THE COMMON SENSE OF JURORS VS THE WISDOM OF THE LAW: JUDICIAL DIRECTIONS AND WARNINGS IN SEXUAL ASSAULT TRIALS

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> Assuming [the pleaders] … successfully avoided errors in form, and did not stammer (for stammering would have been immediately fatal to the stammerer's case), the issue was then before the court for judgment.[1]

In medieval times, precision and completeness of oath determined the court's verdict. How much do the demands of appellate cases present the trial judge's duty to give directions and warnings in the sexual assault trial with challenges akin to the medieval pleader? The role of precise incantations in court also has a more recent embodiment in the 19th (and 20th) century formulaic corroboration direction. Corroboration law became so hidebound with technicalities remote from functionalism that by the late 20th century, courts and legislators relegated it to the historical dustbin. The purpose of this article is to explore whether we are seeing a third generation of legal formulaic demands in the form of the judicial directions and warnings in sexual assault trials. In recent years, consideration has been given to prosecutorial decisions in regard to sexual assault cases,[2] to conviction rates for sexual assault offences[3] and to reform of evidence law affecting sexual assault trials.[4] However less attention has been given to how the growth of judicial directions and warnings to juries impacts on sexual assault trials. Using a snapshot of statistics from the caseload before the New South Wales Court of Criminal Appeal in 2004, this article highlights the prominence of appeal submissions based on alleged defects in a trial judge's warnings and directions in sexual assault trials. The significant number of appeals that concern sexual assault trials and the prominence of these grounds of appeal give tangible

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1 Kathryn Cronin and Jill Hunter, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (1995) 9.

2 See, eg, Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases*, Trends and Issues in Crime and Criminal Justice No 291, Australian Institute of Criminology (2005).

3 See, eg, Legislative Review Committee, Parliament of South Australia, *Inquiry into Sexual Assault Conviction Rates* (2004).

4 See, eg, New South Wales, *Report on Child Sexual Assault Prosecutions: Standing Committee on Law and Justice,* Parl Paper No 208 (2002) ch 4.

weight to the concerns expressed by Sully J in *R v BWT*,[5] that the law has created a Herculean task for trial judges to ensure they recite all manner of directions with precision. The trend towards greater numbers of and increased complexity in directions and warnings raises a query as to their effectiveness in sexual assault trials. The article concludes by asserting the need for jury research to determine the utility of those directions and warnings as effective 'forensic reasoning rules'.[6]

I BACKGROUND

There are 475 cases on the New South Wales Court of Criminal Appeal website for 2004.[7] In view of the number of defendants who plead guilty, it is not surprising that sentence appeals comprise the greatest part of the cases in the 2004 sample (at 62.5 per cent of cited cases). Conviction appeals as a percentage of cases in the sample totalled 26.7 per cent.[8] The table below divides the 2004 conviction appeals into categories concerning sexual assault offences, other violence against the person offences, property offences, drug offences and other offences.

2004 NSW Court of Criminal Appeal: Conviction Appeals

As % of all conviction appeals	
Sexual assault offences	28.3%
Other violence against the person offences (for example, murder and assault offences)	29.9%
Property offences (for example larceny offences and armed robbery offences where no physical injury was charged)	18.1%
Drug offences	19.7%
Other offences (for example, insider trading and escape lawful custody offences)	3.9%

5 (2002) 54 NSWLR 241.

6 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004) 499.

7 CaseLaw NSW: New South Wales Court of Criminal Appeal (2004) Lawlink NSW <http://www.agd.nsw.gov.au/scjudgments/2004nswcca.nsf/WebView1?OPenView&Start=1&End=31> at 1 May 2005. Some cases include more than one appeal however those multiple appeals were not counted separately.

8 Other appeals, for example, appeals pursuant to s 5F of the *Criminal Appeal Act 1912* (NSW) were 10.8 per cent of the cited cases.

It is notable that the percentage of appeals concerning sexual assault convictions is almost equal to that of appeals concerning all other violence against the person convictions. There is no wish to make these percentages overstate any position, but what can be safely suggested is that conviction appeals concerning sexual assault convictions are numerically significant. The more interesting statistic is that 55.5 per cent of those sexual assault conviction appeals concern grounds of appeal based upon submissions that argued that the trial judge had given an inadequate or incorrect judicial direction and or warning.

II JUDICIAL DIRECTIONS AND WARNINGS IN SEXUAL ASSAULT TRIALS

The case of *R v BWT* is now well known, in particular, for paragraph 32 where Wood CJ at CL listed a 'multitude of directions'[9] that are necessary to be considered by a trial judge when summing up in a sexual assault trial.

Put shortly, the following warnings and directions need to be considered. This list is not exhaustive and the cases before the New South Wales Court of Criminal Appeal in 2004 indicate that directions which were the subject of appeal in sexual assault cases extended beyond this list:

(1) The *Murray*[10] direction: where only one witness asserts the commission of a crime, the evidence of that witness must be scrutinised with great care before concluding that the accused is guilty.

(2) The *Longman*[11] warning (reinforced by the High Court in *Crampton v The Queen*[12] ('*Crampton*') and *Doggett v The Queen*[13] ('*Doggett'*)) must be cast as a warning rather than a comment or a caution: where there is any delay in making a complaint that is not triflingly short and there is a risk of relevant forensic disadvantage that is not 'far-fetched or fanciful'. Even if there is evidence that corroborates the complainant's account the jury should be told that it would be unsafe or dangerous to convict unless the jury, scrutinising the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, is satisfied of its truth and accuracy.

(3) The direction under *Criminal Procedure Act 1986* (NSW) s 294: a delay in complaint does not necessarily indicate that the allegation is false and there may be good reason why the complainant hesitated in complaining.

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9 *R v BWT* (2002) 54 NSWLR 241, 250.
10 *Murray v The Queen* (1987) 11 NSWLR 12.
11 *Longman v The Queen* (1989) 168 CLR 79.
12 (2000) 206 CLR 161.
13 (2001) 208 CLR 343.

(4) The *Crofts*[14] direction (said to counterbalance the direction under s 294): delay in complaining or absence of a complaint may be taken into account in evaluating the evidence of the complainant and in determining whether to believe him or her. The direction should not be made in terms that suggest that complainants of sexual assault are unreliable or that delay is a sign of falsity of the complaint.

(5) The *KRM*[15] or *Markuleski*[16] direction: where the jury entertain a reasonable doubt concerning the truthfulness of the complainant's evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally.

(6) A direction which indicates the forensic use of complaint evidence in regard to its admissibility as relevant to facts in issue (via hearsay) and/or the credibility of the complainant.

(7) The *Gipp*[17] direction: a direction that tells the jury how evidence of uncharged sexual conduct can and cannot be used – whether only to show the nature of the relationship and not to use it for satisfaction of the occurrence of such conduct for proof of the act charged.

(8) A direction pursuant to *Evidence Act 1995* (Cth) s 95[18] or the *BRS*[19] direction: where evidence revealing a tendency (usually of an accused) is inadmissible for a tendency purpose but admissible for another purpose, the jury should be told that the evidence should only be used for that admissible purpose and to use the evidence to prove a tendency is improper.

(9) A direction in relation to the use of evidence admissible to rebut an explanation of coincidence where an accused is charged in the one indictment with sexual assault against two or more complainants. The jury are told that they should be satisfied beyond reasonable doubt, first, of the offences alleged in respect of one complainant and then, of the existence of such a substantial and relevant similarity between the two sets of acts as to exclude any acceptable explanation other than that the accused committed the offences against both complainants.

(10) Any identification warning pursuant to *Evidence Act 1995* (Cth) s 116,[20] a *Domican*[21] warning, or an unreliable evidence warning pursuant to *Evidence Act 1995* (Cth) s 165,[22] upon request and unless there is good reason not to give the warning.

14 *Crofts v The Queen* (1996) 186 CLR 427.
15 *KRM v The Queen* (2001) 206 CLR 221.
16 *R v Markuleski* (2001) 52 NSWLR 82.
17 *Gipp v The Queen* (1998) 194 CLR 106.
18 See also *Evidence Act 1995* (NSW) s 95.
19 *BRS v The Queen* (1997) 191 CLR 275.
20 See also *Evidence Act 1995* (NSW) s 116.
21 *R v Domican* (1992) 173 CLR 555.
22 See also *Evidence Act 1995* (NSW) s 165.

III THE MOVE AWAY FROM CORROBORATION

Corroboration warnings, now increasingly restricted by statute, required judges to direct juries in all cases involving sexual assault offences that it was unsafe to convict on the uncorroborated testimony of the complainant. By the mid-20th century trial judges were required to give a corroboration warning for testimony of three classes of 'suspect witness': accomplices; complainants in sexual assault cases; and children. Corroboration warnings were archaic because they made categorical assumptions about the credibility of whole classes of witness irrespective of the circumstances of the case. The corroboration warning requirement in sexual assault cases reflected two assumptions: first, that sexual assault complainants frequently make false allegations due to perhaps neurotic fantasy, shame or spite; second, that it was especially difficult in the context of one person's word against another's, with little other evidence to determine the conflict, for juries to detect false allegations. Strong prejudice and resentment toward the accused was a distinct possibility and the presumption of innocence could fall by the wayside, particularly where the allegation concerned child sexual assault.

As the problem of non-reporting of sexual crimes became recognised, the idea that sexual assault allegations are easy to bring and sustain to conviction became progressively more implausible. The practical and psychological barriers to taking matters to court were recognised and the necessity of confronting artificial evidentiary hurdles began to be questioned. In addition, the moral climate was changing. The social consequences of extra-marital sex were diminishing and there was no longer any reason to support the assertion that false allegations were widespread and that they necessitated an automatic corroboration warning in all sexual assault prosecutions.

The utility of the corroboration warning was also questionable. As a contribution to rational adjudication the warning was either superfluous where the complainant's unreliability was obvious or useless where the complainant was a skilled, convincing liar. It also gave the harmful impression that the criminal justice system unfairly discriminated against sexual assault complainants. The complainant corroboration warning was also supposed to be protective of the accused, when in practice it could operate to his detriment with the trial judge being required to list damaging evidence capable of providing corroboration and focusing the jurors' minds on the most damaging aspects of the prosecution's case just before the jury deliberated.

Corroboration law also rapidly became superseded in no large part because the technicality and rigidity of the requirements provided a ready avenue for appeal. Ritualistic incantations and formal legal mantras would often be meaningless if not mystifying for the jury. The *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), as well as the *Evidence Act 2001* (Tas), abolished corroboration

requirements[23] along with the requirement for a corroboration warning in s 164, but have preserved judicial discretion for a corroboration warning to be given.

The directions that evolved in Australia outside corroboration law are, in the history of Anglo-based evidence law, 'second generation' directions. Their flexibility and functionality made them appear far more effective in guiding the jury and so bringing about just results. They evolved in response to the legalism and technicality of corroboration directions.

These more 'flexible and functional' directions heralded by *Bromley v The Queen*[24] and *Longman v The Queen*[25] (*'Longman'*) were designed to address newly recognised circumstances involving potentially unreliable evidence and potential unfairness to the accused. The clear objective was to facilitate jurors' evaluation of particularly problematic testimony. A qualitative rather than a quantitative approach was being encouraged. Juries received directions and warnings from the trial judge that pointed out the reason(s) why the particular evidence was of concern. Corroboration, on the other hand, did not give this information to the jury but instead identified other evidence that was capable of connecting the accused with the crime charged. Corroboration in this regard harked back to ancient canon or civil law which required a 'sufficient agglomeration of items of evidence to add up to "full proof"'.[26]

What is clear is that for sexual assault trials the number of second generation 'flexible and functional' directions has become a 'multitude'. Ritual incantation is beginning to emerge. For example, in the 2004 Court of Criminal Appeal case of *R v LTP*[27] Dunford J (Simpson and Howie JJ agreeing) pointed out that in sexual assault trials judges would be well advised to use the list provided by Wood CJ at CL in *R v BWT* as a check list and said 'it is preferable to give the directions, even if the judge considers one or more of them unnecessary in the particular case, rather than have convictions upset on appeal because of the failure to give them'.[28]

Is this a sign of the evolutionary wheel turning 360 degrees, demanding punctilious observance of form over substance? How does this 'checklist' operate to ensure jurors are aided in their use or weighing of evidence? Arguably the new imperative to direct the jury according to a checklist may function to appeal-proof a conviction, but does it aid jurors? Obviously judicial directions must meet standards of content set by appeal courts according to categories of obligation, not according to ease of juror understanding. However, directions compatible with the juror's own understanding are as important as expositions of the legal requirements to which jurors must conform. A more collaborative approach to appellate review and criminal adjudication requires sensitivity to the subtle ways legal determinations bear on forensic fact finding undertaken by the jury. Justice McHugh's observation below drives home the importance of

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23 Except for perjury or a similar or related offence (s 164(2)).
24 (1986) 161 CLR 315.
25 (1989) 168 CLR 79.
26 Cronin and Hunter, above n 1, 16.
27 [2004] NSWCCA 109 (Unreported, Dunford, Simpson and Howie JJ, 1 July 2004).
28 Ibid [47] (Dunford J).

examining what goals are achieved by a multitude of directions and whether such directions are the best means of achieving those goals.

IV ARE JUDICIAL DIRECTIONS EFFECTIVE?

> [T]he more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings.[29]

Judicial directions on the use of an item of evidence are given for two broad reasons – to reduce or remove a potentially unfair form of reasoning (such as propensity or tendency reasoning based on insufficiently probative evidence) or to ensure jurors appreciate potential defects in certain evidence (such as identification, prison informant, oath-against-oath evidence).

The effectiveness of judicial directions has probably been hampered by an unrealistic perception of jury reasoning which seems implicit in many evidentiary doctrines. An axiom of common law trials is that the jury has no business sitting in judgment, except to determine the facts. This has encouraged judges to believe that juries will faithfully follow judicial directions. Some directions and warnings contain an explanation, for example the *Longman* and *Domican* warnings require the jury to be told of the forensic consequences for the accused caused by delay in complaining and the reasons why evidence of identification may be unreliable. Some directions and warnings have an obvious purpose for example the *Murray* direction. This direction requires a self-evident assertion – where only one witness asserts the commission of a crime the evidence of that witness must be scrutinised with great care before concluding the accused is guilty. It must be questioned whether modern jurors are in need of a judicial assertion of the patently obvious, particularly in view of the avalanche of directions now often required in a sexual assault trial.

Judicial directions and warnings are very often used to save items of evidence from discretionary exclusion. An appropriate direction is considered effective to reduce the danger of unfairly prejudicial evidence distracting jurors in their evaluation of evidence. If jurors do not understand or obey the direction or warning, or if they think that it defies common sense and ignore it, the warning is not having the intended effect. If judicial directions are ineffective, the danger of unfair prejudice has not been reduced. The impact of unfairly prejudicial evidence on the jury is consequently underestimated.

A direction instructing juries that a particular use of evidence is forbidden is likely to fail to the extent that it conflicts with the jury's common sense reasoning. Bentham made the point 200 years ago that directions attempting to mandate how evidence should be used in arriving at a conclusion are likely to be counterproductive.[30] Juries should receive judicial assistance to reason correctly, but judicial directions will not be adequate to the task if they fail to connect with

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29 *KRM v The Queen* (2001) 206 CLR 221, 234 (McHugh J).

30 Jeremy Bentham, *Rationale of Judicial Evidence* (1827) vol 3, 219 cited in Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2004) 81.

the jury's understanding. Some judicial directions may fail to provide the jury with an explanation they can understand. With limiting use directions, such as in *Gipp v The Queen*,[31] where the accused's uncharged sexual conduct is before the jury to show the nature of the relationship and should not be used to say that such conduct occurred so the accused is more likely to have committed the act charged, the jury have a doubly demanding task – to comprehend the limited use, and then to resist the temptation to employ an impermissibly prejudicial use.[32] Another example of a limited use direction concerns those relating to the use of complaint evidence for a credibility purpose only.[33]

One of the benefits of our system of jury trials is that jurors bring their 'individual experience and wisdom'[34] to reaching a verdict that accords with good judgment and common sense. Does the checklist of directions facilitate common sense or does it create layers of unnecessary complexity which could give rise to jury confusion? Take, for example, the directions concerning a delay in complaint. On the one hand, juries are told that there may be good reason for the delay and delay does not necessarily mean that the allegation is false. On the other hand, juries are also told that they can take the delay into account when determining whether to believe the complainant. The two directions together can be nonsensical. If there is a good reason for a complainant to delay in complaining, such as trauma or threat, how does her or his delay relate to the complainant's credibility? With the greatest respect, when members of the Court of Criminal Appeal, because of a concern about possible appeal, encourage trial judges to give warnings and directions 'even if the judge considers one or more of them unnecessary in the particular case',[35] the tail is wagging the dog. Taking this conservative approach is understandable but it may sacrifice the function of judicial directions and warnings, that is, enhancing a jury's insight into the evidence.

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31 (1998) 194 CLR 106.

32 See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* (2003) [2-430]:

> You have heard evidence that [the accused] has a prior conviction for ... Now there is a danger about which I must warn you, and that is the danger that such evidence will set off in your minds the following prohibited line of reasoning – 'The evidence shows [the accused] to be a person of bad character; crimes are more often committed by the bad than the good. Therefore [the accused] is likely to be guilty of the crime with which [he/she] is charged.' A jury is never permitted to use such evidence for the purpose of concluding that the accused person is guilty of the crime with which [he/she] is charged simply because [he/she] is the sort of person who would be likely to commit that crime. As I say, that is a prohibited line of reasoning and my firm direction to you is that you must not allow it to enter into your deliberations. [Where appropriate, add] You are, however, free to take that evidence into account, giving it such weight as you think it deserves as evidence showing that [he/she] is not a truthful person, when you are assessing the credibility of the evidence [he/she] has given in this trial. [When the 'bad character evidence' is probative of a fact in issue under the similar fact rule, add] You may, however, bearing in mind my direction about the prohibited line of reasoning, take that evidence into account in the following way in relation to the issue of ... [state the issue].

33 See *Graham v The Queen* (1998) 195 CLR 606.

34 *Black v The Queen* (1993) 179 CLR 44, 49 (Mason CJ, Brennan, Dawson, McHugh JJ, Deane J agreeing).

35 *R v LTP* [2004] NSWCCA 109 (Unreported, Dunford, Simpson and Howie JJ, 1 July 2004) [47] (Dunford J).

The jury can understand when a delay in complaining has importance. In an adversarial trial defence counsel can be relied upon to make the jury so aware. 'Delay' may have always been relevant in the ancient context of the feudal village when the hue and cry was the primary means of finding the wrongdoer. However, nowadays it is a matter of common sense that the more damaging (emotionally and or physically) the sexual assault the longer the 'delay' in complaining. If there is a good reason for not complaining immediately, the fundamental rule of admissibility – relevance – should be used to make these two directions unnecessary.

The *Longman* warning now looms very large in trial courts particularly given its recent and repeated confirmation by the High Court in *Crampton* and *Doggett.* The High Court has indicated that such a warning is integral to the fundamental fairness of a criminal trial. Consequently, a failure to give the warning in the appropriate way can cause an appeal to be upheld even if there was no indication from trial counsel that it was appropriate (rule 4 of the *Criminal Appeal Rules* (NSW) requires leave to be given to argue an appeal point under these circumstances). In the 2004 Court of Criminal Appeal case of *R v MM*,[36] Levine J was concerned about the possibilities in regard to appeal in view of the importance of a *Longman* warning:

> It would be regrettable to the administration of criminal justice if there was evolving some '*forensic culture'* in sexual assault trials in which the *Longman* directions are concerned, for there to evolve a practice of silence on the part of counsel at the conclusion of the summing-up on the basis that Rule 4 would never be applied because any post-trial asserted deficiency in *Longman* directions would go to the heart of the matter, and if made out would amount to a miscarriage of justice. [37]

The extent of litigation on the *Longman* warning and the High Court's treatment of it led Sully J in *R v BWT* to conclude that a prudent judge should give the warning unless the time lapse between offence and complaint was 'trifling' and the risk of forensic disadvantage to the accused is 'far-fetched or fanciful'.[38]

Justice Sully continued:

> a common sense understanding of the real world suggests that a jury which is given a *Longman* direction in the form now apparently required, is likely to reason that the trial judge, although he has stressed repeatedly that it is not for him to tell the jury how the facts should be found, is in fact sending a none-too-subtly coded indication to the jury that the dangers of convicting are such that the jury ought to return a verdict of not guilty.[39]

Justice Sully's concern may be based on the potential for jurors to be influenced by their awe of the trial judge's superior experience. An alternative view is that if the warning is given in circumstances where there has been no significant delay between the offence and the complaint to the authorities, the jury may either ignore the warning or take the view that it is giving an accused an

36 (2004) 145 A Crim R 148.

37 Ibid [36].

38 (2002) 54 NSWLR 241, 275 (Sully J).

39 Ibid 280.

unfair advantage. Either view is equally detrimental to the purpose of the direction and the administration of justice.

The 2004 New South Wales Court of Criminal Appeal figures relating to appeals based on judicial directions and warnings in sexual assault trials indicate that 'appeal proofing' as a stratagem is unsuccessful to date. *R v LTP* indicates that McHugh J's concern about 'the more directions and warnings juries are given' remains unheeded.

Even if the directions *are* effective and functional one must question whether they are sufficiently effective to warrant their present complexity and number. The problem is that we do not know how juries use the directions and warnings given in sexual assault trials. There is no Australian empirical research that has examined this and so no evidence to support an answer to either of these issues. There is substantial empirical research examining the effects of judicial directions on juries, but none have focused on the *combination* of directions presently relevant to sexual assault trials. Research indicates that jurors may struggle to understand trial judges' technical directions.[40] The studies in the main do not examine how the evidence was actually used by real juries.[41] Many United States studies deal with the impact of technical legal language, foreign logic and stilted structure on jury comprehension. This author is not aware of a jury study undertaken with a view to analysing whether the assumptions that underpin the effectiveness of different directions in sexual assault trials are substantiated by the way in which they are comprehended and or utilised by jurors.

V CONCLUSION

The lack of research on the effect of directions and warnings on juries in sexual assault trials (individually as well as their cumulative effect) makes it impossible to determine whether they are having the desired effect. The snapshot of New South Wales criminal appeal cases for 2004 show that judicial directions and warnings in sexual assault trials provide a fertile ground for appeal. The need for and content of the directions and warnings have received significant attention from appellate courts, including the High Court. The exhortations that an 'if-in-doubt-warn' policy is a safe course of action for a trial judge suggests that the 21st century judicial warning is in danger of looking like its 19th century predecessor, and not immensely dissimilar to medieval pleadings. It would appear that warnings and directions initially intended to be flexible and functional have become numerous, complex and formulaic. The effect of the judicial warnings and directions may be productive of more obscurity than light.

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40 See, eg, Jamie Arndt and Joel Lieberman, 'Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence' (2000) 6 *Psychology Public Policy & Law* 677.

41 Rather than mock juries.

An 18 month review of the operation of the uniform *Evidence Acts*[42] is presently being undertaken by the Australian and New South Wales Law Reform Commissions. The Australian Law Reform Commission has raised questions regarding whether common law warnings should be placed within the categories of the unreliable evidence section (s 165).[43] Perhaps a more fundamental review of directions and warnings is required, one that includes an examination of the impact on jurors of these judicial directions and warnings in sexual assault trials.

42 *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW).

43 Australian Law Reform Commission, *Review of the Evidence Act 1995*, Issues Paper No 28 (2004) [14.9], [14.11].