Jury directions in sexual assault trials:

***Murray/Ewen*, significant forensic disadvantage and delay in complaint**

Introduction

1. While jury verdicts are inscrutable, it seems safe to assume that judicial directions are highly influential in determining the outcome of all trials, and perhaps, sexual assault trials in particular, given the prominence that directions play in such matters. As Kirby J stated in *Tully v The Queen* [2006] HCA 56, (2006) 230 CLR 234, 167 A Crim R 192 at [62]:

   "Juries rightly regard counsel's addresses as partisan. They are entitled to look to the judge, himself or herself, to tell them the true issues for decision and to give them any warnings which the law requires, relevant to those issues."

2. This paper does not seek to address in detail all directions specifically or commonly applicable to sexual assault trials (though for ease of reference a checklist of such directions, which is not intended to be exhaustive, is included as Annexure A). Aside from the difficulty involved in doing so given time constraints, there are a number of excellent resources already available that do address most if not all of those directions (a list of those resources to which reference has gratefully been made in the preparation of this paper is included as Annexure B). Further, for a number of the directions on that list, it will simply be a matter of identifying that the direction should be given, and ensuring that it is, rather than the more involved process of considering whether the direction may be warranted and, if so, the steps that might be taken in aid of persuading the trial judge to give it, and what the content of the direction might ultimately be.

3. Consequently, this paper examines in some detail three key directions, each of which has been the subject of important recent case law or legislative reform, being the *Murray/Ewen* direction, the significant forensic disadvantage direction (s165B of the *Evidence Act* 1995 (NSW) ("*Evidence Act*")) and the delay in complaint direction (s294 of the *Criminal Procedure Act* 1986 (NSW) ("CPA")). Finally, brief consideration is given to the overall role of directions in sexual assault trials and the need to shape directions in order to meet the specific requirements of justice in the case in which they are to be given.

The *Murray/Ewen* direction

<u>The position following *Murray*</u>

4. The *Murray* direction takes its name from *R v Murray* (1987) 11 NSWLR 12, 30 A Crim R 315, where Lee J held at 19 that:

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"In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable."

5. Obviously, in sexual assault cases, that "one witness" is going to be the complainant.

6. Despite the fact that as Simpson J (as her Honour then was) noted in *Ewen v R* [2015] NSWCCA 117, (2015) 250 A Crim R 544 at [110], Lee J perhaps did not intend for the direction he described to be treated by trial judges as mandatory, it became customary in this State for a *Murray* direction to be given based solely on the fact that the prosecution case relied on the evidence of one witness alone, as demonstrated by the survey of cases undertaken by Sulan and Peek JJ in *R v Cheng* [2015] SASCFC 189 at [141].

The position following *Ewen*

7. The rule (or custom) which developed to the effect that a *Murray* direction should be given in sexual assault trials whenever the Crown case relied on the uncorroborated evidence of the complainant was abolished by the Court of Criminal Appeal in *Ewen*.

8. The leading judgment in *Ewen* was given by Simpson J, who based her decision upon a finding that to give a Murray direction based solely upon the fact that the complainant was uncorroborated would be to infringe s294AA of the CPA, which provides as follows:

"(1) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.

(2) Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.

(3) Sections 164 and 165 of the Evidence Act 1995 are subject to this section."

9. In so finding, her Honour held that the substance of the *Murray* direction ("scrutinise with great care") was effectively synonymous with a warning that it would be "dangerous to convict". It followed that that the giving of the direction based exclusively upon the evidence of the complainant being uncorroborated transgressed s294AA.

10. Despite finding that s294AA prohibited the giving of a *Murray* direction based *solely* upon the fact that the evidence of the complainant was uncorroborated, her Honour also made clear that there was still scope for a warning of this type to be given in sexual assault proceedings:

"[143] None of this has the effect that an appropriate direction, as envisaged in Longman, cannot be given in prosecutions for sexual offences. The emphasis in Longman, and in Robinson and Tully, was that directions appropriate to the circumstances of the individual case are to be given, and were available to be given under s 405C and its equivalent in other jurisdictions. If the evidence in any case is such as to call for a warning, or a specific direction, as to weaknesses or deficiencies in the evidence, particularly if they are weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury, then the judge is entitled, and may be obliged, to draw that to the jury's attention. Delay in bringing

proceedings is one such circumstance that calls for a direction. Such a direction does not transgress s 294AA; it discharges the judge's duty to direct the jury in accordance with the circumstances of the case, and not according to suppositions about the reliability of any class of witnesses.

[144] Where, for example, the evidence shows that others were present and were or may have been in a position to observe what took place, and were not called to give evidence, there is real merit in drawing attention to that fact. The absence of corroboration where corroborative witnesses might have been available is significant: see <u>MFA</u>, at [67]." (emphasis added)

11. Her Honour's description of the "appropriate direction as envisaged in *Longman*" is presumably not a reference to the more specific (and now superseded) direction related to the effect of delay upon the fairness of the trial, which is discussed below. Rather, it seems her Honour was referring to the instruction given by Brennan, Dawson and Toohey JJ in their joint judgment, described by Simpson J at [113] of *Ewen* as "[a] (if not the) central proposition that emerged from *Longman*", that:

    "Apart from the special rule [in relation to the effect of delay]*, the general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case."*

12. For ease of reference, in this paper a direction of that type warning the jury to scrutinise the evidence of the complainant with great care (based upon matters in addition to the lack of corroboration of the complainant) will hereafter be referred to as a *Ewen* direction. The complications that arise in referring to a direction of this type when it had come to be known as a *Murray* direction but where *Murray*, at least insofar as it applies to sexual assault trials, has now been overturned by *Ewen*, bears out Basten JA's comments in *Ewen* at [32] that "labelling warnings according to particular cases is apt to mislead."

<u>In what circumstances might a *Ewen* direction now be given?</u>

13. As at the time of writing, there has been no reported judicial consideration of Simpson J's remarks at [143]-[144], or of the circumstances in which "an appropriate direction" might be given in a sexual assault trial, if not on the basis of a lack of corroboration of the complainant, or of the content of that direction.

14. Accepting the unavailability of warnings based solely upon the evidence of the complainant being uncorroborated, is it possible then to predict the circumstances in which a trial judge might be persuaded to give a *Ewen* direction on the basis that it is required in the broader sense envisaged in *Longman*?

15. As may be seen from the extract above, two features that may commonly require a warning are identified by her Honour. One is delay in bringing proceedings (though this would, presumably, be subsumed within the giving of a warning pursuant to s165B, as set out below). The other is the failure by the prosecution to call witnesses who might have corroborated the complainant.

16. Aside from those two matters, then it would appear, both from general principle as expressed in *Longman* and other cases, and from the observations of Simpson J in *Ewen* at [143], that the emphasis will be upon the circumstances of the individual case, and the need to address any risk of a miscarriage of justice that might arise in that instance. Self-evidently, the circumstances that may give rise to such a risk will vary from case to case, and cannot be exhaustively described.

Robinson/Tully factors

17. It may well be that the High Court cases to which Simpson J made reference in that key passage of her judgment in *Ewen*, namely *Robinson v R* [1999] HCA 42, (1999) 197 CLR 162 and *Tully*, provide some guidance as to some features that, individually or, more likely, cumulatively, give rise to the need for a warning to be given.

18. While both of these cases arose in the context of the *Criminal Code* (Qld), they have been applied by the Court of Criminal Appeal, on the basis that they have a broader application, as illustrated, for example, by *Chivers v R* [2010] NSWCCA 134 at [143], and of course in *Ewen* itself.

19. In *Robinson*, the appellant had been convicted of two offences of unlawful anal intercourse with a child under the age of 12 years. The complainant was a boy aged eight at the time of the alleged offences, and the appellant was 19 years old at that time. On the evening in question, the complainant and the appellant were sleeping on mattresses in the garage of the complainant's home. The complainant was involved in the Joey Scouts. The appellant was a scout leader. The appellant had taken the complainant to a scout swimming carnival. The two had planned to camp out that night in the yard of the complainant's house, but, because of the weather, they slept inside the garage. The complainant gave evidence that he woke to find that the boxer shorts he had been wearing had been pulled down and that he was being anally penetrated by the appellant. According to the complainant, the appellant then left the garage before returning and again penetrating him.

20. The High Court, in holding that a warning of the type given in accordance with *Murray* could and should have been given, without suggesting that complainants as a class might be regarded as unreliable witnesses, stated at [25] that the warning was required not simply because the evidence of the complainant was uncorroborated but also because "there were particular features of the case which demanded a suitable warning." Those features were described as including:

    - the age of the complainant at the time of the alleged offences;
    - the long period that elapsed before complaint, which meant that it was impossible for a medical examination to verify or falsify the complaint;
    - the inconsistency in some aspects of the complainant's evidence as to whether penetration occurred;

- the absence of any conversation of any kind, on the evening in question or later, between the complainant and the appellant, about the appellant's conduct;
- the absence of any threat or warning to the complainant not to tell anyone;
- the maintenance of a harmonious relationship between the complainant and the appellant subsequent to the date of the alleged offence;
- the absence of any suggestion of any earlier or later misconduct by the appellant towards the complainant;
- the evidence of the complainant that he was asleep when the first act of penetration occurred, and that he woke up while it was going on; and
- certain features of the history of complaint, which may have indicated a degree of suggestibility on the part of the complainant.

