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**Tasmania Law Reform Institute. Issues Paper No. 8, 2005**  
***Warnings in sexual offences cases relating to delay in complaint***

Thank you for inviting Women Tasmania to comment on the above Issues Paper. The *Report of the Task Force on Sexual Assault and Rape in Tasmania* 1998 was a major step forward in developing better responses to sexual assault victims in Tasmania and resulted in a number of much needed reforms.

However, victims of sexual assault are still the least likely of all victims of crime to report to police. For those that do report sexual assault and proceed to prosecution the experience is often a traumatic one. Victims of sexual assault who do report the crime often delay in reporting, causing them to be viewed as unreliable witnesses.

Any legislative reform that encourages sexual assault victims to come forward and report the crime to police and proceed to prosecution is a positive step forward for these most vulnerable victims.

Yours sincerely

Wanda Buza  
**DIRECTOR**

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Submission to:

Tasmania Law Reform Institute

*Warnings in sexual offences cases relating to delay in complaint*  
Issues Paper No. 8, June 2005

Q.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? - **YES**

As noted in your Issues Paper, *Warnings in sexual offences cases relating to delay in complaint*, Tasmania has enacted legislation requiring trial judges to inform juries that delay in or failure to complain in sexual assault cases is not necessarily indicative of fabrication. The reform, designed to eliminate unwarranted misconceptions about the unreliability of the evidence of sexual assault complainants who may not report a sexual assault crime immediately (for numerous reasons) becomes undermined if the presiding judge also chooses to issue a *Longman* warning or *Crofts* direction. The *Longman* warning, particularly, carries the contrary warning to the jury that (a) because of the passage of time the evidence of the complainant cannot be adequately tested and (b) that it would be, therefore, dangerous to convict on that evidence alone.

Juries are given conflicting messages by the presiding judge that may result in confusion for the jurors as to the veracity of the victim's evidence when trying to arrive at a verdict.

The delay by complainants in reporting sexual offences may occur for a number reasons. This is acknowledged in the *Criminal Code Act 1924* s371A by the provision that the judge shall "inform the jury that there may be good reasons why such a person may hesitate in making, or may refrain from making, a complaint." These reasons include<sup>1</sup>:

- Shame and/or embarrassment
- Not wanting family or others to know
- Fear of reprisal by assailant
- Self blame or blamed by others for the attack
- Desire to protect offender, relationship or children
- Fear of not being believed
- Fear of being treated hostilely by police or other parts of the justice system
- Lack of proof that the incident happened
- Not knowing how to report the incident [particularly in the case of victims with cognitive impairment].

The issue of delay in complaint was cited as a comment on the issue of consent in the *Report of the Task Force on Sexual Assault and Rape in Tasmania*:

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<sup>1</sup> Australian Institute of Criminology for the Commonwealth Office for the Status of Women, *Non-reporting and hidden recording of sexual assault: an international literature review*, 2003

Many women find that their consent to sexual intercourse is judged on extraneous factors such as where she was at the time of the assault; previous consent to intercourse; lack of physical struggle; **the time taken until reporting**; the victim's demeanour afterwards.<sup>2</sup>

If a sexual assault case goes to trial, delay in reporting the assault by the complainant may be viewed with suspicion. Traditional suspicions and beliefs about sexual assault complainants fabricating the assault are raised. As we have stated above, there are a number of reasons why a sexual assault victim may delay in making a complaint.

In the case of child victims of sexual assault substantial delays in reporting may, and often do, occur. The *Report of the Task Force on Sexual Assault and Rape in Tasmania* gives insight into the obstacles for a child victim of sexual assault to have their report prosecuted successfully:<sup>3</sup>

- In child sexual assault cases the child is often the victim of abuse by a family member and it is hard for them to 'tell on' a trusted adult on whom they may be dependent.
- Children are confused by court procedures.
- A further difficulty is the status of their evidence. The law has traditionally cast doubt on the reliability of children's accounts of events.
- Cross-examination is particularly difficult for child witnesses. Repetitive and challenging questioning may indicate to them that their credibility is being questioned. Research has demonstrated that children are particularly stressed by accusations that they are lying.
- If the accused is acquitted, the child may believe that others thought they were lying or that they were to blame not the offender. Failure of the case on technical grounds may be difficult to explain to the child.

Increasingly, incidents of sexual assault that may have occurred in a victim's childhood are being brought to trial when the victims reach adulthood. However, the delay in reporting works against them if doubts are raised by the presiding judge about the reliability of their evidence, because there has been a delay in reporting.

The most recent example of large scale delayed reporting of sexual assault crimes has been the investigation by the Tasmanian Ombudsman, which resulted in the report, *Review of claims of abuse from adults in state care as children*, 2004. This report revealed 192 allegations of sexual assault, 24% of the total of claims. A number of these were not reported at the time the assault took place, with those that were reported recorded on individual's files. The Ombudsman noted that in most cases it is recorded that no charges were laid as a result of the complaints at the time they were initially reported. At the time of the review eight cases, previously reported and dismissed, had been referred to police for prosecution.

In her forward the Ombudsman made the following statement:

I knew that it would be a difficult and daunting task. I had no idea how difficult and complex it would be, nor how long it would take. We learnt very quickly

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<sup>2</sup> Tasmania. Task Force on Sexual Assault and Rape in Tasmania, *Report of the Task Force on Sexual Assault and Rape in Tasmania*, 1998, p.29

<sup>3</sup> Tasmania. Task Force on Sexual Assault and Rape in Tasmania, p.35

that uncovering people's lives to expose secret, painful memories that had lain hidden for 30, 40 and 50 years was not a task that could be rushed. Many of the adults who came forward confessed that they had never told anyone of their childhood experiences. Others who had told someone in authority are still bitter that they were not listened to, or were not believed.<sup>4</sup>

This is a clear, and rather tragic, example that substantial delays in reporting sexual assault may occur for a number of legitimate reasons.

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<sup>4</sup> Tasmanian Ombudsman, *Listen to the Children: Review of claims of abuse from adults in state care as children*, 2004

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

While ultimately it is the jury who makes the decision of guilt or innocence in a trial, the trial judge does influence the jury by giving common law directions and warnings. Section 165(5) of the *Evidence Act* retains the common law directions and warnings a judge may give, including the *Longman* warning and the *Crofts* direction.

Both the *Longman* warning and *Crofts* direction specifically target the delay in making an early statement as a reason for the jury to question the validity of the complaint. As you note in part 3 of your Issues Paper, *Options for Reform*, trial judges have a number of opportunities to give warnings to the jury if they believe this is necessary. As you state, if s 165(5) is repealed trial judges are still able to give warnings to the jury in accordance with s 165(1), (2), (3) and (4). Women Tasmania does not believe the repeal of subsection 165(5) would interfere in any way with the fair trial imperative.

It is also noted in part 2 of your Issues Paper, *The Need for Reform*, that there is a degree of confusion about when it is appropriate for a judge to issue a direction, or warning to the jury. It is disturbing to note that some judges seem to think warnings should be issued as a matter of course to avoid the risk of an appeal. Women Tasmania believes this approach would mean that at each trial where there has been delayed reporting of a sexual assault the reliability of the witness is called into question by the judge, perpetuating the myth that sexual assault complainants are unreliable witnesses.

Q.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? **NO**

The Victorian Law Reform Commission<sup>5</sup> points out that under current Victorian legislation, judges must warn juries it may be 'dangerous or unsafe to convict' the accused on the basis of the complainant's evidence alone if there has been a long delay between the alleged assault taking place and when it is reported (*Longman* warning). The Commission report points out that delays are typical in many sexual offence cases, and recommends that judges only give this warning when the accused has suffered a specific disadvantage because of the delay.

The Commission also recommends judges no longer routinely warn juries that a delay in reporting reflects badly on the credibility of the complainant. A warning of this kind should only be given if there is evidence in the case which justifies doing so.

These recommendations still leave the decision to issue a *Longman* warning to the discretion of the presiding judge.

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<sup>5</sup> Victorian Law Reform Commission, *Sexual Offences Final Report: Summary and Recommendations in Plain English*, 2004, p.6

Q.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 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? **YES**

Q.5 Alternatively, would you support permitting a *Longman* warning only where there are exceptional circumstances, and that delay alone will establish those exceptional circumstances? **NO**

Q.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 on 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? **YES**

Q.7 Do you prefer the VLRC's recommendations or reform based on s 4A(4) of the *Criminal Law (Sexual Offences) Act 1978 (Qld)*?

The *Criminal Law (Sexual Offences) Act 1978 (Qld)* s 4A (4) gives a very clear direction to judges that:

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 or other complaint.

However, s 4A (5) allows comment by the presiding judge 'Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that is appropriate to make in the interests of justice' on any aspect of the complainant's evidence which may be of concern. This seems to indicate comment on the issue of delayed complaint is precluded.

As you point out in your Issues Paper, the Victorian Law Reform Commission's proposed reform still allows a judge to give a *Longman* warning when the judge believes the accused has suffered a specific disadvantage because of the delay in the complainant reporting. As such, the Queensland reform on the issue of delay in reporting sexual assault would be more desirable than the Victorian Law Reform Commission's.