



CAN WE FINALLY SAY ‘SO LONG’ TO LONGMAN?: DELAY, CREDIBILITY WARNINGS, AND THE CASE FOR EVIDENCE LAW REFORM IN WESTERN AUSTRALIA

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For more than three decades, the High Court's decision in Longman v The Queen has shaped the law governing delayed complaint directions in Australian sexual offence trials. Although intended to protect accused persons from the forensic disadvantage caused by delay, Longman warnings have frequently operated to reinforce outdated assumptions that delayed disclosure reflects adversely on a complainant's credibility. This article argues that the resulting jurisprudence has become conceptually unstable, requiring trial judges to deliver contradictory directions that simultaneously reject and invite delay-based credibility reasoning. Through a comparative analysis of Australian and Canadian jurisprudence, the article demonstrates how Canadian courts have disentangled forensic disadvantage from credibility assessment by rejecting myths and stereotypes surrounding delayed disclosure. It contends that Western Australia's new Evidence Act 2025 represents a significant doctrinal shift by abolishing mandatory Longman warnings and confining judicial comment on delay to demonstrable forensic disadvantage. These reforms do more than modernise Western Australia's evidence law — they dismantle a doctrinal framework that permitted discredited assumptions about delayed disclosure to persist under the guise of trial fairness.

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I INTRODUCTION

Alongside the development of the jury system, the common law established an intricate body of evidentiary rules to guide lay decision-makers through complex adjudicative processes.¹ Judges long feared that juries, comprised of ordinary citizens rather than legal specialists, might attach undue weight to particular kinds of evidence unless carefully directed by the bench.² As a result, the law of evidence came to play a central role in criminal trials, governing not only what information could be received by the trier of fact, but also the permissible inferences that might be drawn from it.³

Over time, statutory intervention supplemented and, in some instances, displaced these common law rules.⁴ In Australia, as elsewhere, evidence law reform has been driven by growing recognition that evidentiary doctrines do not merely regulate trial mechanics; they reflect and reinforce social norms, including those relating to gender, power, and credibility.⁵ Few areas of evidence law illustrate this more starkly than the treatment of sexual abuse offence complainants, who are mostly female.⁶

The way a legal system assesses the credibility of those who allege sexual violence is a critical indicator of substantive equality in modern society.⁷ Yet, sexual assault typically occurs in private, leaving the complainant as the sole witness to the alleged offence. Historically, this absence of corroboration generated evidentiary principles concerned with protecting the accused from wrongful conviction, particularly where there has been a long delay in the victim’s reporting of the crime. Sexual offence trials often turn on word against word, with contextual detail and credibility assuming

¹ Wouter de Vos, ‘Jury Trials in Western Australia’ (2017) *International Trade and Business Law Review* 335, 335.

² John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) 45–7.

³ Kathy Mack, ‘An Australian Perspective on Feminism, Race and Evidence’ (1999) 28 *Southwestern University Law Review* 367, 367.

⁴ Colin Tapper, ‘Evidence Law Reform in an International Context’ (1992) 22(1) *University of Western Australia Law Review* 31, 35.

⁵ *Ibid* 36.

⁶ Constance Backhouse, ‘Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History’ (2000) 29(1) *University of Western Australia Law Review* 79, 80.

⁷ *Ibid*.

determinative significance.⁸ Delay in reporting has thus come to occupy a duplicitous position in the law of evidence, vacillating between concern for trial fairness, on the one hand, and suspicions about complainant reliability, on the other.⁹

Although legislatures throughout Australia, and other common law jurisdictions, have sought to repudiate the assumption that delayed complaint necessarily indicates falsity, judicial doctrine has struggled to disentangle legitimate concerns for forensic disadvantage from impermissible reasoning grounded in myths and stereotypes about victim behaviour. In Australia, that tension has been most blatantly expressed through the use of the *Longman*¹⁰ direction — requiring juries, in cases of substantial delay, to be warned of the danger of convicting on the uncorroborated evidence of the complainant.

Originally justified as a safeguard against forensic disadvantage to the accused, the *Longman* warning has, in practice, operated as a conduit through which long-discredited assumptions about particular kinds of complainants have continued to influence the trial process.¹¹ Its application has generated a complex and unstable body of jurisprudence, requiring trial judges to deliver a sequence of “balancing” directions that simultaneously caution juries against assuming falsity from delay, while inviting delay-based suspicion. That approach is not merely undesirable; it is logically unsound.

The treatment of delayed complaint further reveals a sharp divergence between common law jurisdictions. In Canada, as discussed below, delay-based credibility reasoning has long been rejected as a matter of constitutional principle. In particular, the equality provision in s 15 of the *Canadian Charter of Rights and Freedoms* provides a framework for considering, in the words of Sheilah Martin, Justice of the Supreme Court of Canada (‘SCC’), the effects of ‘disparity, disadvantage, disproportion, and domination’ in the law because it ‘forces us away from assumed norms, and asks us to consider how actions or choices will work on the ground for everyone’, especially the disadvantaged.¹² Equality analysis thus requires decision-makers to turn their minds to the wider social, historical, and political effects of the law. Judicial reliance on myths and stereotypes is treated as legal error,

⁸ *Robinson v The Queen* (1999) 197 CLR 162, 178–9.

⁹ Note this article does not deny the reality of forensic disadvantage; rather, it challenges the presumption that delay, by itself, necessarily perpetuates that disadvantage.

¹⁰ *Longman v The Queen* (1989) 168 CLR 79 (‘*Longman*’).

¹¹ *Kribs v The Queen* [1960] SCR 400, 405 (‘*Kribs*’).

¹² Sheilah L Martin, ‘Equality Jurisprudence in Canada’ (2019) 17(2) *New Zealand Journal of Public and International Law* 127, 147.

and delay is regarded as a neutral fact, unless linked to demonstrable forensic consequences.¹³

Until very recently, Western Australia ('WA') remained wedded to the *Longman* framework, notwithstanding various legislative attempts to neutralise its effects.¹⁴ The long-awaited introduction of the *Evidence Act 2025* (WA)¹⁵ (the 'new Act') is expected to mark a decisive shift. By abolishing the duty to give *Longman* warnings, and confining judicial comment on delay to demonstrable forensic disadvantage, the new Act represents a complete doctrinal reset.

The reforms were recently lauded by state government as 'the biggest overhaul of evidence law in 100 years'.¹⁶ In announcing the legislation, the Attorney-General explained the reforms are part of a broader effort to improve the experiences of victims of family violence and sexual assault within the criminal justice system.¹⁷ As the government acknowledged, victims of these offences are often the only witnesses to the alleged crimes and may be required to give deeply personal and distressing evidence at trial.¹⁸ The new framework is intended to provide greater protections and support to such victims, while facilitating the introduction of relevant evidence in criminal proceedings.

More fundamentally, the reforms displace outdated myths and stereotypes about victim behaviour that have long pervaded the common law.¹⁹ Questions such as, 'Why did the complainant not report sooner?', or, 'Why did she remain in the abusive relationship?' have historically been used to cast doubt on the credibility of complainants.²⁰ Contemporary social science research, however, demonstrates that

¹³ *R v Seaboyer* [1991] 2 SCR 577 ('*Seaboyer*').

