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KEYNOTE ADDRESS: 14TH AUSTRALASIAN CONFERENCE ON CHILD ABUSE AND NEGLECT

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PROFESSIONAL KNOWLEDGE AND JUDICIAL UNDERSTANDING

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Commissioner, Royal Commission into Institutional Responses to Child Sexual Abuse

The Royal Commission has now been in operation for more than two years. We have completed the public hearings for 25 case studies which in most cases have been concerned with the failure of institutions to manage their affairs to adequately protect the children in their care. We have looked at churches, religious schools, and state run institutions. We recently looked at issues in relation to out of home care. But we have many more and varied tasks to complete.

One of the obligations in our Terms of Reference requires the Commissioners to consider what "institutions and governments should do to address, or alleviate the impact of past and future child sexual abuse … including, in particular, in ensuring justice for victims

through the provision of redress by institutions, process for referral for investigation and prosecution and support services.

Justice for victims is an elusive concept. In the civil context redress schemes providing modest money compensation without the need to prove a breach of a duty of care are commonly believed to be appropriate. Otherwise in the civil context there are difficulties in defining the content of a duty of care. Determining the individuals or institutions who must accept the obligation of fulfilling that duty can also provoke animated discussion. Whether common law damages or some more confined financial recompense is appropriate are matters the Commissioners are considering as part of our discussions about redress for survivors.

Justice for victims in the criminal context raises multiple and complex issues different from the issues in a civil context. The Royal Commission is addressing many of those issues through external research, round tables and our own policy development. Prof Arie Frieberg, Hugh Donnelly and others have already completed significant work for us. The issues extend across the appropriate range of criminal offences, the reporting of criminal acts, their investigation and their prosecution. The latter requires us to consider the trial process, the legal rules which control it, in particular joint trials and tendency evidence, directions to juries and appropriate sentencing outcomes.

The Royal Commission is in a privileged position. We are able to both undertake and also commission other professionals to conduct empirical research to inform our decision making. But what of the judge in whose court the criminal trial is conducted? The question I will explore today is how knowledge developed in disciplines outside the law, but relevant to determinations made within it, can be communicated to, and appropriately used by judges. Although relevant to all judicial decision making it has particular relevance in the child sexual assault context. Today's discussion will not be the last I will have on this topic, but it provides me with an opportunity to raise issues which we will seek to discuss with the community going forward.

The rule of law is the fundamental concept which underpins the social compact by which we order our society. It is important to stress that although the concept necessarily contemplates legal rules it must be distinguished from the notion of rule by law. Rules are necessary to govern a society which accepts the rule of law. The question is always do we have the appropriate rules.

If confidence in the rule of law is to be maintained it is necessary for the legal rules to reflect the contemporary knowledge and expectations of the community. Those expectations are borne of generally accepted values. Some of those values are reflected in our trial processes which are informed by contemporary understandings

of human behavior. With time and greater knowledge our understandings are modified or redefined. And therein lies the challenge for those who make the rules be they legislators or judges. Early in the development of the common law the task was relatively easy. It is now much more difficult.

In the mid-1700s the English jurist Sir William Blackstone discussed the common law approach to a provoked killing. His words reflect the values of the 18th century but resonate today. He said: "if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor" then the law "pa[id] … regard to human frailty" and the killer was convicted of manslaughter. If, however, there was "a sufficient cooling time for passion to subside and reason to interpose" then the defence would fail and the killing would be murder.[1]

Contrast the contemporary relevance of those words about provocation with Blackstone's understanding of the mind of a victim of sexual assault. He said:

> "if the witness be of good fame; if she presently discovered the offence, and made search for the offender … these and the like are concurring circumstances, which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for a

[1] *Blackstone's Commentaries on the Laws of Englan*d, 1st ed, bk 4, c 15 p 191

> considerable time after she had the opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might be heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive presumption that her testimony is false or feigned."[2]

The seeds of later and erroneous approaches to issues of sexual assault can be seen in these remarks.

In 1879 an event occurred of fundamental importance in the development of our understanding of human behavior. In Leipzig, the first laboratory solely dedicated to psychological research was founded by Wilhelm Wundt. In that laboratory Wundt and his students developed the empirical methodologies that allowed psychology to emerge as a discipline distinct from philosophy.[3] The question was how would the law respond to the birth of the new science whose area of focus – human behavior – was central to so many aspects of the law itself.