21. *Tully* was an appeal following the conviction of the appellant in relation to seven offences of "indecent treatment" of the complainant, who was aged 9 or 10 throughout the period of the alleged offending. The majority (Callinan J, Heydon J and Crennan J), in separate judgments dismissed the appeal, and in particular the ground of appeal relying upon *Longman* and *Robinson*, on the basis that a *Longman* direction was not required. While irrelevant for present purposes, it might be thought that on this point the views of the minority (Kirby J and Hayne J, again in separate judgments) should be preferred, in that the real issue, and the gravamen of the appellant's complaint, related not to the failure of the trial judge to give a *Longman* warning based upon the effects of delay, but rather upon the failure to give a *Longman* warning in the more general sense that it was needed in order to avoid a risk of a miscarriage of justice, because of the presence of factors similar in nature and, more importantly, effect, to those identified in *Robinson*. What is of present relevance is the nature of the factors asserted by the appellant to give rise to the need for a warning in accordance with *Robinson*, which were identified by Kirby J at [57] along the following lines:

- the very young age of the complainant at the time of the alleged offences;
- the circumstances of her mother's new and ultimately temporary personal relationship with the appellant, which could engender animosity and jealousy on the part of the complainant towards the appellant;
- the long delay between the alleged offences and of the complainant's statement to her mother (or anyone else) about those offences;
- the explanations given for such delay, including after the mother's relationship with the appellant ended and the family moved to New South Wales;
- the inconsistencies that arose between the original statements to police and the evidence under cross-examination in court; and

- the possible inconsistency of the claim of repeated deep sexual penetration and the intact hymen of the complainant.

22. A similar list of circumstances was more recently accepted by the Queensland Court of Appeal in *R v HBO* [2017] QCA 18 at [29] as being matters that the trial judge should have included (but did not) in the warning that was given to the jury in accordance with *Longman*. The Court went on to note that if such a warning had been given there would have been no need for a second warning to be given in accordance with *Robinson* addressing the same circumstances (again illustrating the potential for confusion that might be said to have afflicted the majority in *Tully*, and the force of Basten JA's observations in *Ewen* about the use of case names to label particular directions), but implicit in that finding is an acceptance that those factors would have been sufficient to give rise to the need for a direction in accordance with *Robinson*.

23. As something of an aside, it may be noted that in *Ewen* itself, Basten JA made mention at [13] of the complainant's state of inebriation and her possible use of methamphetamine as factors which might have rendered her evidence unreliable. Conceivably a different outcome may have been reached had those factors been relied upon, in combination with the lack of corroboration, as giving rise to the need for a *Ewen* direction.

24. Returning then to *Robinson* and *Tully* and the reference made to them by Simpson J in *Ewen*, it appears there may be scope for a *Ewen* direction to be given based upon the factors relied upon in those cases (and possibly other factors, such as inebriation and so on) where the evidence of the complainant is uncorroborated. In making an application for such a direction, it may be tempting to simply run down the list of features identified in *Robinson* (and like cases), and, upon identification of the presence of one or more of them, to agitate for the giving of a warning. But this may not be sufficient. As Kirby J stated in *Tully* at [51]:

    "… each case will contain features that are special. … The case law on judicial warnings does not progress by perceived similarity amongst the facts of particular cases but by reference to the dangers of miscarriages of justice that particular facts serve to illustrate."

25. That said, and as acknowledged by Kirby J himself in *Tully* at [53]-[54], there was significant commonality between the circumstances argued to give rise to the need for a warning in that case and those relied upon in *Robinson*. As noted above, the list of factors was again similar in *HBO*. So much is perhaps reflective of the observation of Callinan J in *Tully* at [131] that on its facts, it was not "a particularly exceptional case".

26. Accepting that to be so, and noting the frequency with which submissions are made by defence counsel in relation to, for instance, inconsistencies between the various accounts of complainants, it will be interesting to see whether the Court of Criminal Appeal is prepared to endorse the proposition that, depending on the facts of the particular case, a *Ewen* direction may be required where the evidence of the complainant is uncorroborated and is also beset by some of the more common (and perhaps, more easily understood by juries) "weaknesses or deficiencies" identified in *Robinson* and subsequent cases. Aside from the fact that circumspection will presumably be applied in relation to factors such as the age of the

complainant, in light of s165A of the *Evidence Act*, and that warnings relating to the absence of, or delay in, complaint are subject to s294 of the CPA, it may well be that in relation to the more commonplace criticisms of the evidence of complainants that might be said to give rise to the need for a warning, there may be resistance to giving the direction on the basis that it might lead to the reinstatement of the pre-*Ewen* position via another route. It is to be hoped that such an approach would be avoided, because the fact that particular matters may commonly give rise to a risk of a miscarriage of justice unless appropriate directions are given does not mean that in any such case in which those matters may be found that such a risk is any the less acute.

27. It will also be interesting to observe whether the Court of Criminal Appeal baulks at the giving of *Ewen* directions based upon the existence of such matters on the basis that they cannot be described as "weaknesses or deficiencies that are apparent to the judge but [which] might not be so apparent to the jury", in particular because they are commonly matters upon which defence counsel address. However, it might be thought that the mere fact that counsel happens to draw the attention of the jury to a particular weakness or deficiency in the evidence of a complainant in their address does not render the import of that weakness or deficiency as apparent to the jury as to the judge. For instance, it would surely still be incumbent upon a trial judge to warn a jury in relation to the absence of corroborative evidence that might have been expected to have been called by the prosecution, but was not, as described by Simpson J at [144], whether or not defence counsel made reference to that issue in their closing address. If the position were otherwise, that may lead to the absurd situation where defence counsel deliberately refrained from addressing on particular weaknesses or deficiencies with a view to requiring the trial judge to do so in their stead. What is important is not simply the identification of the particular weakness or deficiency, but the expression by the judge of its significance in the context of the trial. To return to the comments of Kirby J quoted at the commencement of this paper, while juries hopefully have regard to counsel's closing addresses, they are likely to also consider counsel as partisan. On the other hand, they are likely to rely upon and defer to the instruction they receive from the trial judge in summing up the case. As was made clear in *HBO*, that is a function not just of jury attitudes and courtroom dynamics, but also of the properly understood roles of judge, jury and counsel:

    "[35] Of course the jury had heard the addresses of counsel as to whether to accept or reject the complainant's evidence. But they were arguments which, as the trial judge told the jury in the usual way, the jury was not bound to accept.

    [36] The jury was bound to follow the trial judge's instructions and, in particular, to heed the warning within this instruction about the complainant's testimony."

28. Further encouragement for the proposition that *Ewen* directions might be given based upon the type of factors identified in *Robinson* and like authorities, depending on the circumstances of the particular case, might perhaps be drawn from the fact that, as in *Ewen*, Simpson JA also delivered the leading judgment in *Cox v R* [2015] NSWCCA 158. That case was an appeal against conviction in relation to one charge of sexual intercourse with a child then

under the age of 10 years. The sole ground of appeal was that the conviction was unreasonable and could not be supported having regard to the evidence. No mention is made in the appeal decision of what the trial directions may have been, and in particular of whether a *Murray* direction was given. Without dwelling upon the particular facts of the case, there were a number of features of the evidence of the complainant (who was seven years old at the date of the alleged offending and also at the date it was reported to police) relied upon by the appellant in support of that ground which were accepted by Simpson JA (and the other two members of the Court, Davies J and Hamill J) as being demonstrative of an unsafe and unreasonable verdict, namely:

- inconsistencies in the complainant's evidence;
- a lack of reliability in the complainant's recollection of events;
- inconsistency between the complainant's evidence and that of his mother;
- inconsistency between the complainant's evidence and his complaint to his father; and
- an accepted error on the part of the complainant as to the scene of the alleged assault.

29. It is noteworthy that these factors are similar in nature to some of the matters which were found in *Robinson* to require the giving of a warning. Like the features of the complainant's evidence to which attention was drawn in *Robinson* and *Tully*, these matters might also be said to be not particularly unusual, thus demonstrating it will not necessarily be exceptional matters that give rise to a risk of a miscarriage of justice. It might also be thought that if, based upon these factors, the Court was prepared to accept that there was "a significant possibility that an innocent person has been convicted", then consistent with that decision (allowing for the fact that each case turns on its own facts), the Court may well, in a case where a risk similar in nature was present, based upon similar weaknesses or deficiencies in the evidence of the complainant, find that a *Ewen* warning was required, whether or not matters such as inconsistencies in the complainant's account might properly be characterised as matters "that are apparent to the judge but might not be so apparent to the jury".

30. In any event, it might be kept in mind that in *Ewen*, Simpson J did not restrict the basis for the giving of a direction solely to "weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury". Rather, what was said was that it might be *particularly* in such a situation that a direction was required. On this point it is noteworthy that, at least in the collection of circumstances that existed in *Robinson*, whether or not the issues with the complainant's evidence in that case represented "weaknesses or deficiencies that are apparent to the judge but might not be so apparent to the jury" does not appear to have troubled the High Court.

