25 July, 2005

Professor Kate Warner
Director
Tasmania Law Reform Institute
Private Bag 89
HOBART Tasmania 7001

Dear Professor Warner

WARNINGS IN SEXUAL OFFENCES CASES RELATING TO DELAY IN COMPLAINT

Thank you for inviting my comments on the Tasmania Law Reform Institute’s Issues Paper No. 8.

Subject to some reservations I set out below, I agree generally with the Paper’s thrust namely that the judicially imposed requirements of Crofts and Longman warnings need statutory modification. Indeed, in focussing only on sexual offences trials I believe the Paper is too narrow and the myriad warnings judges have decided juries need to be given all require reconsideration. I made this point in a paper I presented to the Heads of Prosecution Agencies of the Commonwealth in 2003. I commented on the encroachment of the jury’s function by the replacement of rules of evidence by judicial discretions, by the multiplicity of judicial warnings now required, and by the rule that in credibility issues a reasonable doubt felt by an appeal court is one a jury ought to have had and a conviction is thus unsafe and unsatisfactory where on appeal such doubt is felt. As to judicial warnings, I said:

"The traditional distinction of the roles of judge and jury in a criminal trial stresses that the judge is to direct the jury on the law but the jury are the “sole judges on the facts”. Model summings-up stress this separation of functions.

However, in modern times Australian courts have developed a body of law which places an obligation on the trial judge to warn the jury of the “dangers” of acting on certain evidence or to otherwise give strong direction to the jury on how it is to regard certain kinds of evidence, or how to go about its task. This obligation is apparently not seen either as creating a tension with the separation of roles, nor of being at odds
with the body of cases in which the possibility that the jury would be “overawed” by a judge expressing his views on the facts too strongly or in an unbalanced way (e.g. Broadhurst v R [1964]) results in the verdict being set aside.

The High Court of Australia has developed a requirement to warn far beyond the traditional “warnings” required such as the danger of convicting on the uncorroborated evidence of an accomplice.

In Bromley v R (1986) evidence against the accused had been given by a schizophrenic witness. The High Court held that where it “appears” (i.e. to the trial judge - or should have so appeared) that a witness whose evidence is important has some characteristic which may affect his capacity to give reliable evidence the jury should be given an appropriately tailored warning of the danger of convicting unless there was confirmation of that witness’s evidence.

In McKinney v R (1991) the High Court held that where there was evidence of a confession to police from a person involuntarily held in police custody, and the making of the confession was disputed and not “reliably corroborated” (i.e. not by the Police) there must be a warning given pointing to the danger involved in convicting on the basis of that evidence.

In Longman v R (1989) the High Court held (notwithstanding the statutory abolition of the requirement of corroboration of a complainant of sexual crime) that the uncorroborated evidence of a complainant of sexual crimes a long time ago ought to attract a judicial warning pointing out the danger of convicting in light of the loss by delay of the defendant’s means of testing the allegations.

The dangers of identification evidence require a warning - like the other warnings now required this must be given even if there had been a full canvassing in counsel’s addresses of the dangers and deficiencies in such evidence; what the jury has to have is a warning by the judge which adds “the weight of his authority to the need for caution” (Festa v The Queen (2001)).

The occasions upon which a warning might be held to have been required are many and varied, and have increased significantly in the last 20 or so years. The consequence of there being a failure to warn when the occasion is identified (by an appeal court) to have arisen is that a verdict will almost invariably be set aside as unsafe and unsatisfactory. This will occur whether or not the “danger” was fully argued to the jury by counsel - the jury will still apparently be presumed to be insufficiently aware of the “danger” without the judge pointing it out from on high.

The effect has been that appeals are routinely conducted with a complete focus on what the trial judge did or did not say as to the facts - not the law - for these warnings go to what the jury as fact finder is to do.

Reasonable verdicts clearly open on the evidence are thus liable to being set aside because it is assumed that without the benefit of (what should have been) the trial judge’s view about how certain witnesses or factual matrixes should be viewed and dealt with, the jury’s verdict has insufficient quality to stand. The judicial view of the facts is thus elevated in importance above that of the jury’s.”
My reservations about the Paper are these:

1. I do not believe it is accurate to transpose studies or estimates of non reporting to be evidence of delay in reporting - paragraph 1.1.3. They may well spring from different causes. Nevertheless, I would not argue against the conclusion that delay in reporting is not uncommon, for various and readily understandable reasons.

2. A reconsideration of the Crofts direction seems to me in fairness to invite a reconsideration of whether evidence of complaint in sexual cases ought to continued to be allowed. The explanation for allowing evidence of complaint in sexual cases (in non sexual cases such evidence is generally inadmissible as being self serving or self-corroborating) and the only use that can be made of it is that it evinces consistency of the conduct of the complainant with her account in the witness-box of the relevant events including her non-consent to the act of sexual intercourse – Jones v R (1997) 71 ALJR 538.

It seems illogical to say on the one hand that evidence of recent complaint is exceptionally admissible as it is consistent with lack of consent, but on the other hand to say that lateness of complaint is (at least) neutral or tends to prove nothing.

(I appreciate that the specialised law of recent complaint has been overtaken and extended by s 66 of the Evidence Act 2001, however it seems it still retains a role independent of that, particularly in its readiness to be led and allowed in sexual cases.)

3. I agree that the recommendation of the Victorian Law Reform Commission to ameliorate the Longman requirement is unlikely to achieve its aim. However, the imposition on the defendant of a burden of proof of exceptional circumstances or the loss of a specific forensic disadvantage before such a warning is given might set the bar too high the other way, particularly as the defendant usually bears no onus in a prosecution. Driving the accused to the witness-box, or having him or her adduce evidence and lose the right of last address to satisfy these tests might also be an unfair result.

It is one thing (and one I agree with) to seek to remove the mandatory and authoritarian nature of the “warnings”. It is quite another thing to seek to remove all mention of the observations behind them unless some onus is discharged by the defence. There will be cases where an accused person, usually through counsel, will wish to explore why a complaint was not
made earlier. There will be cases where a jury will be, reasonably, invited by the accused to consider the difficulties in defending an allegation of conduct in the distant past. Sometimes a point will be made which the trial judge thinks a good one and would wish to endorse, so long as comment is within Section 371(j) of the Criminal Code. It seems to me that the Paper's proposals, concentrating as they do placing evidentiary hurdles before warnings are given, might undesirably restrict fair argument or comment on issues arising from the evidence. What needs to be removed is the giving of judicial "warnings", not the ability of the parties or, where appropriate, the trial judge to put forward views or submissions arising from the evidence for the consideration of the jury. As with any comment on the facts it would have to be made plain that the facts are for the jury and it is free to accept or reject counsel or the Judge's views or observations.

Yours sincerely

T J Ellis SC
DIRECTOR OF PUBLIC PROSECUTIONS