HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN: STEVEN MOORE (a pseudonym)
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues

2. The respondent contends that the appeal presents the following issues:

   a. On an interlocutory appeal pursuant to s 295 of the *Criminal Procedure Act 2009* (Vic) ('**CPA**'), the Court of Appeal held that it was open[1] to the primary judge to admit evidence under s 137 of the *Evidence Act* 2008 (Vic) ('***Evidence Act***') (and also observed that the primary judge was correct[2] not to exclude the evidence). On the proper construction of ss 295 and 300 of the CPA, is the applicable standard of appellate review whether the primary judge's ruling was open, or whether it was correct?

   b. Whether the Court of Appeal erred in determining on (a) the *House v The King*[3] standard of appellate review; or (b) a correctness standard, that s 137 of the *Evidence Act* did not require exclusion of the evidence because its probative value was not outweighed by the danger of unfair prejudice to the accused.

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[1] Judgment [187] (CAB 93–94).
[2] Judgment [188] (CAB 94).
[3] (1936) 55 CLR 499 ('***House***').

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The respondent considers that no notice under s 78B of the *Judiciary Act 1903* (Cth) is required to be given.

Part IV: Factual matters in contention

4. The relevant factual matters are set out at Judgment, [7]–[23] (CAB 49–52). The respondent does not take issue with the summary which appears at Appellant's Submissions ('**AS**') [5]–[10].

5. The appellant is charged with seven offences, each of which is alleged to have been committed against the complainant on the night of 30 August 2021 and into the morning on 31 August 2021[4] at the complainant's premises.[5] In the Defence Response to Summary of Prosecution Opening, the defence stated that the appellant had entered the complainant's apartment with her permission and that there had been an argument, but that the appellant had left the apartment and had not assaulted the complainant.[6] The Defence Response denied that the appellant had been at the complainant's unit for as long as alleged.[7] It was accepted that the complainant was observed to have injuries on 31 August 2021, but denied that the appellant was responsible for any injuries.[8]

6. In a hearsay notice pursuant to s 67 of the *Evidence Act*, the Crown indicated its intention to adduce hearsay evidence of previous representations made by the complainant. Relevantly, these included five distinct sets of previous representations:

    a. representations made to the complainant's mother by phone on 31 August 2021 between 11.30am and 12.20pm, when the complainant was at the home of her next-door neighbour, around 6.5 to 7.5 hours after the time the appellant was alleged to have left the complainant's premises (Judgment, [88]–[91]; CAB 71–2);

    b. representations made in a recorded '000' call at 12:20pm on 31 August 2021 (Judgment, [99]–[101]; CAB 73–4);

    c. representations made to Senior Constable Stack at the complainant's neighbour's home commencing at 1.05pm on 31 August 2021 (Judgment, [108]–[110]; CAB 75–6);

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[4] Indictment (CAB 5–6).
[5] Amended Summary of Prosecution Opening, ABFM, 6–12.
[6] Defence Response, [4] (ABFM, 20).
[7] Defence Response, [16] (ABFM 21).
[8] Defence Response, [8] (ABFM 20–22).

d. representations made to Senior Constable Stack at the complainant's home commencing at 1:30pm on 31 August 2021 (Judgment, [121]–[125]; CAB 78–9); and

e. representations made to Senior Constable Rinderhagen at the hospital to which the complainant had been taken by ambulance, and which were recorded in a written statement which the complainant signed at 5.28pm on 31 August 2021 (Judgment, [132]–[139]; CAB 80–84).

7. Two further points in addition to the summary at AS [5]–[10] should be noted. First, as the appellant's argument developed in the Court of Appeal, he objected to each of the alleged previous representations which tended to identify him as the offender, or which otherwise went to the timing of the offending. The appellant did not maintain objections to representations which only went to the fact that the complainant had been assaulted: Judgment, [87]; CAB 71. Secondly, the representations made to Senior Constable Stack at the complainant's neighbour's unit, and at the complainant's home, were recorded on Senior Constable Stack's body-worn camera. The jury on the appellant's trial would have the benefit of viewing that footage and being able to assess the complainant's demeanour based on that audio-visual evidence: Judgment, [184]; CAB 93.

Part V: Statement of argument

8. The application of 137 of the *Evidence Act* is 'an evaluative task'.[9] While it requires a number of different factors to be evaluated in assessing probative value and the danger of unfair prejudice, the result is a binary outcome: the danger of unfair prejudice either does, or does not, outweigh the probative value of the evidence. The Court *must* refuse to admit the evidence if its probative value is outweighed by the danger of unfair prejudice.[10]

9. It is well-established in Victoria, since *McCartney*, that on an offender's appeal against conviction the standard of appellate review relevant to a trial judge's ruling to admit evidence over an s 137 objection is the correctness standard, rather than an assessment whether the trial judge's evaluation of the balance between probative value and the danger of unfair prejudice had been *open*.[11] It is equally well-established that the *House*

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[9] *McCartney v The Queen* (2012) 38 VR 1, 7 [33] (Maxwell P, Neave JA and Coghlan AJA) ('***McCartney***').
[10] *Norris v The Queen* [2018] VSCA 137, [44] (Priest, Niall and Ashley JJA) citing *R v Cook* [2004] NSWCCA 52, [27] (Simpson J).
[11] *McCartney* (2012) 38 VR 1, 7–10 [31]–[45] (Maxwell P, Neave JA and Coghlan AJA).

standard of review applies to review of a s 137 ruling on an interlocutory appeal by either an accused or the prosecution.[12]

The applicable standard of appellate review of a s 137 ruling on interlocutory appeal

10. The appellant asserts that the Court of Appeal's 'primary error' was the application of the *House* standard of review in circumstances where the correctness standard applied: AS [11]. The error in that submission is that it fails to account for the nature of appellate review on an interlocutory appeal under Part 6.3 Div 4 of the CPA, as distinct from an appeal against conviction under Part 6.3 Div 1 of that Act.

