TASMANIA
LAW REFORM
INSTITUTE

Warnings in sexual offences cases relating to delay in complaint

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The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

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About this issues paper

This issues paper discusses reforming the law in relation to the warnings and directions given to juries relating to delay in complaint in sexual offences cases. Any group or person is invited to respond to this issues paper. Following consideration of all responses it is intended that a final report will be published, containing recommendations.

How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. Questions are contained at the end of the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If your do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

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Part 1
The Current Law

Introduction

1.1.1 In all trials, judges are required to direct juries in relation to applying the relevant law. They are also required to comment on or warn juries about the reliability of certain types of evidence where the accumulated experience of courts has provided knowledge about its reliability beyond that expected of the average juror. Historically, the common law viewed complainants in sexual offences cases as a class of inherently unreliable witness, predisposed to fabricate accusations of sexual assault and tending to fantasise about sexual experiences. This perception was used to justify the requirement that trial judges should warn juries that it would be unwise/dangerous to convict the accused in a sexual offences case on the uncorroborated evidence of the complainant. After lengthy debate informed by Law Reform reports and research that demonstrated the injustice attendant upon and the discriminatory nature of the common law approach, all Australian legislatures have enacted reforms removing mandatory corroboration requirements for the evidence of sexual assault complainants. In Tasmania these reforms are contained in section 136 of the *Criminal Code* (Tas) and s 164 *Evidence Act 2001* (Tas). Section 164 is of general application - it abolishes all common law corroboration doctrines. It provides:

> (1) It is not necessary that evidence on which a party relies be corroborated.
>
> (2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.
>
> (3) Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:
>
> (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
>
> (b) give a direction relating to the absence of corroboration.
>
> [Subsection (4) makes specific provision with respect to the evidence of children.]

Section 136 of the Code is of specific application, applying only in sexual offences trials. It provides:

> (1) At the trial of a person accused of a crime under chapter XIV or XX, no rule of law or practice shall require a judge to give a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of a person against whom the crime is alleged to have been committed.
>
> (2) A judge shall not give a warning of the kind referred to in subsection (1) unless satisfied that the warning is justified in the circumstances.[1]

[1] The crimes in Chapter XIV are 'crimes against morality' including, inter alia, incest, indecent assault unlawful sexual intercourse with a young person. The crimes in Chapter XX are rape, abduction and stalking.

1.1.2 The common law also had expectations about the way that genuine victims of sexual assault would behave. In particular, it was believed that a genuine victim would complain about the offence as soon as possible after it occurred. Such an expectation, in the common law view, accorded with common sense understandings of human behaviour. Absence of complaint or delay in making a complaint was, therefore, considered to impact unfavourably upon the credibility of the complainant's account and suggested that the allegations made were fabricated. The leading Australian authority on this construction of a complainant's delay in complaining or failure to complain is the High Court decision in *Kilby*.[2] In that case it was held that trial judges should instruct juries that such delay reflected upon the credibility of the complainant's account and supplied an important factor in determining whether her or his allegations were fabricated (known as the *Kilby* direction).

1.1.3 The dubious assumption that anyone who has been sexually assaulted will naturally make an early complaint takes little account of the possible circumstances involved in the offence – the nature of the assault, the relationship of the perpetrator to the complainant, any trauma resulting, and the complainant's age and her or his ability to relate what has occurred. Research has shown that delay in making a complaint is common among sexual assault victims and that many victims will make no complaint at all. For example, the Australian results from the 2000 International Crime and Victim Surveys (ICVS) showed a reporting rate of only 15% for sexual assaults and offensive sexual behaviour.[3] The Australian Women's Safety Survey of 1996 also found a reporting rate of 15% for women who had been sexually assaulted in the 12 months prior to the survey.[4] The same research indicates that there are powerful reasons which cause many to make no complaint. Social, emotional and economic pressures all influence complainants to suppress any impulse to recount their experience. A desire not to cause distress to family members, fears of being disbelieved, feelings of guilt and shame about the assault also militate against revelation. Additionally, victims' negative perceptions about the justice system's provision of redress result in non-reporting.[5]

1.1.4 The courts have, by and large, been slow to acknowledge the varying 'normal' responses of victims to sexual crimes. However, judicial critique of the common law approach is growing. For example, in the High Court case, *Papakosmas* McHugh J queried its validity:[6]

> Whether the credibility reason for admitting complaint evidence remains, or ever was, valid may be doubted. In *R v King* [(1995) 78 A Crim R 53 at 54 (Queensland Court of Appeal)], Fitzgerald P pointed out, correctly in my opinion, 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".

[2] (1973) 129 CLR 460.
[3] D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault in Australia,* AIC, Canberra, 2002.
[4] Australian Bureau of Statistics, *Women's Safety Australia 1996* ABS, Canberra, 1996; for further examples see Law Reform Commission of Victoria, *Rape: Reform of the Law of Procedure* Appendices to Interim report No 42, 1991; *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault*, Gender Bias and the Law Project, Dept of Women, New South Wales Government, November 1996; A Neame & M Heenan *What lies behind the hidden figure of sexual assault?* Briefing No. 1 Australian Institute of Family Studies, September 2003; D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review*, Commonwealth Office of the Status of Women, Canberra, 2003.
[5] D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault in Australia,* AIC, Canberra, 2002.
[6] (1999) 196 CLR 298. See also: *M* (1994) 181 CLR 487 at 514 per Gaudron J on the unsuitability of the doctrine in respect of child complainants; *Jones* (1997) 191 CLR 439 at 463 per Kirby J; *Suresh v R* (1998) 72 ALJR 769 at 778 per Kirby J and *R v King* (1995) 78 A Crim R 53 at 54 per Fitzgerald P.

1.1.5 In *LTP* Howie J stated:[7]

> I do not understand how any inference can legitimately be drawn about the veracity of a young child from the fact that the child does not complain about sexual misconduct at the first reasonable opportunity especially where the conduct is perpetrated by a close family member. Certainly courts should not be encouraging such a line of reasoning on the basis of some supposed collective experience or understanding of the behaviour of children in such a situation …

1.1.6 Legislatures have been quicker in recognising and attempting to remedy the deficiencies of the common law and, as a result, many jurisdictions including Tasmania, have enacted legislation requiring trial judges to inform juries that delay in or failure to complain is not necessarily indicative of fabrication. These provisions also require trial judges to advise juries about the possible explanations for a complainant's failure to make a timely complaint. The relevant statutory provision in Tasmania is s 371A *Criminal Code* (Tas), (enacted in 1987). It provides:

> Where, during the trial of a person accused of a crime under chapters XIV or XX, there is evidence which tends to suggest an absence of complaint by the person upon whom the crime is alleged to have been committed or which tends to suggest delay by that person in making a complaint, the judge shall –
>
> (a) give a warning to the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the crime was committed is false; and
>
> (b) inform the jury that there may be good reasons why such a person may hesitate in making, or may refrain from making, a complaint.

1.1.7 This reform and the reforms relating to corroboration were designed not only to eliminate unwarranted misconceptions about the unreliability of the evidence of sexual assault complainants but also to achieve a balance of fairness in the criminal justice process for the accused and for complainants. The 1982 Tasmanian Law Reform Commission Report on Rape and Sexual Offences which recommended the reform contained in s 371A also suggested that the warning would help to counteract smear tactics by defence counsel based on the complainant's delay in complaining and would assist the jury in gaining an understanding of the complainant's position.[8]

1.1.8 However, the effectiveness of these reforms has been eroded by subsequent judicial interpretation and developments in the common law. While section 136 of the *Code* and section 164 of the *Evidence Act* have abolished the requirements for corroboration in common law terms, they do not prohibit judges giving a corroboration warning in relation to the complainant's allegations in particular cases where they believe it is appropriate, in the interests of ensuring a fair trial for the accused, to do so. Similarly, s 371A does not prevent a trial judge from giving a *Kilby* warning. Further, sections 371A, 136 and 164 should be read with s 165 of *the Evidence Act* which requires a trial judge to give a warning to the jury on the request of a party about the unreliability of particular evidence. It provides:

[7] [2004] NSWCCA 109.
[8] Law Reform Commission (Tasmania), *Report and Recommendations on Rape and Sexual Offences*, Report No 31, 1982, p 26.

165(1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:

(a) evidence in relation to which Part 2 of Chapter 3 or Part 4 of Chapter 3 applies;
(b) identification evidence;
(c) evidence the reliability of which may be affected by age, ill health, whether physical or mental, injury or the like;
(d) evidence given in a criminal proceeding by a witness who may reasonably be supposed to be criminally concerned in the events giving rise to the proceedings;
(e) evidence given in a criminal proceeding by a witness who is a prison informer;
(f) oral evidence of official questioning of a defendant that is questioning recorded in writing that has not been signed or otherwise acknowledged by the defendant;
(g) in a proceeding against the estate of a deceased person, evidence adduced by or on behalf of a person seeking relief in the proceeding that is evidence about a matter about which the deceased person could have given evidence if he or she were alive.

(2) If there is a jury and a party so requests, the judge is to –

(a) warn the jury that the evidence may be unreliable; and
(b) inform the jury of the matters that may cause it the be unreliable;
(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
(4) it is not necessary that a particular form of words be used in giving the warning or information.
(5) This section does not affect any other power of the judge to give a warning to, or inform, the jury.

Section 165(5) expressly retains the power of a trial judge to give common law directions and warnings. Despite the legislative reform of the common law corroboration doctrines and of the law relating to early complaint, the High Court has developed new corroboration requirements and imposed new mandatory directions upon trial judges relating to delay in complaint that potentially reinstate, albeit in a mutated form, traditional suspicions and beliefs about sexual assault complainants. These directions apply in Tasmanian sexual offences trials by virtue of s 165(5) *Evidence Act 2001* (Tas).

The main common law directions/warnings to be given in sexual offences trials fall into two distinct categories:

1) the *Longman* warning which directs the jury as to the dangers of convicting on the complainant's evidence alone and which is to be given "whenever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case"[9] and

2) the *Crofts* direction which requires the trial judge to give a 'balancing direction' to the direction required by such provisions as s 371A *Criminal Code* (Tas) and to inform the jury that delay in complaining may affect the credibility of the complainant's account.

1.2 Longman Warning[10]

1.2.1 In *Longman,*[11] the accused was charged with sexual assault of his step-daughter. The offences allegedly occurred over 20 years prior to the complainant making any complaint

[9] *R v Longman* (1989) 168 CLR 79 at 91 per Brennan, Dawson and Toohey JJ.
[10] See generally, J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Procedure*, (2005) LexisNexis Butterworths, Sydney, 1187 – 1198.
[11] (1989) 168 CLR 79.

about them. The High Court held that substantial delay between offence and complaint and therefore prosecution disadvantaged the accused in mounting a defence and consequently required the trial judge to warn the jury about the dangers of convicting him on the complainant's uncorroborated evidence. McHugh J held that the disadvantage to the accused was constituted by difficulties he would have in marshalling witnesses and by the inevitable lack of detail in the evidence arising from such delayed accusations.

1.2.2 Brennan, Dawson and Toohey JJ explained the problems arising for the accused from the delayed complaint and prosecution as follows: [12]

> Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial … The jury should have been told 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.

1.2.3 The approach of the High Court in *Longman* has been entrenched in two succeeding High Court cases, *Crampton*[13] and *Doggett*[14]. In *BWT*,[15] Sully J stated that the High Court's position since these cases is that in any sexual offences trial where there is evidence of substantial delay in complaint, a *Longman* warning *must* be given and it *must* be cast in a form that plainly manifests certain characteristics. His Honour then detailed the principles in this regard that can be extracted from these cases: [What follows paraphrases His Honour's points.]

> (a) The direction must be cast in the form of a *warning*. If what is said is cast as a *comment*, or even a *caution* it will not sufficiently comply with the High Court requirements.
>
> (b) The warning must be framed to ensure that it covers the following propositions: *first*, that because of the passage of time the evidence of the complainant cannot be adequately tested; *secondly*, that it would be, therefore, dangerous to convict on that evidence alone; *thirdly*, that the jury is entitled, nevertheless, to act upon that evidence alone if satisfied of its truth and accuracy; *fourthly*, that the jury cannot be so satisfied without having first scrutinised the evidence with great care; *fifthly*, that the carrying out of that scrutiny must take into careful account any circumstances which are peculiar to the particular case and which have a logical bearing upon the truth and accuracy of the complainant's evidence; and *sixthly*, that every stage of the carrying out of that scrutiny of the complainant's evidence must take serious account of the warning as to the dangers of conviction.
>
> (c) The warning must unmistakably bear the imprint of the Court's own authority and it must be made clear that the basis for warning is the accumulated experience of the Courts in dealing with cases involving delayed complaint. It is unwise to suggest that the warning is simply a reflection of what the jurors' common sense would in any event have indicated.
>
> (d) Additional considerations to which Deane J and McHugh J referred must be also kept in mind when framing the warning (see para 2.1.22).
>
> (e) The framing of a satisfactory *Longman* direction will be a much more difficult task

[12] (at 87).
[13] (2000) 206 CLR 161.
[14] (2001) 208 CLR 343.
[15] (2002) 54 NSWLR 241.

> where there is corroboration for the complainant's evidence. This is because, in such a case, as was pointed out by Gleeson CJ in *Doggett* at [9], the warning, to be of practical assistance to the jury, requires the trial judge to go into the matter of corroboration, to direct the attention of the jury to the evidence capable of being regarded as corroborative and to explain its possible significance. This may be, in fact inimical to the defence case, because often as far as the accused is concerned, the less said about corroboration the better.
>
> While the majority of the High Court has not said that a *Longman* direction will always be required notwithstanding that there is evidence capable of corroborating the complainant's evidence, their Honours do make plain that the availability of such corroborative evidence cannot, *of itself*, obviate the need for a proper *Longman* direction. Their Honours appear to have said that the availability of such corroborative evidence will require the trial Judge to make a painstaking analysis of the way in which, the extent to which, and of the particular points in connection with which, the corroborative material is effective; and then to decide whether the resulting state of affairs leaves open, notwithstanding the corroboration, such forensic disadvantage as to call for the giving of a *Longman* direction.
>
> (f) The initial trigger for any *Longman* direction is the passage of time between the alleged offence and first complaint. What is not clear is whether there is any, and if so what, time lapse that would be generally regarded by current majority opinion in the High Court as not calling for the giving of a *Longman* direction, so it would be prudent for a trial Judge to regard any delay between offence and complaint as sufficient to raise for consideration the need for a *Longman* direction.

1.2.4 Sully J's judgment indicates that the *Longman* warning consists of three component parts:

- the warning (it is dangerous to convict),
- the reasons for the warning (because the accused has been prejudiced by delay) and
- the response to the warning (to carefully scrutinise the evidence before convicting upon it).[16]

His Honour also provided guidance in framing the *Longman* warning and the wording to be used (see also Buddin J in *GS*[17]). His Honour suggested that a trial judge who is framing a *Longman* direction must ensure that the final form of the direction to the jury covers the following propositions:

(ii) That because of the passage of time the evidence of the complainant cannot be adequately tested;

(iii) That it would be, therefore, dangerous to convict on that evidence alone;

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

(v) That the jury cannot be so satisfied without having first scrutinised the evidence with great care;

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

(vii) That every stage of the carrying out of that scrutiny of the complainant's evidence must take serious account of the warning as to the dangers of conviction.

[16] *R v MM* (2003) 145 A Crim R 148 per Howie J.
[17] [2003] NSWCCA 73.

1.2.5 It is apparent from *Crampton* and *Doggett* and from Sully J's judgment in *BWT* that the requirement to give a *Longman* warning operates akin to a rule of law whenever there is substantial delay in complaint. A strong prosecution case and the existence of corroborative evidence for the complainant's account do not relieve the trial judge of the necessity of giving the warning: *Doggett* per Gaudron, Callinan and Kirby JJ. Appeal Courts have focused particularly on the *adequacy* of trial judges' directions. The direction must be in the form of a *warning*. If what is said is couched as a comment only or a caution it will be insufficient.[18] Additionally, the warning must be in the terms and cover the matters prescribed by the High Court decisions in *Longman, Crampton* and *Doggett*.[19]

1.2.6 Departure from the terms of the warning devised by the High Court will provide fertile grounds for appeal. Nevertheless, it has been held that no specific form of words is required in giving the *Longman* direction so long as the essential purpose of the direction is performed and the substance of the principles in *Longman* accorded with.[20]

1.3 Crofts Warning[21]

1.3.1 In *Crofts*,[22] the High Court considered the effect of the Victorian equivalent of s 371A *Criminal Code* (Tas)[23] and concluded that it did not, as a matter of law, prohibit the trial judge from giving a *Kilby* direction. The High Court went further and held that in appropriate cases a judge is *required* to instruct the jury to the effect that failure to make an early complaint might indicate that the complainant has fabricated her or his in-court allegations. According to the High Court the purpose of provisions like s 371A is to remediate the balance of jury instruction, not to remove it. The court held:

> …the intention of the legislature was not to "sterilise" complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration.

Toohey, Gaudron, Gummow and Kirby JJ emphasised the use of the word 'necessarily' in the Victorian provision, which is also used in the Tasmanian provision, in deciding that the *Kilby* direction should still be given:

> [I]n the particular circumstances … the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that … the allegation was false.

1.3.2 In *Crofts*, the delay in complaining was six months after the last alleged assault, but six years from the first. The majority of the court held that the requirements of fairness to the accused dictated that the jury be instructed as to the 'legal significance of the absence of complaint soon after the alleged incidents'. Failure to give a *Kilby* direction, the High Court found, justified quashing the convictions. Such failure was also said to create the risk that provisions like s 371A might wrongly be interpreted as converting sexual assault

[18] *GS* at 95, per Buddin J, Santow J and Smart JA agreeing.
[19] *BWT* per Sully J Wood CJ at CL, Dowd J agreeing.
[20] *Kesisyan* [2003] NSWCCA 259 per Meagher JA and Sully J, Kirby J agreeing.
[21] See generally, J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Procedure*, (2005) LexisNexis Butterworths, Sydney, 1198 – 1210.
[22] (1996) 186 CLR 427.
[23] S 61(1)(b) *Crimes Act* 1958 (Vic).

complainants into an 'especially trustworthy class of witnesses'. The High Court accepted two qualifications to the duty to provide the *Kilby* direction. The first is where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness. No indication was given of the type of case that might meet this qualification, and given the apparent ordinariness of the cases where the direction has been held to be necessary 'to ensure that the accused secures a fair trial', it is difficult to envisage a case of delayed complaint where a warning in the required terms might not be given. In fact, current authority suggests that the *Kilby* direction should be given 'as a general rule'.[24]

1.3.3 The second qualification to the duty to caution is that the warning should not be expressed in such terms as to undermine the purpose of the mandatory statutory directions by suggesting a stereotyped view that complainants in sexual assault cases are unreliable or that delay in making a complaint about an alleged sexual offence is invariably a sign that the complainant's evidence is false. How this is reasonably to be achieved remains a mystery.

1.3.4 **In summary** *Crofts* establishes that a trial judge has a discretion in individual cases to invite the jury to use lack of recent complaint to impugn the complainant's credibility. The underlying principles of a fair trial and the overriding duty of a trial judge to ensure that the accused secures a fair trial mean that the trial judge may, and in appropriate cases must, give a 'balancing direction' to the mandated s 371A directions to the effect that failure to complain or delay in complaint may be taken into account in the assessment of the complainant's credibility.

[24] see comments to this effect in *Markuleski* [2001] NSWCCA 290 per Spigelman CJ, Carruthers AJ agreeing, and per Wood CJ at CL.

Part 2
The Need for Reform

The *Longman* and *Crofts* warnings give rise to a number of practical, procedural and theoretical problems. Specifically, they introduce uncertainty into the law because it is unclear in many cases whether either or both of these warnings should be given; the warnings require complex, possibly confusing and even contradictory directions to be given to the jury; they potentially re-instate and endorse false stereotypes of sexual assault complainants and, therefore, also raise the spectre of injustice and unjustified discrimination in the criminal justice process for such complainants and they undermine legislative reforms to the common law designed to overcome this injustice and discrimination. The *Longman* warning is also problematic because it has developed through case law so that now it creates an irrebuttable presumption that the accused has been prejudiced in his defence by the length of delay between the commission of the alleged offence and its reporting. This presumption continues to apply and requires a warning even in cases where there is no evidence that the accused has actually been prejudiced in this way. Further, this warning is open to misinterpretation by the jury as a coded direction from the judge to acquit the accused.

2.1 Complexity and Confusing Nature of the Warnings[25]

Longman warning

2.1.1 The complexity of the *Longman* warning, particularly where there is actually some corroboration of the complainant's account, is demonstrated and explained in the judgment of Sully J in *BWT*. Its complexity coupled with the necessity to give an adequate warning in the terms mandated by the High Court pose difficulties for trial judges in giving directions that are insulated against successful appeal and that also meet the coexisting requirement of intelligibility, simplicity and brevity. The number of successful appeals on the ground of failure to give an adequate warning provides eloquent testament to this problem, see for example:

Sy [2004] NSWCCA 297
Percival [2003] NSWCCA 409
Eyles [2002] NSWCCA 510
DBG [2002] NSWCCA 328
GEA [2002] NSWCCA 222
Channell [2002] NSWCCA 187
GPP [2001] NSWCCA 493
Ball [2001] NSWCCA 352
Newhouse [2001] NSWCCA 294
Henman [2001] NSWCCA 4
Mayberry [2000] NSWCCA 531
Roberts (2001) 53 NSWLR 138
Allegreatta [2003] WASCA 17
Crisafio [2003] WASCA 104
Kailis (1999) 21 WAR 100
BFB [2003] SASC 411
K (1997) 68 SASR 405
Liddy (2002) 81 SASR 22
Buckley [2004] VSCA 185
WEB [2003] VSCA 205
Miletic [1997] 1 VR 593
Arundell [1999] 2 VR 228
Scott [2004] NSWCCA 254
Garlick [2003] NSWCCA 398
Lewis [2003] NSWCCA 180
H [2002] NSWCCA 355
JBV [2002] NSWCCA 212
BWT [2002] NSWCCA 60
Greenhalgh [2001] NSWCCA 437
Murray [2001] NSWCCA 289
Littler [2001] NSWCCA 173
Roddom [2001] NSWCCA 168
Murphy [2000] NSWCCA 297
MWR [2003] WASCA 236
Dawe [2001] WASCA 306
Allegretta [2003] WASCA 17
Cook (2000) 22 WAR 67
RWB [2003] SASC 420
Corrigan (1998) 74 SASR 454
T (1999) 74 SASR 486
NJB [2004] VSCA 168
MWL [2002] VSCA 221
Hyatt (1998) 101 A Crim R 83
Vonarx [1999] 3 VR 618
Westley [2004] NSWCCA 192
Lewis[2003] NSWCCA 180
GS [2003] NSWCCA 73
WRC [2002] NSWCCA 210
SJB [2002] NSWCCA 163
BKK [2001] NSWCCA 525
Fuller [2001] NSWCCA 390
Murre [2001] NSWCCA 286
Fitzsimmons [2001] NSWCCA 59
GJH [2001] NSWCCA 128
Johnston (1998) 45 NSWLR 362
Gee [2003] WASCA 178
Christophers (2000) 23 WAR 106
Petty (1994) 13 WAR 372
HS [2004] SASC 300
Power [2003] SASC 77
Green (2001) 78 SASR 463
Aristidis [1999] 2 Qd R 629
TWK [2003] VSCA 225
Salater [2001] VSCA 128
Young [1998] 1 VR 402
GEC (2001) 3 VR 334

[25] See generally, J Hunter, C Cameron and T Henning, *Litigation II: Evidence and Criminal Procedure*, (2005) LexisNexis Butterworths, Sydney, 1198 – 1210

This does not pretend to be a comprehensive list.[26]

The prominence of appeals based on alleged defects in trial judges' warnings to juries in sexual offences cases has also been revealed by recent research[27] in New South Wales which found that 26.7% of all cases before the New South Wales Court of Criminal Appeal in 2004 (n = 475) were appeals against conviction.[28] The table below[29] relates to these conviction appeals and shows that 28.3% involved sexual assault offences.

2004 NSW Court of Criminal Appeal: Conviction Appeals

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

However, of most significance for the present inquiry is the finding that in 55.5% of all of the appeals against conviction in sexual offences cases the grounds of appeal related to inadequate or defective warnings by trial judges. Wood CJ at CL and Sully J in BWT commented on the difficulties now facing trial judges in adequately warning juries. Sully J stated in an addendum to his judgment:

> [114] It seems to me, if I may say so with unfeigned respect, that the combined effect of the decisions in *Longman*, in *Crampton* and in *Doggett* makes it, if not quite impossible, at least extremely and unnecessarily difficult for a conscientious trial Judge when directing a jury, to give dutiful effect, as of course he must do, to the requirements of those decisions, while simultaneously giving effect to the requirement that he be succinct, simple and clear.