Initially, matters moved relatively quickly. Less than two decades after the formation of Wundt's laboratory, a murder trial in Munich, saw what was probably the first testimony given by a psychological expert.[4] And in Vienna, in 1906 Freud gave a series of

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[2] *Blackstone's Commentaries on the Laws of Englan*d, 1st ed, bk 4, c 15 p 213-214

[3] Stanford Encyclopedia of Philosophy. http://plato.stanford.edu/entries/wilhelm-wundt/#OrdKno

[4] R D Mackay, A M Colman and P Thornton, 'The Admissibility of Expert Psychological and Psychiatric Testimony' in A Heaton-Armstrong, E Shepherd and D Wolchover (eds) *Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals* (1999, Oxford University Press) 322

lectures to judges discussing the lessons that psychology might offer the law in the context of fact-finding.[5]

Despite these promising beginnings, by 1908 it was evident that the law was largely indifferent to the way in which psychology might be applied within its domain. That year Hugo Munsterberg, who had been a student of Wundt's in Leipzig[6] before moving to the United States to run the psychological lab at Harvard, published a book entitled *On the Witness Stand: Essays on Psychology and Crime*. Munsterberg was a strong advocate of forensic psychology and in particular psychological testimony. He had himself served as psychological consultant in two murder trials in the US.[7] In his book Munsterberg described how experimental psychology had sufficiently matured to the point where it could now be deployed to serve "the practical needs of life";[8]education, medicine, art, economics and the law.[9] But whilst the other disciplines had embraced psychology, he said of the law:

> "The lawyer alone is obdurate. The lawyer and the judge and the juryman are sure that they do not need the experimental psychologist. They do not wish to see that in this field pre-eminently applied experimental psychology has made long

[5] A Kapardis, Psychology and the Law: A Critical Introduction (2014, 4th ed, Cambridge University Press), 3
[6] Hugo Munsterberg, *On the Witness Stand: Essays on Psychology and Crime*(1908, The McClure Co), 4
[7] Mackay, Colman Thornton, above n 4, 322.
[8] Munsterberg, above n 6, 8.
[9] Ibid 9

strides … They go on thinking that their legal instinct and their common sense supplies them with all that is needed and somewhat more."[10]

As far as the law was concerned human behavior was directly observable. Our common sense together with a judicial wisdom derived from legal experience was more than adequate. This sentiment is captured in the words of Lawton LJ in *R v Turner*[11]who said that "[j]urors do not need psychiatrists to tell them how ordinary folk who are not suffering from mental illness are likely to react to the stresses and strains of life."

Despite the advances psychology was making and the insights it was generating, judges continued to rely on their own observations and assumptions about human behaviour. The evidence of children, for example, was to be treated suspiciously because of "the possibility of a young child having a mistaken recollection of what happened."[12]

Standard legal texts contained quasi-psychological explanations of criminal behavior. Discussing the relevance of post offence behavior to a determination of guilt Kirby J referred to the 1940 writings of Wigmore who hypothesized that just as the commission of a crime leaves "traces of blood, wounds or rent clothing, which

[10] Munsterberg, above n 6, 10-11.
[11] [1975] QB 834, 841.
[12] *R v Pitts* (1912) 8 Cr App 126.

point back to the deed done by him" it will also leave "mental traces" which will manifest in subsequent conduct of the criminal.[13]

Psychology and psychiatry grew rapidly after the Second World War.[14] Many judges, however, continued to rely on their own assumptions about how people behaved. One area in which this is particularly evident is in assumptions judges make about how jurors reason. For example it has been held that a judicial direction is required where there is evidence that the accused has lied because "[t]here is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado."[15] Similarly, the rationale for trying multiple counts separately was held to be the "real risk to an accused person [which] may arise from the adverse effect which evidence of his implication in one of the offences charged in the indictment is likely to have upon the jury's mind in deciding whether he is guilty of another of those offences."[16] Judicial assumptions about human behavior are still, in relatively contemporary times, informing the content of the law.[17]

[13] *Zoneff v The Queen* (2000) 200 CLR 234 at 258-9 citing *Wigmore on Evidence* (3rd ed, 1940).
[14] Mackay, Colman Thorton, above n 4, 322.
[15] *Broadhurst v The Queen* [1964] QB 441 at 457.
[16] *Sutton v The Queen* (1984) 152 CLR 528.
[17] For example in the provocation context, the High Court of Australia in 1990 determined that the age of the accused should be incorporated into the ordinary person test because "[a]s a broad generalization it is true to say that the powers of self-control of a young adult of eighteen or nineteen years are likely to be less than those of a more mature person.": *Stingel* (1990) 171 CLR 312, 331.