11. As noted in AS [23], appeals are creatures of statute. To discern the nature of the appeal created requires construction of the relevant statutory provisions governing the appeal.[13] Further, the identification of the nature of the appeal does not determine, by itself, the standard of appellate review to be applied. For example, to classify an appeal-creating provision as providing for a rehearing (whether with or without power to admit further evidence) does not, by itself, decide whether the *House* standard of review, a correctness standard, or a different standard applies as there are 'shades of meaning'[14] to the term 'rehearing'. As Gageler J noted in *Minister for Immigration and Border Protection v SZVFW*,[15] 'incidents of appeals can vary from statute to statute' and '[t]o describe a particular appeal as an appeal by way of rehearing can accordingly be to fail to identify all of the statutory incidents of that appeal'.[16]

12. Relevant considerations in determining the standard of appellate review in a case such as this include 'the terms of the statutory provision providing for appellate review, the nature of the question under review, the need to discern error, the respective advantages and disadvantages of the court below and the appeal court and, implicitly, a degree of

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[12] *McCartney* (2012) 38 VR 1, 11–2 [46]–[51] (Maxwell P, Neave JA and Coghlan AJA). A challenge to this aspect of *McCartney* was rejected in *Bray (a pseudonym) v The Queen* (2014) 46 VR 623.
[13] See, eg, *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 619–22 (Mason J); *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124, 128–9 [2] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).
[14] See, eg, *Western Australia v Rayney* (2013) 46 WAR 1, [331] (Weinberg, Whealy and Buddin AJJA). That judgment addressed whether the standard of appellate review described in *Warren v Coombes* (1979) 142 CLR 531, or some greater degree of deference, applied to the appeal court's review of findings of fact made by a judge in a judge-alone trial, in circumstances where the provisions creating the appeal simply described it as a 'rehearing'.
[15] (2018) 264 CLR 541 ('***SZVFW***').
[16] *SZVFW* (2018) 264 CLR 541, 555 [29].

legal policy'.[17] They also include an assessment of the legislature's intended allocation of decision-making responsibility as between the trial court and the appellate court.[18]

13. The 'nature of the question under review', and whether there is a binary answer to the question, is not determinative by itself. As Kirk JA recently noted in *Mann v The Queen* (which was a post-conviction appeal), 'there are many binary choices to which a *House v The King* type standard is applied on appellate review, for example decisions to grant adjournments'.[19] Apart from the 'nature of the question under review', the statutory context to the appeal-creating provision may mean that a degree of 'latitude' is warranted even in cases where 'the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment'.[20] And as this Court stated in *Dwyer v Calco Timbers Pty Ltd*, the 'occasion for appropriate appellate intervention will depend upon the nature and scope of the particular statutory appeal for which the legislature provides', and 'that inquiry is not advanced by describing the overall decision making process of the primary judge as "discretionary"'.[21] The synthesis of all of these considerations can point in different directions when dealing with an interlocutory appeal as opposed to an appeal post-conviction, even where the question under review (the outcome of the s 137 evaluative judgment) is the same.

14. Given the importance of the terms of the statute creating the appeal in fixing the relevant standard of review, it is necessary to consider the provisions governing interlocutory appeals in Victoria contained in Part 6.3 Div 4 of the CPA. Section 295(2) of the CPA relevantly provides that a party to a proceeding in the County Court for the prosecution of an indictable offence 'may appeal to the Court of Appeal against an interlocutory decision made in the proceeding if the Court of Appeal gives the party leave to appeal'.

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[17] *DAO v The Queen* (2011) 81 NSWLR 568, 586 [88] (Allsop P) ('***DAO***'). See also *Eastman v The Queen* (2000) 203 CLR 1, 40–41 [130] (McHugh J), quoted in *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124, 128 [2] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), as to factors relevant in identifying the nature of an appeal.
[18] *SZVFW* (2018) 264 CLR 541, 557 [35] (Gageler J).
[19] [2023] NSWCCA 256, [19].
[20] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 205 [19] (Gleeson CJ, Gaudron and Hayne JJ). See also *SZVFW* (2018) 264 CLR 541, [153] (Edelman J): 'The breadth of a statutory decision making power is not conclusive of a manifested statutory intention that judicial restraint should be exercised upon review of the decision' … 'where the review is by way of an appeal, the nature of any restraint upon the judge will depend upon whether, on the proper construction of the legislation conferring the right of appeal, the appeal is by way of a hearing de novo, an appeal in the strict sense, or an appeal by way of rehearing'.
[21] (2008) 234 CLR 124, 138–9 [40] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

This provision — unlike those in New South Wales[22] — permits an accused to seek leave to appeal from an interlocutory ruling on the admissibility of evidence.

15. In a case such as this involving an interlocutory decision on the admissibility of evidence, leave may be sought if judge who made the decision 'certifies' that 'the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case': s 295(3)(a). The trial judge so certified in this case (CAB 43).[23] Section 297(1) provides that the Court of Appeal may grant leave to appeal against an interlocutory decision 'only if the court is satisfied that it is in the interests of justice to do so', having regard to, among other matters, 'the extent of any disruption or delay to the trial process that may arise if leave is given'. Section 296(1) provides that a party who requested certification under s 295(3) may seek review of a trial judge's refusal to certify. On that review, the Court of Appeal must consider the matters in s 295(3), and may grant leave to appeal 'if satisfied as required by s 297'. Section 300(1) of the CPA then provides that an interlocutory appeal 'is to be determined on the evidence, if any, given in the proceeding to which the appeal relates, unless the Court of Appeal gives leave to adduce additional evidence'.

16. Section 300(2)(a) provides that on an appeal under s 295, the Court of Appeal 'may affirm or set aside the interlocutory decision'. The section is silent as to the standard of appellate review to be applied. Nor does s 300(2) contain any *express* requirement for the finding of error before the Court of Appeal might set aside an interlocutory decision. However, as Spigelman CJ observed in *DAO* with respect to s 5F of the *Criminal Appeal Act 1912* (NSW), which is similarly silent, that 'does not mean that the jurisdiction [for the Court of Appeal to interfere with an interlocutory decision] is at large'.[24] The following matters serve to assist in giving content to the open-ended terms of s 300(2), and in combination point to the correctness of the conclusion in *McCartney*, applied by the Court of Appeal in this case, that the *House* standard of review applies on an interlocutory appeal challenging a trial judge's ruling under s 137.