¹⁴ Victorian Law Reform Commission, *Sexual Offences: Law and Procedure* (Final Report, August 2004) 105–8 [2.7]–[2.12].

¹⁵ The new Act repealed the *Evidence Act 1906* (WA) and introduced significant reforms designed to align Western Australia with the Uniform Evidence Law adopted in other Australian jurisdictions, thereby improving consistency and accessibility in court proceedings.

¹⁶ Tony Buti, 'Historic Revamp of Evidence Laws Gives Victims Greater Supports' (Media Statement, 29 April 2025) <www.wa.gov.au>.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Explanatory memorandum, Evidence Bill 2025 (WA) 143–6 ('Explanatory memorandum').

²⁰ As discussed below, such questions were addressed by Wilson J (as her Honour then was) of the Supreme Court of Canada, in a case involving battered wife syndrome, in which she wrote:

The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted

the experience of victims — predominantly women and children — who endure sexual trauma frequently falls outside the realm of ordinary human expectations. Delayed disclosure, continued association with the offender, and fragmented memories are now widely recognised as common features of such cases.

This article maintains that, like Canada once did, the WA Parliament has finally reconsidered its approach to the assessment of credibility in sexual violence cases for important social and cultural reasons. Canadian courts have long been grappling with the inherent risks of importing dangerous myths and stereotypes into evidence-based credibility assessments. Such reform is not merely desirable, but necessary, and long overdue. It aligns WA with contemporary evidentiary law principles, restores coherence to jury directions, and removes a warning whose historical function has been to cast vulnerable complainants as inherently unreliable and untrustworthy.

This article proceeds in six parts. Part II traces the historical development of delay-based reasoning in sexual offence cases and its entanglement with myths and stereotypes. Part III examines the emergence and expansion of the *Longman* warning and the difficulties it has generated in Australian law. Part IV analyses Canada's rejection of delay-based credibility reasoning and explains why that approach has achieved doctrinal stability. Part V evaluates the new Act and argues that it adopts many sound elements of the Canadian approach. This article concludes, in Part VI, that once credibility and forensic disadvantage are properly disentangled, fairness to the accused can be preserved without perpetuating discredited assumptions about victim behaviour.

II DELAY, COMPLAINT, AND THE MYTH OF THE "IDEAL VICTIM"

Historically, in the common law, it was assumed that a victim of sexual assault would complain about it at the first reasonable opportunity, and a failure to do so was seen as evidence that any subsequent complaint was false.²¹ Indeed, female sexual assault complainants have traditionally been viewed as so untrustworthy that their failure to make an immediate allegation was long considered a 'virtual self-contradiction of [their] story'.²²

with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

R v Lavallee [1990] 1 SCR 852, 871 ('*Lavallee*').

²¹ Elaine Craig, 'The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence' (2011) 36 *Queen's Law Journal* 551, 554.

²² *Kribs* (n 11) 405.

Authorities from as early as the 13th century show the common law contained an absolute requirement that victims of sexual violence raise an immediate “hue and cry” in order to be heard.²³ This once applied to all violent crimes; although it was ultimately rejected for other offences, it remained solely applicable to sexual assault, or rape, in the common law.²⁴

Sir Matthew Hale, the English jurist, is often credited with formulating the doctrine of corroboration when he made his well-known statement in 1734,²⁵ that rape is ‘an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent’.²⁶ By the end of the 18th century, this principle had evolved into a factual presumption. In Hawkins’ *Pleas of the Crown*, the author states: ‘It is a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact.’²⁷

Consistent with the presumption that sexual assault must be reported swiftly to be taken seriously, legislation enacted in the same century prohibited a woman from seeking legal redress if 40 days had passed since the alleged offence.²⁸ While Hale’s statement was made long before the jury took on its current fact-finding role in the criminal trial process, the presumption concerning delayed complaints was already well entrenched at common law.²⁹

Those views were echoed by the judiciary into the 19th and 20th centuries. For example, in the now widely discredited SCC case of *Kribs v The Queen*, Fauteux J (as he then was) wrote:

The principle is one of necessity. It is founded on factual presumptions which, in the normal course of events, naturally attach to the subsequent conduct of the prosecutrix shortly after the occurrence of the alleged acts of violence. One of these presumptions is that she is expected to complain upon the first reasonable opportunity, and the other, consequential

²³ Morrison Torrey, ‘When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions’ (1991) 24(4) *UC Davis Law Review* 1013, 1041. This was also said to encourage victims to alert the community to help apprehend an offender.

²⁴ *Ibid.*

²⁵ Backhouse (n 6) 86.

²⁶ Matthew Hale, *Historia Placitorum Coronae* (Nutt and Gosling, 1734) vol 1, 635–6.

²⁷ Williams Hawkins, *A Treatise of the Pleas of the Crown; or, A System of the Principal Matters relating to That Subject, Digested under Proper Heads* (Eliz. Nutt, 1st ed, 1721) bk 1, c 41, s 9, quoted in *R v Lillyman* [1896] 2 QB 167, 170–1 (Hawkins J).

²⁸ Matthew Hale, *History of the Pleas of the Crown* (1736) vol 1, 627.

²⁹ John Willis and Marilyn McMahon, ‘Educating Juries or Telling Them What to Think? Credibility, Delay in Complaint, Judicial Directions and the Role of Juries’ (2017) 41 *Criminal Law Journal* 27, 38.

thereto, is that if she fails to do so, her silence may naturally be taken as a virtual self-contradiction of her story.³⁰

Legal scholars have opined that underpinning this rule was the notion that the absence of an early complaint by a sexual assault victim reflected adversely on her claim, and credibility, simply because she was female, and thus more likely to be untrustworthy.³¹ This framing of sexual violence informed not only substantive criminal law, but also the evolution of evidentiary rules that treated female complainants, like children, as inherently suspect and in need of corroboration.³²

III THE LONGMAN WARNING: FROM FAIR-TRIAL SAFEGUARD TO CREDIBILITY PROXY

Up to the introduction of the *Acts Amendment (Sexual Assaults) Act 1985* (WA),³³ which inserted the former s 36BE into the *Evidence Act 1906* (WA), there was a rule that the trial judge was required to warn the jury that it was dangerous to convict on the uncorroborated evidence of the victim of a sexual offence.³⁴ Prior to this, victims of sexual violence were generally considered “suspect” witnesses; and although in Australia the rule was articulated in gender neutral terms, in practice, it primarily affected women and children.³⁵

*Longman v The Queen*³⁶ held that the effect of s 36BE was to abolish the rule that victims of sexual offences were in a special category of suspect witnesses. However, the High Court also stated that a jury warning may still be required in cases where there has been a long delay between the alleged offence and the first complaint by the victim. Thus, the need for a warning remained tied to the reliability of the victim's evidence as to the sexual offence.³⁷

³⁰ *Kribs* (n 11) 405. Note that the rationale in *Kribs* has since been subjected to criticism, is not followed, and has been overruled. The Parliament of Canada also chose to negate the authority of *Kribs* by statute: *Criminal Code*, RSC 1985, c C-46, s 275.