Some of these assumptions may be sound. Some accord neatly with a "common sense" view that would be prevalent in the wider community. But how do we know, absent direct consultation of relevant empirical material (if it exists), that these assumptions are correct? It may well be that at the time many of these assumptions were developed there was no objective material of professional learning that could be consulted. But what is to happen if subsequent knowledge casts doubt on assumptions that have found their way into the content of the law? How should judges keep abreast of wider scientific developments relevant to the judicial task and how then should they make use of them? And what does the law itself have to say about how judges might appropriately undertake this task? In essence the question to be asked is how should we frame the contemporary rules of judicial notice.

Judicial notice allows judges to draw on their own knowledge when deciding the facts in an individual case. It also allows them to deploy their knowledge of the world when developing the law. It sets the limits on the capacity of courts to consult material not tendered in evidence to undertake both these tasks.

Judicial notice is an exception to the rule that information that is to be relied on in the determination of material facts in issue – adjudicative facts – must be proved by admissible evidence; evidence

that is tendered and subject to cross-examination.[18] Rather relevant information need not be tendered and may be acted upon either *simpliciter*, because it is well known and indisputable, or where it has been appropriately verified. [19]

The search for consistency in the application of the common law doctrine of judicial notice to fact-finding in Australia is destined for failure. The application of the doctrine by the High Court itself has been described as "erratic"[20] with the criticism made that that "many of the cases appear to have departed from the principle in pursuit of convenience."[21] This reflects the difficulty which the law has encountered in providing rules which allow relevant learning in other disciplines to be utilized by courts when making decisions.

Since the introduction of the uniform evidence legislation in Australia, provisions in the Evidence Acts now govern the principles of judicial notice in the jurisdictions in which this law applies. The key provision is section 144. That section provides that proof is not

[18] *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 [64] (McHugh J); Ligertwood & Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (2010, 5th ed), [6.59]; Freckelton "Judicial Notice" in Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2013, 5th ed), 163-164.

[19] One classic statement of the doctrine at common law is that of Isaacs J in *Holland v Jones* (1917) 23 CLR 149, 153: "The only guiding principle – apart from statute – as to judicial notice which emerges from the various recorded cases, appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court "notices" it, either simplicter if it is once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt."

[20] Freckelton 'Judicial Notice' in Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2013, 5th ed), 167-169.

[21] Ibid, 165.

required about knowledge that is not reasonably open to question. If that condition is satisfied then the knowledge must also be either common knowledge or knowledge capable of being verified by reference to an authoritative document which cannot be reasonably questioned. Section 144 also provides that judges may acquire this knowledge in any way they see fit. It responds to procedural fairness concerns by providing that the judge is to give a party an opportunity to make submissions and refer to relevant information relating to the taking into account of knowledge of this kind to ensure that they are not unfairly prejudiced.

It is important, at least in the Australian context that in *Gattellaro v Westpac Banking Corp*[22] Gleeson CJ, McHugh, Hayne and Heydon JJ stated that "there would appear to be no room for the operation of the common law doctrine of judicial notice, strictly so called, since the enactment." If judicial notice at common law was unsatisfactory, incorporating the doctrine entirely within the parameters of s 144 is also highly problematic. Such an approach presents a serious impediment to any dialogue that might be had between the law and science.

The practice of judges consulting external material to help them decide cases has existed for centuries. In 1761 Lord Mansfield

[22] (2004) 78 ALJR 394 at [17]. See also, discussion of this issue in Odgers, *Uniform Evidence Law,* (2014, 11th ed) 926-927.

delivered the judgment of the House of Lords in a case involving the obligation of an insurer to indemnify the insured when a cargo of sugar was damaged at sea.[23] As was common at the time the trial was conducted with a special jury, the verdict being challenged on appeal. Lord Mansfield did not confine his deliberations to the evidence or submissions before him acknowledging that "[he] had endeavoured to get what assistance I could by conversing with some gentlemen of experience in adjustments."[24]

In 1955, however, the rules which governed judicial notice where brought directly into focus by attempts in the United States to codify the law of evidence. That year the American legal academic Kenneth Culp Davis published an article titled "Judicial Notice" in the *Columbia Law Review.* Davis' purpose in writing this article was to express his concern with judicial notice provisions then being proposed in the US for the Model Code of Evidence and the Uniform Rules of Evidence; provisions Davis regarded as "seriously and fundamentally unsound."[25]