<u>Manner of questioning of child complainants in pre-recorded interviews</u>

31. Finally in relation to the *Ewen* direction, one factor not addressed in the judgment of Simpson J that might be said to be "apparent to the judge but might not be so apparent to

the jury" and hence which might, in an appropriate case, be argued to give rise to the need for a direction, is (depending of course on the circumstances of the case) the manner of questioning of a "vulnerable person" (defined in s306M of the CPA as a child or a cognitively impaired person) by an investigating official, where the recording of that questioning is to be used as the evidence in chief of that witness, pursuant to s306U of the CPA. Although there are a number of ways in which the manner of questioning might give rise to issues in terms of the truthfulness or reliability of the answers given in response by the witness, the most common, and one of the most difficult (bearing in mind the obvious tension between the complexities involved in eliciting sensitive information from a vulnerable person and the need to ensure that such information as is provided is not tainted by the manner of questioning), is the use of leading questions by the investigating official.

32. The way in which defence counsel have attempted to remedy the potential unfairness occasioned by this style of questioning has varied from case to case, illustrating Basten JA's observation at [14] of *Ewen* that in relation to particular areas where unreliability concerns have arisen, the law has adopted a number of different methods to address those concerns. In relation to leading questioning of child complainants, in some instances, objection has been taken to the admissibility of the interview, or at least to an impugned passage of questioning (under s37 or s137 of the *Evidence Act*). In others, it has been argued that a warning should be given (pursuant to *Longman*, in applying the "general law" requirement to ensure a fair trial rather than the "specific rule" relating to delay, or s165A). The response of the courts receiving these submissions has, perhaps not surprisingly, depended very much upon the particular questions or passages with which issue has been taken, understood in the context of the interview as a whole, and also upon the existence (or otherwise) of such other evidence upon which the prosecution might rely to make out its case.

33. Of those cases, there is only one reported instance in which this issue has been argued to give rise to the need for a *Ewen* type direction (albeit, as noted above, under the rubric of the "general law" requirement described in *Longman*), being the Victorian case of *R v Knigge* [2003] VSCA 94; (2003) 6 VR 181. In that case, the applicant was found guilty at trial of three counts of committing an indecent act with a child under 16 and two counts of taking part in an act of sexual penetration with a child under the age of 10 years, each of which was in relation to the one complainant, who was aged six or seven years old at the date of the alleged offending, and who was the daughter of the applicant's then partner. While his appeal against conviction succeeded on other grounds in relation to all counts, the Court nevertheless gave consideration, without formally deciding upon it, to a ground asserting that the trial judge erred by failing to direct the jury as to the danger of convicting in all the circumstances, pursuant to a *Longman* warning (in the sense described above). The submissions of the applicant in relation to this ground were directed in particular to the applicant's convictions in respect of the counts alleging penetration, and pointed to the leading questions that were asked of the complainant in relation during her interview with investigators ("VATE") which was used as her evidence in chief. The leading judgment, written by Winneke P (with whom Phillips JA and Chernov JA agreed), does not set out the complainant's interview verbatim but, rather summarises critical portions of it. Relevantly, in

relation to each of the counts involving penetration, propositions were put to the complainant to the effect that previously in the interview she had described acts of penetration, whereas this was in fact not the case (at [7] and [9]). Even though the complainant subsequently adopted the propositions being put to her, Winneke P, while as noted above declining to rule upon the ground (in the event that a re-trial might be ordered), made clear enough that the effect of this questioning was capable of giving rise to the need for a *Ewen* type warning:

> *"[30] It cannot be doubted that technology has assisted young victims of alleged sexual assaults to avoid the rigours and intimidation of court room procedures and, thus, to provide them with an avenue of exposing inappropriate sexual behaviour by predatory adults, without which such behaviour might never be exposed. Nevertheless, courts should 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. The VATE tape procedure enables a complainant's evidence-in-chief to be assembled in a place remote from the court of trial and in the absence of the accused to whom it is directed. The accused is necessarily deprived of the opportunity to challenge the "evidence" as it is given, to object to questions put and, accordingly, to "shape" the nature of the case made against him. In this case, the procedure employed procured that "evidence" in a fashion which potentially impacted upon its reliability. That is not to say that it was inadmissible. All that needs to be said is that there were aspects of the evidence, and the manner in which it was procured, which raised questions as to its reliability.*
>
> *[31] … If … there is a re-trial and the evidence - both as to form and content - remains the same as it was at this trial, then it will be a matter for the trial judge to determine whether a warning of the type contended for … should be given. No doubt in so determining the need for such a direction, the learned judge will take into account the comments which I have made."* (emphasis added, footnote omitted)

34. While none of the other cases in which the issue arose required the courts to rule in relation to a submission that such a direction should have been given, it may well be that it is considered to be, in an appropriate instance, the preferable means of dealing with any risks that may arise from the manner of questioning, particularly in contrast to the more extreme measures of giving an unreliability warning pursuant to s165A or excluding the interview (or a particular section of it) from evidence altogether (bearing in mind that exclusion of the interview would not preclude the complainant giving evidence in chief in the usual way, subject to the protections provided for vulnerable persons by ss306ZA-306ZI of the CPA). While decided upon different grounds, the three case studies set out in Annexure C may be instructive in a broad sense of the types of questioning that may, or may not, be found to give rise to the need for a *Ewen* direction.

35. Turning then to the examples, the first is drawn from *Martin v The Queen* [2013] VSCA 377; (2013) 46 VR 537; 238 A Crim R 449, which involved submissions made on appeal that, based upon a number of factors, including the use of leading questions in the underlined sections of the extracts from the investigators' interview with the complainant which was used as his evidence in chief, the convictions of the applicant of five counts of incest were

unsafe or unsatisfactory, or in the alternative a warning should have been given pursuant to s165A. Perhaps, with respect, not surprisingly, the Court dismissed this ground (and others) of the appeal, largely on the basis that while the impugned questions were leading, they were did not have the effect of, to use the words of Redlich JA (with whom Maxwell P and Neave JA agreed) at [52]:

> *"… introducing to the complainant facts about which the witness had not already given evidence. Any information raised by the interviewer in her question had already been asserted by the child."*

Similar observations were made by Neave JA at [4].

36. Example (ii) is taken from *In the matter of an application by JC* [2010] ACTSC 134. In that case, the Court was required to rule on an application to exclude portions of the interview (the judgment does not make clear which portions exactly), which was provided by a child who was a witness to be called by the prosecution in relation to offences allegedly committed against his sister. The precise basis for the objection was not set out in the judgment, but it was clear that it centred on the use of leading questions by investigators.

37. The result in this case was perhaps less straightforward, given that there was the clear introduction by the questioner of a new piece of information, at Q44, and then some relatively persistent questioning directed to getting the complainant to adopt that information. Nevertheless, as Mathews AJ pointed out, despite the leading way in which the topic was introduced, the complainant did go on to elaborate in relation to the incident in response to non-leading questions:

> *"[27] … commencing with answer 53, Michael provided considerable detail about the incident which went significantly beyond the proposition which was put to him in the leading questions. The offending questions (44, 46 and 52) referred only to Michael pulling the accused off Mary because she was yelling. There was no indication as to where this took place or the details of what happened. These were all provided by Michael in answer to later non-leading questions.*
>
> *[28] It is well established that special considerations apply in relation to the evidence of young children. In particular, leading questions which might not be appropriate for adult witnesses might well be required in order to direct the child's attention to the particular matter at hand. That is precisely what occurred here. Having understood what it was that the questioner wanted him to talk about, Michael, as indicated, gave detailed information which went extensively beyond anything which had been put to him by the questioners."*

38. The final example, taken from *Douglass v The Queen* [2012] HCA 34, (2012) 86 ALJR 1086, 290 ALR 699, involved an appeal from the appellant's conviction following his trial by judge alone for the aggravated indecent assault of his granddaughter. The extracted passage represented the evidence in chief of the complainant upon which the conviction was based. Evidence was also given in cross-examination that the complainant had touched the appellant's penis, but only in response to a *Browne v Dunn* question. No evidence of that nature was volunteered at any prior point in the questioning, when she was being asked about the day of the alleged offence. The High Court, in a joint judgment, upheld the appeal

on the basis that the trial judge had erred in being satisfied beyond reasonable doubt only of the truthfulness of the complainant's evidence but not also of its reliability. In reaching its decision, the Court placed reliance upon the manner of the complainant's questioning by investigators and upon the fact that her account was uncorroborated:

> *"[46] … How was the judge to arrive at a state of satisfaction beyond reasonable doubt of the reliability of CD's statements in the interview given that the limited detail of the allegation was supplied in response to leading questions and only after initial denials? Those statements were the only evidence of the commission of the offence."*

39. It went on to place weight also upon the inconsistencies between the various versions of the complainant:

> *[47] In later statements, CD gave inconsistent accounts of the scene of the offence. It is understandable that CD may have been confused when she was shown the plan of her great-grandmother's property and asked to identify the shed. Nonetheless, the fact that CD gave three different accounts of the scene of the offence cannot be dismissed in any assessment of her reliability as an historian."*

40. It might be thought that *Douglass* lends strong support for the giving of a *Ewen* direction in a factually similar case, where there is leading questioning of an uncorroborated child complainant, accompanied by other difficulties with their evidence, such as inconsistencies. Whether the Court of Criminal Appeal will adopt that position, along with the way in which it will develop the law in relation to this direction more generally post-*Ewen*, remains to be seen.