³¹ D Fletcher Dawson, ‘The Abrogation of Recent Complaint: Where Do We Stand Now’ (1984) 27(1) *Criminal Law Quarterly* 57, 59. Note that although the offence of sexual assault (rape) was later broadened to include victims of either gender (see *R v Camelleri* [1922] 2 KB 122), it has been argued that the doctrine of recent complaint persisted due to societal misconceptions about women, including assumptions that they are untrustworthy and prone to falsify claims of sexual assault.

³² Elizabeth A Sheehy, ‘Judging Women: Gender, Feminism and the Law of Evidence’ (1993) 6 *Canadian Journal of Women and the Law* 247, 250.

³³ *Acts Amendment (Sexual Assaults) Act 1985* (WA).

³⁴ *Anderson v Western Australia* (2014) 46 WAR 363, 370 [37] (*‘Anderson’*).

³⁵ *Ibid* 371 [38].

³⁶ *Longman* (n 10).

³⁷ *Anderson* (n 34) 371 [38].

In that case, the accused, John Henry Longman, was charged with indecent dealing with three girls under the age of 14. After severance of the counts, he was tried and convicted in October 1988 on two counts relating to his step-daughter. The alleged offences occurred while the complainant was asleep, when she was aged 6 and 10 respectively. At the time of trial, the complainant was 32 years old and had first reported the alleged conduct some 22 years after the later incident. The accused denied the charges, relying on evidence of good character, and there was no independent evidence corroborating the complainant's account.

Defence counsel sought a warning for the jury, relying on the length of the delayed complaint, the lack of explanation for non-disclosure to the complainant's mother, the accused's resulting inability to meet the allegations, and the absence of corroboration. The trial judge declined to give the warning. On appeal, the High Court of Australia quashed the convictions and ordered a new trial, holding the failure to warn the jury of the forensic disadvantage caused by the delay caused a miscarriage of justice.

For the plurality, the significant delay (over 20 years) in the accusations coming to the defendant's attention meant the victim's evidence could not be adequately tested.³⁸ The *Longman* warning articulated by Brennan, Dawson and Toohey JJ was that

as the evidence of the complainant could not be adequately tested after the passage of more than twenty years, it would be dangerous to convict on that evidence alone unless the jury, scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.³⁹

That is, the delay caused forensic disadvantage to the defendant — for example, loss of evidence or memory — linked with his inability to adequately test the evidence of the complainant relating to the commission of the sexual offences.⁴⁰ To avert a potential miscarriage of justice, the court ruled it was 'imperative' to warn jurors that 'it would be dangerous to convict on [the complainant's] evidence alone' after a long delay unless, after scrutinising the evidence with great care, they were satisfied of its truth and accuracy.⁴¹

The rationale was that ordinary jurors might not appreciate the inherent unfairness to the accused caused by faded memories, missing witnesses, or lost documents,

³⁸ *Longman* (n 10) 91.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

over time. Such a warning, in theory, serves to safeguard the presumption of innocence by reminding jurors that the passage of many years can undermine the reliability of testimony and the ability to mount a defence. This is particularly true in the case of an alibi defence.

The principles explained in *Longman* apply to all types of criminal cases, not just sexual offence cases.⁴² However, the use of this warning is particularly common in sexual offence trials; and, as substantial delay in complaining is often a factor in child sexual abuse cases, *Longman* warnings are routinely given there as well.⁴³ The need for this warning is rooted in historic common law concerns, discussed above, about certain kinds of evidence (especially uncorroborated sexual assault allegations) being unreliable. The primary rationale is that a jury might fail to appreciate that, as a result of the delay between the occurrence of the alleged offence, and the accused being informed of the complaint, he will have suffered a forensic disadvantage by losing the opportunity to adequately test the complainant's evidence and marshal a defence.

It should be acknowledged that the WA Court of Appeal has repeatedly emphasised that the existence of forensic disadvantage must be assessed in light of the circumstances of the case, and that delay alone does not automatically establish such disadvantage. In several cases, the Court has concluded that no forensic prejudice was demonstrated.⁴⁴ These decisions suggest that the doctrinal rationale of *Longman* remains tied to trial fairness rather than delay itself. Nevertheless, as the cases below illustrate, the practical application of delay directions has often emphasised concerns about complainant reliability, rather than the forensic disadvantage suffered by the accused.

Statutory provisions (such as s 36BD of the *Evidence Act 1906* (WA)) were enacted to require judges to inform juries that absent, or delayed, complaints do not necessarily mean the allegation is false, and there may be good reasons for the

⁴² *Eravelly v Western Australia* [2018] WASCA 139; *DWM v Western Australia (No 2)* [2019] WASCA 143.

⁴³ Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) 598 [18.26]–[18.28] ('ALRC Report No 102'), noting that *Longman* warnings are particularly common in sexual offence trials and are frequently given in child sexual abuse cases due to delay in complaint. See, eg, *SPB v Western Australia* [2012] WASCA 136, [51]; *RMD v Western Australia* (2017) 266 A Crim R 67, 95 [129], 109 [198]; *JEL v Western Australia* (2022) 58 WAR 295, 323–4 [164] ('*JEL*'); *TWR v Western Australia (No 2)* [2025] WASCA 5, [40].

⁴⁴ See, eg, *Liddington v Western Australia* (2005) 152 A Crim R 502; *Angliss v Western Australia* [2005] WASCA 162; *JEL* (n 43).

delay.⁴⁵ Although these provisions were intended to remove stereotypes as to the unreliability of evidence given by sexual assault complainants, their protective effects were subsequently undermined by the High Court in *Crofts v The Queen* ('*Crofts*').⁴⁶

In *Crofts*, the complainant alleged she was sexually assaulted by a family friend over a period of 6 years, and reported the conduct 6 months after the final assault. The trial judge directed the jury, pursuant to s 61(1)(b) of the *Crimes Act 1958* (Vic), that delay in complaint does not necessarily indicate the allegation is false and there may be good reasons why a complainant delays in reporting sexual abuse. On appeal, however, the High Court held that even where such a statutory direction is given, the trial judge may also remind the jury that delay can be taken into account in assessing the complainant's credibility, provided this is done without invoking impermissible stereotypes.⁴⁷

The result was a confusing "balancing" approach. As the Australian Law Reform Commission ('ALRC') later observed, the near-mandatory *Crofts* or *Kilby* direction tended to 'restore the balance' in favour of the accused to such an extent that it risked undermining the very purpose of the protective legislation designed to counter outdated assumptions about delayed reporting.⁴⁸ In practice, the interaction of *Longman* and *Crofts* has produced a tendency for trial judges to give delay warnings as a matter of caution, even where the specific forensic disadvantage suffered by the accused is limited or unclear.⁴⁹

Crofts was subsequently analysed by the WA Court of Appeal in *FGC v Western Australia*.⁵⁰ Justice Wheeler, with whom the other judges concurred, explained that *Crofts* stands for the proposition that where there has been delay in complaining of sexual offences, the trial judge's directions must make it clear that the jury is permitted to consider whether that delay casts doubt on the complainant's credibility.⁵¹ At the same time, the statutory direction required by s 36BD of the *Evidence Act 1906* (WA) must also be given.