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[22] Section 5F(3) provides that 'any other party' may 'appeal to the Court of Criminal Appeal', with leave, against an 'interlocutory judgment or order given or made in the proceedings'. However, a ruling on the admissibility of evidence is not an 'interlocutory judgment or order': see, eg, *Liristis v DPP (NSW)* [2018] NSWCCA 196, [15] (Basten JA). *Criminal Appeal Act 1912* s 5F(3A) provides for interlocutory appeals against admissibility rulings by the prosecution.

[23] Section 296 provides for the making of an application to the Court of Appeal for review of a trial judge's refusal to certify. In determining that application, s 296(4) provides that the Court of Appeal must consider the matters in s 295(3) of the CPA and grant leave if satisfied that leave should be granted having regard to the matters specified in s 297.

[24] *DAO* (2011) 81 NSWLR 568, 580 [54] (Spigelman CJ).

17. **First**, the nature of the Court of Appeal's function on an interlocutory appeal differs markedly from its statutory task on an appeal against conviction determined under s 276(1) of the CPA. Under s 276(1) the Court assesses in hindsight, looking back to the completed record of the trial, whether a substantial miscarriage of justice occurred.

18. As noted above, s 300(2) of the CPA does not prescribe how the Court of Appeal is to determine an interlocutory appeal. Under s 276(1), the Court must allow an appeal against conviction if satisfied that 'there has been a substantial miscarriage of justice' because of 'an error or an irregularity in, or in relation to, the trial' or 'for any other reason', or because 'the verdict of the jury is unreasonable or cannot be supported having regard to the evidence'. The question whether there has been a 'substantial miscarriage of justice' is informed by review of the 'full record of the trial'.[25] As the Court of Appeal stated in *McCartney*:

> On the appeal against conviction, the appeal court is able to review the record of the relevant evidence as actually presented to the jury and can assess, in the context of the trial as a whole, whether there was a danger of unfair prejudice to the accused and, if so, whether it outweighed the probative value of the evidence. The question is whether the decision of the trial judge not to exclude the evidence under s 137 was 'an error...in, or in relation to the trial' and, if so, whether it was productive of a substantial miscarriage of justice. That question can only be answered by considering the trial in its entirety.[26]

19. When dealing with a post-conviction appeal in which a trial judge's refusal to exclude evidence under s 137 is in issue, the Court of Appeal has the benefit of knowing the substance of the evidence as actually adduced at trial, the exact use to which the evidence was put, the extent (if any) to which the balance between probative value and danger of unfair prejudice could be seen to be affected by other evidence actually adduced in the trial,[27] and the extent (if any) to which the danger of unfair prejudice was in fact reduced by judicial direction. At the interlocutory appeal stage, the analysis of those factors is necessarily prospective. Even in a case involving the admissibility of recordings of prior representations where it may be expected that the evidence will be adduced in the same form anticipated at a pre-trial hearing, the probative value of the evidence or the danger of unfair prejudice may be illuminated by other evidence actually led at trial and the directions actually given.

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[25] *Baini v The Queen* (2012) 246 CLR 469, 484 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[26] (2012) 38 VR 1, 11–12 [50] (Maxwell P, Neave JA and Coghlan AJA).
[27] *Aytugrul v The Queen* (2012) 247 CLR 170, 185–6 [30] (French CJ, Hayne, Crennan and Bell JJ); *IMM v The Queen* (2016) 257 CLR 300, 313 [45] (French CJ, Kiefel, Bell and Keane JJ).

20. The difference in the nature of the appellate function supports the availability of the different approaches to the standard of review identified in *McCartney* and consistently followed.[28] Because the evaluative task involved in applying s 137 on a post-conviction appeal involves a materially different exercise, the Court of Appeal may in theory conclude on a post-conviction appeal that evidence should not have been admitted even where it had previously dismissed an interlocutory appeal challenging a trial judge's ruling that the evidence was not inadmissible under s 137. That may be the case where the decision on the interlocutory appeal had been based upon a materially different understanding of the evidence in context when looking prospectively towards the trial which was not reflected in the reality of the trial as conducted. In such a case, the Court of Appeal will have reviewed what was in substance a very different s 137 balancing test at the interlocutory appeal stage.[29]

21. The difference in the appellate task means that, contrary to AS [34], there is no necessary 'anomaly' in the application of different standards of appellate review. The availability of the full record of the completed trial enables the Court of Appeal to more finely balance the probative value of the evidence and the danger of unfair prejudice based upon the record of the trial, and to assess whether its admission produced a substantial miscarriage of justice. That context more readily supports, and enables, a conclusion to a correctness standard. The conclusion is not, by that stage, built on a potentially shifting evidentiary landscape as it ordinarily will be at the interlocutory appeal stage. In those circumstances, it is appropriate that there be 'judicial restraint' on an interlocutory appeal which is reflected in the *House* standard of review.

22. **Secondly**, and relatedly, the appellate court's analysis of where the balance lies between probative value and the danger of unfair prejudice may be overtaken by events and require re-assessment in the light of materially-changed circumstances which change the

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[28] See, eg, *Bray (a pseudonym) v The Queen* (2014) 46 VR 623, 638 [62] (Santamaria JA); *Ebrahimi v The Queen* [2022] VSCA 65, [19]–[24] (Maxwell P, Sifris and Macaulay JJA).

