ATTACHMENT C

Northern Territory Government

DEPARTMENT OF
THE ATTORNEY-GENERAL AND JUSTICE

Consultation Results Report

Consultation Report: Response to the High Court decision in Crofts: giving of directions during sexual assault trials regarding the timing of a complaint

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This report has been prepared for internal government discussion purposes only and any views expressed are not to be taken to represent the views of the Northern Territory Government, the Northern Territory Attorney-General and Minister for Justice or the Department of the Attorney-General and Justice.

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1. Introduction

In April 2007, the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse delivered its report entitled 'Ampe Akelyernemane Meke Mekarle' (Little Children are Sacred). In response to recommendation 30 of the report, the former Northern Territory Government reviewed court procedures for vulnerable witnesses and released the 'Closing the Gap of Indigenous Disadvantage – A Generational Plan of Action' Report. In June 2011, the former Department of Justice produced the Review of Vulnerable Witness Legislation Report setting out the findings and recommendations of the review[1].

Recommendation 8 of the Review of Vulnerable Witness Legislation Report recommended that amendment be made to the *Sexual Offences (Evidence and Procedure) Act* in response to the High Court's decision in Crofts v The Queen (1996) 186 CLR 427, to provide clear guidance as to the directions, if any, that should be given to the jury in relation to the timing of a sexual assault complaint.

The decision in Crofts v The Queen has received widespread criticism for being based on a premise which reflects discredited assumptions of the nature of sexual assault and the behaviour of sexual assault complainants. Prior to progressing recommendation 8, a consultation paper was prepared and consultation undertaken to determine the legal profession's view on the High Court decision and any potential amendment.

The purpose of this report is to outline the consultation process and feedback received and to make recommendations in relation to the progression of recommendation 8.

2. Summary of the issue

The issue is whether section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* should be amended so as to provide further guidance to judges as to the directions, if any, that should be given to the jury in relation to the timing of a sexual assault complaint.

3. Background

3.1 Vulnerable witness legislation

Vulnerable witness legislation is intended to minimise any harm that could be caused to a witness when giving evidence whilst balancing the interests of justice with the witness being able to give quality evidence.

In the Northern Territory, vulnerable witness protections are contained in the *Evidence Act*, the *Justices Act*, the *Sexual Offences (Evidence and Procedure) Act* and the *Domestic and Family Violence Act.*

[1] http://www.nt.gov.au/justice/documents/depart/review_of_vulnerable_witness_legislation.pdf

3.2 Role of the judge in jury trials

In jury trials, a judge has an overriding duty to ensure a fair trial. Included in this duty is the requirement to direct the jury as to the legal rules that it must apply to the evidence, including any legal limits on the use it may make of the evidence. Accordingly, the judge is required to give appropriate cautions where there is potential 'danger' in the jury acting upon particular evidence. These cautions are referred to interchangeably as directions or warnings. A direction is usually required in respect of legal matters in which the court is said to have 'special knowledge' not possessed by the members of the jury. In this regard, jury directions may assist in counteracting any misperceptions held by the jury regarding sexual assault.

3.3 *Sexual Offences (Evidence and Procedure) Act* - Kilby v the Queen

Section 4(5)(a) of the *Sexual Offences (Evidence and Procedure) Act* provides that a Judge in a sexual offence trial ***shall not*** suggest to the jury that it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards sexual assault complainants as an unreliable class of witness. In addition, section 4(5)(b) provides that, if evidence is elicited that suggests there was a delay in the making of a complaint about the alleged sexual offence, the Judge ***shall*** warn the jury that delay in complaining does not necessarily indicate the allegation is false (section 4(5)(b)(iv)). The Judge must also inform the jury that there may be good reasons why a victim may hesitate in making a complaint (section 4(5)(b)(v)). However, section 4(6) allows the Judge to retain discretion to make comment to the jury in relation to any matters, including those in section 4(5), if it is appropriate in the interests of justice.

The *Sexual Offences (Evidence and Procedure) Act* commenced on 1 January 1984, with the provisions of sections 4(5) and (6) drafted in response to the High Court decision in Kilby v The Queen (1973) 129 CLR 460. Similar legislation has been enacted in all jurisdictions across Australia.

In Kilby v The Queen, the High Court confirmed that, as a general rule, a jury should be given a direction that a delay or absence of complaint could be taken into consideration when assessing the credibility of a complainant. However, the Court was very clear to stress that a delay or absence of complaint is not evidence of consent.