⁴⁵ *Criminal Procedure Act 1986* (NSW) s 294; *Crimes Act 1958* (Vic) s 61(1)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1906* (WA) s 36BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71.

⁴⁶ *Crofts v The Queen* (1996) 186 CLR 427 ('*Crofts*').

⁴⁷ *Ibid* 444.

⁴⁸ Australian Law Reform Commission, *Family Violence: A National Legal Response* (Report No 114, 2010) 1325–6 [28.64]–[28.67]. See also *R v Kilby* (1973) 129 CLR 460, 473–4.

⁴⁹ Law Reform Commission of Western Australia, *Project No 113: Review of the Law of Evidence* (Final Report, 2022) 182 ('*Project No 113*').

⁵⁰ *FGC v Western Australia* (2008) 183 A Crim R 313.

⁵¹ *Ibid* 335–6 [87]–[88].

However, simply cautioning juries against relying on stereotypical assumptions may create inconsistencies and knowledge gaps.⁵² In practice, such gaps may easily be filled by the very same myths the legislation seeks to eliminate.⁵³ For example, where there has been a significant delay between the alleged offence and the complaint, jurors may infer that a “real victim” would have reported the offence at the first available opportunity, thereby drawing a negative inference about the complainant’s credibility from her failure to disclose the abuse.

In WA, trial judges have also been required to deliver an extensive three-pronged “balancing” direction in sexual offence trials involving delayed complaint. The jury must be told, consistently with s 36BD, that delay does not necessarily indicate falsity and that there may be legitimate reasons for delayed complaint and reporting. At the same time, consistent with *Crofts*, jurors must also be told that delay may be taken into account in assessing the complainant’s credibility. Finally, where applicable, a *Longman* warning must address any forensic disadvantage suffered by the accused as a result of the delay.

Trial judges are thus required to simultaneously warn jurors not to assume that delay indicates falsity, while also instructing them that delay may bear upon credibility. In this way, WA courts have been compelled to give directions that risk reimporting the very same prejudicial reasoning Parliament sought to exclude through the introduction of s 36BD. Such directions are not only conceptually strained, but may also be confusing for jurors.⁵⁴

Recent case law further illustrates how easily such balancing directions can slide back into credibility-based suspicion, even while purporting to neutralise it. In *DLS v Western Australia*,⁵⁵ for example, the complainant alleged her step-father sexually assaulted her some 14 years earlier. The trial judge directed the jury on the significance of evidence suggesting a possible motive to fabricate, the complainant’s disclosure to her mother four to five years after the alleged offences, and the significance of delayed complaint.⁵⁶

Her Honour also delivered a *Longman* direction, instructing the jury to scrutinise the complainant’s evidence with great care, and emphasising the following:

⁵² Craig (n 21) 553.

⁵³ Ibid.

⁵⁴ *KRM v The Queen* (2001) 206 CLR 221, 234 [37]. As McHugh J observed: ‘The more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings.’

⁵⁵ *DLS v Western Australia* (2021) 293 A Crim R 113.

⁵⁶ Ibid 122 [54].

Human memory is fallible and honest witnesses can be wrong in their recollection. The longer the delay the more opportunity there is for error. And that's particularly so for events that occurred in childhood. And it's a matter of common experience that the longer you believe something to have happened, the more convinced you are that it has happened. So, this can be so even if you are mistaken in your recollection.⁵⁷

The trial judge specifically referred to the complainant's age at the time of the alleged offending — nine years old — and to the 14-year delay between the alleged conduct and the first complaint to her mother. While her Honour also mentioned the forensic disadvantage suffered by the accused, noting the delay made it more difficult to test the evidence, the direction primarily told the jury to scrutinise the complainant's evidence 'with special care' because of the delay.⁵⁸

Notably, the ALRC has cautioned against this approach, warning that the use of such language risks inviting jurors to treat the complainant's testimony as inherently suspicious simply because of the delay.⁵⁹ Directions framed in these terms may reinforce outdated assumptions about the reliability of complainants in sexual violence cases. In particular, they may suggest to the jury that delayed disclosure is necessarily a reason to doubt the credibility of the complainant, which is not supported by social science and empirical research on the dynamics of sexual violence.⁶⁰

The ALRC also recognised that jurors are ordinarily expected to assess credibility by reference to their own experience and reasoning, noting that credibility assessment is fundamentally grounded in 'ordinary human experience' rather than specialised knowledge.⁶¹ Yet, as discussed below, substantial research shows that individual responses to sexual abuse are often counterintuitive and may not accord with ordinary expectations. Delayed disclosure, fragmented accounts, and continued contact with the offender may all be wrongly interpreted by jurors as signs of fabrication or unreliability. As such, judicial directions framed around "common

⁵⁷ Ibid.

⁵⁸ The accused appealed his conviction primarily on the basis that a miscarriage of justice had occurred because the only evidence capable of supporting the conviction was subject to 'a perceptible risk of unreliability from [the complainant's] hypnosis', which the jury was not warned about. While that issue is beyond the scope of this article, it is noteworthy that the Court of Appeal dismissed the appeal and upheld the conviction. In doing so, they did not fault the *Longman* direction given to the jury by the trial judge, despite its heavy reliance upon credibility assessment.

⁵⁹ ALRC Report No 102 (n 43) 640–1 [18.169]–[18.172].

⁶⁰ Ibid.

⁶¹ Ibid 597–8 [18.25]–[18.28].

sense” may actually reinforce, rather than dispel, myths and stereotypes about sexual abuse, as well as distorting the fact-finding process.

A similar pattern can be seen in *BW v Western Australia*,⁶² where the appellant was convicted on 20 counts of sexual penetration, indecent dealing, and indecent recording involving his two child nieces. The trial judge directed the jury to pay careful attention to the long passages of time between the alleged offending and the first complaint, as well as the further delay before trial.⁶³

Her Honour stated that, since the complainants, A and N, were the only witnesses to the alleged crimes, the members of the jury ‘should scrutinise [their] evidence with care’.⁶⁴ She went on to state that, ‘[i]n assessing the truthfulness, reliability and accuracy of their evidence you also have to keep in mind that there has been a delay ... [and] ... clearly the longer the time interval between an incident and a complaint to the police and also between the incident and the actual trial, the greater the possibility of error by witnesses who try and recollect the incident’.⁶⁵ The focus is squarely on the effect of the delay on the credibility and reliability of the complainants, the only witnesses to the alleged events.

Her Honour went on to stress that human memory is fallible, and the longer the delay, the more opportunity there is for error, particularly for events occurring in childhood. Drawing on ‘common experience’, the jury was reminded that memories fade over time, and people may struggle to recall details accurately after many years.⁶⁶ She then stated, ‘[s]o that is a matter that you have to consider carefully when you are looking at and considering the truthfulness, reliability and accuracy of the evidence of [A] and [N]’.⁶⁷ Her Honour further told the jury that the longer a person believes something, the more convinced they are that it actually did happen; and this may be true even for ‘honest witnesses’, who are simply mistaken in their recollection of the events.⁶⁸

Framed this way, the direction focuses on the fallibility of the complainants’ recollections and the inherent unreliability of their testimony. Delay is presented primarily as a factor bearing on the credibility and reliability of the complainants, rather than as a circumstance that may create a forensic disadvantage for the accused. Although the direction briefly referred to the difficulties delay may pose for

⁶² *BW v Western Australia* [2013] WASCA 212.

⁶³ *Ibid* [38].

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

the defence — such as the accused's inability to recall events, locate witnesses, or test the allegations effectively — these remarks were limited and secondary to the substantial emphasis placed on scrutinising the complainants' evidence for the possibility of mistake or fabrication.

The appellant argued, on appeal, that the trial judge's *Longman* direction was inadequate and resulted in a miscarriage of justice.⁶⁹ He contended that her Honour failed to give a sufficiently firm direction, did not properly emphasise the forensic disadvantage caused by delay, and failed to identify specific disadvantages arising from the passage of time.⁷⁰ Justice Newnes rejected those arguments and held that no miscarriage of justice occurred.⁷¹ His Honour concluded that the direction, read as a whole, adequately conveyed that the complainants were the sole witnesses to the alleged offences, and their evidence therefore required careful scrutiny.⁷² The Court further accepted the trial judge's reasoning that delay may affect the accuracy and reliability of memory, particularly in relation to childhood events.⁷³

A similar approach can be seen in *Headley v Western Australia*,⁷⁴ which involved delayed complaints of sexual offences committed against young boys. The trial judge directed the jury that the significant passage of time between the alleged offences and the complaint increased the risk of errors in memory.⁷⁵ Jurors were reminded that human recollection is fallible — particularly in relation to childhood events — and that even honest witnesses may be wrong.⁷⁶ The jury was instructed to carefully assess the 'truthfulness, reliability and accuracy' of the complainants' recollections and consider whether the delay affected the credibility of their evidence.⁷⁷

On appeal, Mazza, Beech and Pritchard JJA held that the *Longman* warning given by the trial judge was adequate. The Court took no issue with the trial judge's reliance on assumptions about the fallibility of memory, thus affirming a line of reasoning that treats delay as a basis for questioning the reliability of complainants' recollections, rather than focusing on demonstrable forensic disadvantage to the accused.⁷⁸ When applied in sexual offence trials, this approach is uncomfortably

⁶⁹ Ibid [41].

⁷⁰ Ibid.

⁷¹ Ibid [43]–[46].

⁷² Ibid [46].

⁷³ Ibid.

⁷⁴ *Headley v Western Australia* [2019] WASCA 119.

⁷⁵ Ibid [50].

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid [60]–[71].

reminiscent of the historical common law position that a delayed complaint is inherently suspicious and suggestive of fabrication.⁷⁹

As noted above, empirical research undermines many assumptions underpinning these directions. For example, the Royal Commission into Institutional Responses to Child Sexual Abuse reviewed extensive research on disclosure patterns among survivors of child sexual abuse and made important findings regarding the timing, process, and circumstances of disclosure.⁸⁰ The Commission noted that international research consistently shows that only a minority of children disclose sexual abuse during childhood, which may be explained by trauma, fear, shame, or other legitimate psychological and social factors, which have little or nothing to do with credibility.⁸¹

Studies examining adult survivors of child sexual abuse — including abuse occurring within families and in institutional settings — estimate that only about one-third of victims disclose the abuse while they are still children.⁸² This means that the vast majority of survivors do not disclose until later in life, often many years after the trauma occurred.⁸³ Moreover, even among those who disclose while still young, the disclosure frequently does not occur immediately after the abuse; instead, there may be significant delay between the abusive conduct and the first disclosure.⁸⁴ This is illustrated by the cases reviewed above.

Survivor accounts gathered in inquiries and research literature further reinforce that disclosure of child sexual abuse should not be understood as a single, discrete event, but as an evolving and gradual process that unfolds over time.⁸⁵ Consistent with this belief, the Commission observed that the process of disclosure is highly variable and complex.

The Commission further highlighted research indicating that the relationship between the victim and the perpetrator can significantly affect disclosure patterns. Studies suggest that the closer the relationship between the victim and the

⁷⁹ Other cases similarly illustrate the focus on credibility and reliability concerns rather than on the forensic disadvantage rationale underlying *Longman*. In *EDP v Western Australia* [2011] WASCA 264, for example, Mazza JA noted that the direction contained no reference to any actual forensic disadvantage suffered by the accused. See also *OKS v Western Australia* (2018) 52 WAR 482; *Western Australia v GT* [2020] WADC 65.

⁸⁰ *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 4, 33.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.* 30.

⁸⁴ *Ibid.* 34.

⁸⁵ *Ibid.* 32.

perpetrator, the less likely the victim is to disclose the abuse, particularly during childhood.⁸⁶ In cases where the perpetrator is a family member, caregiver, or authority figure, children tend to delay disclosure for longer periods than victims of abuse perpetrated by those outside the family.⁸⁷

Children may form attachments or traumatic bonds with perpetrators and may delay disclosure to protect family relationships or avoid disrupting the family unit.⁸⁸ Perpetrators also frequently use grooming tactics to instil a fear of disclosure in victims, including telling them they will not be believed.⁸⁹ This power dynamic can be present in cases of domestic violence, and ongoing sexual assault, perpetrated against both children and adults.⁹⁰

Despite this, *Longman* warnings have become routine in cases involving delayed complaint, largely because of the perceived risk of a successful appeal on the basis of a miscarriage of justice if the direction is not given.⁹¹ Yet, the reasoning behind these warnings rests on generalised “common sense” assumptions about human memory and behaviour, not on any empirical or evidentiary foundation. Allegations of sexual abuse frequently relate to events that lie outside the ordinary understanding of most people, meaning that assumptions about how they should be remembered, experienced, or disclosed cannot safely be drawn from jurors’ everyday knowledge.

Along these lines, Canadian courts have accepted that delayed disclosure, and the fact of continuing to associate with an offender, by victims of sexual or family violence does not accord with “ordinary” human experience at all. The limits of relying on jurors’ assumed knowledge of such behaviours were emphasised in *R v Lavallee*,⁹² where the SCC considered the role of expert evidence in dispelling mistruths about why some family violence victims remain in abusive relationships.

Justice Wilson rejected the notion that jurors are ‘thoroughly knowledgeable’ about human nature, observing that the average person may lack sufficient knowledge or experience of human behaviour to draw appropriate inferences from the facts before

⁸⁶ Ibid 41.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ NSW Health Department Child Protection and Violence Prevention Unit, Submission E 23 to Royal Commission into Institutional Responses to Child Sexual Abuse (21 February 2005), noting that there are many valid reasons why victims of sexual assault do not immediately report sexual assault to the authorities, including trauma, shame and embarrassment. See also ALRC Report No 102 (n 43) 613 [18.78].