Significant forensic disadvantage direction

<u>The position following *Longman*</u>

41. The significant forensic disadvantage direction stands in place of the *Longman* direction (in the more specific sense that the term is used, where it relates to disadvantage suffered by an accused as a consequence of a delay between the date of the charged offences and the date of the trial). That direction took its name from *Longman v The Queen* [1989] HCA 60, (1989) 168 CLR 79, 43 A Crim R 463, where Brennan, Dawson and Toohey JJ held at p91 that:

> *"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 evidence alone unless the jury, scrutinizing 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."*

42. The content of a *Longman* direction was described as follows by Sully J in *R v BWT* [2002] NSWCCA 60; (2002) 54 NSWLR 241 at [95]:

> *"… a trial judge who is framing a <u>Longman</u> direction must ensure that the final form of the direction to the jury covers in terms the following propositions:*
>
> *first, that because of the passage of time the evidence of the complainant cannot be adequately tested;*

secondly, that it would be, therefore, dangerous to convict on that evidence alone;

thirdly, that the jury is entitled, nevertheless, to act upon that evidence alone if satisfied of its truth and accuracy;

fourthly, that the jury cannot be so satisfied without having first scrutinised the evidence with great care;

fifthly, that the carrying out of that scrutiny must take into careful account any circumstances which are peculiar to the particular case and which have a logical bearing upon the truth and accuracy of the complainant's evidence; and

sixthly, that every stage of the carrying out of that scrutiny of the complainant's evidence must take serious account of the warning as to the dangers of conviction."

The position under s165B of the *Evidence Act*

43. While the nature and content of a *Longman* direction was the subject of much judicial debate, the resolution of those issues need not presently be pursued, because since 1 January 2007, when s294(3)-(5) of the CPA commenced, the giving of a direction in relation to disadvantage suffered by an accused as a consequence of delay has been governed by statute. Subsections 294(3)-(5) of the CPA were in turn repealed and replaced by s165B of the *Evidence Act*, which commenced operation from 1 January 2009 (in relation to proceedings commenced by the laying of charges from that date). Since then, the giving of a significant forensic disadvantage direction has been governed by that section, which provides as follows:

"Delay in prosecution

(1) This section applies in a criminal proceeding in which there is a jury.

(2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.

(4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.

(5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.

(6) For the purposes of this section:

(a) delay includes delay between the alleged offence and its being reported, and

(b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.

(7) For the purposes of this section, the factors that may be regarded as establishing a significant forensic disadvantage include, but are not limited to, the following:

(a) the fact that any potential witnesses have died or are not able to be located,

(b) the fact that any potential evidence has been lost or is otherwise unavailable."

44. A summary of the operation of s165B was recently provided by Price J (Button J and Fagan J agreeing) in *TO v* R [2017] NSWCCA 12 at [167]:

> *"1. The duty on the judge to give a direction in accordance with subsection (2) arises only on application by a party and what is said to be the particular significant forensic disadvantage must form part of the application: Groundstroem v R [2013] NSWCCA 237 ("Groundstroem") at [56].*
>
> *2. Subsection (5) prohibits the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section: Jarrett v R (2014) 86 NSWLR 623; [2014] NSWCCA 140 at [53] ("Jarrett").*
>
> *3. There is a duty to inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence, only when the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay": Jarrett at [53].*
>
> *4. Subsection (3) provides a rider to the obligation to inform where the judge is satisfied there are "good reasons" for not taking that step: Jarrett at [53].*
>
> *5. Subsection (4) prohibits the judge from suggesting that it would be dangerous or unsafe to convict the defendant "solely because of" the delay or the disadvantage. Otherwise, no particular form of words need be used: Jarrett at [53].*
>
> *6. Whether there has been a significant forensic disadvantage depends on the nature of the complaint and the extent of the delay in the circumstances of the case. The extent of delay is not the test. It is the consequence of delay which is decisive: Groundstroem at [61]. The proper focus of s 165B is on the disadvantage to the accused: Jarrett at [60].*
>
> *7. The concept of delay is relative and judgmental. Although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the exception in s 165B(3): Jarrett at [61]–[62].*
>
> *8. If the accused is put on notice of the complaint, any failure to make inquiry thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction: Jarrett at [63]."*

45. It is clear from the terms of s165B, and from the above summary of its provisions taken from *TO*, that both the circumstances in which a direction will be given, and the content of that warning, are fundamentally different from the position as set out by the High Court in *Longman*. Unlike the common law, where it was *presumed* that delay gave rise to forensic disadvantage, an accused seeking a direction is now required by virtue of s165B(2) to satisfy the court that he or she "has suffered a significant forensic disadvantage because of the consequences of delay." In this regard it may be noted that s165B(6)(b) provides that significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay. And unlike the formulation derived from *Longman*, extracted above, by virtue of s165B(4) a trial judge giving the direction is prohibited from suggesting to the jury that it would be "dangerous or unsafe to convict" an accused solely because of the delay or of the disadvantage that they have suffered as a consequence.

What is "significant forensic disadvantage"?

46. What is however less clear from s165B itself is exactly what, as a consequence of delay, might constitute "significant forensic disadvantage". Subsection 165B(7) provides some guidance, but is not exhaustive, and in any event, the two circumstances listed therein "may", rather than "must" be regarded as making out significant forensic disadvantage. Hence, the mere fact that either or both of those circumstances apply will not necessarily mean that significant forensic disadvantage has been established.

47. Perhaps as a consequence of the factually specific nature of the enquiry, there remains relatively limited guidance to be had from reported decisions by way of a statement of general principle. Some assistance, both at that level of abstraction, and to those seeking a warning under s165B, may be drawn from the judgment of Doyle CJ (White J and Peek J agreeing) in *R v Cassebohm* [2011] SASCFC 29, (2011) 109 SASR 465, 209 A Crim R 496 at [30], an appeal from conviction in relation to six counts of historical child sexual assault, where there had been a delay of 24 years between the alleged offending and the trial. While the observations below arose in a different statutory context, they are addressed to the same issue as arises under s165B: what will constitute significant forensic disadvantage?

> *"It will not be sufficient for the trial judge to identify a theoretical or hypothetical or assumed disadvantage to the accused. On the other hand, if it were necessary for the accused to satisfy the judge of an actual and specific disadvantage, the provision would offer little protection to a defendant. One can rarely be sure what a deceased witness might have said, one can rarely know what a person might have remembered 20 years ago but no longer remembers, one can never know what is in a document now lost. I consider that it is sufficient for a trial judge to conclude that the lost or missing or unavailable material is likely to have assisted the defence of a charge, even though one cannot say just how, and even though one cannot be certain that that is so."* (emphasis added)

48. In applying that test to the instant case, the matters accepted by the Chief Justice at [34] as giving rise to significant forensic disadvantage may be summarised as follows:

- The impairment of the accused's memory. The appellant gave evidence to the effect that he could no longer recall matters of detail, and that he had trouble remembering events

in the more distant past. This was accepted by the Chief Justice as amounting to significant forensic disadvantage even though the appellant's evidence was "not suggestive of a greater degree of memory loss or impairment than one would expect after 24 years".

- The loss of the initial police investigation file, and, in particular, of two contemporaneous documents, being an interview given to police by the appellant and a statement taken by police from the complainant. In accepting the existence of consequent significant forensic disadvantage Doyle CJ held at [34]:

  > *"He was no longer able to refer to his own interview, which might have refreshed his memory and might have contained details that threw light on aspects of the prosecution case, and also on the reason why no charges were laid. The loss of Ms A's statement to the police meant that Mr Cassebohm lost the opportunity to test her evidence against her statement. One cannot say that inconsistencies between the statement and the evidence would have emerged, but I consider that the loss of a statement by Ms A, made reasonably close to the time of the events in question, amounts to a forensic disadvantage."*

- The death of two potential witnesses. While there was no indication of precisely what the evidence of either would have been, or whether it would have assisted the appellant (in this regard it is noteworthy that one of the deceased was the mother of the complainant), it was nevertheless held that the inability to question them gave rise to a significant forensic disadvantage.