[29] See, eg, *WEA v The Queen* [2013] VSCA 386, [30] (Whelan and Coghlan JJA): 'Of course, once the evidence is led, the analysis of these issues might be different. On any subsequent appeal which might be brought, if the applicant was to be convicted of any of these offences, different principles would apply.' See also *Tuite v The Queen* (2015) 49 VR 196, 200 [14] (Maxwell ACJ, Redlich and Weinberg JJA). Further, s 297(3) of the CPA provides that a refusal of leave to appeal 'does not preclude any other appeal on the issue that was the subject of the proposed appeal'. Section 297(3) does not mean that, if leave is granted, further consideration of the same issue on a conviction appeal is necessarily precluded: *DAO* (2011) 81 NSWLR 568, 574–5, [15] (Spigelman CJ), cf at 607 [207] (Simpson J). See also *DAO* (2011) 81 NSWLR 568, 608 [212] (Schmidt J); *Obeid v The Queen* (2017) 96 NSWLR 155, 222 [323]–[324] (Leeming JA); 245 [471] (Hamill J). More generally on the effect of this Court's judgment in *Rogers v The Queen* (1994) 181 CLR 251 to revisiting decisions involving the weighing of probative value and the danger of unfair prejudice, see *R v Edwards* [1998] 2 VR 354.

balance.[30] In those circumstances, there is no 'anomaly' (cf AS [34]) in distinguishing between the standard of review applicable to an interlocutory decision that may later be revisited and the standard of review applicable in determining whether a conviction should be set aside.[31]

23. In support of his argument that the purported 'anomaly' in the standard of review is unwarranted, the appellant relies (at AS [34]) upon the judgment of Basten JA in *DPP (NSW) v RDT*.[32] That was an appeal from a trial judge's ruling to refuse the admission of tendency evidence under s 97 of the *Evidence Act 1995* (NSW).[33] Basten JA's reasoning in that case appears to treat the 'legal character' of the decision as not only relevant in determining the applicable standard of appellate review, but determinative by itself.[34] For the reasons above at paragraph [13], the legal character of the decision under review is not the only consideration in determining the applicable standard of review. Rather, it is significant that the appeal is an interlocutory appeal.

24. Further, Basten JA stated in *RDT*:

> [a]n argument for a lower standard of scrutiny in relation to a preliminary decision is that, if the evidence is admitted, but later turns out not to have the significant probative value which was anticipated, the decision to admit the evidence may be reconsidered and may be reviewed on an appeal following conviction. Thus a lower level of scrutiny is appropriate with respect to preliminary rulings *because they are not final*. [35]

25. While Basten JA did not view that consideration as sufficient to determine the applicable standard of appellate review, it is a factor which supports the proposition that the *House* standard applied to the Court of Appeal's appellate function in this matter.

26. **Thirdly**, the provisions governing interlocutory appeals in in Part 6.3 Div 4 of the CPA are to be construed against the well-accepted need to avoid the fragmentation of criminal trials. The trial court is the primary decision-maker on pre-trial issues[36] and evidentiary

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[30] *Kadir v The Queen* (2020) 267 CLR 109, 136 [45] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), referring to the 'possibility of events occurring which may require the trial judge to revisit any evidentiary ruling'. See also *R v GK* (2001) 53 NSWLR 317, 335–6 [74[4]] (Sully J); *Tuite v The Queen* (2015) 49 VR 196, 200 [14] (Maxwell ACJ, Redlich and Weinberg JJA): 'The failure of the interlocutory appeal does not affect in any way the ability of the applicant to raise the same issue agains during the trial, in the event that materially different evidence is adduced, or on appeal in the event of a conviction'.
[31] See also *DAO* (2011) 81 NSWLR 568, 602 [175] (Simpson J).
[32] [2018] NSWCCA 293 ('***RDT***').
[33] [2018] NSWCCA 293, [19]–[23].
[34] [2018] NSWCCA 293, [21].
[35] [2018] NSWCCA 293, [23] (emphasis added).
[36] See generally *CPA* s 199(1) concerning the trial court's power to 'hear and decide any issue with respect to the trial that the court considers appropriate…'.

rulings, and not the Court of Appeal. This Court has noted the 'strong repugnance appellate courts have towards interrupting trials by interlocutory appeals'.[37] The undesirability of interrupting the course of a trial calls for a measure of appellate restraint. In enacting the interlocutory appeal regime, Parliament 'intended to uphold the authority of the trial judge, and that such authority should not lightly be interfered with'.[38]

27. It may be accepted that the certification and leave requirements in ss 296 and 297 of the CPA are directed to achieving a balance between the utility of an interlocutory appeal and the need to avoid fragmentation of a criminal trial. However, it does not follow that those sections are intended to be *exhaustive* of the intended scope of the Court of Appeal's ability to take account of fragmentation and the primary role of the trial judge when determining how it exercises its jurisdiction on an interlocutory appeal, particularly given the non-prescriptive terms of s 300(2) of the CPA. The Court of Appeal has, ever since the introduction of the interlocutory appeal provisions, approached its jurisdiction mindful of the need to avoid interruption to the trial process.[39] If an interlocutory appeal might be allowed only because of a difference of opinion between the Court of Appeal and a trial judge as to the correct result of the evaluative judgment required by s 137, then the result would be to encourage a proliferation of interlocutory appeals in a way most unlikely to have been intended.

28. **Fourthly**, the adoption of the *House* standard is more consistent with the role of the trial court as the primary decision-maker on pre-trial and evidentiary issues.[40] Any role of the Court of Appeal in that process, under the allocation of responsibility set by the legislature, is confined to matters in which the Court of Appeal grants leave to appeal: CPA ss 296(4)(b), 297. If a difference of opinion on the correct outcome to the evaluative judgment required by s 137 is sufficient to overturn a decision of a trial judge, that would tend to subvert the primary role of the trial court. Again, the non-prescriptive terms of s 300(2) concerning the determination of an interlocutory appeal do not require such a result. This consideration was influential in the judgment of Santamaria JA, with whom

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[37] *Cornwell v The Queen* (2007) 231 CLR 260, 297 [94] (Gleeson CJ, Gummow, Heydon and Crennan JJ).
[38] *DPP v Pace* [2015] VSCA 18, [25] (Priest and Beach JJA); *R v Steffan* (1993) 30 NSWLR 633, 642 (Hunt CJ at CL, Grove and Sharpe JJ).
[39] See, eg, *R v DG* (2010) 28 VR 127, 133 [33]–[34] (Buchanan and Weinberg JJA, Bongiorno AJA) regarding the 'real dangers' if interlocutory appeals against evidentiary rulings are 'too readily brought before [the] Court'; *Mokbel v The Queen* [2010] VSCA 354, [43]–[44] (Maxwell P, Redlich and Weinberg JJA).
[40] See generally Part 5.5 Div 4 of the CPA concerning the making of pre-trial orders and other decisions.

