

MEDIA RELEASE

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TASMANIA
LAW REFORM
INSTITUTE



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ATTENTION: Chiefs of Staff, News Directors

Today the Tasmania Law Reform Institute released its Issues Paper No 8:

Warnings in Sexual Offences Cases Relating to Delay in Complaint.

The Paper considers the need for further reforms to the law of evidence in sexual offences cases. Specifically, the Institute examines the need for changes to directions that trial judges give to juries in sexual offences cases about victims' delay in making complaint. The Institute suggests that the current law in this area relies on outmoded, inaccurate views of so-called 'normal' behaviour of victims of sexual offences. The law has also resurrected inappropriate stereotypes of sexual assault complainants as unreliable witnesses and in doing so has undermined legislative reforms enacted to displace these stereotypes. The Institute also suggests that the law in this area is uncertain and confusing, that it creates a minefield for trial judges and requires extensive, complicated and sometimes contradictory directions to be given to juries. The current law has been the subject of critical comment for some time by members of the judiciary, commentators and other law reform bodies.

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 to be aware of.

Historically, 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. Therefore when there was no complaint, or a delay in making a complaint, it was considered to impact unfavourably upon the credibility of the complainant's account and suggested that the allegations made were fabricated. Relying on these views, the High Court in 1973 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).

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 reforms has been eroded by subsequent judicial interpretation and developments in the common law, particularly in the High Court cases of *Longman* and *Crofts*. These decisions have been criticised for creating mandatory directions that:

- 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.

Further, concern has been expressed in a number of cases that the multitude and nature of the warnings required in sexual assault cases makes it unnecessarily difficult for trial judges to instruct a jury in such a way as to ensure that there is no basis for appeal.

The issues paper considers options for addressing these problems.

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).

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.

The Institute invites responses to the Issues Paper by 23 July 2005.

FURTHER INFORMATION/INTERVIEWS: Terese Henning 6226 2079

Terese Henning is a Senior Lecturer in the Faculty of Law, and a member of the Institute's Board.

The Report can be downloaded from www.law.utas.edu.au/reform/
Tasmania Law Reform Institute
Private Bag 89, Hobart, TAS 7001
phone (03) 6226 2069 fax: (03) 6226 7623
law.reform@utas.edu.au