3.4 Crofts v The Queen

In Crofts v The Queen (1996) 186 CLR 427, the High Court considered the Victorian equivalent of section 4(5)(b)(iv) and (v) of the *Sexual Offences (Evidence and Procedure) Act*. The Court held that a trial judge must warn a jury that substantial delay in complaint can be used to impugn the credibility of the complainant (known as the Crofts direction). Their Honours noted that the requirement to give a statutory direction and not a Kilby direction was unbalanced. As a result, when there is 'substantial delay' in making a complaint, the High Court held that a Kilby direction must be given in addition to the statutory warning. However, the court stated that jury direction need not be given where 'the peculiar facts of the case and the conduct of the trial do not suggest the need for a direction to restore the balance of fairness' (such as where explanation for the delay has been provided). In addition, their Honours indicated that the direction should not be expressed in terms that suggest a stereotyped view that sexual assault complainants, as a class, are

unreliable. The High Court noted that legislative provisions were designed to 'restore the balance' and rid the law of stereotypical notions about the unreliability of sexual assault complainants, however, they were not to immunise the complainants from critical comment where necessary in order to secure a fair trial for the accused.

The decision in Crofts v The Queen has been widely criticised for a number of reasons:

(a) it produced uncertainty about when a judge is to direct a jury;

(b) it requires judges to give competing and apparently contradictory statutory and common law directions; and

(c) it reinforces misconceptions regarding the nature of sexual assault and the behaviour of sexual assault complainants, which undermines the original purpose of the legislative provisions.

3.5 Australian legislative responses to Crofts v The Queen

In response to the High Court's decision, a number of other Australian jurisdictions have enacted or amended relevant legislation:

- Queensland enacted section 4A of the *Criminal Law (Sexual Offences) Act 1978* which prohibits a Judge from giving a Crofts direction. This legislation has, however, been criticised as it removes judicial discretion to make any comment about the delay of a complaint, even if delay is raised during the trial;

- Victoria amended section 61 of the *Crimes Act 1958* to provide that a judge must not warn the jury that the credibility of the complainant is affected by delay unless, on the application of the accused, the judge is satisfied there is sufficient evidence tending to suggest that the credibility of the complainant is so affected as to justify the giving of such a direction (section 61(1)(b)(ii)). There has been criticism that this provision could be interpreted as simply enacting the Crofts direction. However, the Victorian Law Reform Commission has noted that the provision simply acknowledges that there may be cases where the credibility of the complainant is affected by delay. The view is that rather than justifying a mandatory direction, the provision describes the circumstances in which a direction may be given and its content;

- section 34M(1) of the *Evidence Act 1929* (SA) was enacted to abolish the Crofts direction and provides that no suggestion or statement may be made to the jury that a delay in making a complaint is of probative value in relation to the complainant's credibility;

- section 294 of the *Criminal Procedure Act 1986* (NSW) provides for a jury direction if evidence of delay is raised during trial. Section 294(2) requires the trial judge to warn the jury that absence of complaint or delay does not necessarily indicate the allegation is false, and there may be good reasons why a victim may delay making a complaint. In addition, section 294(2)(c) provides that the judge must not warn the jury that delay is relevant to the complainant's credibility unless there is 'sufficient evidence' to justify such a warning. It has

been noted that the 'sufficient evidence' requirement may serve to prevent judges from indiscriminately giving the Crofts direction to 'appeal-proof' a matter; and

- although the Tasmania Law Reform Institute recommended that the *Criminal Code Act 1924* (Tas) be amended to prohibit judges from giving the Crofts direction[2], this has not been implemented.

It is clear from the above that the legislative responses to Crofts v The Queen are not uniform and no clear consensus about the best option for reform has emerged.

3.6 Australian Law Reform Commission recommendation

In its report entitled 'Family Violence – a National Legal Response'[3], the Australian Law Reform Commission highlighted that, in a criminal trial, the role of the jury is to determine facts, central to which is an assessment of the credibility of witnesses. Upon assessing the credibility of each witness, the jury will make a decision to accept or reject the witness's evidence. Credibility is, therefore, particularly important in sexual assault matters as the case ordinarily relies upon the complainant's word against that of the defendant. As the credibility of the complainant is a matter for the jury and not the Judge, the Australian Law Reform Commission noted that the issue of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury. Consequently, the Australian Law Reform Commission recommended that all Australian jurisdictions amend their relevant legislation to provide that:

(a) the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury;

(b) subject to paragraph (c), except for identifying the issue for the jury and the competing contentions of counsel, the judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so to ensure a fair trial; and

(c) if evidence is given, a question is asked or comment is made that tends to suggest that the victim either delayed making, or failed to make, a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence may delay or fail to make a complaint.

The advantages of this approach were noted to include:

- it better acknowledges the adversarial nature of the criminal trial process and is more consistent with the roles of judge and jury;
- it is consistent with the simplification of the law; and
- it overcomes the problem of juries having to understand and apply directions about delay which appear contradictory and which may suggest to the jury that the evidence of the complainant has no probative value.

