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Professor K Warner - Director
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Dear Professor Warner

ISSUES PAPER No.8

I extend my thanks to the Institute for providing additional time within which to respond to Issues Paper No.8, which only came to attention after the initial date of response at well passed. The Institute has now confirmed that the Tasmanian Independent Bar will be provided with notice of the Issues Papers as they are released and I thank your office for that.

General Comment: Firstly, the reader of the paper could be forgiven for thinking that the case of *Longman v R* applies only in sexual offences trials, when that is not so. For an example of how the Longman direction was applied in a non-sexual setting, *Carr v R* (2000) 117 A Crim R 272; [2000] TASSC 183. By concentrating so heavily upon the argument that Tasmania needs law reform to stop the judges (of the Supreme Court of Tasmania, it must be inferred) reinstating *"by the back door"*, stereotypes about the unreliability of complainants in sexual offence cases the Institute ignores the broader application of the principles embodied in *Longman*.

Further, while objective evidence cannot *always* be presented to a Court in aid of the submission that substantial delay in complaint will *in fact* prejudice the trial for an accused person, it is most definitely *usually* the case. That is why the High Court attempted to re-balance the scales in these types of criminal trials. The reasons are obvious and are oft-stated by Courts dealing with issues of delay. It is axiomatic that justice delay is justice denied. Witnesses' and accused persons' memories fade. Evidence is lost or destroyed. Witnesses and accused are obviously unable to remember what may have been forgotten. Truth is often discovered through a fact of seemingly marginal relevance being placed into a factual matrix in such a way that there is a reasonable doubt as to guilt or that a hypothesis consistent with innocence cannot be excluded. It is often the case in trials relating to offending of some antiquity, that a great deal of detail cannot be recalled by witnesses and accused persons, but at the same time, the accused cannot point to a particular absent witness or to a particular line of inquiry that

time has washed away – but the prejudice is apparent nonetheless. This is why the Court's stamp needs to be given to warnings about delay. Without a warning such as is required by *Longman*, a verdict of guilty, conviction, and a sentence which in a sexual case will ordinarily deprive the citizen of his or her liberty can be brought in on an entirely unsatisfactory basis. It is submitted that the issues paper deals with issues surrounding prejudice caused by delay in a superficial manner, dismissing them as hypothetical or presumptive disadvantages, which most certainly ignores the practical problems faced by accused persons responding to allegations of some antiquity.

The issues paper provides a very long list of cases which are relied upon in support of a "need" for reform in Tasmania. Not one of the cases cited is a Tasmanian case. The practical, procedural and theoretical problems of which the issues paper makes so much, do not seem to have arisen in the Tasmanian context – at least by reference to the material which is accessible via the Tasmanian Supreme Court database on www.austlii.edu.au – or, it is submitted at all. As far as can be ascertained, no Tasmanian judicial officer has voiced any of the concerns which the issues paper reports as being expressed by the judges of the New South Wales and Victorian Supreme Courts; nor does the issues paper refer to any anecdotal evidence of such concerns being voiced within any Tasmanian context.

It is submitted that any suggestion by the Tasmania Law Reform Institute that *Longman* warnings given in this state are - or have ever been - interpreted by a jury as a coded instruction to acquit, proceeds in ignorance of the form of *Longman* warnings routinely given by Tasmanian trial judges. The alleged use of such 'code' bears no resemblance to any language used in any direction given by any judge in any trial which I have either observed or in which I have appeared within Tasmania. It is submitted that the suggestion to this effect, made at paragraph 2.2.3 of the issues paper, is unsustainable.

Lack of empirical support for Tasmanian Law Reform: The issues paper does not proceed with the benefit of any research or analysis of any empirical data or anecdotal evidence. It is submitted that the recommendations for reform in Tasmania are thereby premature and quite probably flawed.

There is no analysis of disadvantage which may be experienced by an accused person in relation to a criminal trial, whether relating to sexual of other offence, where delay has occurred between the date of the alleged offence and the trial. Until such analysis is conducted and, thereafter, discussed more broadly, it is submitted that suggestions for reform in Tasmania are entirely premature.

In Victoria, for instance, prior to recommending legislative amendment, the Victorian Law Reform Commission undertook qualitative empirical study in which it examined 24 judges' charges of an unknown number of sexual offence trials that took place between 2000 and 2002 in the County Court of Victoria. As a result of those findings, further research and consultation were conducted after which time recommendations were made. In the Victorian interim report there is

reference to Melanie Heenan's study involving 33 of an unknown number of trials actually observed, between 1996-1998 where 9 "dangerous to convict" warnings were given – 2 of which were, according to Heenan, given in the 'coded' form and 1 where the trial judge regrettably referred to *"the tide of community sentiment being unfairly skewed towards believing rape victims"* (we are not told whether these were the actual words used or whether or not this was one of the 2 'coded' warnings). In the absence of Tasmanian judicial comment lamenting the need for – and form of - the relevant warnings, to the effect that is reported from Victoria and New South Wales, research of this kind would, it is submitted, be necessary and invaluable prior to making meaningful recommendations about need for reform to the law in Tasmania. It is submitted that the decisions of the Tasmanian Court of Criminal Appeal are not too full of complaint about the 'practical judicial burden' which, the issues paper suggests, the *Longman* and *Crofts* warnings represent.

In relation to the Victorian legislation referred to in the issues paper, it is understood that the proposal (as set out in the Victorian Law Reform Commission's *'Sexual Offences'* final report), is that *Longman* and *Crofts* style warnings be restricted to situations where the judge is *"satisfied"* that there is sufficient evidence that the accused has in fact suffered some specific disadvantages as a result of the delay: (a) in reporting; or (b) for other reasons. The Victorian position seems a sensible enough response to the situation that the research found to exist in Victoria. However, it is submitted that for the purposes of the reform to the law in Tasmania, there is no warrant for there to be an *"exceptional circumstances*" test applied before the warnings should be given. It is not clear from the issues paper why the Tasmanian Institute prefers an *"exceptional circumstances"* test. Of course, there may not be any great difference between the position as per the Victorian final report and the position as expressed in issues paper, but it certainly seems as though the Tasmania Law Reform Institute uses language which puts the accused in the position of having to fight to overcome what is submitted to be the inevitable prejudice of delay. That prejudice is real. The High Court saw it as critical to protect an accused person from such prejudice in the *Longman* and *Crofts* decisions and in the decisions subsequent. To its great credit Tasmanian jurisprudence and practice seems to have developed in a way which has avoided the problems experienced in the other states which is the justification for the 'need' for reform as suggested by the issues paper.

For these reasons, the Tasmanian Independent Bar is of the view that there is no present need for reform to this area of the law in Tasmania.

Once again, I thank you for the opportunity to comment.

Yours faithfully,

MICHAEL DALY