error: Rulings – 1 (upheld)	***R v BT*** Jury Error: Jury Verdicts U/U – 1 (failed)
R v Cupid Judicial Error: Jury directions – 2 (1 upheld 1 failed) Judicial Error: Rulings – 1 (Failed)	***R v DCC*** Judicial Error: Jury Directions – 6 (Failed) Judicial Error: Rulings – 1 (Failed) Judicial Error: MOJ/Aggregate of Errors – 1 (Failed)
R v Hindman Judicial Error: Rulings – 1 (upheld)	***R v De Ruiter*** Judicial Error: Jury Directions – 4 (failed) Jury Error: Jury Verdicts U/U – 1 (failed)
R v JMV Jury Error: Jury Verdicts U/U – 1 (upheld)	***R v GAM*** Judicial Error: Jury Directions – 4 (failed) Judicial Error: Rulings – 1 (failed) Jury Error: Jury Verdicts U/U – 1 (failed)
R v Knigge Judicial Error: Jury Directions – 3 (2 upheld, 1 nntd**) Judicial Error: Rulings – 1 (upheld)	***R v GTN*** Judicial Error: Jury Directions – 1 (failed) Jury Error: Jury Verdicts U/U – 1 (failed)
R v Lewis Judicial Error: Rulings – 3 (1 upheld, 2 nntd) Jury Error: Jury Verdicts U/U – 1 (failed) Judicial Error: MOJ/aggregate of errors – 1 (natd)	**R v Menta** Judicial Error: Jury Direction – 1 (failed)
R v Lyne Judicial Error: Rulings – 1 (upheld)	**R v MTP** Judicial Error: Jury Directions – 1 (failed) Judicial Error: Rulings – 1 (failed) Judicial Error: Jury Verdicts U/U – 1 (failed)
R v McKenzie Judicial Error: Rulings – 2 (upheld) Jury Error: Jury Verdicts U/U – 1 (failed) Judicial Error: MOJ/Aggregate of errors – 1 (upheld)	**R v Olivar** Judicial Error: Jury Directions – 1 (failed) Judicial Error: Rulings – 1 (failed) Judicial Error: MOJ/Aggregate of errors – 1 (failed)
R v MWL Judicial Error: Jury Directions – 3 (2 upheld, 1 failed)	**R v O'Neill** Judicial Error: Rulings – 2 (failed) Jury Error: Jury Verdicts U/U – 1 (failed)
R v Pidoto Judicial Error: Jury Directions – 7 (2 upheld, 5 failed) Jury Error: Jury Verdicts U/U – 1 (failed)	**R v Papamitrou** Judicial Error: Jury Directions – 3 (failed) Judicial Error: Rulings – 2 – (failed) Jury Error: Jury Verdicts U/U – 1 (failed)

R v WEB Judicial Error: Jury Directions – 2 (2 upheld) Judicial Error: Rulings – 3 (3 upheld) Jury Error: Jury Verdicts U/U – 1 (partly upheld/partly failed)	**R v Rimon** Effect of death on leave to appeal – 1 (failed)
	R v Trainor Judicial Error: Jury direction – 1 (failed) Jury Error: Jury Verdict U/U – 1 (failed)
	R v VST Judicial Error: Jury Directions – 7 (failed) Judicial Error: Rulings: – 3 (failed) Judicial Error: Jury Verdicts U/U – 1 (failed)
Judicial Error: Jury Directions – 23 (14 upheld; 8 failed; 1 nntd) **Judicial Error: Rulings** – 18 (15 upheld; 1 failed; 2 nntd) **Judicial Error: Jury Verdicts U/U** – 1 (failed) **Judicial Error: MOJ/aggregrate of errors** – 3 (2 upheld; 1 nntd) **Jury Error: Jury Verdicts U/U** – 6 (1 upheld; 4 failed; 1 partly upheld/partly failed) **Total Grounds** – 51 (32 upheld; 14 failed; 4 nntd; 1 partly upheld/failed) **Appeals Allowed** – 13	**Judicial Error: Jury Directions** – 32 (all failed) **Judicial Error: Rulings** – 17 (all failed) **Judicial Error: Jury Verdicts U/U** – 3 (all failed) **Judicial Error: MOJ/aggregrate of errors** – 2 (both failed) **Jury Error: Jury Verdicts U/U** – 7 (all failed) **Effect of Death on appeal** – 1 (failed) **Total Grounds** – 62 (all failed) **Appeals Dismissed** – 15

* 'Judicial Error: Rulings' — this category includes judicial rulings on evidentiary and procedural matters.
** Not necessary to decide.