[2] Tasmania Law Reform Institute; *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8; (2006); 33

[3] Australian Law Reform Commission; Family Violence – a National Legal Response; (2010); 161-162

4. Consultation

In response to recommendation 8 of the Review of Vulnerable Witness Legislation Report and due to the criticism and technical nature of Crofts v The Queen, a consultation paper was prepared in early 2013 by the Department of the Attorney-General and Justice (refer Attachment A). The consultation paper proposed that the Northern Territory implement the 2010 Australian Law Reform Commission Report recommendations.

The consultation paper was provided to the following identified stakeholders:

- Chief Justice, the Honourable Trevor Riley;
- former Chief Magistrate, Mrs Hilary Hannam;
- Children's Commissioner, Dr Howard Bath;
- Director of Public Prosecutions;
- Witness Assistance Service;
- Northern Territory Police, Fire and Emergency Service;
- Northern Territory Legal Aid Commission;
- Darwin Community Legal Service;
- Northern Territory Bar Association;
- Law Society Northern Territory;
- Criminal Lawyers Association of the Northern Territory;
- Central Australian Aboriginal Legal Aid Service;
- Top End Women's Legal Service;
- North Australian Aboriginal Justice Agency;
- Northern Territory Women's Lawyers Association;
- Katherine Women's Information and Legal Services;
- North Australian Aboriginal Family Violence Legal Service;
- Central Australian Women's Legal Service;
- Department of Correctional Services;
- Domestic Violence Legal Services (Alice Springs and Darwin); and
- Sexual Assault Network Darwin (C/- Ruby Gaea Darwin Centre Against Rape).

The paper was also released on the Department of the Attorney-General and Justice's website for a period of three months. Letters were sent to stakeholders in January 2013. Submissions were received from nine organisations, stakeholders and government departments[4]. A number of stakeholders that the Department contacted did not provide submissions but noted informally that they supported the proposal[5].

[4] Chief Justice, Children's Commissioner, the Director of Public Prosecutions, Northern Territory Legal Aid Commission, Criminal Lawyers Association of the Northern Territory, Top End Women's Legal Service, North

Set out below is a summary of the responses received in relation to the consultation.

5. Support for the proposed amendment to implement the Australian Law Reform Commission recommendations

5.1 Reasons for delay

A number of organisations with intimate knowledge of the psychology of victims outlined their support for the proposed amendments on the basis that, in order to dispel stereotypical notions, jurors needed to be advised that there may be very good reasons for a delay in making a complaint[6]. In this regard, it was noted that delay in reporting sexual abuse is well within the spectrum of expected responses of a victim and there may be many reasons for a delay in reporting sexual offences:

- a power imbalance in the relationship between the perpetrator and victim leading the victim to fear for their safety and reprisal from the perpetrator and the community;
- cultural dynamics or obligations;
- the maturity of the victim;
- feeling ashamed regarding the offence;
- historical distrust for authorities (particularly relevant in Aboriginal communities);
- lack of support;
- a fear that they may not be believed;
- as a result of the 'double bind' effect[7];
- unable to cope with the stress of reliving incidents and recounting events;
- may not be confident they were assaulted due to myths/commonly held beliefs in the community; and
- do not see any point in reporting the incident/s due to a perception regarding low sentencing rates.

Australian Aboriginal Justice Agency, Central Australian Women's Legal Service, Sexual Assault Network Darwin

[5] Northern Territory Police, Fire and Emergency Service; Department of Correctional Services

[6] Children's Commissioner, Central Australian Women's Legal Service, Top End Women's Legal Service, Sexual Assault Network Darwin, Director of Public Prosecutions

[7] The 'double bind' effect is based on the theory of betrayal trauma and occurs where a child is assaulted by an immediate/extended family member, or trusted authority figure (i.e. teacher, minister, coach). Their experience of being abused conflicts with their instinctive understanding that it is the role of these people to protect and nurture them. The effect also occurs where the assault conflicts with their family's values (i.e. if their family is extremely religious). As a result the child is placed in an impossible psychological bind so they have a psychological interest in refusing to recollect events.

Section 4(5)(a) of the *Sexual Offences (Evidence and Procedure) Act* already provides that a judge shall not make comment on the unreliability of the complainant's evidence simply because they are of a particular class of witness (i.e. sexual assault complainant) and section 4(5)(b) requires the Judge to advise the jury that delay does not necessarily indicate the allegation is false and that there may be good reasons why a victim may hesitate in making a complaint, if delay is raised during the trial. Both of these provisions already protect the complainant from stereotypical assumptions and ensure that the jury is aware there may be good reasons for delay.

5.2 Jury confusion created by Crofts direction

The Office of the Director of Public Prosecutions and the Central Australian Women's Legal Service raised concern with the potential of the Crofts direction to confuse the jury who may feel that they are receiving conflicting directions. It was submitted that, in accordance with the Crofts direction, the jury will be warned that there may be very good reasons for a delay, but then this direction is potentially offset by the requirement to further warn jurors that delay can be relevant to the credibility of the complainant. Accordingly, the operation of common law and statute was noted to be contradictory and confusing.