Davis recognized that courts use facts not tendered in evidence before them in two ways.[26] The first is to determine the facts in issue in a case; a fact so used he labelled an adjudicative fact. The second

[23] *Lewis v Rucker*, 2 Burr 1167; 97 ER 769 (1761)
[24] *Lewis v Rucker*, 2 Burr 1167, 1172; 97 ER 769, 772 (1761)
[25] Davis, "Judicial Notice" (1955) *Columbia Law Review* 945, 945.
[26] Ibid 952. See also Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55 *Harvard Law Review* 364, 402-410.

way in which facts are used is in assisting the court to 'determine the content of the law and policy and to exercise its judgment or discretion in determining what course of action to take'; facts used in this way are legislative facts. Davis was concerned that the distinction between legislative and adjudicative facts had not been recognized in the proposed legislation. This was problematic because incorporating legislative facts into the judicial notice provisions placed a fetter on the ability to draw on outside knowledge in circumstances where the formulation of law and policy "gains strength to the extent that information replaces guesswork or ignorance or intuition or general impressions. Questions of law and policy often yield to comprehensive factual study."[27]

In Australia the distinction between legislative and adjudicative facts and the consequences that follow were discussed by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd*: His Honour said:

> In contrast with adjudicative facts, which always relate to the issues between the parties, legislative facts generally relate to the law-making function of the judicial process. As Brennan J pointed out in *Gerhardy v Brown,* a court that is considering the validity or scope of a law "is not bound to reach its decision in the same way as it does when it tries an issue of fact between

[27] Ibid 953.

the parties". Whether the law is a Constitution, a legislative enactment or a principle or rule of the common law or equity the "validity and scope of a law cannot be made to depend on the course of private litigation."[28]

Heydon J has described legislative facts as revealing "how existing rules work and how rules which do not exist might work if they were adopted."[29] They are sometimes developed from evidence tendered in the trial although that is not necessary in every case. For Heydon J the distinguishing feature will be the level of technical sophistication in the material relied upon. However, the fact that minds may differ about the material relied upon does not itself require the calling of the author who may be subject to cross examination.[30]Legislative facts are available to assist the court in determining adjudicative facts. Section 144, like the proposed provision discussed by Davis, does not expressly recognize the distinction between adjudicative and legislative facts.[31]

Any discussion of legislative and adjudicative facts raises multiple dilemmas. Reasoning processes which apply when determining a fact in issue may be a result of the application of a

[28] (2002) 208 CLR 460, [65].
[29] *Aytugrul v The Queen* [2012] HCA 15, [71] (Heydon J). Justice Heydon has referred to the different ways in which judges use facts in a number of cases: see, for example, *Thomas v Mowbray* (2007) 233 CLR 307, 512-523; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 382.
[30] *Aytugrul v The Queen* [2012] HCA 15, [74] (Heydon J).
[31] The Australian Law Reform Commission intended that s 144 apply to both legislative and adjudicative facts: Odgers, *Uniform Evidence Law,* (2014, 11th ed) at 927.

legislative fact authoritatively determined and used to inform a rule. We may also, and often do, instinctively apply our accumulated knowledge to determine a fact in issue. In reality we may be applying our own formulation of legislative facts to aid the resolution of the facts in issue. And when we look at what people instinctively assume we may be in for a surprise.

In a paper published in 2006 I discussed the process by which a person may determine facts in issue, including the behavioural characteristics by which many people believe they can identify and distinguish a truthful witness from someone who is telling lies.[32]

The research I examined for the purposes of that paper indicated that despite the assumption that observing the demeanour of a witness under examination, in particular under cross-examination, will assist the tribunal of fact in determining whether that witness is truthful, for most people, the likelihood of a person detecting a lie is no better than chance.[33] Importantly, it is not just the jury who will struggle with this task. There is evidence to the effect that judges and lawyers fair no better than lay people in their ability to detect deception.[34]

[32] McClellan P, "Who is Telling the Truth? Psychology, Common Sense and the Law" (2006) 80 *Australian Law Journal* 655.
[33] Ibid 657-8, citing Ekman P, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* (Norton, New York, 1985).
[34] Ibid 660, citing Ekman P and O'Sullivan M, 'Who can Catch a Liar?" (1991) 46 *American Psychologist* 913.