49. A different result was reached in *TO*, an appeal from conviction in relation to three sexual offences alleged to have occurred in June 2012. The complainant, the daughter of the appellant's then partner, was nine years old at that time. She was interviewed by police in January 2014 and again in April of that year. Her evidence was that she complained to her mother prior to being interviewed by police, but she could not remember how much earlier it was that she made that initial complaint. The trial was held in June 2015. Perhaps not surprisingly, given the relatively unexceptional length of time between the alleged offences and the trial, no direction was sought at trial in accordance with s165B. On appeal however, three separate bases of significant forensic disadvantage were asserted as giving rise to the need for such a direction. Each basis was rejected by Price J (Button J and Fagan J agreeing) at [183], essentially because no disadvantage had been suffered by the appellant:

    > *"For the Court to be satisfied that the appellant has suffered a significant forensic disadvantage, there must be more than mere supposition."*

50. Looking at each of those three bases in turn, they were:

- The failure by police to take a statement from the appellant's son, who was present in the house when the offences were alleged to have been committed, and the consequent failure of memory of the appellant's son, who was asserted to have had "virtually no memory of the day". The appellant asserted this caused him disadvantage because if the son had been asked to provide his recollections of the day closer to the date of the

alleged offences, he would have been able to give evidence that he did not hear the screaming or yelling on the part of the complainant, of which she gave evidence. Price J held that as trial counsel had relied upon such evidence that the appellant's son *was* able to give at trial of having failed to hear any screaming or yelling in the house, and that this argument had been dealt with "sympathetically" by the trial judge, in "the circumstances of the trial, the forensic disadvantage to the appellant by reason of the delay in interviewing [the appellant's son] was not significant."

- The lack of contemporaneous medical examination of the complainant. An examination was made of the complainant's anus on 12 July 2014. The examination was inconclusive, and neither confirmed nor contradicted the complainant's account of being penetrated by the appellant. Price J accepted the Crown's submission that as the penetration complained of was brief and the degree of penetration unknown but unlikely to be significant, it was likely that a contemporaneous medical examination would have resulted in the same neutral findings as the examination in July 2014 (or, less likely but possibly, been adverse to the appellant).

- The lack of an opportunity to "examine the crime scene". No indication in the judgment of Price J was given of exactly what it was that the appellant would have wished to examine (or would have wished the investigating police to examine) but was unable to as a consequence of delay. It would appear that this was a function of the appellant being unable to give such an indication to the Court, and this basis was rejected accordingly.

51. Price J also noted that the complainant had given evidence of threats made by the appellant and had said that she did not complain because she was scared. His Honour applied *Jarrett* at [162] and held that if an application had been made to the trial judge for a significant forensic disadvantage direction, it would have been open to her Honour to find that the appellant's misconduct significantly contributed to the delay, that any forensic disadvantage was not a consequence of the delay in complaint, and that the complainant's testimony of these threats provided a "good reason" (s165B(3)) not to comply with s 165B(2).

52. In comparing *Cassebohm* with *TO*, it is suggested that while there is little to distinguish them by way of statements of principle (Doyle CJ requiring the party seeking the warning to identify more than a *"theoretical or hypothetical or assumed disadvantage"* and Price J requiring that there be *"more than mere supposition"*), there is a marked difference in the application of that rule. While Doyle CJ, on the one hand, was prepared to accept the existence of significant forensic disadvantage despite not knowing the content of the lost documents or of the evidence that might have been given by the deceased witnesses (and hence whether any of that material would assist the defence case), Price J was unwilling to accept that significant forensic disadvantage arose where the results that might have been obtained from a contemporaneous medical examination or an examination of the crime scene were similarly unknown. Even allowing for the fact that the consequences of delay in *TO* were, it might be thought, less likely to give rise to significant forensic disadvantage than those relied upon in *Cassebohm*, the approach of Doyle CJ does appear to be more generous to an accused than that adopted by Price J. Given that, as noted above, the test for significant forensic

disadvantage is necessarily very factually specific, perhaps all that can ultimately be drawn from a comparison of the two cases is that wherever it can be argued that because of delay, there has been a particular consequence that the defence understands as being adverse, an application should be made for a direction under s165B, but the strength of that application will be greatly enhanced if evidence is capable of being led of the particular way in which this consequence is adverse to the defence case (that is, what a witness might be expected to have said, what a document might be expected to have contained, and so on).

The role of evidence in satisfying the Court of "significant forensic disadvantage"

53. That observation leads in to a more general consideration of the importance of evidence in support of an application for a direction pursuant to s165B. The way in which evidence will be of assistance (if not required) in order to obtain such a direction extends beyond demonstration of the disadvantage suffered because of a particular consequence of delay, but also to satisfying the Court of the preliminary matter that there has in fact been a particular consequence of the delay between the alleged offence and the trial of the accused. So much was held by the Victorian Court of Criminal Appeal in *PT v The Queen* [2011] VSCA 43 at [38], where Maxwell P, Buchanan JA and Weinberg JA stated at [38] that:

    "The threshold question for a trial judge in considering whether a forensic disadvantage warning should be given is whether the judge is satisfied that there has been 'significant' forensic disadvantage. That requires, as has been seen, a measure of precision in identifying the nature of the disadvantage alleged. It also requires some demonstration of the obstacles confronting the defence as a result of the delay. That, in turn, may call for some evidence to be led of the attempts made to overcome the difficulties identified." (emphasis added)

54. All of the bases asserted on appeal to give rise to a significant forensic disadvantage direction were rejected by the Court. Of particular relevance is the way in which the Court dealt with the submission that significant forensic disadvantage flowed from the asserted inability to adduce evidence the location of the applicant's family at the relevant time:

    "[43] That takes us to the matter of location. All that was put before this Court was that the applicant had lost the opportunity to prove that the family no longer lived in house one at the time these offences were said to have been committed. Why that should be so is something of a mystery. There was no evidence led of any attempt on the part of the defence to obtain records of the family's movement to house two in 1989 or house three in 1991, in accordance with the applicant's account to the police.

    [44] One would assume that, if the family had moved to these locations at the dates asserted by the applicant, such records would have been available. At the very least, there ought to have been evidence of some attempt to locate them. It would have been possible, for example, to check the electoral rolls for the period. If that produced nothing, it would have been possible to search for rate notices, as well as telephone, gas and electricity accounts. Had that failed, other enquiries could have been made of bodies like VicRoads, which have records of driver licence addresses. The fact that the defence led no evidence of any such enquiries having been made detracts from the submission that the applicant suffered a significant forensic disadvantage by reason of PN's delay in having complained of being sexually abused."

That passage may be seen as illustrative of the need for evidence to be led to prove particular consequences (such as the loss of evidence) that are said to arise because of delay.

55. That an assertion of significant forensic disadvantage based upon the unavailability of evidence, such as records, will need to be made good by evidence was also the view of Adams J (Macfarlan JA and Button J agreeing) in *Groundstroem v R* [2013] NSWCCA 237, where at [64] his Honour commented as follows in relation to the assertion by trial counsel for the appellant that *"the effluxion of time ... [means] that it's highly unlikely that [medical] records [relating to the complainant attending upon a doctor subsequent to the alleged sexual assault] will still exist"*:

   "It seems to me (though it is not necessary to decide) that this merely speculative possibility as to the availability of records made it difficult, if not impossible, for this submission to succeed. Where the proposed significant forensic disadvantage comprises loss or unavailability of evidence, it will be necessary in most cases to establish that this is in fact the case rather than leaving it to supposition." (emphasis added)

56. See also *Jarrett* at [58] and following, where Basten JA effectively agreed with the trial judge's observation that where disadvantage was asserted based upon the alleged failure of memory of a potential witness, evidence should have been led of that failure.

57. The requirement to identify the "particular significant forensic disadvantage" said to have been suffered when making the application, and to lead evidence in order to satisfy the Court of that matter in support of the application, brings into sharp focus the need for early preparation and consideration of the case as a whole and specifically, any disadvantage that may be thought to flow from delay. All members of the defence team – counsel, solicitor and client – can and must assist in that task, as Adams J noted in *Groundstroem* at [56]:

   "An accused's lawyers will have obtained instructions as to the issues in the case and, accordingly, be aware how delay had given rise to any particular forensic disadvantage. This is a matter peculiarly within the accused's knowledge or, perhaps more likely, that of his or her legal advisers."

   It follows that where preparation is late, and such matters are not properly identified and then pursued well in advance of the trial, let alone the application for a direction under s165B, the prospects of obtaining such a direction will be greatly diminished. While the significant forensic disadvantage direction is, of course, given at the end of the trial, the time to give thought to it (as with other directions) arises much earlier than that, given the importance of leading evidence to satisfy the Court that the accused has suffered significant forensic disadvantage.

Conclusions in relation to s165B

58. The foregoing review of the case law might be thought to demonstrate that satisfying the Court that the defendant has suffered a significant forensic disadvantage might be conceptualised as involving two steps:

   1) satisfying the Court that there has been a particular consequence of the delay between the alleged offence and the trial of the accused (for example, that the defendant has

suffered an impairment of memory; evidence has been lost; an opportunity to make enquiries has been lost, and so on); and

2) satisfying the Court that because of this consequence, the defendant has suffered a significant forensic disadvantage (for example, the defendant is less able to assist in the preparation of their case, or to give evidence in their defence, because of the impairment of memory; it was likely that the lost evidence would have assisted the defence case; it was likely that the enquiries would have assisted the defence case in some way, whether by the calling of evidence obtained as a consequence of those enquiries or otherwise).