Appendix 2: Delay in Reporting — Outcomes of Appeals and Retrials — Jury Directions as Grounds

Case Name	Delay in reporting after 1st offence	Delay in reporting after last offence	Outcome of Appeal	Outcome of allowed Appeal	Jury Directions as grounds for appeal and outcome
R v Lewis	1 Day	1 Day	Allowed	Retrial — Acquitted	None
R v Deruiter	2 days	2 days	Dismissed		Procedural x 2 (Failed) Evidentiary x 2 (Failed)
R v MTP	Few days	Few days	Dismissed		Murray (Failed)
R v Barnes	Less than a month	Less than a month	Dismissed		None
R v Cupid	About a month	1 to 2 days	Allowed	Retrial — Convicted and sentenced	Palmer (Upheld) Procedural x 1 (Failed)
R v BAH	About 5 to 6 months	Unknown	Allowed	Retrial — Convicted and sentenced	None
R v GAM	6 months	1 to 2 days	Dismissed		Longman (Failed) Procedural x 2 (Failed) Evidentiary x 1 (Failed
R v GTN	1 year 2 months	Soon after	Dismissed		Longman (Failed)
R v Papamanou	1 year 3 months	Soon after	Dismissed		As to Counts x 2 (Failed) Evidentiary x 1 (Failed)
R v VST	1 year 3 months	About 3 months	Dismissed		Kilby (Failed) Procedural x 2 (Failed) Evidentiary x 4 (Failed)
R v Lyne	About 2 years	Unknown	Allowed	Retrial — Convicted and sentenced	None
R v Knigge	2 years 2 months	About 1 year	Allowed	Retrial — Nolle Prosequi	Longman (Not necessary to decide) As to Recent Complaint x 2 (Upheld)
R v McKenzie	3 years 8 months	About 3 years 6 months	Allowed	Retrial — Acquitted	None

Case Name	Delay in reporting after 1st offence	Delay in reporting after last offence	Outcome of Appeal	Outcome of allowed Appeal	Jury Directions as grounds for appeal and outcome
R v Alexander	3 years 8 months	About 3 years 6 months	Allowed	Retrial — Nolle Prosequi	Kilby (Upheld but no MOJ) Procedural x 1 (Failed) Evidentiary x 4 (Upheld)
R v Menta	5 years	Unknown	Dismissed		As to counts x 1 (Failed)
R v Trainor	6 years 2 months	Within a month	Dismissed		Markuleski (Failed)
R v Olivar	9 years (nearly)	18 months	Dismissed		Longman (Failed)
R v O'Neil	8 years 10 months	2 years 10 months	Dismissed		None
R v WEB	14 years	4 years 7 months	Allowed	Retrial — Convicted and sentenced	Longman (Upheld) Kilby (Upheld)
R v DCC	19 years	11 years	Dismissed		Longman (Failed) Procedural x 3 (Failed) Evidentiary x 2 (Failed)
R v MWL	20 years	13 years	Allowed	Retrial — Convicted and sentenced	Longman (Upheld) Kilby (Failed) Evidentiary x 1 (Upheld)
R v Clarke	20 years	About 15 years	Allowed	Retrial — Acquitted (this was a 2nd retrial)	None
R v Pidoto	20 years 6 months	19 years 6 months	Allowed	Retrial — Nolle Prosequi	Kilby (Failed) Evidentiary x 1 (Failed) Evidentiary X 2 (Upheld Procedural x 2 (Failed) As to Recent Complaint (Failed)
R v BT	23 years	17 years	Dismissed		None
R v JMV	30 years	24 years	Allowed	Acquittal	None
R v ALP	39 years	Unknown	Dismissed		Procedural x 2 (Failed) Evidentiary x 1 (Failed)
R v Rimon	Unknown	Unknown	Dismissed		None
R v Hindman	Unknown	Unknown	Allowed	Retrial — Nolle Prosequi	None

Appendix 3: List of the 28 Court of Appeal cases in the study

R v Alexander & McKenzie [2002] VSCA 183 (Unreported, Winneke, P, Charles, and Vincent, JJA, 20 November, 2002).

R v ALP [2002] VSCA 210 (Unreported, Chernov and Eames, JJA and O'Bryan, AJA, 18 December, 2002)

R v BAH [2002] VSCA 164 (Unreported, Winneke, P, Callaway, JA and O'Bryan, AJA, 18 October, 2002).

R v Barnes [2003] VSCA 156 (Unreported, Callaway, Buchanan and Eames, JJA, 2 October, 2003).

R v BT [2004) VSCA 44 (Unreported, Vincent, JA, Smith and Coldrey, AJJA, 2 April 2004).

R v Clarke [2002] VSCA 184 (Unreported, Winneke, P, Eames, JA, O'Bryan, AJA, 15 November, 2002).

R v Cupid [2004] VSCA 1831 (Unreported, Ormiston, Callaway and Buchanan, JJA, 3 and 10 August, 2004).

R v DCC [2004] VSCA 230 (Unreported, Callaway, Eames and Nettle, JJA, 15 November, 2004).

R v Deruiter [2003] VSCA 66 (Unreported, Callaway and Buchanan, JJA, Warren, AJA, 4 June, 2003).