This inability to accurately identify a falsehood may be explained by what psychology tells us are the behavioural cues that do *not* indicate dishonesty; cues which run counter to many commonly held assumptions. Shifting posture, smiling, scratching and head, foot or leg movements are not the hallmarks of a liar.[35] And whilst most observers rely on a person's face to assess their credibility this is in fact the easiest behavioural 'channel' for a person to control.

I concluded in that paper that acceptance that precepts of common sense applied to decision making will lead to an understanding of the real truth that may be at odds, indeed sometimes markedly at odds, with what science may tell us about the observed behavioural characteristics.

The Royal Commission is of course concerned with sexual offending in relation to children. The history of sexual assault trials and the legislative facts relevant to them are replete with statements by judges which reveal ignorance of the learning available in the relevant field. To take some of these

- "If events such as these occur one expects some complaint to be made and that such a complaint is made within a reasonably early stage of the events themselves. Take for example an allegation that someone was raped and the complaint is made a year later. That, in the eyes of

[35] Ibid 660.

everybody, would cast some suspicion on the acceptability of the allegation."[36]

- "There is, of course nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling. Sometimes it is a fine line between agreeing, then changing of the mind, and consenting …"[37]
- "Experience has shown that human recollection and particularly the recollection of events occurring in childhood, is frequently erroneous and liable to distortion."[38]
- "it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute."[39]
- "A complaint is admissible if made at the earliest reasonable opportunity – if a man runs out of a house and doesn't tell anyone the house is burning until the night following it is not consistent with him believing that the house was on fire when he ran out of it."[40]
- "There is no evidence, apart from the evidence she gave, which corroborates [or] significantly confirms, what she told you. Her evidence is not evidence of the truth."[41]

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[36] NSW Department of Women, "Heroines of Fortitude: The experience of women in court as victims of sexual assault" (November 1996), 211. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.
[37] *R v Johns* (unreported, Supreme Court of South Australia, 26 August 1992) (Bollen J)
[38] *Longman v The Queen* (1989) 168 CLR 79, 108 (McHugh J).
[39] *Reg v Henry; Reg v Manning* (1968) 53 Cr App R 150, 153 (Lord Salmon) cited with approval by a majority of the High Court in *Kelleher v The Queen* (1974) 131 CLR 534.
[40] NSW Department of Women, "Heroines of Fortitude" above n 44, 211. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.
[41] Ibid 193. This statement was recorded in a sexual assault hearing in the District Court of NSW held between 1 May 1994 and 30 April 1995.

The law in relation to legislative facts in Australia has been rendered uncertain by the decision of the High Court in *Aytugrul v The Queen.*[42]I must disclose that the appeal was from the NSW Court of Criminal Appeal where I presided and dissented over the appropriate approach to describing the consequence of DNA evidence. I referred directly to research undertaken into the persuasive power associated with different forms of expression of statistical information. The information was being relied on not to determine a fact in issue. Rather it was relevant to the jury's consideration of the DNA evidence and, in turn, how the rules relating the exclusion of that evidence might be applied. The consequence would be how the advocates could explain the evidence in submissions to the jury and how the judge would direct them in relation to that issue. This is of course a legislative as opposed to an adjudicative fact.

The High Court decision has come to be understood, at least that of the joint judgment, as excluding recourse to legislative facts unless determined in accordance with the rules in relation to judicial notice in s 144 of the Uniform Evidence Act. Heydon J is the only judge who suggests otherwise. If this is the case it represents a significant constraint upon the law's capacity to utilize the available learning, particularly of psychologists and psychiatrists, in

[42] [2012] HCA 15

understanding the characteristics of human behavior relevant to the adjudicative process.

It also represents a significant shift in approach. For example, in *Woods* McHugh J recognized that "[o]n countless occasions, Justices of this Court have used material, extraneous to the record, in determining the validity and scope of legal rule and principles. They have frequently relied on reports, studies, articles and books resulting from their own research after the case has been reserved and parties have made their submissions." [43] His Honour went on to cite as examples the reference to extraneous materials to explain why children may delay in complaining about sexual assault in *Jones v The Queen*[44] and his Honour's own reference to psychiatry journals and reports in discussing the sentencing approaches to pedophiles in *Ryan v The Queen.*[45] *Woods* was an appeal from the Full Court of the Supreme Court of Western Australia. Western Australia is not a jurisdiction in which the uniform evidence legislation applies.

In *Doggett v The Queen* Kirby J in the course of discussing why judicial warnings were required in cases involving sexual offences where there had been a long delay stated that "[i]t would not ordinarily be expected that jurors would be aware of the findings of experimental psychology or of the common experience of forensic

[43] (2002) 208 CLR 460, [68].
[44] (1997) 191 CLR 439, 463
[45] (2001) 75 ALJR 815, [42]-[44].

contests, and other data supporting the reflections about memory, mentioned in *Longman*. Judges, on the other hand *are*, *or should be*, aware of such matters. That is why, in a case of long delay, a warning must be given to the jury."[46] *Doggett* was an appeal from the Supreme Court of Queensland Court of Appeal. The uniform evidence legislation does not apply in Queensland.

'Ordinary human behaviour' has been recognized as a particular category of facts that may be judicially noticed without inquiry; that is without reference to external material. In *M v The Queen* Gaudron J observed that child victims of sexual assault may be reluctant to resist the offender or to protest, and reluctant also to complain for fear that they may be rejected or punished by the offender.[47] It is significant that such an observation could be considered so common place and well-known to fall within the judicial notice exception and yet be contrary to decades long legal practice in respect of absence of complaint which assumed the very opposite. I will say more about this later.

What material falls into and outside of the category of 'ordinary human behaviour' will largely be a matter for the individual judge. It is a topic about which reasonable minds may differ. Consider, as an example, differences in the way judges approach their capacity to

[46] (2001) 208 CLR 343, [126]

[47] (1994) 181 CLR 487 at 515. This is cited by McHugh J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, [66] as an example of 'Notorious facts judicially noticed without inquiry' and in Heydon, *Cross on Evidence* (2015, 10th ed), 167.

"know" how teenagers behave. In *M v The Queen,* an appeal against conviction for of a number of sexual offences committed against a complainant who was 13 years old at the time of the alleged offences, McHugh J expressed doubt as to the capacity for judges to assess teenage behavior stating:

> "Attitudes towards sexual matters and behavior of young people have changed so much in recent years that in many instances the views of appellate judges about how teenagers behave, derived from their own past conduct with teenagers, may well be out of date."[48]

The contrary position was taken by the Full Court of the High Court in *Phillips v The Queen,*[49] a tendency case, where the Court relied on its own assessment of how teenagers normally behave to determine that the accused's behavior on other occasions was not sufficiently unusual, and therefore not sufficiently probative to justify its admission. This decision precluded the jury from making its own assessment of the behavior of the accused and its possible probative value.

Another judge who has cautioned against judge's relying on their own assumptions about modern society is Callinan J. He has observed that "[a]n assumption of such a kind may be unsafe

[48] (1994) 181 CLR 487, [43]
[49] (2006) 225 CLR 303

because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it."[50]

'Ordinary human behaviour' is fundamental in the study of psychology. Although our current rules have been framed by judges drawing upon their own understandings, however misguided they may be, s 144 prevents consultation of authoritative professional material on potentially the same topic unless that information is brought to the attention of the parties and only where it is not reasonably open to question. This has significant implications for the both the civil, and particularly the criminal, trial process.

The history of the legislative facts relating to delayed complaint illustrates some of the problems. Embedded within the common law were special rules for dealing with complaint in the context of sexual assault, in particular in circumstances where there was a delay between the occurrence of the assault and the time at which a complaint was made. The common law, as laid down in *Kilby v The Queen*, required a judge to warn the jury that delayed complaint was relevant to the jury's assessment of the credibility of the complainant.[51]

[50] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [252]

[51] The rule as stated by Barwick CJ in *Kilby v The Queen* (1973) 129 CLR 460, 465 was that "[i]t would be no doubt proper for a trial judge to instruct a jury that in evaluating the evidence of a woman who claims to have been the victim of rape and in determining whether to believe her, they could take into account that she had

The rationale for this rule was the "general assumption that the victim of sexual offences will complain at the first reasonable opportunity, and that, if complaint is not then made a subsequent complaint is likely to be false."[52] The common law equated delay with falsity because of how judges assumed genuine victims of sexual offences behaved. The assumption was derived from the medieval doctrine of 'hue and cry'.[53]

Research has thoroughly discredited this assumption.[54] Delay in complaint is in fact typical rather than unusual, particularly in the context of child sexual abuse.[55] Evidence indicates that a majority of children who are sexually abused do not reveal this abuse in childhood.[56] Research has eroded any factual basis on which a general requirement to direct a jury that delay is relevant to credibility could have been justified.

made no complaint at the earliest reasonable opportunity. Indeed, in my opinion, such a direction would not be proper but, depending of course on the particular circumstances of the case, ought as a general rule be given."