Similarly, in *Dyers* Kirby J commented:[30]

> I sympathise with the difficulty that trial judges and courts of criminal appeal face in conforming to the various opinions stated in this court in relation to the *Longman* requirement. Different emphasis has been placed at different times by different members of this court upon different parts of the reasoning in *Longman*.

2.1.2 Even if the guidelines provided in cases like *BWT* are followed and a trial judge warns the jury in relation to delay, the warning may still lack the specificity required for an acceptable *Longman* warning. The successful appeal in *GJH*,[31] demonstrates how exact the language used by trial judges must be. In that case Stein J stated, "The trial judge did not express the matter of delay in terms of 'dangerousness'…The summing up amounted to a comment that was comprehensive, but was not a warning of the unmistakable and firm kind that was needed in a case of such lengthy delay".

[26] See also the discussion of this issue by C R Williams, 'Warnings Occasioned by Delay in Paedophile Prosecutions' (2003) 27 *CLJ* 70.
[27] D Boniface, 'The Common Sense of Jurors vs The Wisdom of the of the Law: Judicial Directions and Warnings in Sexual Assault Trials' (2005) *UNSWLJ* (forthcoming).
[28] the majority of appeals (62.5%) were appeals against sentence: Boniface, *ibid*.
[29] this table is taken from Boniface, *ibid.*
[30] (2002) 210 CLR 285, Kirby J at para 55.
[31] (2001) 122 A Crim R 361.

2.1.3 Further, despite judicial guidance, there are conflicting views about the content, necessary strength and delivery of the warning. In some cases it has been held that, "no specific words are required in a *Longman* direction and as long as the essential purpose of the direction is performed, that is all the judge needs to do".[32] For example, Callaway JA in *Glennon*[33] stated that, "a *Longman* warning does not have to take any particular form. The critical question is whether the judge gave such directions as were necessary and practical, in the circumstances, to avoid a perceptible risk of miscarriage of justice arising from a factor that the jury required the judge's assistance to evaluate". In contrast, in other cases, a strict adherence to the nominated requirements of the *Longman* direction has been required. For example, in *RSJB* Levine J held:[34]

> the critical words 'dangerous to convict' which it is to be stressed, are contained in the *Longman* direction as originally formulated must be used. They were not, there has been a miscarriage of justice, the conviction must be quashed.

2.1.4 The case law also reflects a level of confusion about the requirements of the warning. For example, in *Fotou*,[35] Charles J rejected the applicant's third ground of appeal and found that while a *Longman* warning was required, the trial judge had adequately complied with its requirements by telling the jury that the central issue was the complainant's credibility, that her evidence must be scrutinised very carefully, that the jury should look for other supporting evidence, and that because she was young and intellectually disabled her evidence should be carefully examined.[36] This informal approach to the application and substance of the *Longman* warning can be contrasted with cases like *JBV*,[37] where even though the trial judge's summing up was held to represent 'an earnest attempt to apply the majority reasoning in *Longman*', it was nevertheless held to be defective.

2.1.5 It is probably undesirable that a standardised *Longman* warning be developed. As Charles JA in *WEB*[38] stated, "I accept [counsel for the applicant's] argument that no particular form of words is required, in the sense that every warning must be appropriately tailored to the facts of the case concerned, and each warning is, in that respect unique". A similar approach was taken by Miller J in *Gaulard*[39] who stated, "I agree that the words used by the majority in *Longman* are not a formula which is to be parroted by a trial judge without reference to individual circumstances". However, given the number of successful appeals where deviation from the perceived requirements of the *Longman* warning has occurred or where an aspect of the *Longman* warning regarded as critical by the appeal court has been omitted by the trial judge, the development of a standardised, ritualised warning may be inevitable. In fact, in R v LTP, Dunford J, with Simpson and Howie JJ agreeing, suggested that trial judges in sexual offences cases would be well advised to use the points set down by Wood CJ in BWT as a check list.[40]

[32] *R v Kesisyan* [2003) NSWCCA 259 per Meagher JA.
[33] *(No 2)* (2001) 7 VR 631.
[34] (2002) 129 A Crim R 54.
[35] Supreme Court, Victoria, Court of Appeal: Winneke, Charles and Southwell JJ, 26 June 1996.
[36] 'Case and Comment – Fotou', in *Criminal Law Journal*, Vol 21 1997, LBC Information Services 1997.
[37] [2002] NSWCCA 212.
[38] (2003) 7 VR 200.
[39] [2000] WASCA 218.
[40] [2004] NSWCCA 109 at [47].

Crofts Warning

2.1.6 The *Crofts* warning is problematic because it produces apparently equivocating directions on the relevance of want of complaint for the complainant's credibility.[41] For example, in a trial where there is evidence of delay in making a complaint the trial judge may give two apparently contradictory warnings to the jury – the first mandated by s 371A of the Criminal Code which requires a warning that delayed complaint does not necessarily indicate that the complainant has fabricated her allegations. The second mandated by the decision in *Crofts* which requires the 'balancing' direction, that such delay may be indicative of fabrication. What is a jury to make of this? Logically, such directions, being contradictory as to the probative potential of the lack of complaint evidence, effectively rob it of any probative value and so render it irrelevant. In any event, the multiplicity of directions where a *Longman* direction is also given may result in jury overload and confusion.[42]

2.1.7 The difficulties faced by trial judges in adequately warning juries, the complexity and length of the warnings to be given and the consequent confusion that may result for juries is increased by the number of warnings that may have to be given in sexual offences cases. In *BWT*,[43] Wood CJ at CL identified eight distinct categories of warning which may need to be given by the trial judge in a sexual assault case. These directions are in addition to the standard directions and warnings which must be given in every trial:[44]

> (a) the *Murray* direction (*R v Murray* (1987) 11 NSWLR 12) to the effect that where there is only one witness asserting the commission of a crime, the evidence of that witness "must be scrutinized with great care" before a conclusion is arrived at that a verdict of guilty should be brought in;
>
> (b) The *Longman* direction (as reinforced in *Crampton* and *Doggett*), that by reason of delay, it would be "unsafe or dangerous" to convict on the uncorroborated evidence of the complainant 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.
>
> (c) The *Crofts* direction (*Crofts v R* (1996) 186 CLR 427), if a jury is to be informed, in accordance with s 107 of the *Criminal Procedure Act*, [the New South Wales equivalent of s 371A Criminal Code (Tas) 1924] that a delay in complaint does not necessarily indicate that the allegation is false, and that there may be good reasons why a victim of sexual assault may hesitate in complaining about it, *then* it should also be informed that the absence of a complaint or a delay in the making of it may be taken into account in evaluating the evidence of the complainant, and in determining whether to believe him or her (but not in terms reviving the stereotyped view that complainants in sexual assault cases are unreliable or that delay is invariably a sign of the falsity of the complaint: *Crofts* at 451.
>
> (d) The *KRM* direction (*KRM v R* (2001) 75 ALJR 550) to the effect that, except where the evidence relating to one count charging sexual assault is admissible, in relation to another count or counts alleging a separate occasion of such an assault, the jury must consider each count separately, and only by reference to the evidence which applies to it; balancing that direction, where appropriate, by a reminder that

[41] On this point see in particular the comments of Simon Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in *Balancing the Scales: Rape Law Reform and Australian Culture*, P Easteal (ed), Federation Press, (1998), p 41.

[42] It is possible that a number of other directions will also be required to be given, compounding the problem of jury overload; see further in the discussion below at para 2.1.22.

[43] *BWT* [2002] NSWCCA 60.

[44] Hon. Justice Eames, 'Better communication with jurors', in (G C Lindsay SC (ed.)) *Australian Bar Review*, Vol 24, No 1, September 2003, Lexis Nexis: 2003, p. 44.

> if the jury has a reasonable doubt concerning the credibility of the complainant's evidence on one or more counts, they can take that into account when assessing his or her reliability on the other counts (see *R v Markuleski* [2001] NSWCCA 290 at [259]–[263]).
>
> (e) Any warning which may be required by reason of a ruling that limits the use of evidence concerning a complaint, or delay in complaint, to the question of credibility (eg under s 108(3) of the *Evidence Act* as an exception to the credibility rule), or alternatively that allows it to be taken into account (under s 66 of the *Evidence Act* as an exception to the hearsay rule) as evidence of the facts asserted.
>
> (f) The *Gipp* warning (conveniently so called, although there was divided reasoning in *Gipp v R* (1998) 194 CLR 106) concerning the way in which evidence of uncharged sexual conduct between an accused and a complainant can be taken into account as showing the nature of the relationship between them, but not so as to substitute satisfaction of the occurrence of such conduct for proof of the act charged;
>
> (g) Any warning that may be necessary in relation to the use of coincidence evidence (under s 98 *Evidence Act*) where the accused is charged in the one indictment with sexual assault against two or more complainants, requiring the jury to be satisfied beyond reasonable doubt first of the offences alleged in respect of one complainant, and then of the existence of such a substantial and relevant similarity between the two sets of acts as to exclude any acceptable explanation other than that the accused committed the offences against both complainants;
>
> (h) A *BRS* direction (*BRS v R* (1997) 191 CLR 275) that where evidence revealing criminal or reprehensible propensity is admitted, but its use is limited to non propensity or tendency purposes, for example those considered proper in that case, then it is to be used only for those purposes and not as proof of the accused's guilt.

His Honour then commented:

> [33] In combination with the other standard directions customarily given in a criminal trial, and in particular any further warnings which may be required under s 165 of the *Evidence Act*, a trial judge is faced with a somewhat formidable task in sufficiently directing a jury in this category of case.
>
> [34] The jury is similarly faced with a potentially bewildering array of considerations, some of which may appear highly technical, if not inconsistent, to the lay mind and which, in any event, are likely to vex an experienced trial lawyer, even though they related to a simple factual dispute arising very often within a domestic setting …
>
> [35] In all of these circumstances, bearing in mind also the desirability of containing a summing up to an acceptable length; of ensuring its immediate relevance to the actual trial (*R v Zorad* (1991) 19 NSWLR at 91, *R v Williams* (1990) 50 A Crim R 213, *KRM v R*, and *R v Chai* [2002] HCA 12 at [18]); of avoiding unnecessary judicial input into the fact finding process (*Azzopardi v R* [2001] HCA 24); and of paying due respect to the tactical considerations which are best judged by trial counsel in the actual atmosphere of the trial, I consider it timely for there to be a further review of the evidentiary, and other requirements of procedural law that apply to cases of sexual assault, particularly those involving children.

When are the Longman and Crofts Warnings Required?

2.1.8 It is unclear when the *Longman* and *Crofts* warnings are required to be given. For example, in *GAR*, Miles AJ said:[45]

> A failure to give a warning to the jury in accordance with what was said by the High Court in *Longman* has become a common ground in appeals against conviction. There is a wide range of opinion about exactly what is meant by a *Longman* direction and when such a direction is required.

Similarly in *BWT*, Wood CJ at CL said:

> notwithstanding the number of times that the *Longman* direction has been considered, there still is a sharp division in the High Court (following *Doggett v R*) as to the circumstances when, and the terms in which, the necessary warning should be given.

2.1.9 In *BFB*, Doyle CJ said:[46]

> It appears to me that trial judges are having difficulty in applying to cases involving sexual offences the principle considered in *Longman.*…The difficulty that trial judges are experiencing in this area is probably due to the fact that there are no hard and fast lines to be drawn.

2.1.10 It is not certain what length of delay will be considered to be 'substantial' such as to necessitate the giving of a *Longman* warning. In *BFB* Doyle CJ held, "Sometimes a relatively short time will put the accused at a disadvantage. Sometimes a lengthy lapse of time will not put the accused at a disadvantage".[47] In *Longman* itself there was a delay of 20 years between alleged offence and trial. However, much reduced delays have been held to necessitate a warning. In *Robinson v R*, *R v Jolly*, *R v Omarjee*, and *R v Miletic*,[48] for instance, the delay was about three years. In *Jones v R*, the delay was four years, and in *R v Heuston* a delay of six months.[49] In the last two cases, it was held that a full *Longman* warning was not required although in *Heuston* Hodgson JA held that for the sake of caution a warning about the reduced ability of the accused to challenge the Crown case and to make out any positive defence should have been given. His Honour also said that he found it very difficult to determine whether a *Longman* direction was called for in that case. In *King*,[50] the accused appealed his conviction for failure of the trial judge to give a *Longman* warning where the complainant's delay in disclosing the sexual offences was only 26 days. While this appeal was dismissed, the fact that it was made suggests that uncertainty about when a warning must be given may promote the making of ambit appeals. The level of uncertainty in this area and its implications for trial judges in directing juries were noted by Sully J in *BWT*:

> It is, I think, clear enough that a delay in the order of 20 years would require, imperatively in the view of the current majority opinion in the High Court, a *Longman* direction, and a strong one at that. What is not clear is whether there is any, and if so what, time lapse that would be generally regarded by current majority opinion in the High Court as not calling for the giving of a *Longman* direction.

[45] [2003] NSWCCA 224.
[46] [2003] SASC 411.
[47] *BFB* [2003] SASC 411at 38.
[48] *Robinson v R* (1999) 165 ALR 226, *R v Jolly* [1998] 4 VR 495, *R v Omarjee* (1995) 79 A Crim R 355 and *R v Miletic* [1997] 1 VR 593.
[49] In *Jones v R* (1997) 191 CLR 430, the delay was four years. And see the discussion of this matter in *R v GTN* [2003] VSCA 38 per Eames JA (delay of 2–14 months) and in *R v Heuston* [2003] NSWCCA 172 per Hodgson JA (delay of six months).
[50] 2000] NSWCCA 507.

> While that state of affairs continues, it seems to me that the only prudent approach of a Trial Judge is one that regards any delay between offence and complaint as sufficient to raise for consideration the need for a *Longman* direction. That consideration should concentrate upon two related factors, namely, the actual lapse of time involved in the particular case; and the actual risk of relevant forensic disadvantage in the particular case. It seems to me that, as matters stand, a trial Judge would be well advised to give a *Longman* direction unless it is possible to conclude reasonably: *first*, that the particular time lapse is so small that any reasonable mind would regard it as, in context, trifling; *and secondly*, that the risk of relevant forensic disadvantage would be seen by any reasonable mind as, (to borrow from Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47), "far-fetched or fanciful".

2.1.11 The difficulty in achieving certainty in this area of the law is exacerbated by the fact that, *Longman* itself does not clearly identify when a warning is necessary "save by reference to the loss by an accused of means of testing a complainant's testimony which may not have been apparent to the jury".[51] Moreover, in *Longman* and in other cases since the decisions in that case and in *Crampton* and *Doggett*, other circumstances have been identified as necessitating the giving of a *Longman* warning. They include cases where the nature of the relationship between the complainant and the accused might suggest that the allegations are untrustworthy, cases where 'emotion, prejudice or suggestion' may operate to distort recollection and cases where the age of the complainant at the time of the alleged offences coupled with a period of delay, may also lead to a distortion of recollected events. Such developments prompted Ormiston JA in *Mazzolini*[52] at 130 to voice similar disquiet to that expressed by Sully J and Wood CJ at CL in *BWT:*

> As defence counsel catalogue the variety of 'special' circumstances seen by appellate judges (including, I confess, myself) as requiring warnings in particular cases, so trial judges will retreat to the safety of issuing *Longman* warnings for every such circumstance and every faintly analogous circumstance …

In LTP, Dunford J stated that, "it is preferable to give the directions, even if the judge considers one or more of them unnecessary in the particular case, rather than have convictions upset on appeal because of a failure to give them." It is, of course, understandable why judges would take such an approach. The consequences for the complainant of any successful appeal, (for example a retrial) are ones that trial judges are likely to go to some lengths to avoid. The fact that they feel impelled to do this, however, then entrenches the practice of giving the warning even where a warning is possibly unnecessary or counterproductive.

2.1.12 Ormiston JA also commented in *Mazzolini* on other potential consequences of trial judges' "retreat to safety". His Honour suggested that by doing so trial judges will once again give the appearance of judicial imprimatur to the recasting of sexual assault complainants, despite protestations to the contrary by the High Court in *Longman*, as an unreliable class of witness. He said:[53]

> Since the issue seems only (or almost only) to arise on trials for sexual offences (and appeals therefrom), the impression might be given, …that judges are again, by a back door, treating complainants in such cases as ordinarily unreliable witnesses…

This problem was also alluded to by Deane J in *Longman*. His Honour stated:

[51] per Heydon JA in *R v GPP* [2003] NSWCCA 493.
[52] [1999] 3 VR 113 at 130.
[53] *Mazzolini* [1999] 3 VR 113 per Ormiston JA at 130.

> Another problem about a general rule of practice that requires such an unqualified warning is that it inevitably involves an element of disparagement of the complaint in that it places the complainant in a special category of suspect witness.

Similarly in *BFB* Doyle CJ said:

> The giving of excessive and inappropriate warnings will be unfair to complainants, contrary to the public interest in a regularly conducted trial process, confusing to juries and runs the risk of returning this aspect of the law to an approach from which Parliament endeavoured to extract it.

2.1.13 Uncertainty about the application of *Longman* is also created by the nature of sexual offence cases, which, as Winneke P pointed out in *Olivar*[54]is that, "no two cases are alike, and it is not possible to argue that because a '*Longman* warning' was given in one case, therefore it must be given in another. The facts of the particular case will govern the nature and type of directions which the trial judge believes are appropriate".

2.1.14 The problem is further compounded because in some sexual assault cases, appeal courts have overturned convictions due to inadequacies or errors in trial judges' warnings, even though the defence did not request such a warning at trial and where there may have been sound tactical reasons why defence counsel did not request a warning : see judgment of Sully J in *BWT*. In *WRC*, Greg James J commented:[55]

> In my view, even though no application for a proper direction is made, even where, as here, conviction on all or most counts in both trials would be inevitable, the present state of the law requires that unless there is a direction which approaches nearly enough to the *Longman* requirements so that the jury could be seen to have the requisite understanding, the appeal should be allowed.

2.1.15 The environment of procedural uncertainty and judicial variation in this area of the law has created ongoing difficulties because the current law offers almost no guidance to trial judges on the circumstances in which a warning might be required.[56] This has been evidenced in situations where even though there is no clear special need for a warning, trial courts give these or stronger warnings, apparently mindful that convictions are often overturned on appeal if a trial judge has not given as adequate warning.[57]

2.1.16 The *Crofts* direction that often overlaps with the *Longman* warning in sexual offences cases, suffers from the same uncertainty as to when it should be given. Heydon JA in *GPP*[58] commented that, "*Crofts* [does not cast a] significant light on the circumstance in which the warning should be given". In the absence of specific guidance from the High Court, the trend observable in the case law has been for trial judges to give and appeal courts to require them to give a *Crofts* direction whenever there is evidence of delay in complaint. Overwhelmingly, current authority suggests that the *Crofts* direction should be given 'as a general rule'.[59] This approach applies even where there has been explanation of or reasons given for the delay. Accordingly, while the legislative reforms aimed to eliminate the giving of indiscriminate warnings about delayed complaint and misconceptions about the implications of that delay for questions of complainants' credibility, the result of the decision in *Crofts* appears to have been to restore such indiscriminate warnings and misconceptions. On this point, the Victorian

[54] [2004] VSCA 41.
[55] [2002] NSWCCA 210.
[56] Victorian Law Reform Commission *Sexual Offences: Final Report,* 'Judges' Directions To Juries, p.379.
[57] Kathy Mack, *"You should scrutinise her evidence with great care": Corroboration of women's testimony about sexual assault'*, in Balancing the Scales, The Federation Press: NSW, 1998, p. 73.
[58] (2001) 129 A Crim R 1.
[59] see comments to this effect in *Markuleski* [2001] NSWCCA 290 per Spigelman CJ, Carruthers AJ agreeing, and per Wood CJ at CL.

Law Reform Commission in its report, *Sexual Offences: Law and Procedure,*[60] quoted the New South Wales Standing Committee on Law and Justice:

> While the Committee notes the argument that the *Crofts* warning was "not meant to revive the stereotypical view that delay is invariably a sign of the falsity of the complaint" , the Committee is of the opinion that such is the unavoidable result of a warning to the jury that in assessing the complainant's credibility, they should take into account the complainant's failure to complain promptly.[61]

2.1.17 Because, the premise on which the 'balancing' *Crofts* warning is based derives from the 'collective experience of courts in sexual offences cases' rather than from the particular facts of the case being tried, and because other experience and knowledge, (including knowledge derived from empirical research), is to the contrary effect, continued application of the *Crofts* principle in its present form may further erode respect for the criminal courts and criminal justice process in this area. There is clear evidence that in many quarters the judiciary is considered to be ill-informed about modern understandings of sexual assault and sexual assault complainants, to be out of touch with developments in this area and to adhere to conservative and gender- biased views.[62] It further suggests that the *Crofts/Kilby* directions should only be given where there is a firm evidentiary foundation, apart from the mere fact of the delay, that the delay has a real connection to the complainant's credibility.[63]

The Crofts and Longman Warnings Resurrect Outmoded Views about the Reliability of Sexual Offences Complainants

2.1.18 As noted above, the *Longman* and *Crofts* warnings have been criticised as potentially reinstating, 'by the back door', false stereotypes about the unreliability of complainants in sexual offences cases. This danger was mentioned by Omiston JA in *Mazzolini,* Doyle CJ in *BFB* and by Deane J in *Longman.* Judicial protestations in *Longman, Crampton, Doggett* and *Crofts* that the principles they propound are not intended to resurrect or to be interpreted as endorsing these stereotypes may be perceived as merely a cloak for underlying prejudice expressed in confusing and contradictory terms. The problem of the resurrection of false stereotypes arises principally because of the uncertainty about when the warnings are required to be given. This uncertainty can then prompt trial judges to give them routinely even indiscriminately in an attempt to avoid appeal. It arises also, in the case of the *Longman* warning, because it may also be required to be given even where there is significant corroboration of the complainant's allegations and also because this warning operates as an irrebuttable presumption of law (see further below at 2.2). The form of the warning is also problematic in this regard. The requirement to warn the jury that it is 'dangerous to convict', as noted by Wood CJ at CL in *BWT*, may be treated by juries as an encoded message to acquit even though the intention is only to alert juries to the need to scrutinise the complainant's evidence carefully. His Honour said:

> … any direction, framed in terms of it being "dangerous or unsafe" to convict, risks being perceived as a not too subtle encouragement by the trial judge to acquit, whereas what in truth the jury is being asked to do is to scrutinize the evidence with great care.

[60] Victorian Law Reform Commission, *Sexual Offences: Law and Procedure, Final Report,* Melbourne, 2004, at para 7.90.
[61] Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *report on Child Sexual Assault Prosecutions* Report No 22 (2002) para 4.176.
[62] The Law Reform Commission, *Equality Before the Law: Women's Equality*, report No 69, 1994.
[63] See also comments on this matter by Wood CJ at CL in "Complaint and Medical Examination Evidence in Sexual Assault Trials" (2003) 15 (8) *Judicial Officers' Bulletin,* 63 and by Ormiston JA in *R v Mazzolini* [1999] VSCA 150.

2.1.19 Inevitably, a suggestion that it is 'dangerous to convict' on the complainant's unsupported testimony must cast her or him as an unreliable witness and, given the mandatory nature of the warning, must cast all complainants who delay in making complaint, as unreliable.

2.1.20 It has now long been recognised that lack of proximate complaint by sexual assault complainants has little real bearing on the genuineness of the allegations made.[64] Therefore, the High Court decisions in *Crofts* and *Longman* because they purport to be based upon the collective experience of the courts suggest that such collective experience is a faulty base on which to assess issues of credibility. Accordingly they run the risk of bringing that collective experience into disrepute.

2.1.21 While it is acknowledged that the central intentions of the *Longman* and *Crofts* warnings are the achievement of fair trials and a fair balance between the interests of accused and complainants in the conduct of trials, they have been criticised as striking that balance too much in favour of the accused.[65]

2.1.22 The principal circumstance identified by the High Court as giving rise to the need for the warning in *Longman* was the substantial delay between the occurrence of the offences and their reporting and hence prosecution. However, other matters were identified by McHugh J and Deane J as warranting the giving of a warning. McHugh J held that the judge should have cautioned the jury regarding the complainant's hostility towards the accused. In fact the complainant's evidence was not that she was hostile in a general sense towards the accused but that she hated him because of what he had done to her. She said, 'I hate him for what he did to me'. Deane J further relied upon the fact that the sexual contact was non-violent, that the complainant had been only six years old at the time of the alleged offences and that she had been woken from sleep on each occasion. He pointed to the possibility that she had been fantasising and the difficulty that she may have had in distinguishing fact from fantasy. None of these matters can justify the giving of a warning. In fact they reflect discredited common law stereotypes about sexual assault and sexual assault complainants – that 'real rape' involves violence (apart from the sexual offence itself); that children are inherently untrustworthy witnesses and that they may fantasise about sex. It is absurd to suggest that children of six would fantasise about sex or have difficulty in knowing the reality of a sexual assault upon them. Our knowledge of sexual assaults perpetrated upon children clearly shows that neither the age of the complainant nor the 'non-violent' circumstances of the offence provide a proper foundation in themselves for an inference of unreliability. Prejudice to the accused arising from a long delay in the prosecution of the offence is of an altogether different order to such matters. While these additional matters rest upon discredited assumptions and prejudices, logic tells us that lengthy delay is capable, in many cases, of impacting adversely upon an accused's ability to challenge the Crown case. Nevertheless, delay may not always have this effect and the irrebuttable presumption that it does so is problematic.

[64] See discussion at para 1.1.3.

[65] (Justice) James Wood in "Complaint and Medical Examination Evidence in Sexual Assault Trials" (2003) 15(8) *Judicial Officers' Bulletin* 63 suggested that where there is not a 'firm basis' for suggesting that delay in complaint has actually affected the complainant's credibility, the *Crofts* direction may tip the balance too far in favour of the accused. See also Victorian Law Reform Commission (2004) *Sexual Offences: Law and Procedure, Final Report.*

2.2 Longman Warning as an Irrebuttable Presumption of Law

2.2.1 The effect of the decision in *Longman*, as interpreted in *Crampton* and *Doggett*, is also controversial and problematic because it creates an irrebuttable presumption that the accused has been prejudiced by the complainant's delay in making a complaint. Wood CJ at CL in *BWT* explained this matter:

> [13] [His Honour began by quoting from the relevant passages in *Doggett*, *Crampton* and *Longman* then continued:]These passages have been taken up, so it seems to me, as requiring that an instruction in equally positive terms, be given in every case involving a substantial delay, irrespective of whether or not there is any evidence, or basis beyond suspicion, that the absence of contemporaneity between the alleged offence and complaint, or trial has *in fact* **(not "might have")** denied to the accused a proper opportunity to meet the charge or charges brought: see for example *R v Roddom*[2001] NSWCCA 168, *R v GJH* [2001] NSWCCA 128 and *R v Roberts* [2001] NSWCCA 163.
>
> [14] Put another way, the effect of these decisions has been to give rise to an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainant's evidence; and that, as a consequence, the jury must be given a warning to that effect irrespective of whether or not the accused was in fact prejudiced in this way.
>
> [15] The difficulty which I have with this proposition is that it elevates the presumption of innocence, which must be preserved at all costs, to an assumption that the accused was *in fact* innocent, and that he or she might have called relevant evidence, or cross examined the complainant in a way that would have rebutted the prosecution case, had there been a contemporaneity between the alleged offence and the complaint or charge. That consideration loses all of its force if, in fact, the accused *did commit* the offence. In that event there would have been no evidence available of a positive kind, relating for example to the existence or ownership of the premises, or of a motor vehicle or other item, associated with the offence charged, or going to establish an alibi for the relevant occasion, no matter how contemporaneous the complaint or charge was with the offence. …

2.2.2 While it is acknowledged that delay in making a complaint can disadvantage many accused in preparing their defence, where there has been no such disadvantage, or where no specific disadvantage can be indicated, application of the *Longman* warning is irrational. It is therefore preferable that the circumstances where a *Longman* warning must be given should be limited to situations where an accused can show a specific disadvantage caused by the delay, rather than a hypothetical, presumptive disadvantage.

2.2.3 In summary, the case for reform resides in the complexity, uncertainty and unsound basis of the current law constituted by the *Crofts* and *Longman* warnings, in their operative impact in resurrecting false stereotypes about complainants in sexual offences cases and, in the case of the *Longman* warning, in its likely interpretation as an instruction to acquit. The Institute is therefore of the preliminary view that the law relating to the warnings required to be given to juries in sexual offences cases relating to delay in complaint should be reformed.

Question

1. Do you agree that the law relating to the warnings required to be given to juries in sexual offences cases relating to delay in complaint is in need of reform?

Part 3
Options for Reform

Repeal of s 165(5)?

3.1.1 Because the *Longman* and *Crofts* warnings apply in Tasmanian proceedings principally by virtue of s 165(5) *Evidence Act* (Tas) which preserves the power of the trial judge to give common law warnings, a possible option for reform is to repeal this provision. The aim of this reform would be to encourage trial judges to give warnings in accordance with s 165(1), (2), (3) and (4) rather than in accordance with the common law under s 165(5). This reform would not proscribe a warning being given to the jury in cases where there is substantial delay in complaint. The trial judge would retain the power to warn under s 165(1) of the Act on the basis that the evidence of the complainant "is of a kind" that falls within that section. However, two primary benefits may be gained from encouraging trial judges to apply s 165(1), (2) and (3) rather than the common law. First, subsection (2) makes the giving of a warning conditional on the request of a party. It may, therefore, preclude a party from deploying the strategy of not requesting a warning for tactical reasons, then subsequently lodging an appeal on the basis that no warning was given. Second, the warning under subsection (2) is not formulated as a 'dangerous to convict' warning. Instead it requires the trial judge to warn the jury that the evidence may be unreliable, to inform the jury of the reasons why it may be unreliable and to warn of the need for caution in accepting the evidence and determining what weight to assign to it. A warning formulated in this way may be less likely to be perceived as a coded direction to acquit. Finally, subsection (3) enables a trial judge to decline to give a warning where there are good reasons for not doing so.

3.1.2 The fair trial imperative, which might in some cases be seen to justify the giving of a warning irrespective of request, could be accommodated by inserting in s 165 a subsection akin to s 132 of the Act. This subsection would require the trial judge to alert a party to the affect of s 165(1) and (2) where that party may have grounds for requesting that a warning be given. It might provide, for example:

> If it appears to the court that a party may have grounds for requesting a warning under this section, the Court must satisfy itself (if there is a jury, in the absence of the jury) that the party is aware of the right to request such a warning.

3.1.3 Section 165(5) is based on recommendations made by The Australian Law Reform Commission in ALRC Interim Report No 26 and Evidence, Report No 38, 1987. These recommendations were made prior to the High Court decisions in *Longman* and *Crofts*, at the time when sexual assault prosecutions relating to children (at the time of the assault) were relatively infrequent and when the escalation in the complexity and number of judicial warnings was yet to occur. Consequently, the inclusion of s 165(5) at that time did not carry with it the practical judicial burden that its application now requires. Further, the ALRC draft Evidence Bill (1987) reflected now discredited perceptions of sexual assault complainants. For example, the draft Bill's equivalent of s 165(1) listed as a class of unreliable witness, victims of alleged sexual offences in proceedings relating to those offences (see clause 140(1)(e) of the Bill). The past 15 years has provided much prosecution and trial experience of both children and adults as victims of sexual assault and has enhanced understandings of both child and adult complainants in sexual assault proceedings. To some extent this

enhanced understanding gained a foothold in the uniform evidence legislation enacted in 1995 in New South Wales and the Commonwealth and in 2001 in Tasmania – sexual assault complainants were not listed in s 165(1) as a class of unreliable witness. Nevertheless, dated and inappropriate attitudes towards sexual assault complainants persist and apply under the legislation by virtue of s 165(5).

3.1.4 However, while repeal of s 165(5) is a step in the right direction, it will not be a sufficient reform. This is because neither s 164, (which abolishes corroboration requirements), nor the remaining subsections of s 165, prohibit the giving of common law warnings or limit the giving of warnings about the reliability of evidence to warnings given in accordance with s 165. Further, s 9 of the *Evidence Act* provides that the Act does not affect the operation of a principle or rule of common law or equity, except so far as the Act provides otherwise expressly or by necessary intendment. Accordingly, the *Longman* and *Crofts* doctrines may continue to apply by virtue of a trial judge's obligation to ensure a fair trial for the accused. Therefore, it is suggested that further reform should be enacted expressly limiting the application of *Longman* and *Crofts.*

Question

2. Should subsection 165(5) of the Evidence Act be repealed?

Longman Warning

3.1.5 The Victorian Law Reform Commission has also been critical of the *Longman* direction. It has recommended that the law be reformed to restrict the giving of the warning to situations where the trial judge is satisfied that certain specific circumstances exist, namely, there is evidence that the accused has suffered an identifiable forensic disadvantage as a result of the delay in complaint or there is evidence that the accused has been prejudiced in some other way as a result of other circumstances. The Commission has also recommended reform of the requirement to couch the warning in the terms, 'dangerous to convict'. Its recommendations are:[66]

> " …(1)(c) The judge must not warn, or suggest in any way to the jury that it is dangerous to convict the accused, unless satisfied that:
>
> (i) there is evidence that the accused has in fact suffered some specific forensic disadvantage due to a substantial delay in reporting; or
>
> (ii) there is evidence that the accused has in fact been prejudiced as a result of other circumstances in the particular case.
>
> (d) If the judge is satisfied in accordance with subsection (c) that a jury warning is required, the judge may warn the jury in terms she or he thinks appropriate having regard to the circumstances of the particular case.
>
> (e) In giving a jury warning pursuant to subsection (d), it is not necessary for the judge to use the words 'dangerous or unsafe to convict'."

3.1.6 It is questionable whether the recommended Victorian reform will actually achieve its legislative intent and displace the requirement to give a *Longman* warning. It may still permit

[66] Victorian Law Reform Commission (2004) *Sexual Offences: Law and Procedure, Final Report*, paras 7.122 – 7.132.

continued operation of *Longman* in its existing form. Reform in this area may need to take a more mandatory or prescriptive form. For example, subsection (1)(e) does not proscribe the use of the dangerous to convict formulation. It just provides that use of that formulation is not necessary. This potentially leaves room for trial judges to continue to employ the dangerous to convict formulation and it may be that they will adhere to this formulation in order to avoid appeal. The cases to date demonstrate a clear trend on the part of trial judges to "retreat to the safety" of issuing *Longman* warnings whether truly warranted or not in order to insulate their jury directions against appeal. Similarly, the removal of the requirement to give a dangerous to convict warning as formulated in subsection (1)(c)(i) and (ii) may be inadequate. These provisions permit a *Longman* warning where there is evidence of some specific forensic disadvantage suffered by the accused or where there is evidence that the accused has in fact been prejudiced as a result of other circumstances. The reasoning in *Longman, Crampton* and *Doggett* was that an accused has necessarily suffered a forensic disadvantage by reason of the delay. In other words, the fact of delay is seen as a sufficient factual foundation for giving of a warning. It is possible that the same reasoning could be read into the proposed Victorian reforms. Judges may, therefore, view these reforms as not providing a sufficiently express, clear or mandated exclusion of *Longman* to justify their departure from it. What may be required to displace the irrebuttable presumption created by *Longman* is a clear statement that no such presumption is to be applied and that a warning in the *Longman* terms is only to be given where the existence of a specific forensic disadvantage is established on the balance of probabilities, that disadvantage not being established by the mere fact of delay. Alternatively, the reform may take the form of permitting a warning only where there are exceptional circumstances, and that delay alone will not establish those exceptional circumstances.

Questions

3. Do you consider that the recommended Victorian reform will actually achieve its legislative intent and displace the requirement to give a *Longman* warning in all cases?
4. Would you support the introduction to the *Evidence Act* of: (a) a clear statement that no presumption is to be applied that delay alone in complaint has disadvantaged the accused; and (b) that a warning in the *Longman* terms is only to be given where the existence of a specific forensic disadvantage is established on the balance of probabilities, a disadvantage that is not established by the mere fact of delay?
5. Alternatively, would you support permitting a *Longman* warning only where there are exceptional circumstances, and that delay alone will not establish those exceptional circumstances?

Crofts Warning

3.1.7 The Victorian Law Reform Commission has recommended amendment of s 61 *Crimes Act* 1958 (Vic), (the Victorian equivalent of s 371A *Criminal Code* (Tas)), to restrict the *Crofts* warning to cases where there is evidence to show that delay in complaint actually does have implications for the complainant's credibility:

> Section 61 of the Crimes 1958 should be amended as follows:
>
> (1) on a trial of a person for an offence under Crimes Act 1958 Part 1, Division (8A), (8b), (8c), (8D) or (8E) …

> (a)The Judge must not warn, or suggest in any way to, the jury that the law regards complainants in sexual offences cases as an unreliable class of witness: and
>
> (b) (i) If evidence is given or a question is asked of a witness or a statement is made in the course of an address on evidence which tends to suggest that there is delay in making a complaint about the alleged offence by the person against whom the offence is alleged to have been committed, the judge must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it.
>
> (ii) The judge must not state, or suggest in any way to the jury that the credibility of a complainant is affected by delay in reporting a sexual assault unless satisfied that there exists sufficient evidence in the particular case to justify such a warning. …
>
> (2) Subject to s 61(1)(b)(ii), (c), (d) and (e), nothing in subsection (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice.
>
> (3) Despite subsection (2), a judge must not make any comment on the reliability of evidence given by the complainant in a proceeding to which subsection (1) applies if there is no reason to do so in the particular proceeding in order to ensure a fair trial.

3.1.8 It is questionable whether this provision will displace *Crofts.* The decision in that case was premised upon the assumption that the balancing direction it mandates is necessitated by the particular circumstances of the instant case, not by considerations at large. It may be that the Victorian amendments could be interpreted as simply enacting *Crofts* because they make provision for the trial judge to warn where he or she is "satisfied that there exists sufficient evidence in the particular case to justify such a warning". The facts in *Crofts* itself, as viewed by the High Court, arguably satisfy this condition.

3.1.9 In Queensland, the decision in *Crofts* has been overridden by s 4A(4) *Criminal Law (Sexual Offences) Act 1978* (Qld). This provides:

> If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary complaint or other complaint.

A "preliminary complaint" is defined as a complaint other than the complainant's first formal witness statement to a police officer given in, or in anticipation of criminal proceedings or a complaint made after such a complaint.

3.1.10 The effect of section 4A(4) has not to date received significant judicial interpretation. Consequently, it is not known whether it precludes a trial judge from making any comment at all on the issue of delayed complaint. The legislation does not prevent the defence from attempting to undermine the credibility of the complainant's account by cross-examining her or him about delayed complaint or by addressing the jury in these terms. Where this occurs, the question will be whether s 4A(4) *Criminal Law (Sexual Offences) Act 1978* (Qld) prevents a trial judge from making any comments on this tactic and the assumptions that underlie it. Section 4A(5) provides that, subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.

3.1.11 Section 4A(4) appears to be stronger than the reform recommended by the Victorian Law Reform Commission because it does not contain any 'let out' clause along the lines of the Victorian model. The major weakness of the Queensland legislation is that it does not *require* the trial judge give any counterintuitive directions to the jury about the implications of delayed complaint for the trustworthiness of the complainant's account where the defence has made this an issue in the case.

3.1.12 Given the research findings that delay in or failure to make complaint is normal, is, in fact, the rule rather than the exception, that it is what happens in the vast majority of sexual assault cases, logically it will only be in exceptional circumstances that lack of proximate complaint can have any genuine implications for the truthfulness of the complainant's account. Therefore, it is suggested that s 371A of the *Code* should be amended to reflect this fact and to preclude the trial judge from suggesting or warning that absence of proximate complaint may reflect on the creditworthiness of the complainant's account except in exceptional circumstances. Exceptional circumstances should require it to be shown on the balance of probabilities that the delay in complaint can be ascribed to fabrication of the allegations of sexual assault or that it has a genuine and identifiable connection, apart from the mere fact of delay, to the complainant's credibility.

Questions

6. Do you support the Institute's preliminary proposal that s 371A of the *Code* be amended to preclude trial judges in sexual offences cases from suggesting or warning that absence of proximate complaint may reflect on the creditworthiness of the complainant's account unless there are exceptional circumstances? Namely, (a) where it is shown on the balance of probabilities that the delay in complaint can be ascribed to fabrication of the allegations of sexual assault; or (b) delay has a genuine and identifiable connection, apart from the mere fact of delay, to the complainant's credibility?
7. Do you prefer the VLRC's recommendations or reform based on s 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld)?