59. While evidence will not always be required in order to satisfy the Court in relation to either or both of those steps (the second limb, in particular, may often be a matter for submissions), the prospects of any application for a direction will generally be greatly enhanced by supporting evidence. In particular, where there is evidence which might have been led, but which has not been (such as, for example, efforts to locate a particular piece of evidence asserted to be lost), that will count against the prospects of success of an application for a direction.

Delay in complaint direction

The position under *Crofts*

60. The warning given to a jury that the absence of, or delay in, complaint may be relevant to the credibility of a complainant is often described as being a *Crofts* direction, after the High Court's decision in *Crofts v The Queen* [1996] HCA 22; (1996) 186 CLR 427, 88 A Crim R 232. In that case the Court affirmed the comments of Barwick CJ in *Kilby v The Queen* [1973] HCA 30; (1973) 129 CLR 460 as representing the general law:

> *"… quite apart from the fact that there may be many reasons why a complaint is not made, the want of a complaint does not found an inference of consent. It does tell against the consistency of the woman's account and accordingly is clearly relevant to her credibility in that respect."*

It went on to describe the way in which that principle intersected with the particular Victorian provision which was the subject of the appeal:

> *"Delay in complaining may not necessarily indicate that an allegation is false. But in the particular circumstances of a case, the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false."*

The position under s294 of the CPA

61. However, as is the case in relation to what was the *Longman* direction, in NSW it is no longer correct, in form or in substance, to speak of a *Crofts* direction, following the introduction of s294(2)(c) of the CPA, which commenced on 1 January 2007 (the balance of s294 having commenced operation on 1 January 2000, as s107 of the CPA) and which fundamentally changed the circumstances in which such a direction may be given and also the content of any such direction. In *Jarrett*, Basten JA went so far as to say at [34] that the High Court's

decision in *Crofts* provided "no assistance" to the applicant in arguing error on the part of the trial judge, who failed to direct the jury that they could take into account in assessing the complainant's credibility the delay on her part in making a complaint.

62. Turning then to the terms of s294, it provides as follows:

> *"(1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest:*
>
> > *(a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or*
> >
> > *(b) delay by that person in making any such complaint.*
>
> *(2) In circumstances to which this section applies, the Judge:*
>
> > *(a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and*
> >
> > *(b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and*
> >
> > *(c) 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."*

63. As for the way in which s294 operates, in *Jarrett* Basten JA described it as having three elements:

> *"[40] … The first is that absence of complaint or delay in complaining does not of itself indicate falsity of complaint, because there may be good reasons why the victim hesitated or refrained for a period. That element is inconsistent with the assumption of fact expressed by Barwick CJ in Kilby (at 469) that it is "a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact".*
>
> *[41] Secondly, removing the presumption did not deny the possibility that in some cases absence of complaint within a reasonable time might cast doubt on the complainant's credibility. There is no presumption either, however, as to how particular facts will operate. The termination of a relationship (particularly one of dependency) may be seen to free the victim of a constraining force, or (especially if the termination was bitter) it may provide a motive for fabrication. These are pre-eminently matters to be left to the jury. Where the complainant has provided an explanation for delay or absence of complaint, the credibility of the explanation may itself be a significant matter to be considered by the jury.*
>
> *[42] Thirdly, accepting that each case must be considered on the evidence, it is logical to conclude that the jury should be given appropriate assistance by the judge in explaining how delay may be relevant to the victim's credibility in the particular case. Nevertheless, a warning (which, in context, is of an adverse inference) is not to be given unless there is "sufficient evidence to justify such a warning."*

64. It is the third element which represents the most major change to the position according to *Crofts*, given that s294(2)(c) curtails the circumstances in which a warning of the effect of delay upon the credibility of a complainant may be given, requiring that there be "sufficient evidence to justify such a warning". In passing it may be noted that, unlike paragraphs (a) and (b) of s294(2), paragraph (c) makes reference only to delay in complaining, and not also to the absence of complaint. This seems a curious omission, noting especially that in the second reading speech for the *Criminal Procedure Amendment (Sexual and Other Offences) Act* 2006 (NSW), which inserted paragraph (c) into s294, the amendment was described as applying both to cases where there was an absence of complaint and where there was a delay in complaint. Possibly it is connected to the fact that the forerunner provisions to what is now s165B of the *Evidence Act*, dealing with the effect of delay, were initially to be found in s294(3)-(5) of the *Criminal Procedure Act* (now repealed, as noted above), and those provisions ran on from and referred back to s294(2)(c). In any event, it is likely to be of little importance, given that there will be very few cases where there is a complete absence of complaint, rather than delay, which is much more commonly asserted to give rise to the need for a warning.

<u>What is "sufficient evidence"?</u>

65. There is no definition of "sufficient evidence" in the CPA. Nor is there a body of case law to assist in interpreting that phrase. The sole reported authority on the point is *Jarrett*, where Basten JA dealt with the meaning of "sufficient evidence" in general terms at [43]:

> *"Without being prescriptive, there must be something in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint. Usually, one would expect that such matters would have been put to the complainant in the course of cross-examination. Those very matters may constitute the "good reasons" why there was no timely complaint for the purposes of par (b), but, if not believed, may form the evidence justifying the warning under par (c)."*

66. With respect to his Honour, the last sentence of that passage is perhaps somewhat confusing. In general, "matters … put to the complainant in cross-examination" that might allow the jury to "legitimately consider that the delay could cast doubt on the credibility of the complaint" would be "matters" consistent with the delay being the product of fabrication. It is difficult to see why or how these "very matters may constitute the "good reasons" why there was no timely complaint for the purposes of par (b)". In the ordinary course, it might be expected that cross-examination on the cause of delay would be intended to put both the existence of "matters" damaging to the credibility of the complainant as the cause of the delay, and the non-existence of "good reasons" for the lack of timely complaint.

67. Moving then to the determination of this ground of appeal in *Jarrett*, Basten JA found that in that case, there was not "sufficient evidence" to justify the warning. In so holding, his Honour held at [49] that inconsistency between various complaints that were made did not constitute a basis for the giving of a warning in relation to delay in the making of those complaints. The focus of s294(2)(c) is thus properly on the possible effect of delay on the

credibility of the complainant, not upon other matters, unrelated to delay, which may impact upon credibility.

68. Perhaps less straightforward were his Honour's other reasons for finding that there was not "sufficient evidence" to justify the giving of the warning, which were set out at [44] as follows:

> *"In the present case, the jury might well have dismissed the possibility of complaint to the person who came to the door in the course of the evening as not constituting a reasonable opportunity. There would also have been good reason to doubt that, assuming the complaint to be true, the victim would complain to the daughter of the offender, who was her best friend. It might be equally unlikely if the complaint were untrue. Different considerations would arise with respect to the victim's mother, but she gave evidence of a hostile relationship at the relevant time and of the unwillingness of the complainant to talk to her about anything. Again, if accepted, that would have provided good reason for the failure to complain to the mother. A further reason was given by the complainant herself in the course of her police interview, namely that she was scared to complain because "he convinced me and make me believe if I told anyone he would kill himself": ERISP Tcpt, Q404."*

69. While this survey of the evidence at trial could in one sense be understood as a demonstration of the lack of "sufficient evidence" to justify the giving of a warning, it does appear that Basten JA went beyond such a finding to enquire as to the existence of evidence that might constitute "good reason" why the complainant did not complain earlier. While his Honour's conclusion was not expressed in so many words, it does seem that having found the existence of such "good reason", it followed that there was not "sufficient evidence" to justify the giving of the warning. Put another way, his Honour's reasoning appears to have been that the trial judge was correct to decline to give a warning under s294(2)(c) not because there was nothing "in the evidence sufficient to raise in the judge's mind the possibility that the jury may legitimately consider that the delay could cast doubt on the credibility of the complaint", as his Honour had posited at [43], but, rather, because there was sufficient evidence (or at least an explanation that accorded with the evidence) to explain the delay in a way that did not adversely affect the credibility of the complainant.

70. With respect, such a course of reasoning does not accord with the terms of s294(2)(c), which clearly makes the enquiry one of the sufficiency of evidence that delay in complaining is relevant to credibility, rather than of the sufficiency of evidence that there are "good reasons" to explain the delay, picking up the wording of s294(2)(b).

71. Confirmation that a construction of "sufficient evidence" based upon the existence (or otherwise) of "good reasons" for the delay in complaint cannot be correct may be found from consideration of the position where there is no evidence of "good reasons" to explain the delay, an eventuality not uncommon in child sexual assault cases, where the complainant will often say that they do not know why they did not complain earlier (thus emphasising the need for the giving of the directions mandated by s294(2)(a) and (b)). In such a situation, applying Basten JA's reasoning, it would arguably be permissible for a warning to be given under s294(2)(c) because of the absence of evidence of "good reasons" why complaint was not made earlier. But to do so in those circumstances would effectively be tantamount to a

resurrection of *Crofts*, as the direction would be based, absent the existence of "sufficient evidence" of something positive in relation to the delay to give rise to doubt the credibility of the complainant, upon delay alone.