⁹¹ *Project No 113* (n 49) 182.

⁹² *Lavallee* (n 20).

them.⁹³ Her Honour further underscored that family violence is ‘subject to a large group of myths and stereotypes’ that lie beyond the understanding of the ordinary juror.⁹⁴ According to Wilson J, the difficulty in imagining how a battered spouse might act arises largely because the “reasonable man” does not normally occupy such a position.⁹⁵ The concept of reasonableness must therefore ‘be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical “reasonable man”’.⁹⁶ The Canadian experience is instructive for WA because it demonstrates that fairness to the accused does not require warnings grounded in stereotypes or discredited assumptions about victim behaviour.

IV CANADA: CONSTITUTIONAL ELIMINATION OF DELAY-BASED CREDIBILITY REASONING

In Canada, the rejection of delay-based credibility reasoning is both doctrinally settled and constitutionally grounded.⁹⁷ The SCC has consistently held that reliance on assumptions about how a “genuine” sexual assault complainant would behave — particularly assumptions concerning prompt complaint — constitutes a legal error.⁹⁸ Delay in reporting, or the absence of complaint altogether, is treated as a neutral fact, incapable of supporting an adverse inference about truthfulness or credibility.⁹⁹

The decisive shift in Canadian law occurred through the interaction of evidentiary reform and constitutional reasoning under the *Charter of Rights and Freedoms*, particularly the guarantees of equality and fundamental justice.¹⁰⁰ The SCC has recognised that credibility assessments grounded in stereotype do not merely misapprehend the evidence; they entrench structural inequality and distort the

⁹³ Ibid 871.

⁹⁴ Ibid 873.

⁹⁵ Ibid 874.

⁹⁶ Ibid. Similarly, in *R v Marquard* [1993] 4 SCR 223, 249, McLachlin J, on behalf of the majority, recognised that expert evidence may be admitted to explain why young victims of sexual abuse often delay making a complaint.

⁹⁷ *Canada Act 1982* (UK) c 11, sch B (*‘Constitution Act 1982’*); *Seaboyer* (n 13) 604–10 (L’Heureux-Dubé J).

⁹⁸ *R v Ewanchuk* [1999] 1 SCR 330, 370–2 (L’Heureux-Dubé J) (*‘Ewanchuk’*).

⁹⁹ *Seaboyer* (n 13) 604–10 (L’Heureux-Dubé J).

¹⁰⁰ *Canada Act 1982* (UK) c 11, sch B pt I (*‘Canadian Charter of Rights and Freedoms’*) ss 7, 15. The right to equality is contained in s 15(1) of the *Charter*, which provides: ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’

fact-finding process.¹⁰¹ The Court has made it clear that assumptions about prompt complaint reflect gendered stereotypes, not logic, experience, or empirical reality.¹⁰²

Importantly, those findings have been framed as equality-enhancing measures, reflecting an acknowledgment that evidentiary rules can either entrench or dismantle structural disadvantage.¹⁰³ The SCC has recognised that the right to equality rests on 'competing characterisations and larger social, political, historical, and economic contexts'.¹⁰⁴ Likewise, it is intimately tied to the need for social change, and redistributive justice, as the courts become 'more active supervisors of the distribution of benefits and burdens' in modern society.¹⁰⁵

More than 30 years ago, a mere two years after *Longman* was decided in Australia, Canada's highest court took decisive steps to eliminate the stereotypical reasoning underpinning that approach. In the landmark case of *R v Seaboyer*,¹⁰⁶ then-Justice L'Heureux-Dube penned an often-cited judgment, partially in dissent, chronicling the dangerous beliefs about women's character and credibility that historically prevailed in legal discourse. These included the following: 'unchaste' women lie and consent indiscriminately; women are often categorised into binary, 'one-dimensional types', such that '[t]hey are good or they are bad ... [t]hey are madonnas or they are whores'; women are known to be spiteful and malicious towards men; women are 'more emotional' than men, and are thus expected to act hysterically after being sexually assaulted;¹⁰⁷ and, if a woman is sexually assaulted, she will necessarily 'be so upset that she will report it'.¹⁰⁸ Justice L'Heureux-Dube systematically repudiated those beliefs as distortions of the fact-finding process, not merely unfair prejudices, which are incompatible with fair decision-making in sexual violence cases.

¹⁰¹ *R v Find* [2001] SCR 863, 907–8 [103]–[105] ('Find').

¹⁰² *Ewanchuk* (n 98) 370.

¹⁰³ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 164–5; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 507. See also Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 *Supreme Court Law Review* 17.

¹⁰⁴ *Martin* (n 12) 131.

¹⁰⁵ *Ibid.* See also Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (rev ed, Irwin Law, 2016).

¹⁰⁶ *Seaboyer* (n 13).

¹⁰⁷ *Ibid* 652–3. It is noteworthy that the Law Reform Commission of Western Australia also addressed these stereotypes, noting that research indicates that sexual violence complainants who appear calm and controlled in court may be perceived as less credible than those who appear distressed, despite evidence that emotional demeanour is not a reliable indicator of truthfulness: *Project No 113* (n 49) 185.

¹⁰⁸ *Seaboyer* (n 13) 653.

Subsequent cases in the SCC have affirmed that myth and stereotype have been widely used to discredit female complainants in sexual violence cases. For example, in *R v Find*,¹⁰⁹ the unanimous Court observed:

These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social “common sense” in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that complainants of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.¹¹⁰

Similarly, in *R v Mills*,¹¹¹ the majority of the SCC relied on equality concerns when interpreting (what were then) new criminal law provisions that placed conditions on the accused's access to records over which the complainant had a reasonable expectation of privacy. The relevant equality concerns included ‘an appreciation of myths and stereotypes in the context of sexual violence’.¹¹² The Court held that accused persons cannot rely on their right to full answer and defence as a justification for reliance on myths and stereotypes that pertain to the complainant's consent and credibility.¹¹³

The Court stated that the failure to protect the complainant's confidential doctor/patient communications from automatic disclosure would perpetuate ‘the disadvantage felt by victims of sexual assault, often women’, as they may be reluctant to report or may become ‘doubly victimised’.¹¹⁴ That result, the Court held, would not provide the equal protection of the law to victims of sexual offences, especially when compared with victims of other types of offences.¹¹⁵ The majority of the SCC observed:

As has frequently been noted, speculative myths, stereotypes, and generalized assumptions about sexual assault complainants and classes of records have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences ... The myths that a woman's testimony is unreliable unless she made a complaint shortly after the event (recent

¹⁰⁹ *Find* (n 101) 907–8 [103]–[105].

¹¹⁰ *Ibid* 906–7 [101]–[103].

¹¹¹ *R v Mills* [1999] 3 SCR 668.

¹¹² *Ibid* 727 [90].

¹¹³ *Ibid*. Specifically, the Court stated that ‘[t]he reasons in *Seaboyer* make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper ... The accused is not permitted to “whack the complainant” through the use of stereotypes regarding victims of sexual assault.’

¹¹⁴ *Ibid* 727–8 [91].

¹¹⁵ *Ibid*.

complaint), or if she has had previous sexual relations, are but two of the more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law.¹¹⁶

The case of *R v D(D)*¹¹⁷ is arguably the clearest, most direct, example of the SCC's rejection of delay in disclosure as a means of assessing credibility. There, the complainant alleged that the accused, her mother's live-in partner, sexually assaulted her when she was between five and six years old. The complainant told no one about these events for two and a half years. At trial, defence counsel cross-examined the complainant, who was then 10 years old, on the delay in reporting the incidents, and suggested she fabricated the story. The 'fact in issue' before the SCC was whether the child's delay in reporting the sexual abuse suggested it did not occur, and the Court emphasised that the case against the accused turned on the credibility of the complainant.¹¹⁸

During a voir dire at trial, the Crown's psychologist gave evidence about the phenomenon of delayed disclosure in child sexual abuse cases, drawing on established scientific literature. He explained that the timing of a complaint is influenced by a wide range of psychological, social, and relational factors, and that delay in disclosure is common and well documented in the scientific literature.¹¹⁹ According to the expert, a pertinent issue is the relationship between the child and the perpetrator, particularly where the offender occupies a position of trust or authority.¹²⁰ Such factors help explain why the disclosure of child sexual abuse is often delayed, fragmented, or gradual, rather than immediate.

Justice Major, writing for a majority of the Court, found the trial judge should have instructed the jury that 'there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave'.¹²¹ Justice Major further underscored that, while some complainants disclose immediately, others delay, or never report the abuse, often due to factors such as fear, embarrassment, guilt, or lack of

¹¹⁶ Ibid 741 [119].

¹¹⁷ *R v D(D)* [2000] 2 SCR 275 ('*D(D)*').

¹¹⁸ Ibid 286–8 [17]–[20].

¹¹⁹ Ibid 281–3 [4]–[7]. As noted by the expert, in fact, most sexual abuse is never disclosed.

¹²⁰ Ibid. Dr Marshall further identified several factors that may discourage children from disclosing abuse at the time it occurs, including feelings of embarrassment or shame; fear of getting themselves or others into trouble; and manipulation by the perpetrator, such as through bribery, coercion, or threats.

¹²¹ Ibid 305 [65].

understanding.¹²² As such, '[a] delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant'.¹²³

These cases provide a sound normative framework for why credibility assessments grounded in stereotypes and misconceptions are structurally flawed and constitutionally suspect. Yet, as the SCC has observed, such beliefs are so deeply entrenched in our social psyche, and so often mislabelled as "common sense", that they are difficult to identify and confront.¹²⁴ When judges and juries rely on them to determine the guilt or innocence of an accused, based on abstract notions of the "ordinary experience", the "goodness" or "badness" of the complainant, or the timeliness of her complaint, they become part of the law itself, and are all that much more difficult to identify and eradicate.¹²⁵

The Canadian experience is instructive for WA because it demonstrates that fairness to the accused does not require the preservation of warnings grounded in discredited assumptions, and that forensic disadvantage can be addressed directly without treating delay as inherently suspicious. It also illustrates that attempting to "balance" stereotypes out of existence — by warning against them while simultaneously inviting credibility suspicion — serves only to perpetuate instability. Once stereotype-based reasoning is clearly removed, both equality and trial fairness are better served.

V WESTERN AUSTRALIA AND THE EVIDENCE ACT 2025 (WA): A DOCTRINAL RESET

The common law possesses an inherent flexibility that allows judges to modify legal principles as social norms evolve.¹²⁶ Through appellate review, for example, courts can identify errors in the way trial judges frame jury directions, and clarify the content and limits of those directions where earlier decisions have proved insufficient.¹²⁷ In this way, appellate review enables the law to develop incrementally in response to changing societal standards and practical experience in the trial courts.

However, reliance on incremental common law development alone is unlikely to achieve meaningful structural reform in this area. This is primarily because only a small proportion of criminal trials are ever subject to appellate scrutiny. While

¹²² Ibid.

¹²³ Ibid.

¹²⁴ *Seaboyer* (n 13) 603–4.

¹²⁵ Ibid.

¹²⁶ *Project No 113* (n 49) 169.

¹²⁷ Ibid.

precise data on the number of jury trials, and the subset involving *Longman*-type directions, is limited, it is clear that only a fraction of criminal matters proceed to trial, and an even smaller proportion are appealed. Out of the tens of thousands of criminal matters lodged each year in WA, only a few hundred proceed to appellate review, many of which concern sentence rather than conviction.¹²⁸ Accordingly, the overwhelming majority of criminal proceedings are resolved without appellate oversight, limiting the capacity of appellate courts to perform an effective supervisory function.

Moreover, unlike appellate courts, juries do not provide written reasons, and there is no record of the deliberative process that led to the verdict. It is impossible to know which aspects of the judge's directions the jury relied upon, misunderstood, or ignored, including whether and how a *Longman* warning influenced their findings. If only a small number of cases are appealed, review courts have limited opportunity to perform their gatekeeping function of scrutinising the adequacy of these directions. In practice, this means that most warnings delivered to juries are never reviewed on appeal, leaving little judicial oversight of how these directions actually function in the trial process.

The decisions reviewed above suggest that trial judges in WA have continued to deliver expansive directions that emphasise the perceived unreliability of complainants, instead of the forensic disadvantage suffered by the accused. Rather than consistently correcting these approaches, or clearly circumscribing the circumstances in which such warnings should be given, the jurisprudence has continued to tolerate broad formulations of the direction. Accordingly, even though appellate authority appears to locate the core rationale underpinning *Longman* in forensic disadvantage, the language used by trial judges continues to reflect an approach that has been widely criticised for relying on outdated assumptions about memory and victim behaviour.

In this context, meaningful reform was unlikely to occur through incremental common law development alone, making legislative intervention both necessary and justified. This is not to suggest that the common law is incapable of doctrinal evolution. Indeed, as the Canadian experience demonstrates, courts can play a central role in dismantling stereotype-based reasoning. However, in WA, the combination of limited appellate oversight and the persistence of established legal

¹²⁸ Productivity Commission, *Report on Government Services 2026: Courts* (February 2026) <www.pc.gov.au>.

norms meant that incremental reform through case law was unlikely to produce consistent or systemic change.

There are several reasons why legislative intervention was particularly appropriate in these circumstances.¹²⁹ First, Parliament is uniquely positioned to require judges to dispel entrenched common law myths and stereotypes about sexual violence and victim behaviour, thereby reducing the risk that jury decisions are influenced by such misconceptions.¹³⁰ Second, legislation promotes greater clarity, consistency, and certainty in the directions given to juries, addressing the doctrinal instability that has characterised this area.¹³¹ Finally, it enables jury directions to be modernised in light of contemporary social values and empirical research, rather than remaining tethered to principles developed in markedly different historical contexts.¹³²

The *Evidence Act 2025* (WA), passed by the WA Parliament at the end of last year, adopts a modernised framework that brings the state into line with developments in other common law jurisdictions. It also sits comfortably alongside the approach taken in Canada, where courts have rejected credibility warnings, confined the relevance of delay to cases involving demonstrable forensic disadvantage, and discouraged reliance on stereotypical assumptions about the behaviour of victims of sexual violence.¹³³

For example, s 319 of the new Act abolishes the common law requirement for a *Longman* warning in cases involving delayed complaint.¹³⁴ Instead, it allows a judge to give a direction about delay only where the accused demonstrates that the delay has caused a *significant* forensic disadvantage in the circumstances of the case. The judge must explain the nature of that disadvantage to the jury and direct them to take it into account when evaluating the evidence. However, the direction must be case-specific and cannot be framed as a warning that it is unsafe to convict or that the complainant's evidence should be treated with suspicion simply because of the delay. The section also clarifies that delay alone does not establish forensic disadvantage, thereby confining judicial directions about delay to situations where actual prejudice to the defence can be identified. Importantly, the direction must not

¹²⁹ *Project No 113* (n 49) 168.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Seaboyer* (n 13) [603]–[604]; *D(D)* (n 117) 305 [65]–[68].

¹³⁴ Subclause (2) abolishes a rule of law or practice which requires a judge in a criminal proceeding to give a *Longman* warning.

imply that the complainant's evidence is inherently unreliable, or that it would be unsafe to convict the accused, merely because of the passage of time.

As a result, credibility assessment in WA has been reoriented toward rational, evidence-based decision-making. Delay is relevant only insofar as it produces demonstrable forensic consequences — such as the loss of evidence, faded memories, or the unavailability of witnesses — and even then, the issue is framed in neutral terms directed to trial fairness, rather than to complainant credibility.¹³⁵ This approach resembles the Canadian model, discussed above, and strikes an appropriate balance between protecting complainants from outdated myths and stereotypes about their credibility, while ensuring that real prejudice to the accused can be addressed so as to avoid a potential miscarriage of justice.

The explanatory memorandum and Parliamentary debates indicate that these reforms were intended to preserve fairness to the accused while eliminating a warning whose historical function has often been to cast complainants as inherently unreliable.¹³⁶ In other words, the new framework insists that any disadvantage be precisely articulated and grounded in evidence, rather than presumed from delay alone. In this respect, WA has joined other Australian jurisdictions — including Victoria and New South Wales — that have moved away from the *Longman* warning.¹³⁷

The new Act also introduces a series of complementary provisions addressing family and domestic violence, as well as child complainants, further reflecting contemporary research on victim behaviour discussed above.¹³⁸ For example, s 321 requires a trial judge to give an educational direction to the jury in sexual offence and family violence trials where evidence suggests that the complainant delayed in making a complaint, or did not complain at all. The provision requires judges to direct juries that there is no typical or “normal” response to sexual or family violence. Victims may disclose abuse immediately, after a significant delay, or not at all, and delayed reporting is a common occurrence.

This direction reflects modern empirical research, discussed above, which demonstrates that responses to trauma vary widely and frequently include delayed or fragmented disclosure. In doing so, the provision departs from the specious logic underpinning *Longman*-type warnings, which traditionally framed delay as a factor casting doubt on the credibility or reliability of complainants. Instead, the direction

¹³⁵ *D(D)* (n 117) 305 [66].

¹³⁶ Explanatory memorandum (n 19).

¹³⁷ *Jury Directions Act 2015* (Vic) pt 4; *Criminal Procedure Act 1986* (NSW) s 294AA.

¹³⁸ *Ibid* ss 318–22.

recognises that delayed reporting is a common feature of such cases, and seeks to prevent, rather than explicitly encourage, juries relying on misconceptions about memory, victim behaviour, and credibility.¹³⁹

Taken together, these reforms signal a wider shift in WA evidence law away from credibility warnings rooted in historical suspicion of complainants and toward a framework grounded in empirical research, procedural fairness, and rational fact-finding. Delay is no longer treated as a proxy for unreliability. Instead, it is considered only where it produces a demonstrable forensic disadvantage, and even then, it is addressed in neutral terms that focus on the fairness of the trial rather than on assumptions about credibility.

VI CONCLUSION: SAYING ‘SO LONG’ TO LONGMAN AT LAST

For more than three decades, the *Longman* warning has occupied an unstable position in Australian evidence law. Conceived as a mechanism to address forensic disadvantage arising from delay, it has instead operated — particularly in sexual violence cases — as a vehicle for importing suspicions about complainant credibility. Despite legislative efforts to neutralise outdated assumptions about delayed complaint, WA courts remained tethered to *Longman*’s logic through the language of “balancing directions”. In using this language, they preserved the very reasoning Parliament has long been seeking to displace.

This article has illustrated why the *Longman* warning is not merely an anachronism, but a doctrinal distortion. Its continued use has depended on an unstable conflation of forensic disadvantage with credibility assessment, permitting trial judges to invite juries — however cautiously — to assume doubt from delay. The result has been a body of jurisprudence that is internally inconsistent, normatively problematic, and disconnected from contemporary understandings of sexual violence and trauma.

As discussed above, jurors have routinely been invited to accept, as a matter of “ordinary” human logic and experience, that memories inevitably fade with time and that complainants may become increasingly convinced of events that did not occur. These ideas are presented as intuitive normative truths, without reference to psychological research, or case-specific evidence, concerning the reliability of memory in such circumstances. Such presentations overlook the complex psychological, relational, and social barriers that victims often face in reporting abuse — particularly where the abuse occurs within families or involves individuals in positions of trust or authority.

¹³⁹ *Evidence Act 2025 (WA)* s 144.

Empirical research has long confirmed that survivors of sexual abuse often exhibit distinct patterns of disclosure and behaviour. These factors may bear directly on the assessment of a complainant's credibility in sexual violence cases, yet they frequently fall outside the ordinary experience of most jurors. In such circumstances, where the assumed "common knowledge" of the jury is mistaken, jurors may rely on their own experiences and intuitions, leading them to incorrect conclusions grounded in popular, but widely discredited, myths and stereotypes.

Modern law reform has rejected these assumptions as reflecting misconceptions about victim behaviour rather than sound empirical evidence. In this sense, directions that invite jurors to doubt the reliability of delayed recollections on the basis of generalised "common sense" beliefs risk reproducing the same underlying scepticism toward complainants that earlier reforms sought to eliminate. This not only distorts the fact-finding process; it may also give rise to the risk of a fundamental miscarriage of justice.

The enactment of the new Act marks a decisive turning point. By abolishing *Longman* warnings and expressly prohibiting judicial directions that invite adverse inferences from delay, the new Act represents a conscious legislative rejection of *Longman's* underlying misconceptions. This shift brings WA into closer alignment with Canadian constitutional jurisprudence, which has long recognised that credibility-based warnings grounded in delay are incompatible with equality, dignity, and the right to a fair trial. In this respect, the new Act moves beyond earlier, incomplete reforms that sought to neutralise *Longman* through a tenuous judicial balancing act, rather than dismantling it altogether.