[52] *Graham v The Queen* (1988) 195 CLR 606, [12] (Gaudron, Gummow and Hayne JJ).

[53] ALRC, *Uniform Evidence Law*, Report No. 102 (2005), [18.72]. This was a joint report of the ALRC, NSWLRC and VLRC.

[54] Ibid [18.155]

[55] Cossins, "Time Out for Longman: Myths, Science and the Common Law" (2010) 34 *Melbourne University Law Review* 69, 70-83; Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report*, (2014) vol 1, 48.

[56] Donnelly, "Delay and the Credibility of Complainants in Sexual Assault Proceedings" (April 2007) 19(3) *Judicial Officers Bulletin.*

In response to concerns about the stereotypical assumptions contained in the common law, state parliaments enacted legislation requiring judges to warn juries that delay in complaint was not necessarily indicative that the allegation was false and that there may be good reasons for a complainant to delay making a complaint. A joint report by the Australian, New South Wales and Victorian Law Reform Commissions stated that the effect of these provisions was undermined by decisions of the High Court, citing specifically the decision in *Crofts*.[57]

Crofts v The Queen[58] concerned the content to be given to a direction to a jury on the significance they might attached to delayed complaint in the context of amendments made to the *Crimes Act 1958* (Vic). Section 61(1)(b) stated that if in the course of the trial, evidence was given, or a question asked or statement made which suggested that there was a delay in making a complaint about the alleged offence the judge was required to warn the jury that delay in complaining does not necessarily indicate that the allegation is false and to inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in complaining about it. The first complaint in *Crofts* had been made by the complainant to her mother six years after the first alleged incident and six months after

[57] ALRC, above n 53, [18.74].
[58] (1996) 186 CLR 427.

the last incident. Notably, the Court stated that "[b]y the measure of cases of this kind, [this] was a substantial delay."[59] It is now commonly accepted - and this has been confirmed by the survivors who have come to us for a private session - that in the context of child sexual abuse the typical period of delay is more than 20 years.

The Court in *Crofts* held that the legislative amendments had not abrogated the common law requirement to give a direction about delay.[60] Failure to give a direction that delay in complaint was a relevant matter in assessing the complainant's credibility meant that the direction given by the trial judge in accordance with the terms of s 61 was "unbalanced".[61] Parliament's intention:

> "was simply to correct what had previously been standard practice by which, based on supposed "human experience" and the "experience of the courts", judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against were specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to "sterilize" complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested

[59] (1996) 186 CLR 427, 442.
[60] (1996) 186 CLR 427, 451.
[61] (1996) 186 CLR 427, 452.

that the judge should put such comments before the jury for their consideration."[62]

It may well be that parliament intended to preserve the capacity for judges to make critical comment. But any "critical comment" must have a firm factual foundation. What we know about delay in complaint in the context of sexual abuse through empirical research, tells us that there is no legitimate rationale for assuming a nexus between delay and the falsity of complaint.

That *Crofts* itself was a case that required a balancing direction has proved controversial. As the complainant was aged between ten and sixteen at the time of the alleged offences *Crofts* became authority for proposition that a *Kilby* direction should generally be given in the child sexual assault context. This application of *Kilby* attracted criticism from other members of the judiciary, on the basis that there was no valid reason to justify this direction being given in this context.[63]

Post *Crofts* amendments were made to the *Crimes Act 1958* (Vic) to add a "sufficient evidence" test. A court can no longer warn,

[62] (1996) 186 CLR 427, 451.
[63] See *R v LTP* [2004] NSWCCA 109 [123] (Howie J); *R v Markuleski* (2001) 52 NSWLR 82, [244] (Wood CJ at CL)

or suggest to the jury that the credibility of the complainant is affected by delay unless the judge is satisfied that there is sufficient evidence to suggest that the credibility of the complainant is so affected to justify the giving of a such a warning.[64] The sufficient evidence test also applies in similar provisions in NSW.[65] These provisions confer on the trial judge a discretion to give a warning in certain circumstances. In order to fairly exercise this discretion it is important that judges have an accurate understanding of the relevance of delay to an assessment of the complainant's credibility. Without this it is difficult to give content to a "sufficient evidence" test.