72. Lastly on this point, it is noteworthy that the members of the Criminal Justice Sexual Offences Taskforce, who authored the 2006 report commissioned by the then Attorney-General upon which the insertion of s294(2)(c) was based, *Responding to sexual assault: the way forward*, intended the "sufficient evidence" requirement to mean evidence of some issue connected to the delay that is sufficient to justify a warning that the delay is relevant to the complainant's credibility. The authors described at p100 the intended effect of the introduction of s294(2)(c):

   > *"The … proposal* [to insert s294(2)(c) in response to *Crofts*] *is neatly framed, that is, that the delay has some connection with another issue which would appear to require greater scrutiny of the complainant's credit. For example, as mentioned previously, the fact that it coincides with a custody dispute, or unwanted disciplining from the accused or some other factor that might add further doubt as to the complainant's truthfulness."*

73. In other words, a warning may be given where the defence can point to "sufficient evidence" of another matter that may serve to explain the delay (or, put another way, the making of the complaint at the time at which it is made) in a manner which is relevant to the complainant's credibility. As the Taskforce noted at p98, the argument for the giving of a warning will be strengthened where there is "some correlation between the timing of the complaint and some other significant event" which may explain the making of the complaint (such as, for example, conflict between the complainant and the accused).

74. As noted above, at the time of writing, *Jarrett* is the only reported authority on the meaning of "sufficient evidence" in s294(2)(c). Hopefully clarification of the test will be provided when the issue next arises at appellate level.

Role and content of directions

<u>The role of jury directions</u>

75. Finally, while the purpose of giving jury directions is fundamental, and therefore perhaps obvious, it is easy enough to lose sight of it while immersed in any trial, let alone a sexual assault trial with all of the additional considerations that arise in cases of this type. The role of jury directions, and the way in which that impacts upon their content, was described by Brennan J in *Bromley v R* [1986] HCA 49; (1986) 161 CLR 315, 22 A Crim R 216 at p325:

   > *"When a warning is needed to avoid a miscarriage of justice, it must be given; when none is needed to avoid a miscarriage, none need be given. The possibility of a miscarriage of justice is both the occasion for the giving of a warning and the determinant of its content."*

76. The issues that arise in a particular case will thus govern the directions that are sought and/or given and also the terms of those directions.

77. As for the directions that might be given in a particular trial, it is important to ensure that they are given because they are required in the instant case. As McHugh J stated in *KRM v R* [2001] HCA 11, 206 CLR 221, 118 A Crim R 262 at [37]:

> *"To give* [a] *warning when it is not needed may divert the jury from its proper task. The more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings."*

The need to keep in mind McHugh J's comments is perhaps borne out by the length of the list of directions in Annexure A.

78. As Kirby J stated in *Tully* at [44]-[45], quoting from an earlier decision of the High Court in *Alford v Magee* [1952] HCA 3, (1952) 85 CLR 437, the aim of judicial instruction of the jury is to isolate the real issues in the trial and to provide the jury with such assistance as they may require to properly decide those issues:

> *"… the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility (1) of deciding what are the real issues in the particular case, and (2) of telling the jury, in the light of the law, what those issues are."*

79. The corollary of that proposition was expressed more recently by Kiefel, Bell and Keane JJ in *Perara-Cathcart v The Queen* [2017] HCA 9 at [66]:

> *"It is neither necessary under s 34R(1) of the Evidence Act, nor desirable generally, for a trial judge to instruct the jury about the law in relation to matters about which no issue arises in the trial. The heavy responsibility of a trial judge does not extend to imagining possible issues which the parties have not raised – much less to formulating directions designed to instruct the jury in relation to the resolution of such non-issues."*

On this basis the joint judgment damned at [67] the reasoning of Kourakis CJ, who had held that a particular direction should have been given at trial, as involving a "detour into gratuitous illogicality", given that in the eyes of the High Court, no issue had arisen at trial to require the giving of such a direction.

80. From the foregoing, the importance may be seen of ensuring that the jury directions that are given at trial relate to, and address, the particular risks of a miscarriage of justice that may arise in the instant case.

<u>The content of jury directions</u>

81. Similarly, the content of those directions should also be informed by the specific risks that arise in the trial at hand. Just as Brennan J stated in *Bromley*, Basten JA held in *Jarrett* in

relation to both the significant forensic disadvantage direction (at [54]) and the delay in complaint direction (at [43]) that there is no standard form of words that can or should be used in giving either warning, and that the contents of each should be moulded to meet the needs of the particular case. To adopt his Honour's phrase, each must be "case specific" and, in relation to the significant disadvantage direction:

> *"… it will usually be expected that a direction would identify, so far as it is not obvious, how the disadvantage may affect the jury's consideration of the evidence."* (at [54])

82. The reason why this is so was set out at greater length by the Victorian Court of Appeal in *Pate v The Queen* [2015] VSCA 110, (2015) 250 A Crim R 425 (in relation to a trial held prior to the commencement of the *Jury Directions Act* 2015 (Vic)) at [126]:

> *"… a forensic disadvantage direction will not satisfy the legislative requirements of … s 165B unless it brings home to the jury that the accused's capacity to defend himself has been compromised, and spells out the manner in which the accused's capacity to do so has been so compromised. The judge is then required to instruct the jury to take the manner in which the accused's case has been compromised into 'consideration' or 'account'. Thus, the jury must be made to understand the reason why the accused's capacity effectively to defend himself has been compromised, and the effect that may have on the burden and standard of proof. The direction must be emphatic, since it is designed to offer a measure of protection to the accused."*

83. While in her judgment in *Ewen*, Simpson J did not expressly deal with the content of a direction that might be given consonant with the decision in that case, it might be thought that there was at least implicit acknowledgement that, aside from the need to abide by the requirements of statutory provisions such as s294AA, no standard form of words was required, by virtue of the fact that the direction must be "appropriate to the circumstances of the individual case" (at [143]).

84. The need for directions to be case specific, and to tie the legal principles which underpin them to the facts of the individual case and the potential for a miscarriage of justice if the direction is not given and followed, requires the giving of assistance to trial judges to go beyond the suggested directions as set out in the Bench Book, where to do so is required in order to ensure a fair trial. As Hayne J noted in *Tully* at [93]:

> *"Because the criminal law has become as complex as it now is, 'bench books' of standard forms of instructions to the jury are readily available for the assistance of trial judges. Properly used, such books are invaluable. But there is a risk that the prescription of common forms of instruction, which must necessarily be framed without reference to specific facts, and thus in abstract terms, will be used without relating them to the issues that the jury has to decide."*

85. Encouragement for the tailoring of model directions contained in the Bench Book to meet the demands of justice in the particular case may be drawn from the observations of Spigelman CJ (with whom McClellan CJ at CL and Hall J agreed) in *R v Forbes* [2005] NSWCCA 377, (2005) 160 A Crim R 1 at [72]-[73], where his Honour rejected a submission

that the trial judge was in error simply for failing to give a direction in the terms set out in the Bench Book.

86. However, once again, in order to assist the trial judge to link the directions sought to the real issues at trial, proper attention needs to be paid to the question of which directions might be required, and why, well in advance of the judge's summing up.

Annexure A

Directions specifically or commonly applicable to sexual assault trials (and the stage of the trial at which they might generally be given)

Judge's opening remarks and/or immediately prior to or during the evidence of the complainant

1. Vulnerable person (child or cognitively impaired person) giving evidence by way of pre-recorded interview: CPA, s306X
2. Use of pre-recorded evidence in re-trial: *PGM (No 2) v R* [2012] NSWCCA 261 at [85]-[98], especially at [91]
3. Use of CCTV to give evidence: CPA, s294B (complainants in trials for prescribed sexual offences) and s306ZI (vulnerable persons, whether or not complainants)

At the time the evidence is given and in the judge's summing up

4. Tendency and coincidence evidence (the way in which it may and may not be used)
5. *BRS* direction (if evidence admitted for other purposes reveals a criminal or reprehensible propensity on the part of the accused, may only be used for those other purposes and not otherwise as proof of guilt): *BRS v The Queen* [1997] HCA 47, (1997) 191 CLR 275
6. Context evidence (the way in which it may and may not be used): *Gipp v The Queen* [1998] HCA 21, (1998) 194 CLR 106

Close of the Crown case

7. *Prasad* direction: *R v Prasad* (1979) 23 SASR 161

Judge's summing up

8. *Ewen* (formerly *Murray*)
9. Significant forensic disadvantage: *Evidence Act*, s165B (formerly *Longman*)
10. Delay in complaint: CPA, s294 (formerly *Crofts*)
11. Separate consideration: *KRM v R* [2001] HCA 11, 206 CLR 221, 118 A Crim R 262 at [36]

12. *Markuleski* direction (doubts as to the credibility of the complainant with respect to one count should be taken into account in relation to other counts): *R v Markuleski* [2001] NSWCCA 290, (2001) 52 NSWLR 82, 125 A Crim R 186

13. Complaint evidence, and the way in which it may be used: *Evidence Act*, s66, s108(3)

14. Unreliable child witness: *Evidence Act,* s165A(2)

15. *Liberato* direction (failure to accept evidence in defence case does not alter the burden of proof): *Liberato v* R [1985] HCA 66; (1985) 159 CLR 507

16. *Jovanovic* direction (rejection by the jury of motive to lie on the part of the complainant does not mean the witness is truthful and does not impact on the onus of proof): *R v Jovanovic* (1997) 42 NSWLR 520, 98 A Crim R 1

17. Good character of accused

Jury deliberations

18. Replay of pre-recorded evidence: *R v NZ* [2005] NSWCCA 278, (2005) 63 NSWLR 628 at [210]

Annexure B

Bibliography/further reading

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Annexure C

Three examples of questioning of child sexual assault complainants

Example (i)

<u>Passage (1)</u>

"Q: Do you remember any other times that this has happened?

A: When I went to the supermarket and I went into the toilet it happened.

Q: So in the supermarket at the toilet. Can you tell me about that day in as much detail as you can. Tell me about that day.

A: [The applicant] makes me suck his doodle. Well, I don't like sucking his doodle.

…

<u>*Q: Nothing bad that day. Did [the applicant] suck your doodle that day in the toilet at the supermarket?*</u>

<u>*A: Yep."*</u>

<u>Passage (2)</u>

"Q: Ok. So you told me about, that [the applicant] does this when there's nobody else in the house. What rooms of the house does this happen in?

A: My sister's room.

...

Q: So you've said that it's happened in your sister's room. Can you tell me about that day? Do you remember that day that it happened in your sister's room?

A: He only, he only did [inaudible] in my sister's room and only...

Q: He did towels in your sister's room?

A: And in my mum's room, sometimes he drank my wee, sometimes he, he did it, sometimes he did it, sucking my doodle. That's all.

...

Q: The time in your sister's room, you said he used the towel. Can you tell me about that day? So who was in the bedroom first?

A: My sister. Then she had to go somewhere. And then all over me and [the applicant].

Q: Ok. And tell me what happened. It was you and [the applicant] in the room. What happened next?

A: [The applicant] sucked my doodle and then, after that, [the applicant] was, wanted me to play Grand Theft Auto."

...

<u>*Q: Yesterday you told me that you were in the bedroom with [your sister] and that [the applicant] sucked your doodle that day. Did that happen that day?*</u>

<u>*A: Yep.*</u>

...

<u>*Q: You told me yesterday that on that day [the applicant] had sucked your doodle on that day. Is that right?*</u>

<u>*A: Yep."*</u>

Example (ii)

"Q41 Okay. What else happened on father's day?

A41 That was mostly it.

Q42 Mostly it? Did anything else happen?

A42 No.

Q43 No?

A43 No.

Q44 Nothing, all right. I heard you told mum that on Sunday, you tried to pull Pop off [Mary] because she was yelling?

A44 (No audible reply)

Q45 Did you tell mum that?

A45 Yes, mummy ---

Q46 Okay. Tell me everything about pulling Pop off [Mary], because she was yelling.

A46 I don't know what really happened.

Q47 Okay. Remember how I said before that I only want you to tell me things that you saw with your own eyes and heard with your own ears? Do you remember that?

A47 (No audible reply)

Q48 Yeah? So can you tell me everything that you saw and heard?

A48 Not really.

Q49 Not really? Okay. Because [Mary], [K] and I, we weren't there, so we don't know – we don't know what happened. So if you can, tell me what you saw with your own eyes and heard with your own ears?

A49 I heard everything that I told you.

Q50 Okay. You haven't told me – you tell me, what did you hear?

A50 I don't – I heard everything I told you.

Q51 Okay. You haven't told me what you heard.

A51 All the stuff that I told you, I did hear all that. I didn't hear anything else. I didn't hear anything else.

[At that point another police officer took over the questioning, and the following questions and answers were given:]

Q52 When ... said that she heard that you told mum that you had to pull Pop off [Mary]. Tell me all about that.

A52 Well, he was fighting with [Mary] and I tried to get him off, but Pop just ...(indistinct)...

Q53 So when you say they were fighting, tell me all about that.

A53 Well I tried to stop him and he hit – pushed me and then he picked up [Mary] and put her on the bed and slammed – closed [Mary]'s door. I opened it and then Pop – he has a lock on his door, so he locked his door. So --- that was all.

Q54 Did Pop say anything?

A54 (No audible reply)

Q55 Did [Mary] say anything?

A55 (No audible reply)

Q56 Tell me what [Mary] said.

A56 [Mary] said "Get off me Pop, I don't like it." That's all she said.

Q57 Did you say anything?

A57 No.

Q58 So whereabouts did this happen?

A58 At dad's.

Q59 Okay. Whereabouts at dad's?

A59 In this house.

Q60 Inside the house. Whereabouts?

A60 Inside. It was all in [Mary]'s room.

Q61 [Mary]'s room, was it? So tell me all about what was happening before you had to pull Pop off?

A61 He was talking to me, about things that I don't understand.

Q62 Things that you don't understand? And then what happened.

A62 And then it just started.

Q63 Okay. If you can remember, tell me how it started.

A63 Pop was ...(indistinct)... and it started.

Q64 Were you in the room?

A64 I came in the room.

Q65 Okay, why did you go into the room?

A65 Because I knew that there was something happening.

Q66 Okay. How did you know that, what made you think that?

A66 Because I heard everything about it.

Q67 Okay, tell me about what you heard.

A67 I heard – I heard screaming and I heard – I heard lots of things.

Q68 Yes, so you said you heard screaming, is that right?

A68 Yes.

Q69 Okay, and you said you heard lots of things. What other things did you hear?

A69 I heard bashing, I heard everything like that.

Q70 And then you went into the room, is that right?

A70 Yes

Q71 And what did you see when you walked in?

A71 Pop was trying to hurt [Mary]. I tried to get him off, he pushed me onto the floor, he threw [Mary] onto the bed and then he ran out. He was hiding so we couldn't fight him.

Q72 Okay. So when you first went in to [Mary]'s room, where was pop and where was [Mary]?

A72 [Mary] was on the bed and Pop was fighting with [Mary] on the bed.

Q73 Okay, and when you say fighting, what was he doing?

A73 He was trying to hurt [Mary]. And I – I almost got him off the bed, I put his feet – his foot on the bed, and then he just like – like he just pushed me, he pushed his foot onto my tummy, all the way onto the floor and then he put [Mary] onto the bed and escaped."

Example (iii)

"L Has someone ever asked you to touch their willy?

[CD] ... I touched [m]y brother's.

L You touched your brother's did you. And what happened?

[CD] ... I told to MD to pee in the bucket.

L Did you? And he did. Oh Okay. And what about anybody else. Did someone ask you to touch their willy?

[CD] No.

L Or do anything to their willy?

[CD] No.

L Or. Some people call this a penis. Did you know that? That's the proper word for it isn't it.

[CD] Yes.

L Has anyone asked you to touch their penis?

[CD] No.

L Are you sure?

[CD] No.

L Yeah? Okay. I was just was talking with mum about all that sort of stuff before.

[CD] ...

L If somebody did ask you to hold or touch their penis.

[CD] I touched on my grandpa's.

L O did you? You touched your grandpa's? Oh, tell me about that. What happened?

[CD] I don't know.

L Oh, okay. Well do you know what. I wasn't there and you were there. So what if I try and figure out what happened and you help me. Okay?

[CD] Yes.

L Alright. So where were you when that happened?

[CD] In the shed.

L You were at the shed, were you? At whose house?

[CD] His shed.

L His shed, yeah, and what were you do[i]ng in the shed?

[CD] Holding his willy.

L Holding his willy. Ohm, and how did that happen, like?

[CD] He told me.

L Yeah, and then what, he said, what did he say to you?

[CD] He just said I said to him I didn't want to.

L Oh did you? Good. That was good. And then what happened?

[CD] Mmm, I holded his willy again.

L Did you? Even though you said you didn't want to?

[CD] Yes,

L Yeah. That was a bit rough wasn't it.

[CD] Yeah."

Other cases concerning the asking of leading questions of child complainants

For the sake of completeness, attention is drawn also to:

- *SJX v The State of Western Australia* [2010] WASCA 243, where a ground of appeal was that the interviews with the child complainant should have been excluded from evidence pursuant to Western Australian legislation and regulations which govern the admission into evidence of such recordings. Without delving into the detail of that legislative scheme, it is sufficient to note that this ground of appeal was dismissed (as were the others). Buss JA (with whom McLure P and Mazza J agreed) held at [89]-[97] that looking at the interview as a whole, the questions were leading in form, but not in substance.

- *Lawton v* R [2010] QCA 353 and *R v SCB* [2013] QCA 276, where appeals against conviction were upheld, in *Lawton* on the basis that because of the leading questioning, the complainant's second interview with investigators should not have been admitted, and in

SCB on the basis that, taking into account the manner of questioning of the complainant by investigators (amongst other difficulties with the Crown case), the findings of guilt were unsafe and unsatisfactory.

- *R v A2; R v KM; R v Vaziri (No. 21)* [2016] NSWSC 24, where it was held that despite some of the questions of the child complainants being leading, leave should be granted to the Crown to adduce the evidence, pursuant to ss37 and 192 of the EA.

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