R v GAM [2003] VSCA 185 (Unreported, Winneke, P, Phillips and Eames, JJA, 4 December, 2003).

R v GTN [2003] VSCA 38 (Unreported, Ormiston, Callaway and Eames, JJA, 23 April 2003).

R v Hindman [2001] VSCA 203 (Unreported, Brooking, Phillips and Vincent, JJA, 12 November 2001).

R v JMV [2001] VSCA 219 (Unreported, Winneke, P, Brooking and Buchanan, JJA, 3rd December 2001).

R v Knigge [2003] VSCA 94 (Unreported, Winneke, P, Phillips and Chernov, JJA, 1 August 2003).

R v Lewis [2002] VSCA 200 (Unreported, Winneke, P, Callaway and Bat, JJA, 13 December 2002).

R v Lyne [2003] VSCA 118 (Unreported, Charles, Chernov and Eames, JJA,15 August 2003).

R v Menta [2004] VSCA 57 (Unreported, Phillips and Charles, JJA and Bongiorno, AJA, 31 March 2004).

R v MTP [2002] VSCA 81 (Unreported, Phillips, CJ, Ormiston and Vincent, JJA, 30 May 2002).

R v MWL [2002] VSCA 221 (Unreported, Phillips, CJ, Phillips and Buchanan, JJA, 20 December, 2002).

R v Olivar [2004] VSCA 41 (Unreported, Winneke, P, Buchanan, JA and Coldrey, AJA, 2 April, 2004).

R v O'Neill [2003] VSCA 204 (Unreported, Winneke, P, Vincent and Eames, JJA, 12 December 2003).

R v Papamitrou [2004] VSCA 12 (Unreported, Winneke, P, Ormiston and Buchanan, JJA, 27 February 2004).

R v Pidoto [2002] VSCA 60 (Unreported, Callaway, Batt and Vincent, JJA, 10 May 2002.

R v Rimon [2003] VSCA 136 (Unreported, Winneke, P, Vincent and Eames, JJA, 3 September 2003).

R v Trainor [2003] VSCA 200 (Unreported, Charles, Buchanan and Chernov, JJA, 10 December, 2003).

R v VST (2003) VSCA 35 (Unreported, Winneke, P, Phillips and Buchanan, JJA,15 Aprl 2003).

R v WEB [2003] VSCA 205 (Unreported, Winneke, ACJ, Charles and Eames, JJA, 18th November 2003).

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Crampton v The Queen (2000) 206 CLR 161; (2000) 176 ALR 369; (2000) 117 A Crim R 222.

Crofts v The Queen (1996) 186 CLR 427; (1996) 139 ALR 455; (1996) 88 A Crim R 232

Director of Public Prosecutions (Nauru) v Fowler (1984) 154 CLR 627.

Doggett v The Queen (2001) 208 CLR 343; (2001) 182 ALR 1; (2001) 75 ALJR 1290.

Jones v The Queen (1997) 191 CLR 439; (1997) 149 ALR 598; (1997) 72 ALJR 78.

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Palmer v R (1998) 193 CLR 1; (1998) 72 ALJR 254; (1998) 96 A Crim R 213.

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R v DBG (2002) 133 A Crim R 227; [2002] NSWCCA 328; BC200205266.

R v DCC [2004] VSCA 230 (Unreported, Callaway JA, Nettle JA, Eames JA, 15 December, 2004).

R v GAM [2003] VSCA 185 (Unreported, Winneke, P, Phillips and Eames, JJA, 4 December, 2003).

R v GTN [2003] VSCA 38 (Unreported, Ormiston JA, Callaway JA, Eames JA, 23 April, 2003).

R v JMV [2001] VSCA 219 (Unreported, Winneke P, Brooking JA, Buchanan JA, 3rd December 2001).

R v Knigge [2003] VSCA 94 (Unreported, Winneke P, Phillips JA, Chernov JA, 1 August 2003).

R v Kotzmann [1999] 2 VR 123; [1999] 105 A Crim R 243; [1999] VSCA 27).

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R v Murray (1987) 11 NSWLR 12; (1987) 30 A Crim R 315.

R v MWL [2002] VSCA 221 (Unreported, Buchanan JA, Phillips CJ, Phillips JA, 20 December, 2002).

R v Olivar [2004] VSCA 41 (Unreported, Coldrey AJA, Winneke P, Buchanan AJA, 2 April, 2004).

R v Pidoto [2002] VSCA 60 (Unreported, Callaway JA, Vincent JA, Batt JA, 10 May 2002.

R v Rimon [2003] VSCA 136 (Unreported, Winneke, P, Vincent and Eames, JJA, 8 September 2003).

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R v VST [2003] VSCA 35 (Unreported, Winneke P, Phillips JA, Buchanan JA, 15 April, 2003).

R v WEB [2003] VSCA 205 (Unreported, Winneke P, Charles JA, Eames JA, 18th November 2003).

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