6. Opposition to the Australian Law Reform Commission recommendations

6.1 Impact on judicial discretion

A number of stakeholders[8] highlighted the importance of judicial discretion to an accused's right to a fair trial and, in this regard, noted that the operation of section 4(6) of the *Sexual Offences (Evidence and Procedure) Act* currently provides a 'safety clause' to ensure that judicial discretion is retained.

It was stressed that the fundamental role of a trial judge is to ensure that the defendant gets a fair trial and a trial judge should retain discretion to provide a direction to the jury regarding delayed complaint, if they consider it necessary, in the interests of justice. On this basis, stakeholders submitted that the Crofts direction should be preserved as it provided for a 'balancing' direction if the circumstances of a case required. The Chief Justice, however, noted that the reality, in the Northern Territory, is that the situation rarely arises where a 'Crofts direction' is required.

It was submitted that as the Australian Law Reform Commission proposal sought to relieve the trial judge of his duty and leave determination of how to deal with delay entirely with the jury, the conduct of the trial would be taken away from the judge and there would be a danger that the jury would embark on an unguided, improper reasoning process, which could be subject to bias, prejudice or confusion[9]. Further, in such a situation, the principle of open justice would be compromised as the defendant would not know the basis that the jury had approached any evidence of a delay[10]. Stakeholders submitted that the trial judge was in the best position to

[8] Chief Justice, Northern Territory Legal Aid Commission, Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency

[9] Criminal Lawyers Association of the Northern Territory, Top End Women's Legal Service, Central Australian Women's Legal Service, North Australian Aboriginal Justice Agency

[10] Criminal Lawyers Association of the Northern Territory

determine what justice required in order to balance the rights and interests of all parties[11].

In addition to stakeholders emphasising the importance of judicial discretion in preserving the defendant's rights, a number of parties who represented victims' rights also noted that removing judicial discretion, to apply a 'blanket' direction, was inappropriate and delay should not be treated the same in every case[12]. Particular attention was drawn to cases where 'evidence is given, a question is asked, or a comment is made that tends to suggest that the victim either delayed making, or failed to make a complaint' (as per recommendation (c) of the proposed reform), which it was noted may draw the jury's attention to delay and create an issue where it may not have been relevant or even considered by the jury until raised by the judge[13]. Accordingly, it was submitted the purpose of the legislation would be negated as this could potentially raise stereotypical attitudes regarding the reliability of complainants, in the mind of the jury.

6.2 Current legislative provisions sufficient

A number of stakeholders submitted that the current legislative protections provided under section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* were sufficient in ensuring that stereotypical views regarding the unreliability of complainants in sexual assaults were no longer put to the jury[14].

The Chief Justice also commented that the decision of the Court in Crofts v The Queen was made approximately 17 years ago and he was unaware of any problems that had arisen as a consequence of the decision. In addition, His Honour suggested that the provisions of section 4(6) of the *Sexual Offences (Evidence and Procedure) Act* may be the reason there have been no issues as they allow a Judge to retain the ability to adjust their observations to the circumstances of each case and make any comment that is appropriate. Given the Crofts decision has co-existed with the legislation for such a lengthy time without issue, it was noted that there seemed to be little need to address the issue[15]. This position was supported by other stakeholders[16] who noted that there was no empirical evidence that the decision had produced any injustice, with no cases in the Northern Territory where the giving or not of the Crofts direction had led to an acquittal or the overturning of conviction on appeal. Accordingly, it was submitted that reform was unnecessary.

6.3 Increase in appeals

The Northern Territory Legal Aid Commission, with whom the North Australian Aboriginal Justice Agency agreed, submitted that the proposed reform would lead to an increase in successful appeals (by defendants) as trial judges will sanction not giving a direction, a decision which will then be overturned on appeal. As a result, the

[11] Chief Justice, Northern Territory Legal Aid Commission, Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency; the Children's Commissioner, Top End Women's Legal Service, Central Australian Women's Legal Service

[12] Children's Commissioner, Top End Women's Legal Service, Central Australian Women's Legal Service

[13] Top End Women's Legal Service, Central Australian Women's Legal Service

[14] Northern Territory Legal Aid Commission, Chief Justice, Criminal Lawyers Association of the Northern Territory

[15] Criminal Lawyers Association of the Northern Territory, Northern Territory Legal Aid Commission

[16] Northern Territory Legal Aid Commission, Criminal Lawyers Association of the Northern Territory

Court of Criminal Appeal will overturn any verdict where a direction was not given in accordance with the proposed reform. The number of appeals will in turn increase the costs of the administration of justice.