The law with respect to delayed complaint has been additionally disadvantageous to complainants as a consequence of the decision in *Longman*[66] and the subsequent decisions that confirmed and extended its application.[67] In *Longman*, a period of more than twenty years had elapsed between last alleged assault and the first complaint. The alleged abuse occurred whilst the complainant was aged between six and ten. *Longman* determined that a strongly worded warning should be given in circumstances of delayed complaint as the accused would have inevitably suffered a

[64] Section 61(1)(b)(ii).
[65] *Criminal Procedure* Act 1986 (NSW) s 294(2)(c).
[66] (1989) 168 CLR 79.
[67] See *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343.

forensic disadvantage which the jury would not be aware of without the assistance of the judge.[68] The classic formulation of the *Longman* warning includes the phrase "dangerous to convict."

The precise content to be given to a *Longman* warning was a matter that judges had some difficulty grappling with. The warning set out in the joint reasons was complicated by observations made by Justices Deane and McHugh in their respective judgments as to why they each felt a warning was necessary in that case. Deane J referred to "[t]he possibility of child fantasy about sexual matters, particularly in relation to occurrences when the child is half-asleep or between period of sleep, cannot be ignored" and stated that "[t]he long passage of time can harden fantasy or semi-fantasy into the absolute conviction of reality."[69] McHugh J stated that "[t]he fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to 'remember' is well documented" and that "[r]ecollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine."[70] For these passages Justices Deane and McHugh cite no judicial authority. More importantly, Deane J cites no scientific or extra-judicial material for these propositions. McHugh J cites a single book, "Memory",

[68] (1989) 168 CLR 79, 91.
[69] (1989) 168 CLR 79, 101.
[70] (1989) 168 CLR 79, 107-108.

published in 1964. These observations, disadvantageous to complainants, especially complainants who were children at the time in which they were offended against, were subsequently shown by evidence to be of doubtful accuracy. [71]

The observations made by Deane and McHugh JJ about childhood memory have not been accepted without critical judicial comment. In *JJB v R* Spigelman CJ stated:

> "Many judges share a conventional wisdom about human behavior, which may represent the limitations of their background. This has been shown to be so in sexual assault cases.
>
> Legislative intervention was required to overcome the tendency of male judges to treat sexual assault complainants as prone to be unreliable. The observations of Deane J and McHugh J in *Longman* reflect a similar legal tradition that treated children as unreliable witness. …
>
> There is a substantial body of psychological research indicating that children, even very young children, give reliable evidence. These are complex issues, as reflected in reviews of the research on the ability of young children to distinguish fantasy

[71] ALRC, above n 53, [18.126].

from reality. The same is true of research about a child's ability to accurately stressful events.

The complexity of these issues is not reflected in the observations of Deane J and McHugh J in *Longman*, which should, be treated with caution."[72]

Although Spigelman CJ footnoted a reference to the psychological research he had in mind it was not tendered and subject to cross examination. Although some may be concerned about his methodology, the professionals would confirm he was correct.

The decisions in *Longman* and *Crofts* had profound consequences for complainants in sexual assault cases; particularly complainants who were children at the time at which they were assaulted. Consequences that can be seen to flow directly from what judge's thought they knew about how genuine complainants behaved and what they thought they knew about how memory worked. Assumptions that turned out, with the benefit of empirical research, to be erroneous. These assumptions became embedded in the fabric of the common law and proved difficult even for Parliament to completely dislodge.

Where observations are made about human nature, and these observations go on to inform the law and its practical application

[72] (2006) 161 A Crim R 187, 188 [3]-[8] (internal references omitted).

judges must work to ensure these observations are accurate. Where science progresses and the law lags behind the criminal justice system risks inflicting injustice on either complainants or the accused. However, it is apparent that the law, at least in Australia, has not yet identified the rules which will allow the scientist to speak effectively to the judge. I have referred to occasions when judges of the High Court, without consideration of the appropriate rules for their reception, have embraced the work of psychologists to assist their understanding of human behavior. But the random nature of these references emphasizes the need for some agreed rules about the appropriate approach. A trial within a trial, particularly at the appellate level, is not particularly attractive. But rules which are not informed by science run the risk of undermining community confidence in the law.

In my remarks today I have attempted to provide you with some understanding of the complex problems which the law confronts in utilizing the learning of other professionals, particularly psychologists, in developing the appropriate rules for criminal trials. These issues are of particular concern for the Royal Commission in relation to the complex issues of joint trials, the related issues of tendency and coincidence reasoning and the assessment of harm and other issues in sentencing. I do not have time to discuss our

current thinking on these issues today. All of these will be the subject of detailed consideration in our forthcoming reports.