MEDIA RELEASE

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TASMANIA LAW REFORM INSTITUTE

UNIVERSITY OF TASMANIA

ATTENTION: Chiefs of Staff, News Directors

Today the Tasmania Law Reform Institute released its Final Report No 8:

Warnings in Sexual Offences Cases Relating to Delay in Complaint.

This Report makes three recommendations that will change the warnings/directions that trial judges are permitted to give to juries in sexual offences cases about victims' delay in making complaint.

In all trials, judges are required to comment on or warn juries about the reliability of certain types of evidence. This happens in relation to types of evidence which the experience of courts has found to be less reliable than the average juror might be expected be aware of. The main common law directions/warnings to be given in sexual offences trials that relate to delay in complaint 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 in cases of substantial delay in complaint and which is to be given 'whenever it is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case'; and

2. The *Crofts* direction which requires the trial judge to give a 'balancing direction' to the direction required by s 371A *Criminal Code* (Tas) that delayed complaint does not indicate that the complainant had fabricated the allegations. The *Crofts* direction requires the trial judge to inform the jury that delay in complaining may affect the credibility of the complainant's account.

The recommendations contained in the Report limit the circumstances in which a *Longman* warning may be given. The Institute recommends that the *Evidence Act* should be reformed to accommodate two different situations: (a) that where specific evidence is adduced at trial of an identified forensic disadvantage suffered by the accused as a result of delay (eg where a potential alibi witness has died or is too ill to testify); (b) the situation where there is no specific evidence of an identifiable forensic disadvantage to the accused.

The Report also recommends that trial judges should be expressly prohibited from giving a *Crofts* direction.

The Institute's recommendations reflect the recognition that the directions:

- are potentially highly confusing for juries;
- appear to resurrect outmoded views about the unreliability of complainants in sexual offences cases;
- are unfairly prejudicial to the Crown case; and
- are discriminatory and potentially productive of injustice for complainants in sexual offences cases.

Information Released by:
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Historically, the common law 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.

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. It also runs counter to modern understandings of the behaviour of sexual assault complainants. 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. 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. The same research indicates that there are powerful reasons that 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 result in non-reporting.

The courts have, by and large, been slow to acknowledge the varying 'normal' responses of victims to sexual crimes. 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.

However, the effectiveness of these legislative reforms has been eroded by subsequent judicial interpretation and developments in the common law, particularly in the High Court cases of *Longman* and *Crofts*.

This topic is relevant to other Australian jurisdictions, in particular those where the Uniform Evidence Legislation is in operation (NSW, the ACT) or its introduction is being considered (Vic).

FURTHER INFORMATION/INTERVIEWS: Terese Henning 6226 2079

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The Report can be downloaded from www.law.utas.edu.au/reform/

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