Maxwell P and Weinberg JA agreed, in *Bray (a pseudonym) v The Queen*.[41] That case involved a direct challenge to *McCartney*.[42] Santamaria JA concluded that, in addition to the authority of *McCartney*:

> there is much force in the submission made on behalf of the Crown that, when exercising its jurisdiction to hear and determine an interlocutory appeal, this Court should not make rulings on admissibility that would usurp the jurisdiction of the trial court and of this Court when it hears and determines appeals from the County Court.[43]

29. These observations are consistent with the structure of the CPA insofar as the trial court is the primary decision-maker on questions of admissibility, with the role of the Court of Appeal tightly confined. At risk of repetition, adoption of the correctness standard would tend to promote frequent substitution of rulings on the application of s 137 based only upon the Court of Appeal's different evaluation of probative value and the danger of unfair prejudice. That is not warranted in circumstances where a measure of appellate restraint incorporated in the *House* standard would tend to recognise that a trial judge, particularly when determining multiple pre-trial issues, will often have a broader perspective of the overall evidence likely to be led and a closer appreciation of the facts and issues in the trial than the appeal court. As Simpson J noted in *DAO* (in relation to decisions by trial judges concerning s 97 of the *Evidence Act*):

> it is important to recognise the respective functions of the trial judge and the appellate court. This is not just a question of respecting the trial judge's view. It is a question of recognising the allocation of functions. It is the trial judge's function to make rulings on evidence. Those rulings ought not be reviewed unless they are erroneous - not because another court is in as good a position to make the decision, and takes a different view.[44]

30. **Fifthly**, as noted above nothing in the text of s 300(2) or elsewhere in Part 6.4 Div 4 of the CPA expressly states the appropriate standard of appellate review. It is notable, however, that as at the enactment of the CPA, the 'prevailing view' in New South Wales, as it was described in *McCartney*, was that a decision under s 137 was reviewable only under the *House* standard.[45] The nature of appellate review had not been the subject of detailed consideration in the Victorian Court of Appeal until *McCartney*.[46] The Victorian

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[41] (2014) 46 VR 623.
[42] (2014) 46 VR 623, 631 [34].
[43] (2014) 46 VR 623, 638 [62].
[44] (2011) 81 NSWLR 568, 602 [176].
[45] *McCartney* (2012) 38 VR 1, 8 [36] (Maxwell P, Neave JA and Coghlan AJA).
[46] *McCartney* (2012) 38 VR 1, 7 [31] (Maxwell P, Neave JA and Coghlan AJA).

interlocutory appeal regime was enacted within the context of that 'prevailing view' (as it was described in *McCartney*) of the applicable standard of review.

31. That much is also apparent in the *Criminal Procedure Act 2009 — Legislative Guide* which is cited at AS [fn 45].[47] The discussion of s 300 of the CPA in that document notes that the section 'does not set any particular threshold for when an interlocutory appeal should be allowed or refused', and added that '[t]his reflects the diversity of decisions which could be the subject of an interlocutory appeal'.[48] Further, it stated that '[t]he approach taken by the Court of Appeal should continue to reflect long-standing principles of appellate review of judicial decisions'. Those principles included giving 'limited deference to areas of discretion such as weighing the prejudicial effect of evidence against its probative value'.[49] In those circumstances, extrinsic material capable of shedding light upon the legislative intent supports the approach taken in *McCartney*.

32. **Finally**, a number of the cases upon which the appellant relies do not provide any, or any significant, support for his position. For example, *R v Riley*[50] cited at AS [20] was a prosecution appeal under s 5F(3A) of the *Criminal Appeal Act 1912* (NSW) from a trial judge's ruling that evidence was inadmissible pursuant to s 138. It was not necessary to resolve the question of the applicable standard of review.[51] Further, Bathurst CJ identified 'competing considerations' to his Honour's assessment that *SZVFW* and *R v Bauer*[52] (noting that *Bauer* was a post-conviction appeal) 'suggest the conclusion that appellate review of a decision to admit or reject evidence under s 138 is not subject to judicial restraint of the nature of that referred to in *House v The King*'.[53] These included that *McCartney* had been 'cited with apparent approval in *Bauer*', and 'even if it was necessary to do so' Bathurst CJ 'would have had some hesitation in stating' that cases to the contrary of his Honour's preferred view were 'wrongly decided'.[54] A number of other cases to which the appellant refers did not concern interlocutory appeals.[55]

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[47] Regard can be had to that document in the interpretative task: see, eg, *Stark v The Queen* (2013) 45 VR 1, 11 [36] (Maxwell P, Redlich JA and T Forrest AJA); *Pell v The Queen* [2019] VSCA 186, [fn 283] (Weinberg JA). Section 35(b) of the *Interpretation of Legislation Act 1984* (Vic) relevantly provides that '[i]n the interpretation of a provision of an Act … consideration may be given to any matter or document that is relevant …'.
[48] At 282.
[49] At 282.
[50] [2020] NSWCCA 283.
[51] [2020] NSWCCA 283, [112] (Bathurst CJ), [134] (Button J); [140] (Wilson J).
[52] (2018) 266 CLR 56.
[53] [2020] NSWCCA 283, [112] (Bathurst CJ).
[54] [2020] NSWCCA 283, [114] (Bathurst CJ).
[55] See, eg, *R v Bauer* (2018) 266 CLR 56; *Dibbs v The Queen* (2012) 225 A Crim R 195 cited at AS fn 20; *Taylor v The Queen* [2020] NSWCCA 355, cited at AS [10].

33. Further, the appellant's submission that 'even the Victorian Court of Appeal has recently begun to' apply the correctness standard on interlocutory appeals is based upon: (a) a case in which the Court of Appeal expressly stated that it did not need to decide the question and proceeded on the basis that *House* applied;[56] (b) two cases[57] concerning refusals to order a permanent stay, to which the correctness standard of review may apply at least in part due to 'the extreme consequences'[58] of such a decision (subject to the question of whether *GLJ*, a decision concerning a permanent stay in a civil proceeding, applies to determine the standard of review on an appeal concerning whether a permanent stay should be ordered in a criminal proceeding);[59] and (c) one case (not concerning s 137) where the point was not considered in detail and there was no reference to *McCartney* or the many cases which have followed it.[60]

Probative value not outweighed by the danger of unfair prejudice

34. The Court of Appeal was correct — whether on the *House* standard of review or the correctness standard — to affirm the trial judge's ruling that the evidence was not excluded by s 137 of the *Evidence Act*. In affirming the trial judge's decision, the Court indicated that the result would be the same whichever standard of appellate review applied. That is apparent from the Court's statement that '[f]or completeness, we also observe that in our view the trial judge was correct not to exclude the evidence pursuant to s 137': Judgment, [188] (CAB 94). The appellant's submission at AS [69] that 'the Court of Appeal's repeated reference to the *House* standard suggests that it was this deferential standard that resulted in it affirming the trial judge's ruling' is not an accurate description of the way the Court of Appeal approached the matter given what appears at Judgment, [188] (CAB 94).

35. Section 137 requires the exclusion of evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused. The evidence in issue was evidence of previous representations by the complainant admitted under the

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[56] *DPP (Cth) v Knopp (a pseudonym)* [2023] VSCA 315, [177]–[178] (Niall JA, Kidd and Tinney AJJA) ('***Knopp***').
[57] *Ballard (a pseudonym) v The King* [2024] VSCA 26; *Haris (a pseudonym) v The King (No 2)* [2024] VSCA 9.
[58] *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, 868–9 [26] (Kiefel CJ, Gageler and Jagot JJ) ('***GLJ***').
[59] In *Knopp*, the Court of Appeal stated that '[a]lthough *GLJ* concerned a civil proceeding, there is no reason in principle why it would not also apply to criminal proceedings': at [165] (Niall JA, Kidd and Tinney AJJA). As noted above, the Court did not need to determine the applicable standard of review in that case. In *DPP v Tuteru* (2023) 105 MVR 125, decided before *GLJ*, the Court of Appeal applied *House* in setting aside a permanent stay on an interlocutory appeal: at [44] (Beach, Walker and Taylor JJA).
[60] *Duncan (a pseudonym) v The King* [2024] VSCA 27.

hearsay exception in s 65(2). The facts in issue to which they were relevant — noting that the Defence Response did not dispute the injuries sustained by the complainant but denied that the evidence was capable of proving beyond reasonable doubt that the appellant was responsible for them[61] — were (a) the identity of the offender; and (b) the timing of the offending.[62] The second was related to the first because the Defence Response denied that the appellant had been at the complainant's residence for as long as alleged[63] (noting that the complainant had told Senior Constable Stack that the offending lasted until 5am on 31 August 2021).[64] Before the Court of Appeal, the appellant maintained his objections to representations which identified him as the offender or went to the timing of the offending.[65]

36. Save for the evidence of representations during the '000' call,[66] in each 'set' of representations relied upon (see above at paragraph [6]) the complainant identified the appellant as the offender. The evidence was highly probative. It is necessary to accept that it was credible and reliable.[67] There was no dispute that the complainant knew the appellant, and so could not have mistakenly identified him as the offender in the circumstances.[68] There was no dispute that the appellant had been at the complainant's home at least at some point on 30 August 2021.[69] There was nothing about the circumstances of the alleged offending which might have impaired the complainant's ability to make a positive identification of the appellant. The evidence of the complainant's identification of the appellant as the offender was not 'simply unconvincing'.[70] The representations were also highly probative of the fact that the offending continued over a period of hours.[71]

37. There was no error in the Court of Appeal's conclusions as to probative value. In any event, the appellant accepts that at least 'some of the complainant's previous representations were of high probative value': AS [69]. Instead, the appellant's argument

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[61] ABFM 20 (Defence Response at [8]).
[62] Judgment, [87] (CAB 71).
[63] ABFM 21 (Defence Response at [16]).
[64] Judgment, [108] (CAB 75–6).
[65] Judgment, [87] (CAB 71). The appellant's submissions in this Court do not appear to be confined in that way. Rather, they appear to enlarge the appellant's case beyond the way it was put in the Court of Appeal by seeking the exclusion of *all* of the representations contained in the hearsay notice: AS [70].
[66] Judgment, [100] (CAB 74).
[67] *IMM v The Queen* (2016) 257 CLR 300, 312 [39] (French CJ, Kiefel, Bell and Keane JJ).
[68] Judgment, [180] (CAB 92).
[69] Judgment, [180] (CAB 92).
[70] *IMM v The Queen* (2016) 257 CLR 300, 315 [50] (French CJ, Kiefel, Bell and Keane JJ).
[71] Judgment, [180] (CAB 92).

largely focuses on the danger of unfair prejudice associated with the admission of the evidence.

38. On that question, the appellant relies upon the accused's inability to test the previous representations by cross-examination in circumstances were there would have been 'plausible lines of cross-examination' had the complainant been available to give evidence: AS [42]–[45]. In a case where evidence of previous representations is admitted under s 65(2) of the *Evidence Act*, it necessarily follows that the person who made the representations is 'not available to give evidence' and so cannot be cross-examined. The forensic disadvantage caused by the inability to cross-examine may be relevant to the assessment of the danger of unfair prejudice,[72] but the inability to cross-examine cannot be determinative by itself.[73] Of course, s 137 does not automatically render inadmissible evidence that falls within the exception to the hearsay rule in s 65(2), no matter how high the probative value of the evidence.[74] That would be inconsistent with the rationale behind s 65(2) in permitting the evidence to be adduced after an assessment of the probability that the evidence is reliable.

39. The Court of Appeal accepted that 'there is a real — and unfair — prejudice to the applicant in admitting hearsay evidence of the impugned representations because the applicant will not be able to cross-examine the maker of the representations'.[75] Contrary to AS [44], there is no basis to assume that the Court of Appeal did not recognise the importance of cross-examination in a criminal trial or the capacity of cross-examination to lead a witness to recant or to qualify their account. That was part of the forensic disadvantage which the Court considered in the balancing exercise required by s 137. Indeed the Court noted the 'central significance' of cross-examination.[76] The focus must be on the extent to which the inability to cross-examine would contribute to a danger of unfair prejudice in that the jury might give the evidence too much weight or otherwise misuse it. The forensic disadvantage will likely be insignificant if it is merely speculative that the witness might recant a material aspect of their account or give contradictory evidence.[77]

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[72] See, eg, *Thomas (a pseudonym) v DPP* [2021] VSCA 269, [65] (Beach, Niall and Walker JJA).
[73] *R v Suteski* (2002) 56 NSWLR 182, 201 [126] (Wood CJ at CL).
[74] Judgment, [182] (CAB 92).
[75] Judgment, [182] (CAB 92).
[76] Judgment, [182] (CAB 92) quoting *Lee v The Queen* (1998) 195 CLR 594, 602 [32] (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ).
[77] *R v Suteski* (2002) 56 NSWLR 182, 201 [129] (Wood CJ at CL).

40. The extent to which the inability to cross-examine can contribute to a danger of unfair prejudice must depend upon the relevance of that proposed line of cross examination, whether there is any material to support it, and the extent to which the matters proposed to be put to the witness could be effectively dealt with in closing submissions.[78] It is not enough to assert the existence of 'plausible' lines of cross-examination: cf AS [42]. In that regard, the trial judge in this matter considered that the lines of cross-examination identified were 'either speculative or of low relevance'.[79] The Court of Appeal accepted that the issues raised as to the complainant's credibility and reliability 'can all be put before the jury by way of evidence and/or submissions'.[80] There is no basis to doubt the accuracy of those assessments.

41. None of the matters set out in AS [42] as 'plausible' lines of cross-examination materially add to the danger of unfair prejudice. For example, the complainant's refusal to answer witness summons to attend examinations under s 198B of the CPA could not be a matter of any real significance in the absence of any specific retraction of any of the representations made. It is speculative to assert that any answer given in cross-examination might reveal that the complainant did not attend those hearings because she intended to recant or because she doubted or disbelieved her earlier representations. The complainant had attended the committal and had not been cross-examined.[81] Further:

    a. the complainant's representations to Senior Constable Stack (in the presence of a paramedic) about her use of medication, that she used to drink heavily, and had been in 'detox', could properly be the subject of submission (and those submissions may be informed by any other medical evidence tendered at trial);[82]

    b. the unaccounted-for hours between the end of the alleged offending and the making of the representations could adequately be addressed in submissions;

    c. the letters which the complainant had written to the appellant while he was in custody expressing love and affection for him was, as the Court of Appeal held,[83]

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[78] As to the ability to make submissions on same points which would have been raised in cross-examination, see, eg, *Prasad v The Queen* [2020] NSWCCA 349, [110] (Macfarlan JA), noting that that was an appeal from a judge-alone trial.
[79] Judgment, [173]–[177] (CAB 90–91).
[80] Judgment, [183] (CAB 93).
[81] Judgment, [174] (CAB 90–91). As noted at Judgment [174], the trial judge had held that the appellant's 'reliance on the complainant's non-attendance at the two scheduled s 198B examinations, in order to demonstrate that she was "most likely to be a reluctant or recalcitrant witness who may not have sworn up to her assertions", was speculative'.
[82] Judgment, [79] (CAB 70), [183], [185] (CAB 92–3); ABFM 69, 78–9.
[83] Judgment, [183] (CAB 93).

a matter capable of being addressed by submission (it was also relevant that those letters had been sent 'some significant period of time after the alleged events');[84]

d. inconsistencies in the complainant's account as between the five sets of representations were also capable of being addressed by submission,[85] as was the complainant's demeanour on the body-worn camera footage.

42. It may be accepted that the complainant's unavailability means that the appellant is not able to make his case to the jury through cross-examination and to supplement his closing submissions with favourable answers obtained in cross-examination. That is the basis of the forensic disadvantage and the danger of unfair prejudice accepted by the Court of Appeal. Nevertheless, the ability to make submissions to the jury on the matters listed at AS [42] *moderates* that danger of unfair prejudice, and consequently affects the weight to be given to that danger in the s 137 balancing exercise. Particularly, there would be, as there was in *Huici v The King*, 'considerable scope' to highlight inconsistencies in the complainant's account across the multiple sets of representations by way of submission.[86]

43. Further, the appellant could address the jury on the forensic disadvantage associated with not being able to cross-examine the complainant and to pursue particular lines of cross-examination. Such submissions would be backed by any requested significant forensic disadvantage direction under s 39 of the *Jury Directions Act 2015* (Vic) (noting that the Court of Appeal contemplated that the jury would 'undoubtedly' be given a forensic disadvantage direction).[87] In that regard, consistently with the *Jury Directions Act 2015* (Vic), both parties at trial will have the opportunity to request directions[88] and to make submissions as to how relevant directions should be tailored to address the relevant issues. The trial judge 'must give the jury a requested direction unless there are good reasons for not doing so'.[89]

44. The appellant also asserts that the Court of Appeal erred by making an 'unqualified assumption' that the jury would follow protective directions given concerning the evidence: AS [50]–[57]. That submission should be rejected. Section 137 refers to the '*danger* of unfair prejudice to the accused'. The reference to danger, or a risk, of unfair

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[84] Judgment, [175] (CAB 91).
[85] Judgment, [186] (CAB 93).
[86] [2023] VSCA 5, [82] (Niall and T Forrest JJA).
[87] Judgment, [183] (CAB 92).
[88] *Jury Directions Act 2015* s 12.
[89] *Jury Directions Act 2015* s 14(1).

prejudice, requires consideration of all relevant matters affecting the assessment of that danger.[90] That includes jury directions aimed at reducing the danger of unfair prejudice, noting that exclusion is only mandated by s 137 if the danger, in all the circumstances, *outweighs* probative value.[91] And in this matter, as the appellant accepts in relation to at least some of the previous representations,[92] the probative value of the evidence was high. The representations include identifications of the appellant as the offender in circumstances where, as noted above, there is no dispute that the complainant knew the appellant and 'thus could not have been mistaken in her identification of him as the offender'.[93]

45. The Court of Appeal's approach in taking account of the availability of remedial directions in the evaluative task required by s 137 was orthodox. There was no basis to conclude that the jury would not, or would not be able to, follow those directions. A criminal trial proceeds upon the assumption that the jury will follow and obey a trial judge's directions.[94] Directions as to forensic disadvantage associated with the complainant's absence from the trial, and as to hearsay evidence being 'of a kind that may be unreliable',[95] need not be complex,[96] convoluted, counterintuitive, deal with 'abstract notions',[97] or require a process of reasoning which the jury might regard as artificial, such that a jury's ability to follow them might be doubted.[98] The directions would not require the jury to reason in an unrealistic way or put an unrealistic burden onto the jury. Indeed, the issues associated with the evidence and the forensic disadvantage occasioned by the complainant's absence would have been 'apparent'[99] to the jury to at least some extent.

46. The appellant also asserts that the Court of Appeal 'further erred' in 'failing to appreciate that the sheer volume of the representations, and the fact that a number were repetitive,

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[90] *Aytugrul v The Queen* (2012) 247 CLR 170, 185–6 [30] (French CJ, Hayne, Crennan and Bell JJ); 203–4 [75] (Heydon J).
[91] See, eg, *TKWJ v The Queen* (2002) 212 CLR 124, 153–4 [90] (McHugh J): 'Even if the judge thinks that such a direction may not eliminate the *risk* of prejudice, the probative value of the evidence on the character issue may still require its admission. It will do so if its probative value outweighs any prejudice that it creates'.
[92] At AS [69].
[93] Judgment, [180] (CAB 92).
[94] See, eg, *Gilbert v The Queen* (2000) 201 CLR 414, 420 [13]; 426 [32] (McHugh J); *Gage v The Queen* [2021] NSWCCA 222, [19] (Beech-Jones J).
[95] *Jury Directions Act 2015* (Vic) ss 31, 32.
[96] Cf *DPP v Weaver* [2019] VSCA 26, [54] (Priest, Kyrou and Kaye JJA).
[97] Cf *R v Dickman* (2017) 261 CLR 601, 619 [57] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).
[98] See, eg, *Daniels (a pseudonym) v The Queen* [2016] VSCA 291, [34]–[35] (Beach, Kaye and McLeish JJA), where the Court observed that the directions to mitigate the danger of unfair prejudice in that case 'could easily be understood and followed by a jury evaluating the whole of the evidence'.
[99] *R v Dickman* (2017) 261 CLR 601, 619 [57] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ).

increased' the danger of unfair prejudice: AS [46]. The repetition across the five sets of representations — over a period of hours after the alleged offending in accounts given to different people and/or at different locations — is the source of the asserted inconsistencies which can be highlighted to the jury in submissions. There was no significant danger that the jury might conclude, for example, that a representation that the appellant was the offender was true *by reason of* the fact that it was repeated.[100] Further, it would be open to defence counsel to request a direction to the effect that the repetition of the asserted fact did not make it true.

47. Ultimately, the facts in issue at the trial will be the identity of the offender, and, relatedly, the timing of the offending. Again, it is not in issue that the appellant had attended the complainant's residence, that there was an argument, and that the complainant later presented with injuries: AS [60]. As the argument was developed in the Court of Appeal, the appellant objected to evidence of previous representations 'relevant to the identity of the offender and/or the timing of the events'.[101] The probative value of those representations was high (as does not appear to be contested, at least in relation to some of the representations).[102] The Court of Appeal was correct to hold that that high probative value was not outweighed by the danger of unfair prejudice, as ameliorated by appropriate judicial directions.

Part VI: Time estimate

48. It is estimated that the respondent will require up to 1.5 hours for oral submissions.

Dated 9 May 2024

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Brendan F. Kissane KC

Chief Crown Prosecutor

(03) 9603 7666

Brendan.Kissane@opp.vic.gov.au

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Jack O'Connor

Owen Dixon Chambers West

(03) 9225 7777

joconnor@vicbar.com.au

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[100] *Thomas (a pseudonym) v Director of Public Prosecutions* [2021] VSCA 269, [67]–[68] (Beach, Niall and Walker JJA).
[101] Judgment, [87] (CAB 71).
[102] AS [69].

ANNEXURE: STATUTORY PROVISIONS REFERRED TO IN SUBMISSIONS

Pursuant to item 3 of the Practice Direction No 1 of 2019, below is a list of each of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions above.

Number	Description	Version	Provision
1	*Criminal Procedure Act 2009* (Vic)	Authorised Version No. 097	ss 198B, 199, 274–277, 295–301.
2	*Evidence Act 2008* (Vic)	Authorised Version No. 026	ss 65, 67, 137.
3	*Jury Directions Act 2015* (Vic)	Authorised Version No.015 (Current)	ss 12, 14, 31, 32, 39.
4	*Criminal Appeal Act 1912* (NSW)	Current (as in force from 19 February 2024)	s 5F.