The Chief Justice and the Northern Territory Legal Aid Commission noted the need for a Crofts direction has rarely arisen in the Northern Territory, and, notwithstanding the Crofts decision being made 17 years ago, there have been no appeals in the Northern Territory where the giving or not giving of the Crofts direction has led to an acquittal or the overturning of a conviction. As a result, there is no evidence that Judges in the Northern Territory have been giving Crofts directions in every sexual assault trial in order to render them 'appeal-proof'.

6.4 Defendant's rights already compromised

The Northern Territory Legal Aid Commission, with whom the North Australian Aboriginal Justice Agency agreed, submitted that the proposed amendments should not be made as the defendant was already significantly disadvantaged by the operation of section 26E of the *Evidence Act* and section 66 of the *Evidence (National Uniform Legislation) Act.* It was noted that, prior to the introduction of section 26E of the *Evidence Act,* preliminary complaint evidence was only admissible in relation to the credibility of the complainant, however, due to the enactment of section 26E complaint evidence of children is now admissible as evidence of the facts in issue. Further, it was submitted that the defendant was also disadvantaged by the provisions of the *Evidence (National Uniform Legislation) Act* which provide for the admission of hearsay complaint evidence as evidence of facts in issue[17].

Section 26E of the *Evidence Act* allows for the admission of a statement made by a child to another person, in a sexual or serious violence offence, if the court considers the evidence of sufficient probative value. This procedure ordinarily applies to a child's recorded police interview and if the recording is admitted into evidence, it becomes evidence of facts in issue. Section 26E(3) provides that a defendant cannot be convicted solely on the basis of evidence admitted under the section, and therefore, provides some protection to the defendant.

Section 66 of the *Evidence (National Uniform Legislation) Act* provides an exception to the hearsay rule and allows a person to give evidence of the victim telling them about the offence, if it was 'fresh' in the memory of the victim at the time the complaint was made ('fresh complaint'). Unlike section 26E of the *Evidence Act*, section 66 of the *Evidence (National Uniform Legislation) Act* provides that evidence of a fresh complaint is not admissible as proof of the facts asserted, but rather goes to the credibility of the complainant.

The purpose of this report and the consultation paper is to address concerns with the Crofts direction and proposed legislative amendment regarding jury directions in relation to a delay in making a complaint. It is not within the scope of the report to address concerns with other legislative provisions and their alleged impact on the rights of defendants.

[17] Northern Territory Legal Aid Commission, Criminal Lawyers Association of the Northern Territory, North Australian Aboriginal Justice Agency

7. Additional issues

7.1 Office of the Director of Public Prosecutions

The Office of the Director of Public Prosecutions indicated its support for the proposed amendments in order to limit the judicial interference to redressing misconceptions, once raised, however, the Office of the Director of Public Prosecutions also proposed further amendment to the relevant legislation, beyond that which addressed the High Court decision in Crofts v The Queen.

It was submitted that further amendment be made to allow for the admissibility of any preliminary complaint regardless of how long after the offence it was made. In their proposal, the Office of the Director of Public Prosecutions suggested that the jury is entitled to hear how a matter came to the attention of police. They noted that, currently, unless the complaint is admissible under section 66 of the *Evidence (National Uniform Legislation) Act* or section 26E of the *Evidence Act*, the only way this information is elicited is if the defence raise it during cross-examination. As a result, it was submitted that, inevitably, the jury will wonder why the complainant did not disclose the offending sooner. Accordingly, if the issue is not raised by defence, the Crown cannot address the matter. In their submission, the Office of the Director of Public Prosecutions stressed that even if the matter is raised by the defence the Crown is left in a position whereby they have to take 'defensive' action during the trial to account for the delay, which may be perceived negatively by the jury.

In support of their argument, the Office of the Director of Public Prosecutions submitted that amendment should be allowed to provide for the admissibility of any preliminary complaint, regardless of how long after the offence it was made (similar to the provisions of section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) which provides that evidence of a preliminary complaint can be given at trial regardless of when the preliminary complaint was made).

A brief summary of section 66 of the *Evidence (National Uniform Legislation) Act* is provided in part 6.4 above. The majority of Australian jurisdictions have similar provisions to section 66 which are most often used when a child tells a parent or another child about an assault. Under section 66, the parent or child who received the complaint can give evidence of what the child said. The admissibility of the complaint is subject to the alleged occurrence being 'fresh' in the memory of the complainant when the representation is made to the witness. In Graham v R [1998] HCA 61, the High Court held that the word 'fresh' means 'recent' or 'immediate' and that a representation made to a witness six years after the alleged occurrence was not 'fresh' and was therefore inadmissible. The High Court also discussed the reasons for the strict construction of the provision and noted that the requirement for the complaint to be contemporaneous with the alleged event was adopted for a number of different reasons:

1. to permit evidence of out of court statements based upon some assessment of the 'vividness or quality' of the recollection would be to distract attention from the quality of evidence that the witness had given in court;

2. experience demonstrates that memory does alter over time; and

3. the hearsay exception should be limited to those cases where the tender of the earlier statement is likely to be useful (i.e. to permit the tender of a statement made at the time of, or very soon after, the events in question may give the best available account of what the witness knows and would therefore be useful).

Section 26E of the *Evidence Act*, similarly, allows for the admission of a statement made by a child to another person, if the court considers the evidence of sufficient probative value. Unlike section 66 of the *Evidence (National Uniform Legislation) Act*, section 26E allows for this evidence to be admitted as direct evidence of facts in issue. However, section 26E only applies to evidence of children and ordinarily applies to a child's recorded police interview. Although section 26E allows for this evidence to be admitted as direct evidence, the defendant is protected by section 26E(3) which provides that an accused cannot be convicted solely on the basis of evidence admitted under the section.

The purpose of this report and the consultation paper is to address concerns with the Crofts direction and proposed legislative amendment regarding jury directions in relation to a delay in making a complaint. It is not within the scope of the report to address suggested legislative amendment regarding the admissibility of preliminary complaint evidence. Further, given the potential implications for defendants, extensive consultation with stakeholders, including defence, would be required prior to proceeding with any amendment.

7.2 Application for leave to raise delay

In order to afford greater protection for complainants, the Top End Women's Legal Service suggested that, in addition to the proposed amendments, a provision be introduced requiring parties to seek leave if they wish to raise delay as an issue at trial and that leave not be granted unless the court is satisfied that the delay has 'substantial relevance to the facts in issue' (as required under section 4(1) of the *Sexual Offences (Evidence and Procedure) Act).* Similarly, the Central Australian Women's Legal Service suggested that defence counsel be required to express their intention to raise delay as an issue pre-trial. Parties would be required to prepare submissions addressing the issue and the Judge would then make a decision whether to grant the defence leave to raise delay. In addition, if the defence was granted leave and delay was left solely to the jury, it was submitted that the prosecution would need to be provided with an opportunity to address the jury on the barriers to reporting and the fact that good reasons for delay may exist.

The provisions of section 4(1) are designed to protect complainants from having their prior sexual history and chastity used for no other reason than to attack their credibility. Leave of the court is therefore required if the defence wish to question the complainant on these issues. Questioning is only permitted if the judge determines, in the absence of the jury, that such questioning has substantial relevance to the facts in issue. In this regard, evidence of a sexual act or event that is substantially contemporaneous with the offence or that is part of a sequence of acts or events that explain the circumstances of the alleged offence would be regarded as having substantial relevance. On this basis, the trial judge will hear argument from the defence and prosecution, prior to cross-examination. Based on experience, precedent and the particular circumstances of the case, the judge will then determine whether or not to grant leave for this line of questioning. If, at any stage, defence questioning

goes beyond that for which leave has been granted then objection can be made. The jury can then be directed accordingly.

The provisions in section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* do not require leave of the court to question the complainant about a delay in making a complaint, however, they do require the judge to warn the jury that delay does not necessarily indicate that the allegation is false and that there may be good reasons for delay (section 4(5)(b)). The current procedure is, if a question is put to the complainant that is considered inappropriate, the prosecution can object to the question. The jury is then removed from the courtroom and both parties are given the opportunity to present a case, in voire dire, to the judge as to why or why not such questioning should be put to the complainant. It is then up to the judge to determine the course of action. When the jury returns, directions are given accordingly.

7.3 Admission of evidence regarding the complainant's reputation

The Top End Women's Legal Service also proposed additional reform to section 4(1)(a) of the *Sexual Offences (Evidence and Procedure) Act* so that evidence about a complainant's general reputation as to chastity be completely inadmissible and that leave of the court cannot be sought.

Section 4(1)(a) allows for evidence of a complainant's sexual reputation to be admitted into evidence with the leave of the court, if it has substantial relevance. The Top End Women's Legal Service noted that all other Australian jurisdictions prohibit the admission of evidence relating to a complainant's sexual reputation and that the admission of this evidence could only serve to enforce wrongful stereotypes regarding the credibility of sexual assault complainants.

Each of the other Australian jurisdictions, excluding the Commonwealth, allows for evidence of a complainant's 'sexual experience' or 'sexual activities' to be admitted with the leave of the court, however, each provides that evidence of the complainant's general sexual reputation is inadmissible. Sections 15YB and 15YC of the *Crimes Act 1914* (Cth) allow evidence of a child witness's sexual reputation and experience to be admitted if the court determines that it is substantially relevant.

The purpose of this report and the consultation paper is to address concerns with the Crofts direction and proposed legislative amendment regarding jury directions in relation to a delay in making a complaint. Accordingly, it is not within the scope of the report to make recommendations regarding the admissibility of evidence relating to the complainant's sexual reputation. Further, given the potential implications for defendants, extensive consultation with stakeholders, including defence, would be required prior to proceeding with any amendment.

8. Conclusion and Recommendations

For almost ten years numerous law reform bodies, throughout Australia, have considered the Crofts direction[18]. Notwithstanding the detailed analysis, debate and discussion, no clear consensus has emerged.

What is clear, from the various reports and stakeholder submissions, is that the credibility of sexual assault complainants should not be determined by stereotypical assumptions, including those based on the timing of complaints.

The simple, yet bold solution to abolishing the Crofts direction would be to completely remove all judicial discretion. However, it is apparent from a consideration of the issues and the submissions of stakeholders, that any legislative change should not remove judicial discretion. The implementation of a 'blanket warning' and the removal of judicial discretion does not take into account the particular circumstances of each case. Judicial discretion allows a judge to make comment in each case where appropriate and ensure that each matter is not subject to the same directions. In exercising a discretion, a judge applies his or her expertise and knowledge to determine the correct course in a particular case. This position has been acknowledged by the Victorian Law Reform Commission which noted that there may be cases where the credibility of the complainant is affected by delay[19].

Section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* was enacted to prevent the stereotypical assumption that a delay in complaint meant that the allegation was false. The section ensures that a judge shall not make comment on the unreliability of the complainant's evidence simply because they are of a particular class of witness (i.e. sexual assault complainant) and, if delay is raised during the trial, the judge is required to advise the jury that delay does not necessarily indicate the allegation is false and there may be good reasons why a victim may hesitate in making a complaint. However, section 4(6) also recognises that the circumstances of the delay may be relevant to the complainant's credibility.

If the recommendation of the 2010 Australian Law Reform Commission Report (as listed above at part 3.5) was adopted, it is anticipated that minor amendment to sections 4(5) and 4(6) of the *Sexual Offences (Evidence and Procedure) Act* would be required.

[18] Victorian Law Reform Commission, *Sexual Offences : Final Report* (2004); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 11, VLRC FR (2005); Criminal Justice Sexual Offences Taskforce (Attorney-General's Department (NSW)), *Responding to Sexual Assault – The Way Forward* (2005); L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia; Tasmania Law Reform Institute, *Warnings in Sexual offences Cases Relating to Delay in Complaint*, Final Report (2006); New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), Issue 7.8; Victorian Law Reform Commission, *Jury Directions: Final Report* (2009); A. Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee; Queensland Law Reform Commission, *A Review of Jury Directions: Report,* Report 66 (2009)

[19] Victorian Law Reform Commission, *Jury Directions: Final Report* (2009)

Table 1 provides a breakdown of the Australian Law Reform Commission Report recommendations, the current provisions under the *Sexual Offences (Evidence and Procedure) Act* and any amendment that would be required to implement the recommendations.

Table 1: Amendment required to implement Australian Law Reform Commission Report Recommendations

Recommendations	Current Legislation: *Sexual Offences (Evidence and Procedure) Act*	Amendment
Part (a)	Nil	New provision noting that consideration of delay should be a matter for argument by counsel and determination by the jury.
Part (b)	Sections 4(5) and 4(6)	Specifically state that the default position is for a trial Judge not to give any direction regarding delay. Amend the test in section 4(6) to provide that the Judge can, however, make comment regarding delay if it is necessary to do so to ensure a fair trial, rather than if it is appropriate 'in the interests of justice'.
Part (c)	Section 4(5)(b)	Nil

Based on the above, the only practical effect of amendments would be the clear statement that, first and foremost, delay is a question of fact for determination by the jury. However, as the current legislation does not require a Judge to give a direction and only prompts comment if delay is raised, the introduction of a statement in accordance with part (a) of the Australian Law Reform Commission Report recommendation would seem to have little operational impact.

During consultation, a number of stakeholders[20], including the Chief Justice, noted that despite the Crofts decision being handed down 17 years ago, it has had little impact on the conduct, outcome and directions given in sexual assault trials in the Northern Territory. Further, for this reason amongst others, a number of stakeholders favoured retaining the present legislative position[21].

Although giving contradictory directions (one advising that there may be good reason for delay and another noting that, in the particular circumstances, there may not be) can lead to confusion for jurors, there is no evidence that this has been occurring in the Northern Territory. Although the trial judge retains discretion under section 4(6) to give any additional direction if it is appropriate in the interests of justice, it does not appear that trial judges have been supplementing a direction under section 4(5)(b) with a Crofts direction.

[20] Chief Justice, Criminal Lawyers Association of the Northern Territory, Northern Territory Legal Aid Commission, North Australian Aboriginal Justice Agency

[21] Chief Justice, Criminal Lawyers Association of the Northern Territory, Northern Territory Legal Aid Commission, North Australian Aboriginal Justice Agency

The Department of the Attorney-General and Justice accepts the comments by the Australian Law Reform Commission Report that credibility and, therefore the impact of delay on the same, is ultimately a matter for the jury. Although the adoption of the Australian Law Reform Commission Report recommendation would provide for a clear legislative statement of the need to leave the issue of credibility to the jury and limit judicial direction, given comments by stakeholders regarding the operation of the legislation and directions in sexual assault trials, it would seem that current statutory provisions are sufficient to avoid the court giving a mandated direction in accordance with Crofts v The Queen.

It would therefore appear unnecessary for legislative amendment at this stage to formally 'abolish' the Crofts direction and to implement the Australian Law Reform Commission recommendations.

The Department of the Attorney-General and Justice will, however, continue to monitor the operation of sections 4(5) and 4(6) of the *Sexual Offences (Evidence and Procedure) Act* and the giving of directions in sexual assault trials.

ATTACHMENT A

Northern Territory Government

DEPARTMENT OF
THE ATTORNEY-GENERAL AND JUSTICE

Consultation Paper: Response to the High Court decision in Crofts

The Northern Territory Department of the Attorney-General and Justice (AGD) is seeking comment on a proposed reform to the law, implementing a recommendation set out in the:

- **Report of the Review of Vulnerable Witness Legislation** (Department of Justice June 2011); and
- **Family Violence - A National Legal Response** (Australian Law Reform Commission Report 114, November 2010).

Proposed Reform

Northern Territory legislation should provide that in the trial before a judge and jury of a charge for a sexual offence:

(a) the effect of any delay in making a complaint, or the absence of a complaint, on the credibility of the victim of a sexual offence, should be a matter for argument by counsel and for determination by the jury;

(b) subject to (c), except for identifying the issue for the jury and the competing contentions of counsel, the judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial; and

(c) if evidence is given, a question is asked, or a comment is made that tends to suggest that the victim either delayed making, or failed to make, a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence may delay making or fail to make a complaint.

If you wish to make a submission to the Department of the Attorney-General and Justice about this matter, please read this paper and send your comments by 31 March 2013 to:

Director of Legal Policy
Department of the Attorney-General and Justice
GPO Box 1722,
DARWIN NT 0801

Facsimile: (08) 8935 7662 Email: Policy.AGD@nt.gov.au

Notes

This Consultation Paper contains material previously published in either the:

- Report of the Review of Vulnerable Witness Legislation (Department of Justice 2011) and
- Family Violence - A National Legal Response (ALRC Report 114, 2010).

This Paper adopts the footnote numbering of the ALRC Report for the ease of cross referencing and further research.

Please note the *Evidence (National Uniform Legislation) Act 2011* commenced on 1 January 2013.

Introduction

1. In the trial of charges of sexual assault, the judge may give warnings or advice to the jury which attempt to counter myths about sexual assault, and to ensure that complainants, as well as people charged with sexual offences, are treated fairly.

2. The *Crofts* warning requires the trial judge to warn the jury that delay in complaint can be used to impugn the credibility of the complainant.

3. The issue this Consultation paper raises is whether to enact a law that changes the law as set out in the High Court decision in *Crofts v The Queen* (1996) 186 CLR 427.

Background

4. In *Kilby v The Queen* (1973) 129 CLR 460 the High Court endorsed a court direction to juries that delay or absence of complaint could be used as a factor in determining a complainant's credibility. Legislation was subsequently passed in most Australian jurisdictions to require the judge to warn the jury that a delay in making a complaint of sexual assault does not necessarily mean that the allegation is false.

5. Section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* (NT) provides that where there is delay by the complainant in a making a complaint about a sexual offence the judge must:

   - warn the jury that delay does not necessarily indicate that the allegation is false; and

   - inform the jury that there may be good reasons why a victim of a sexual offence may hesitate in complaining about it.

6. Section 4(6) states nothing in subsection (5) prevents a Judge from making any comment in the interests of justice.

7. Although such provisions were designed to remove stereotypes as to the unreliability of evidence given by sexual assault complainants, their protective effects have arguably been negated by the High Court decision in *Crofts v The Queen* (1996) 186 CLR 427.

The Crofts warning

8. In *Kilby v The Queen*[96], the High Court observed that evidence of recent complaint is not evidence of the facts alleged, but goes to the credibility of the complainant as it demonstrates consistency of conduct. However, the court also held as a corollary that where there has been a failure to make a complaint at the earliest available opportunity, this fact may be used to impugn the credibility of the complainant.[97] *Kilby v The Queen* therefore endorsed a court direction to juries that delay or absence of complaint can be used as a factor in determining a complainant's credibility—known as the *Kilby* direction.

9. