Chapter 6

The Application of the Uniform Evidence Law to Delay in Child Sexual Assault Trials

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This chapter considers a topic that has not received much academic attention, that is, how the Uniform Evidence Law (UEL) operates in relation to one of the most common criminal offences prosecuted in the higher courts – child sexual assault (CSA).[1] There are several key features that characterise a child sex offence:[2]

1. *Word against word evidence*: usually no eyewitnesses means that the complainant is the prosecution's chief witness.
2. *Complainant's young age*: for non-historical cases, vulnerability due to age may be compounded if the complainant suffers from psychological trauma,[3] even though special measures exist for children giving evidence.[4] Children are susceptible to confusion from poor police and cross-examination-style questions, that may induce reporting errors.[5]

1 See, for example, J Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 1, New South Wales Bureau of Crime Statistics and Research; A Cossins, 'The Behaviour of Persistent Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials' (2011) 35 *Melbourne University Law Review* 821.

2 As detailed in A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia*, (National Child Sexual Assault Reform Committee, UNSW, 2010), 60-64.

3 Adverse childhood experiences, such as CSA, increase a child's risk of depression, anxiety and PTSD: E Paolucci, M Genuis and C Violati, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 17 *Journal of Psychology* 135; DM Fergusson, GFH McLeod, LJ Horwood, 'Childhood Sexual Abuse and Adult Developmental Outcomes: Findings from a 30-year Longitudinal Study in New Zealand' (2013) 37 *Child Abuse & Neglect* 664; R Maniglio, 'Child Sexual Abuse in the Etiology of Anxiety Disorders: A Systematic Review of Reviews' (2013) 14 *Trauma, Violence & Abuse* 96.

4 In many jurisdictions a child's video-taped forensic interview with police is played to the jury instead of the child giving live examination-in-chief. See, for example, *Criminal Procedure Act 1986* (NSW) s 306Q; *Criminal Procedure Act 2009* (Vic) ss 367 and 368; see M Powell, N Westera, J Goodman-Delahunty and S Pichler, 'An Evaluation of How Evidence Is Elicited from Complainants of Child Sexual Abuse' (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016). In some jurisdictions, the child's cross-examination can also be pre-recorded; see, for example, *Criminal Procedure Act 2009* (Vic) ss 370, 381.

5 R Zajac and H Hayne, 'I Don't Think That's What *Really* Happened: The Effect of Cross-Examination on the Accuracy of Children's Reports' (2003) 9 *Journal of Experimental Psychology* 187; The British Psychological Society (BPS) Research Board, *Guidelines from Memory and*

3. *Lack of forensic evidence*: many types of sex offences do not involve ejaculation while delay in complaint also results in a lack of forensic evidence.
4. *Lack of medical evidence of abuse*: even with penetrative abuse, 'as many as 96% of children assessed for suspected sexual abuse will have normal genital and anal examinations'.[6]
5. *Delay in complaint*: most child victims do not complain at the time of the abuse[7] yet '[a]n inordinate amount of time is devoted' to delay at trial based on 'outdated notions' about how victims ought to behave.[8] One quarter of the 291 CSA cases that went on appeal in New South Wales between 2005-2013 involved delay as an appeal issue.[9]
6. *Multiple offences*: CSA often involves multiple offences over weeks, months or years, although multiple offences can make it difficult for children to remember the precise details of each individual offence.[10]
7. *Multiple complainants*: if complainants know each other, the defence often argues that they have concocted their evidence or colluded to make false complaints.

The difficulties associated with prosecuting sex offences are well documented,[11] including the relatively low success rates of bringing a child sex offence to trial and gaining a conviction.[12] Because of the above features, a typical CSA trial may involve a number of contentious types of evidence:

1. Because the complainant's credibility is central, hearsay evidence about when he or she made his or her first complaint before a formal complaint to police can be relevant to both the facts in issue and credibility;
2. Expert opinion evidence about child development, children's reliability as witnesses, the reasons for children's counterintuitive behaviours, and/or lack of forensic or medical evidence;
3. Tendency and/or coincidence evidence about the defendant as a result of multiple counts or multiple complainants; and/or
4. Relationship evidence as a result of multiple allegations of abuse.

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the Law: Recommendations from the Scientific Study of Human Memory (British Psychological Society, 2010), 12.

6 CF Johnson, 'Child Sexual Abuse' (2004) 364 *Lancet* 462, 462.

7 K London, M Bruck, S Ceci and D Shuman, 'Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?' (2005) 11 *Psychology, Public Policy and Law* 194; A Cossins, 'Time Out for *Longman*: Myths, Science and the Common Law' (2010) 34 *Melbourne University Law Review* 69.

8 K Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26 *Current Issues in Criminal Justice* 55, 59. Shead writes as a New South Wales Crown Prosecutor.

9 J Cashmore, A Taylor, R Shackel and P Parkinson, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016), 25.

10 Shead, above n 8.

11 See National Child Sexual Assault Reform Committee, above n 2; Shead, above n 8.

12 J Wundersitz (2003) *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (Office of Crime Statistics and Research, 2003); Fitzgerald, above n 1; Shead, above n 8; Cashmore et al, above n 9.

For reasons of space, this chapter considers how the UEL applies to two types of evidence – the admissibility of delayed complaint evidence and expert opinion evidence to explain a child's delayed reporting. In order to inform the reform issues that arise, we begin with an analysis of how appellate courts have dealt with evidence of delayed complaint, followed by an overview of the accuracy of judicial interpretations of the 'freshness' of a person's memory in light of salient research on human memory.

I. Complaint Evidence

(i) The Common Law Approach

First, some history is called for in order to understand the approaches of different courts to complaint evidence under the UEL. At common law, complaint evidence was admitted for credibility purposes rather than evidence of the facts in issue, that is, lack of consent or the commission of the sexual act.[13] While it is commonly thought that the common law's approach to complaint evidence stemmed from its restrictive approach to hearsay evidence,[14] such evidence was 'received by the courts as a matter of old tradition and practice, with little or no thought of any principles to support it. The tradition went back by a continuous thread to the primitive rule of hue-and-cry'.[15]

Although the strictness of the common law hearsay rule may now be the justification for limiting the admissibility of complaint evidence to credibility, sexist assumptions about 'good' and 'evil' women underpinned this particular rule of evidence. In *R v Lillyman*,[16] Hawkins J explained that complaint evidence could be:

> used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony … and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her.[17]

However, the relevance of complaint evidence was not based on the limits of the hearsay rule but on subjective interpretations of women of 'good' and 'evil' fame,[18] with a woman's reputation being relevant to assessing her credibility as a witness.[19] Not surprisingly, one of the characteristics of a woman of 'good' fame was that she had made an early complaint: 'if she presently discovered the offence, and made search for the offender … these and the like are concurring circumstances, which give greater

13 For a summary of the history of the common law's approach to recent and delayed complaints of sexual assault, see A Cossins, 'Defying Reality: Child Sexual Assault and the Delay in Complaint Rule' (1999) 10 *Current Issues in Criminal Justice* 30.

14 *Papakosmas v The Queen* (1999) 196 CLR 297, [12] (Gleeson CJ and Hayne J).

15 JH Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law,* vol IV (Little, Brown and Co, 3rd edn, 1940), 219, para 1134.

16 (1896) 2 QB 167.

17 Ibid 177.

18 Ibid 171.

19 For most of the 19th century, the age of consent was 12 or 13 years in the Australian colonies so that girls were also judged to be of 'good' or 'evil' fame: A Cossins, *Masculinities, Sexualities and Child Sexual Abuse* (Kluwer Law International, 2000), 8-11.

probability to her evidence'.[20] By contrast, a woman of 'evil' fame was someone who delayed her complaint:

> if she concealed the injury for any considerable time after she had opportunity to complain; if the place … was where it was possible she might have been 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.[21]

While the concepts of 'good' (virtuous) and 'evil' women were socially tolerated in the 1890s, do we still judge women and girls as falling into these two dichotomous categories based on the immediacy of their complaints? Let's look at how complaint evidence has subsequently been handled by the common law.

In the main High Court case on the issue, *Kilby v The Queen,*[22] Barwick CJ did not refer to the hearsay rule as the basis for limiting the admission of complaint evidence to its credibility purpose, expressing uncertainty about the historical reasons for its admission.[23] Instead, His Honour considered that there was a line of authority since *Lillyman* that justified the common law's view of what a delayed complaint means:

> that in evaluating the evidence of a woman who claims to have been the victim of a rape and in determining whether to believe her, [the jury] could take into account that she had made no complaint at the earliest reasonable opportunity.[24]

Although *Lillyman* had been interpreted as standing for the proposition that evidence of recent complaint could be admitted to negative consent as well as boosting credibility, Barwick CJ rejected this interpretation.[25] Thus, *Kilby* became authority at common law that recent complaint evidence could not be admitted to prove lack of consent.

It is possible that Barwick CJ had no option but to carry on the common law tradition of treating recent complaint as evidence relevant to a complainant's credibility, rather than the facts in issue, since to do so would have had the consequence that evidence of *delayed* complaint could have been used as evidence of the complainant's consent to rape, as argued by Kilby.

Nonetheless, a jury instruction that a failure to complain at the earliest reasonable opportunity is relevant to a complainant's credibility may produce the same outcome since a jury may be more likely to disbelieve his or her evidence and, therefore, conclude that he or she consented to sexual intercourse.

(ii) The Approach Under the UEL

When the relevance of recent complaint evidence was first the subject of appeal under the UEL, it would have been easy for the High Court to take the path of least resistance by endorsing common law assumptions about women and girls of 'good' and 'evil' fame in its first two cases on the topic: *Graham v The Queen*[26] and *Papakosmas*. By

20 *R v Lillyman* (1896) 2 QB 167, 171.
21 Ibid.
22 (1973) 129 CLR 460.
23 Ibid 472. Barwick CJ wrote the main judgment.
24 Ibid 465.
25 Ibid 470.
26 (1998) 195 CLR 606.

way of summary, after *Graham*, the Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission (ALRC, NSWLRC and VLRC) recommended an amendment to s 66,[27] the hearsay exception under the UEL which permits the admission of a previous representation[28] made by a declarant (the maker of the asserted fact(s) in the representation) who is available[29] to give evidence in court. How the amendment to s 66 came about and its subsequent interpretation by intermediate appellate courts is discussed below.

In *Papakosmas*, the High Court chose not to follow the common law approach to recent complaint evidence, as per *Kilby*, holding instead that such evidence was relevant to the facts in issue, that is, to prove lack of consent. Although *Papakosmas* involved an adult complainant, the High Court's decision means that evidence of recent complaint is relevant to the facts in issue in a CSA trial – namely, whether the defendant committed the alleged sexual conduct.

At trial, three of the complainant's work colleagues gave evidence of what the complainant had told them immediately after she had been sexually assaulted at a work Christmas party, that she had been raped by Papakosmas.

The trial judge had informed the jury that this evidence could be used not only to bolster the complainant's credibility but also as evidence to prove that the complainant had not consented to intercourse.[30] On appeal, the appellant argued that the complaint evidence should only have been admissible for its credibility purpose.

In dismissing the appeal, Gleeson CJ and Hayne J began with an examination of Chapter 3 of the UEL and concluded that the appellant's argument 'leads nowhere' because of the differences between the common law and UEL hearsay rules and exceptions.[31] The liberal scheme under the UEL provided for the admission of complaint evidence under s 66 if the declarant was available to give evidence (she was the Crown's chief witness) *and* if her complaint was made at a time when it was 'fresh' in her memory (it was made immediately after the sexual assault).[32] Nonetheless, the UEL does not define the word, 'fresh', nor is it a term used in the scientific literature on memory. It was not defined in the ALRC's original report on the laws of evidence in Australia in 1985, although it was clear that the term was used as an indicator of the accuracy and, therefore, the reliability of a person's representation.[33]

The upshot in *Papakosmas* was that recent complaint evidence could be admitted for a hearsay or fact in issue purpose, since 'it was impossible to deny' that the

27 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law Report (ALRC Report 102; NSWLRC Report 112; VLRC Final Report)* (Australian Law Reform Commission, 2006).

28 As defined under the Dictionary to the UEL.

29 As defined under the Dictionary to the UEL.

30 *Papakosmas v The Queen* (1999) 196 CLR 297, [7].

31 Ibid [32]. Gaudron and Kirby JJ agreed with the reasons of Gleeson CJ and Hayne J: ibid [44]. McHugh J also agreed that the appeal should be dismissed: ibid [99].

32 This approach was envisaged by the ALRC in its 1985 report on a uniform evidence scheme: ALRC (1985) *Evidence Interim (Report No 26)*, ALRC, [693].

33 Ibid [342].

complaint evidence affected the assessment of the probability that the complainant had not consented to intercourse.[34]

Nonetheless, the decision in *Papakosmas* was hardly a 'rational' decision (under s 55) since it was based on the subjective belief that the complainant's recent complaints, being 'closely contemporaneous' with the allegations, 'were of a kind that might ordinarily be expected if those events occurred'.[35] It was only McHugh J who was prepared to state the irrationality associated with the common law position on complaint evidence – that the interpretation of the circumstances in which a complaint is made is in the eye of the (male) beholder. Quoting Fitzgerald P in *R v King,*[36] McHugh J agreed that:

> the admissibility of complaint evidence 'is based on male assumptions, in earlier times, concerning the behaviour to be expected of a female who is raped, although human behaviour following such a traumatic experience seems likely to be influenced by a variety of factors, and vary accordingly'.[37]

By contrast, a rational decision would have been based on research about the frequency with which sexual assault victims make immediate complaints, compared with delayed complaints. Since judges rarely rely on such research, preferring their own assumptions about human behaviour, it is no surprise that, a year before *Papakosmas* was heard, evidence of a six-year delayed complaint in *Graham* was held to be inadmissible by the High Court to prove the facts in issue in a CSA case. On appeal from the New South Wales Court of Criminal Appeal, the High Court considered the scope of s 66(2) and the fresh in the memory requirement. Gaudron, Gummow and Hayne JJ interpreted 'fresh' to mean '"recent" or "immediate"':

> the core of the meaning intended, is to describe the temporal relationship between 'the occurrence of the asserted fact' and the time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years.[38]

Because the complaint was not considered to be fresh in the complainant's memory, it was inadmissible under s 66(2) for its fact in issue or hearsay purpose. The High Court's reasons for measuring the freshness of an event in hours or days essentially turned on the experience of the courts that 'demonstrates that the memory of events does change as time passes'[39] so that a delayed complaint made years after the events, even if the recollection is 'vivid', 'adds little useful to the material before the court'. Thus, the High Court decided not to adopt the New South Wales Court of Criminal Appeal's interpretation of 'fresh' which focused on the quality of memory:

34 (1999) 196 CLR 297, [31]. A second argument by the appellant, that s 136 should have been used by the trial judge to limit the complaint evidence to its credibility purpose was also rejected on the grounds that it 'amount[s] to an unacceptable attempt to constrain the legislative policy underlying the statute by reference to common law rules, and distinctions, which the legislature has discarded': [39].

35 Ibid [59].

36 (1995) 78 A Crim R 53, 54.

37 *Papakosmas v The Queen* (1999) 196 CLR 297, [76].

38 (1998) 195 CLR 606, [4]; Gleeson CJ agreed with the judgment of Callinan J who agreed with the majority that s 66 had not been interpreted according to its intended construction: (1998) 195 CLR 606, [46].

39 Ibid [5].

> the notion of freshness particularly in this area of law is not anchored to nor determined by simple notions of 'the lapse of time'. It is concerned with … the 'quality' of the memory.[40]

II. Review of the UEL: s 66 and Fresh in the Memory

In their review of the operation of the UEL, the ALRC, NSWLRC and VLRC concluded that delay in complaint was a typical feature of CSA cases. They discussed the empirical psychological literature on CSA, noting that 'understanding of memory processes has progressed significantly' since the UEL was first introduced and that 'the law should reflect that knowledge'.[41]

The Commissions recommended retention of 'fresh in the memory' under s 66(2), with an extension of the matters to be taken into account. The Commissions made a number of comments based upon their review of research on memory in CSA cases. Among these was the notion that memories of emotionally arousing events are likely to be encoded and retained differently than memories of unremarkable events.[42] To overcome the difficulties of admitting hearsay evidence as a result of the decision in *Graham,* the Commissions considered that 'fresh in the memory' should be determined by reference to the nature of the event in addition to delay because of 'the distinct and complex nature of memory of violent crime'.[43] The Commissions also considered that the age and the health of the witness may be relevant in assessing the freshness of a memory. These factors were subsequently enacted under s 66(2A).

Since its enactment, how has s 66(2A) been interpreted by the courts? Although s 66(2A) was 'a great leap forward … [i]n practice it has not had a significant effect'.[44] This is despite the liberal interpretation of s 66(2A) in the first appeal in *XY v R*[45] which concerned a six year delayed complaint. The New South Wales Court of Criminal Appeal discussed the appropriate interpretation of s 66(2A) in light of its background material in the Commissions' report, and decided that 'fresh in the memory' was no longer to be interpreted as meaning 'recent' or 'immediate':

> No longer is the 'core meaning' of the phrase to be interpreted as 'essentially confined to … the temporal relationship between the occurrence of the asserted fact, and the time of making of the representation'. That temporal relationship remains a relevant consideration but it is by no means determinative … Importantly, the court now must take into account 'the nature of the event concerned'. In *Graham's* case, that was

40 Ibid [27].
41 ALRC, NSWLRC and VLRC, above n 27, 253; A Cossins, 'The Hearsay Rule and Delayed Complaints of Child Sexual Abuse' (2002) 9 *Psychiatry, Psychology and Law* 163.
42 ALRC, NSWLRC and VLRC, above n 27, 251. See discussion below about the psychological impact of traumatic events on memory.
43 Ibid 255. The use of the term 'violent crime' does necessarily imply an act of violence was involved.
44 Shead, above n 8, 64.
45 [2010] NSWCCA 181.

> not seen as a particularly important matter. It now takes its place as an important consideration in the factors to be considered.[46]

In Victoria, s 66(2A) has been less liberally interpreted, although there was an initial indication in *LMD v R*[47] that the Victorian Court of Appeal would follow the approach taken in *XY*. In *LMD*, two friends of the complainant had testified that she had told them she was 'molested' by her uncle seven years after the first alleged incident. Similar evidence was given by the complainant's husband who testified that the complainant had revealed the abuse because she used to 'freeze' during sex as a result of her memories. Harper JA considered that the evidence from these witnesses had been correctly admitted at trial under s 66.[48] The fact that the events were fresh in the complainant's memory:

> was demonstrated by her reaction to the approaches made by her boyfriend when sexual intercourse between them was contemplated. If the events were fresh in her memory then, so too were they likely to have been when the complainant spoke to her school friend some four years earlier.[49]

Since *LMD* the Victorian Court of Appeal has taken a restrictive approach to interpreting 'fresh in the memory'. In *Boyer v R*,[50] the applicant had been charged with one count of indecent assault on JP between 2 July 1983 and 7 July 1985. JP had testified that the first person he had told about his stepfather's sexual abuse was a girlfriend in 1992. He also told a counsellor at a youth camp in 1993 and another girlfriend about 10 years before the trial. While serving a prison sentence for assaulting the applicant in 1997, JP told a prison psychologist. The trial judge ruled that evidence of each delayed complaint was admissible under s 66, including an additional complaint made to a constable in a record of interview in 1997 when JP was arrested for assaulting the applicant.

On appeal, Priest JA stated that the trial judge's decision 'was fundamentally flawed'[51] because she had not considered whether JP's assertions were fresh in his memory at the time they were made. Although stating that all three matters listed in s 66(2A) must be taken into account, His Honour only considered the time period in concluding that none of JP's delayed complaints of sexual abuse were fresh in his memory.

While the Crown had relied on the decision in *LMD*, Priest JA distinguished that case because of its 'unusual' facts:

> notwithstanding the lapse of ten years …, there had been … a continuous revival of the events in question, since the complainant … continually experienced difficulty having sex with her boyfriend as a result of constant flashbacks as to the relevant offending.[52]

By contrast, there was no evidence in *Boyer* that JP's memories 'were revived' in a similar manner,[53] even though, as discussed below, one way in which a memory is

46 Ibid [79].
47 [2012] VSCA 164.
48 Ibid [20].
49 Ibid [24]-[25].
50 [2015] VSCA 242.
51 Ibid [67].
52 Ibid [73].
53 Ibid.

'refreshed' is by regular remembering and sharing with other people, as JP had done in *LMD*.

The decision in *Boyer* has moved the goalposts for admission under s 66(2A) by creating another factor for determining the freshness of memory in s 66(2A), that is, 'continuous revival' of memory, thus reaffirming the significance of the temporal relationship between the events and the timing of the delayed complaint. Although the New South Wales Court of Criminal Appeal had said in *XY* that the temporal relationship was no longer the core requirement, with 'the nature of the event' being an important factor, Priest JA did not take that factor into account, hinting instead that *XY* had been 'wrongly decided':

> I have previously resisted an invitation to consider whether *LMD* and *XY* were wrongly decided, observing, however, that I would not hasten to embrace the reasoning in either case.[54]

Because of the decision in *Boyer*, it is no surprise that, in *Clay v R*,[55] the Victorian Court of Appeal was less interested in the nature of the event and more concerned with the 20-year delay in complaint by two of the three complainants:

> Wherever the line is to be drawn, a period that … exceeded 20 years seems to us to have been so far beyond what the legislature could ever have contemplated when it enacted s 66(2A).[56]

As a result, defence arguments about the admissibility of complaint evidence under s 66 in Victoria now centre on timing, as can be seen in the most recent appeal case, *Pate (a pseudonym) v The Queen*.[57] There, the complainant made a disclosure to her boyfriend some 12 years after the alleged sexual abuse by her uncle. On appeal, the appellant submitted that the courts in *XY* and *LMD* had not given 'sufficient emphasis to the temporal factor' in s 66(2A) and 'should not be followed'.[58] Weinberg JA said that a delay of 12 years was not:

> in and of itself, too great to qualify for admissibility under s 66(2A). There is no single bright line figure beyond which a representation made long after an event cannot be 'fresh in the memory'.[59]

However, His Honour considered that the longer the delay, 'the greater the need for there to be some reason why the event would be "fresh" in the memory'.[60] Despite the fact that the nature of the event may provide that very reason. It is in the nature of CSA that children typically delay their complaint for a variety of sensible reasons, and as discussed below, various features of CSA may operate to keep the event(s) "fresh" in the memory. Although Priest JA recognised in *Pate* that 'the subjective features of the person making the representation' might need 'greater attention', no such attention was given by the CA in *Pate*. Instead of considering the nature of the event, Priest JA

54 Ibid. The statement that the reasoning in *LMD* should not be embraced contradicts Priest JA's reliance on *LMD* in *Boyer*.
55 [2014] VSCA 269.
56 Ibid [50].
57 [2015] VSCA 110.
58 Ibid [30].
59 Ibid [65].
60 Ibid.

preferred the view of McHugh J in *Longman v The Queen*[61] that 'the longer the period between an "event" and its recall, the greater the margin for error' and that childhood events are 'particularly susceptible to error'.[62] Although it is generally true that recall of an event does decline over time, and that childhood events are less well remembered than adult events,[63] such points require qualification and are discussed further below.[64]

Because defence counsel in *Pate* had failed to object to the admission of the delayed complaint at trial,[65] the Victorian Court of Appeal dismissed this particular appeal ground.

Recently, the High Court in *IMM* rejected the appellant's argument that a delayed complaint (made nine years after the first alleged act of abuse and two years after the last) 'should have been restricted to its effect upon the complainant's credibility', observing that the argument was 'reminiscent' of the common law treatment of complaint evidence and reaffirming the fact that the UEL had changed that approach.[66] The High Court also affirmed the relevance of delayed complaint to the facts in issue.[67] Whether this case will have an impact on the future admission of complaint evidence in Victoria remains to be seen.

III. Recent Research on Memory Processes

The Commissions concluded in 2006 that the interpretation of 'fresh in the memory' under s 66 should take into account an understanding of memory processes,[68] in particular the empirical research on delay in reporting, memory processes, event memory, and reports about repeated autobiographical events. To underscore the importance of these memory processes in CSA cases, the Commissions enumerated four potentially relevant memory effects:[69] (i) rates of forgetting;[70] (ii) the effect of emotional arousal;[71] (iii) trauma and memory;[72] and (iv) the misinformation effect.[73] A summary of research on each topic was provided, drafted by lawyers based primarily on written submissions and oral consultations with a single expert.[74] The Commissions

61 (1989) 168 CLR 79.
62 Ibid [17].
63 BPS, above n 5, 16.
64 Ibid 12-14. In *Pate,* Priest JA observed that 'consideration might also be given to whether the particular memory can be said to be free of factors which potentially might taint or influence it (such as … psychological counselling or therapy)': [2015] VSCA 110, [146]. This observation relates to the reliability of evidence and, in light of the High Court decision in *IMM* [2016] HCA 14, reliability of a delayed complaint is a matter for the jury after all witnesses have given evidence.
65 [2015] VSCA 110, [67].
66 [2016] HCA 14, [72].
67 Ibid [73].
68 ALRC, NSWLRC and VLRC, above n 27, 253.
69 Ibid [8.86]-[8.112].
70 Ibid [8.99]-[8.104].
71 Ibid [8.88]-[8.98].
72 Ibid [8,109]-[8.111].
73 Ibid [8.105]-[8.108].
74 Ibid fnn 121 and 127 refer to a written submission by Professor Don Thomson, an Australian barrister and experimental psychologist who has provided expert evidence in CSA cases.

concluded there was little professional consensus on these particular topics other than that 'memory processes are complex and subject to a number of different factors and processes'.[75] The Commissions relied on this summary to support their recommendation that, in deciding whether a memory was 'fresh,' in a case of CSA, the courts should take into account both the nature of the event and the age and health of the witness.[76] Based on a submission by the New South Wales Director of Public Prosecutions, the Commissions noted that a wide variety of considerations, including the number and frequency of the events in issue, may be relevant, and that the nature, age and health of the witness were illustrative, not exclusive examples of factors to consider in addition to the temporal criterion.[77]

IV. Effects of the Nature of the Event on Memory

The Commissions differentiated the context of CSA from that of an eyewitness to a crime, implying that memory processes for personally significant events involving interactions with someone well-known to a complainant must be differentiated from the capacity of an unwitting bystander to remember and identify a stranger fleetingly observed at a crime scene.[78]

Comparatively few cases of CSA involve single events, instead typically involving multiple interactions between the complainant and a known abuser who uses 'grooming' techniques that culminate in multiple and repeated incidents of abuse. Thus, memory for repeated events and interactions is the issue, unlike eyewitness memory to a single criminal act. The Commissions cautioned judges not to treat memory for all events in a uniform manner, but to consider that memory of a more enduring relationship and of a series of events and interactions, of personal autobiographical significance to a complainant, might invoke different processes in terms of memory formation, maintenance and recall, than those of an incidental eyewitness to a crime of brief duration, such as a traffic accident.[79] Ultimately, the research literature on the formation, maintenance and recall of eyewitness memory was noted to be supportive of the Commissions' recommendation, especially memory for distinctive events such as violent crimes.[80]

V. Professional Consensus Among Memory Researchers Relevant to Memory and the Law

Because the foregoing discussion of case law on s 66 of the UEL reveals conflicting judicial approaches to the interpretation of 'fresh in the memory', we provide a review of the research issues identified by the ALRC, NSWLRC and VLRC in their final report, to determine if scientific consensus exists on these topics about memory, forgetting and accurate or fresh recall.

75 ALRC, NSWLRC and VLRC, above n 27, 253.
76 Ibid 147.
77 Ibid [8.1220].
78 Ibid [8.83].
79 Ibid [8.84].
80 Ibid [8.120].

Since the Commissions' final report, a statement of professional consensus on the science of human memory was prepared by a national committee of 15 experimental memory researchers and panel of 12 international advisers convened by the British Psychological Society (BPS). They distilled findings from many different studies into guidelines on memory and the law to provide a range of criminal justice professionals with an accurate and accessible 'basis from which to consider issues relating to memory as these arise in legal settings'.[81] While the BPS guidelines draw primarily on eyewitness memory research and do not specifically address memory for CSA, they provide a more in-depth and current view than was available to the Commissions on how memory about a person's life may differ from episodic memory for discrete events.

Implicit in the foregoing case law analysis of 'fresh in the memory', and in defence cross-examination strategies, is the belief that a person can continuously access and recall detailed memories of their abuse experiences, or that intact memories can be revived or refreshed. The BPS guidelines emphasise that a record of an event and a person's experiences of that event will differ, since memory is personal, and experiences are mental constructions in light of a person's interpretation and understanding of the event, rather than an actual record of the event.[82] The BPS emphasised that human memory is not like a video-recording, so memories are always incomplete for both adults and children. Forgotten details and gaps must be anticipated and 'must not be taken as any sort of indicator of accuracy'.[83]

Two types of autobiographical memory or knowledge are relevant in memory reconstruction: episodic and conceptual knowledge. Episodic memory concerns a specific experience or event (an episode). This knowledge is typically associated with sensory perceptions (eg visual, auditory, tactile, haptic). Conceptual or semantic memory includes autobiographical knowledge.[84]

A person's knowledge of their personal life is more stable, and less error-prone than memory for one-off, unique episodic events which means that 'memories of the knowledge of a person's life are more likely to be accurate than memories for specific events'[85] and stronger than episodic recall for particular places, times, and dates of events. One potential explanation for this difference is memory trace strength theory, which predicts that recall for events that are familiar, well-learned and rehearsed, because they are repeated, is stronger as they lay down a more robust 'trace' in long-term memory.[86]

When an experience is repeated, a 'script', 'schema' or memory template representing that type of experience develops in long-term memory. These templates spare a person from detailed encoding of redundant information. Thus, in response to questions about events that were similar or repeated, people remember and report the gist of what would usually happen, rather than specific details of individual events.[87] Specific memory for the first event in a series of similar events, and of the last or most recent

81 BPS, above n 5, 1.
82 Ibid 2.
83 Ibid.
84 Ibid 10.
85 Ibid 12.
86 W Wickelgren 'Trace Resistance and the Decay of Long-term Memory' (1972) 9(4) *Journal of Mathematical Psychology* 418.
87 BPS, above n 5, 15.

event, will typically exceed recall for details of other repeated events. Unusual features that are not predicted by the schema may also be more memorable.[88]

Compared to a single abuse event, multiple, similar episodes of abuse will result in a general schema or 'script' for that type of experience, that is, a general representation of the abuse based on similar experiences.[89] If a child is exposed to abuse occasionally or rarely, its unusual nature may make it more memorable or vivid, and thus more details may be recalled. Other contextual features may also make abuse more remarkable, such as threats or the need for secrecy. Conversely, if a child experiences repeated abuse so that the abuse sequence conforms to a pattern, details of the particular individual events may be less memorable. Instead, recall will be of what usually occurred, not specific times and occurrences[90] so that children who are repeatedly abused in a similar sequence, may have greater difficulty recalling specific details compared to children who are less frequently abused.[91]

VI. Applicable BPS Guidance in Relation to the Concept of 'Fresh in the Memory'

The BPS guidance comprises a helpful resource regarding professional consensus on the four particular memory effects specified by the Commissions that may assist in determining the freshness of a memory in cases of a delayed complaint of CSA.

(i) Rates of Forgetting[92]

The Commissions noted that memory research on rates of forgetting 'based on the type of material to be remembered' need to be taken into account.[93] The BPS also summarised the negative effects of delay on memory.[94] In general, because memory quality deteriorates over time,[95] the longer the delay between an offence and a report, the less complete the report will be.[96]

Some of the factors that can operate to preserve memories and slow rates of forgetting include 'rehearsal,' the repetition of events, the personal subjective significance of an event(s) and the vividness or presence of emotion associated with events. For example, enduring and accurate autobiographical memories after 40 years were documented by persons who experienced detention in concentration camps.[97] However, what is significant to an adult about an event may not be significant to a child. The way information is organised and the content of childhood memories recalled by children depend on their knowledge and understanding at the time of the experience. Because

88 Ibid.
89 Ibid 15.
90 Ibid 16.
91 Ibid 15.
92 ALRC, NSWLRC and VLRC, above n 27, [8.99]-[8.104].
93 Ibid [8.99]-[8.105].
94 BPS, above n 5, 16.
95 Powell et al, above n 4, 11, fnn 15-22.
96 BPS, above n 5, 16.
97 ALRC, NSWLRC and VLRC, above n 27, [8.100]; BPS, above n 5, 10.

memories typically contain few specific details, these will depend on the understanding and interpretation of an experience.[98]

Memory 'rehearsal' can include thinking and talking about an event, both of which reinforce the memory. However, 'rehearsal' through recall can also produce memory errors since 'each instance of recall also offers an opportunity for distortion and error to be assimilated [in]to a memory'.[99] Numerous studies have established that longer delays between the event(s) in issue and questioning may make witnesses more susceptible to suggestion.[100]

However, studies have also shown that the memory for the gist of an event is reliable, while the reconstruction of the time it occurred may be more prone to errors since people are poor at reconstructing the timeframe of an event. As a result, errors that arise by transposing a memory from one timeframe to another timeframe are common.[101]

(ii) The Effect of Emotional Arousal[102]

The Commissions recommended that the relevance of research on vivid memories and emotion and memory be reviewed regarding CSA to better understand their effects in this context.[103]

Experimental studies with students and adults have shown that vivid verbal descriptions are better recalled than pallid verbal descriptions of non-traumatic events. Although highly vivid memories are more durable than less vivid memories, they are not necessarily more accurate. Controlled studies have shown that vividness of memory is poorly related to accuracy,[104] although most studies of vividness have been conducted with adults.

More intense emotions are often associated with more vivid memories, but high emotion can lead to 'both accurate and inaccurate memories'.[105] With respect to traumatic memories, studies show consistency of core recall over time.[106] Events interpreted as negative are generally reported accurately by younger children although they may recall less information compared to children aged 10 years or older.[107]

(iii) Trauma and Memory[108]

Traumatic memories are differentiated from emotional memory in terms of encoding. Memory of trauma is often 'fragmented into several key "hotspot" moments … typically the "worst moments" … [which] are generally remembered as very vivid and clear

98 BPS, above n 5, 2.
99 Ibid.
100 Ibid 29.
101 Ibid 10-11.
102 ALRC, NSWLRC and VLRC, above n 27, [8.88]-[8.98].
103 Ibid [8.85].
104 SJ McKelvie, *Vividness of Visual Imagery: Measurement Nature, Function and Dynamics* (Brandon House, 1995).
105 BPS, above n 5, 16.
106 Ibid 12.
107 Ibid 14.
108 ALRC, NSWLRC and VLRC, above n 27, [8.109]-[8.111].

although they may be recalled "in a jumbled order" with less clear memories of 'details that were less important to the person at the time'.[109]

In terms of the health of a CSA victim, studies of memories of traumatic events have shown that trauma can lead to psychological disorders such as post-traumatic stress disorder (PTSD), depression, phobias and psychosis. PTSD, for example, involves recurrent, involuntary, intrusive traumatic memories, such as flashbacks or nightmares. Up to 50% of persons exposed to as rape and torture may develop PTSD. Many PTSD sufferers will avoid talking about the traumatic event in order to avoid re-experiencing it which can explain delays in reporting. Other victims of traumatic events dissociate, or distance themselves from the traumatic experience, becoming blank, or numb, thus resulting in gaps in their memory for the traumatic event.[110]

Given the wide variation in individual differences in response to traumatic events, the absence of these symptoms does not signify the absence of trauma. The BPS concluded that the effect of trauma on memory is a topic about which controlled experiments and field studies have not yielded a conclusive view that heightened psychological stress during encoding or retrieval processes benefits or decreases memory; contradictory findings have emerged in both lab and field studies.[111]

(iv) The Misinformation Effect[112]

As a general principle, human memory is prone to error and easily influenced by the recall environment, such as police interviews and cross-examination.[113] Each time a memory is recalled or rehearsed, this presents an opportunity for the memory to be distorted and/or changed, depending on the context. While the BPS summary[114] stated that up to 75% of children under six years of age were more suggestible[115] than older children, adolescents and adults, those studies were generally not based on autobiographical memory or memory for repeated events.

More recently, research on age and suggestibility, published since the BPS guidelines were issued, has demonstrated robust reverse developmental effects whereby adolescents and young adults produce more spontaneous false memories, especially for negative events, than do younger children.[116] These findings have changed expert consensus based on the observations that adolescents and adults made more errors than did younger children.[117]

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109 BPS, above n 5, 25.

110 Ibid 26.

111 Ibid.

112 ALRC, NSWLRC and VLRC, above n 27, [8.105]-[8.108].

113 BPS, above n 5, 2(iii).

114 The BPS review of literature published in 2010 is the same as that issued in 2008.

115 BPS, above n 5, 21.

116 J Goodman-Delahunty, N Martschuk and A Cossins, 'What Australian Jurors Know and Do Not Know About Child Sexual Abuse' (2017) 41 *Criminal Law Journal* 86.

117 CJ Brainerd, 'Developmental Reversals in False Memory: A New Look at the Reliability of Children's Evidence' (2013) 22(5) *Current Directions in Psychological Science* 335-341; CJ Brainerd, VF Reyna and SJ Ceci, 'Developmental Reversals in False Memory: A Review of Data and Theory' (2008) 134(3) *Psychological Bulletin* 343; CJ Brainerd, VF Reyna and E Zember, 'Theoretical and Forensic Implications of Developmental Studies of the DRM Illusion' (2011) 39 *Memory and Cognition* 365; N Brackmann, H Otgaar, M Sauerland and M Jelicic,

Research has shown that children with better memories for an event are less suggestible to misinformation about that event.[118] When four slides were displayed briefly to children aged four and 10 years old, with each slide shown either once or twice before children were exposed to misleading information about the content, children who shown the slides twice were resistant to suggestions containing misinformation. The researchers concluded that when 'children's memory is tested for an event that occurred to them frequently, they would be expected to have more accurate memory for this event and be less vulnerable to suggestive influences such as biased interviewing procedures than they would for an event that occurred only a single time'.[119]

Given these new developments in the research literature on the reliability of children's memory, there is concern that experts' belief that children are less reliable witnesses than adults may itself be a factor that is compromising the retrieval of accurate information from child witnesses.[120]

VII. Concluding Remarks about Complaint Evidence and s 66(2A)

Back in 2010, Cossins predicted that 'there will still be problems with admitting evidence of a complainant's delayed complaint'[121] under s 66(2A) because that provision still allowed trial and appellate judges to take into account the issue of delay with no guidance in s 66(2A) as to the effect of the nature of unusual events, such as CSA, on memory retention.

Thus, it is no surprise that recent Victorian case law echoes the common law's suspicions surrounding evidence of delayed complaint. While it is not possible to draw a 'bright line' in relation to when a delayed complaint will or will not be fresh, the ALRC, NSWLRC and VLRC emphasised that the nature of the event was central to determining the quality of a person's memory of events.

Despite a promising start with *XY* and *LMD*, both of which dealt with lengthy delayed complaints, subsequent cases (*Boyer, Clay*, *Pate*) have almost exclusively focused on the length of the delay, rather than the nature of the event. *Boyer* added another factor for assessing fresh in the memory by focusing on whether a memory has been continuously revived. But as our review of the science on memory reveals, the accuracy and freshness of memory are dependent on the holistic experience of the person experiencing the event: their age, their psychological health, the type or nature of the event and delay. As well, the normal forgetting associated with delay can be ameliorated by the original distinctiveness of the event and how often the person

'When Children are the Least Vulnerable to False Memories: A True Report or a Case of Autosuggestion?' (2016) 61(S1) *Journal of Forensic Sciences* S271.

118 AC Hritz, CE Royer, RK Helm, KA Burd, K Ojeda and SJ Ceci, 'Children's Suggestibility Research: Things to Know Before Interviewing a Child' (2015) 25(1) *Anuario de Psicologia Juridica* 3.

119 K Pezdek and C Roe, 'The Effect of Memory Trace Strength on Suggestibility' (1995) 60(1) *Journal of Experimental Child Psychology* 116.

120 Hritz et al, above n 118, 9.

121 Cossins, above n 2, 150.

has recalled the event. When courts focus solely or mostly on delay, this represents an inaccurate and simplistic approach to assessing the freshness of a person's memory.

VIII. Solutions

Twenty years ago, the ALRC and Human Rights and Equal Opportunity Commission (HREOC) recommended that evidence of a delayed complaint ought to be admitted under a special exception to the hearsay rule to allow the admission of a child's hearsay statements of delayed disclosure.[122] Since then, three Australian jurisdictions have enacted child-specific modifications to the law on hearsay evidence. In Western Australia, s 106H of the *Evidence Act 1906* admits a relevant statement made by a child in certain criminal trials, although admission is subject to judicial discretion.[123] Queensland has also enacted a child-specific provision under s 93A of the *Evidence Act 1977* regarding a child's out-of-court statements in a document.[124] However, under s 4A of the *Criminal Law (Sexual Offences) Act 1978*, Queensland is the only jurisdiction that has enacted a specific provision that applies to the admission of out-of-court statements in sexual assault trials, generally[125] so that evidence of a complainant's preliminary complaint is admissible *regardless* of whether it is recent or delayed.

South Australia enacted a child-specific hearsay exception under s 34LA of the *Evidence Act 1929* which abolishes the common law recent complaint rule because out-of-court statements admitted under this provision can be used to prove the truth of the facts asserted (s 34LA(4)).[126] There are various prerequisites to the admission of such evidence, including that the child was under 14 years at the time the statement was made and will not be called as a witness in proceedings (s 34LA(2)).[127]

Since value judgments are the basis of decisions about the relevance of immediate or delayed complaint, and have been accompanied by misunderstandings about the nature of memory, recent Victorian case law highlights the inadequacy of the concept of 'fresh' for determining the admissibility of complaint evidence under s 66 of the UEL. Thus, a child-specific provision under the UEL which allows the admission of the content of child's complaint and the circumstances surrounding it regardless of the length of time between the complaint and the alleged sexual abuse would avoid a debate about what is, or is not, fresh in the memory of a child.[128] For historical cases of CSA, however, a broader provision than South Australia's s 34LA would be required,

122 ALRC and HREOC, *Seen and Heard: Priority for Children in the Legal Process* (ALRC, 1997), 332.

123 See *'Rpm' v R* [2004] WASCA 174; *Wayne v WA* [2008] WASCA 118.

124 See *R v OL* [2004] QCA 439.

125 See *R v GS* [2005] QCA 376; *R v GX* [2006] QCA 564; *R v NM* [2012] QCA 173.

126 See *R v CH* [2016] SASCFC 112.

127 A child-specific hearsay exception was enacted in Victoria under s 41D of the *Crimes Act 1958* and has since been re-enacted under s 337 of the *Criminal Procedure Act 2009* (Vic). See *Stark v The Queen* [2013] VSCA 34 for an analysis of the relationship between s 337 and s 66 of the *Evidence Act 2008* (Vic).

128 See Recommendation 3.1 of the National Child Sexual Assault Reform Committee in Cossins, above n 2, 151.

that is, one that did not impose an age limit on when the out-of-court statement was made by the complainant.

Indeed, if the declarant is available to give evidence and can be cross-examined, the need for a reliability measure, such as 'fresh in the memory', has never been adequately explained by the courts or law reform commissions.

IX. Responses of Criminal Justice Professionals to the Utilisation of s 79(2)

We now turn to another area of evidence law that pertains to evidence of delayed complaints, that is, the special provision that allows the admission of expert evidence about 'child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse)' to be admitted for a credibility purpose (if the criteria in ss 108C and 192 are satisfied[129]). Section 79(2) was intended to fill the gap between empirical research on CSA and outmoded 'views that shape courtroom decision making'[130] in CSA cases, and to address the well-documented misconceptions held by fact-finders about CSA cases.[131]

For example, the need for expert opinion evidence in CSA trials arises from the fact that evidence of any delayed complaint is routinely used to undermine the credibility of complainants.[132] A recent analysis of cross-examination strategies used by defence counsel in a sample of 120 CSA trials conducted in New South Wales, Victoria and Western Australia revealed that the most common means for challenging the plausibility of the alleged abuse was to question the complainant about the delay between the event(s) and the time of reporting.[133] This line of questioning implies that an immediate report is one of the hallmarks of a genuine experience of CSA.

The plausibility of a complainant's account was challenged on the basis of a delayed complaint in 70% of cases,[134] although the strategy was used by defence counsel even if the complainant reported the abuse within hours of the abusive event,[135] and was more likely to be used with older complainants (adolescents or adults).[136] For example, a 12-year-old boy who alleged that he was abused by a family friend on a camping trip reported the abuse to his mother as soon as the accused had dropped the boy home and left the house. He was questioned as to why he had not reported the matter to his mother immediately upon entering the door of his home.

129 See A Cossins 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.
130 Shead, above n 8, 59.
131 J Goodman-Delahunty, N Martschuk and A Cossins, 'Programmatic Pretest-Posttest Research to Reduce Jury Bias in Child Sexual Abuse Cases' (2016) 6 *Onati Socio-Legal Series* 283.
132 Other topics about the development and behaviour of sexually abused children about which an expert can give evidence under s 79(2) are beyond the scope of this chapter.
133 Powell et al, above n 4, 206.
134 Ibid 213.
135 Ibid 202.
136 Ibid 214.

In the context of defence cross-examination that incorrectly normalises immediate complaints of abuse, prosecutors ought to provide jurors with expert guidance on the variety of ways in which children react to CSA, including the fact that delayed complaints are typical of sexually abused children. However, there is a reluctance by prosecutors to call expert witnesses in CSA cases in order to inform courts and juries on matters relating to children's evidence and counterintuitive behaviours, something that was apparent before the insertion of s 79(2) into the UEL.[137]

Recent interviews conducted with 43 criminal justice professionals who were experienced in handling CSA matters in four States,[138] including judges, prosecutors, defence counsel, and witness assistance professionals, revealed widespread support for reforms to admit expert evidence at trial to explain the behaviour of CSA complainants to juries.[139] This perspective was confirmed in an online survey with a larger sample of 355 criminal justice professionals who have the most exposure to CSA cases, of whom 70% rated this type of evidence as helpful.[140]

However, since its enactment s 79(2) has remained largely unused,[141] compared to New Zealand where educative evidence of a general nature is regularly admitted in CSA trials[142] in order to 'correct any [juror] misunderstandings' about the behaviour of sexually abused children[143] so as to 'allow the jury to consider the complainant's credibility on a neutral basis'.[144] New Zealand courts also ensure that the expert evidence is 'not linked to the circumstances of the complainant' in the particular case to prevent the evidence being used by the jury in a 'diagnostic' way[145] while juries are instructed against improper use of the evidence.[146]

When 355 criminal justice professionals in New South Wales, Victoria, and Western Australia were surveyed about their experiences with the use of experts in CSA cases in 2015-2016, only one in every five reported the use of expert evidence in this timeframe. Their views on the helpfulness of the expert evidence were mixed, and associated with their professional role.[147] Approximately one-third rated the expert evidence as weak or ineffective, mostly because of the perceived partisanship of the expert and the fact that the content was too general to be of assistance to the jury, because it lacked information pertinent to the specific case facts.[148]

Other difficulties in the utilisation of s 79(2) have been attributed to challenges in finding appropriate experts, and the spectre of a battle of experts[149] but may also arise

137 See ALRC, NSWLRC and VLRC, above n 27, [9.156]; Recommendation 9-1, [9.158].
138 Three UEL States (New South Wales, Victoria, Tasmania) and Western Australia.
139 Powell et al, above n 4, 44.
140 Ibid 68.
141 Shead, above n 8.
142 *DH v R* [2015] 1 NZLR 625, [30].
143 See ibid; *Kohai v R* [2015] NZSC 36.
144 *DH v R* [2015] 1 NZLR 625, [30]. Section 25 of the *Evidence Act 2006* (NZ) governs the admissibility of expert opinion evidence which is admissible if 'it is likely to provide 'substantial help' in understanding other evidence or ascertaining a fact in issue' (*DH v R* [2015] 1 NZLR 625, [29]).
145 Ibid.
146 Ibid.
147 Powell et al, above n 4, 66.
148 Ibid 69.
149 Shead, above n 8, 68.

because lawyers are unfamiliar with what an expert can offer and the manner in which that evidence can be used in CSA trials.

As stated above, the distinguishing feature of expert evidence under s 79(2) is that it is adduced to assist the jury in assessing a child's credibility if the criteria in s 108C are satisfied. Section 108C is an exception to the credibility rule for evidence given by persons with specialised knowledge including specialised knowledge about child development and behaviour. It is not necessary for the defence to attack the child's credibility before expert evidence under s 79(2) will be admissible because it is assumed that jurors are ill-informed about children's behaviour and responses to sexual abuse, and may engage in improper reasoning without expert guidance on these matters.[150]

For example, information on the type of evidence that an expert can provide on delay in reporting is important for explaining 'the complexities and underlying dynamics of the abuse situation' which results in a child's delayed complaint.[151] A large scale study on delays in reporting CSA in New South Wales cases between 1995 and 2014 revealed a number of differences in reporting patterns based on a child's age at the time of the offence, the nature of the offence, the gender of the child, and the relationship between the child and alleged perpetrator.[152] Thus, an expert witness can address the counterintuitive aspects regarding a delay in a complaint, such as:

(a) whether that delay is a typical feature of CSA;
(b) the common reasons for delay;
(c) that delay is not an indication of fabrication;
(d) how memory is affected by the passage of time, including the impact of a child's specific reasons for their delay; and
(e) how memory operates to preserve the recall or recollection of past events and counteract normal forgetting.

The common reasons that may lead a victim of abuse to delay reporting were documented by the BPS[153] and include: denial or experiencing dissociation triggered by memories of abuse; shame; love/attachment to the perpetrator; and fears/anxieties about reporting. These fears and anxieties are typically associated with beliefs about: not being believed; being blamed by others for the abuse; family break-up; threats by the perpetrator; being deprived of a place to live; re-victimisation due to the prospect of counter-attack (often legally supported) by the perpetrator; exclusion from a community/religious/peer, work or social group; loss of employment, or being deprived of opportunity for advancement; gender stereotyping; racism; and the ability to withstand court processes. Expertise specific to memory research on the particular age-range of a complainant at the time of the alleged abuse, the time of complaint and time of trial may be helpful.

Expert evidence on the foregoing matters can assist in contradicting erroneous assumptions from the defence that a delayed complaint is 'inconsistent with the conduct of a truthful person who has been sexually assaulted, thus indicating a false complaint'.[154]

150 ALRC, NSWLRC and VLRC, above n 27.
151 Shead, above n 8, 68.
152 Cashmore et al, above n 9.
153 BPS, above n 5, 13.
154 R Shackel, R, 'How Child Victims Respond to Perpetrators of Sexual Abuse' (2009) 16 *Psychiatry Psychology and Law* S55.

X. Conclusion

In this chapter, we summarised the discriminatory basis behind the common law position on the admission of complaint evidence, both recent and delayed. We also discussed the High Court's first two cases on complaint evidence under the UEL, one of which (*Graham*) led to recommendations for reform to the hearsay exception, s 66 of the UEL, in order to broaden the criteria for determining what was 'fresh in the memory', the measure of reliability used for admitting a witness's hearsay statements when he or she is available to give evidence. Since this reform, we have seen a divergence in how the New South Wales and Victorian appellate courts have interpreted the phrase, 'fresh in the memory', with Victorian courts applying a stricter interpretation despite the clear objectives of the reform and without any guidance from the scientific literature on the factors that affect memory retention.

For this reason, we discussed the scientific evidence on the effects of delay, and the nature of the event on memory and considered reform options to enable the admission of a child's complaint(s) of abuse, irrespective of the time period between the alleged events and first report to police. Finally, we considered the utility of admitting expert evidence under s 79(2) of the UEL in a CSA case involving delayed complaint in order to encourage greater use of this provision by prosecutors dealing with counterintuitive behaviours of a complainant.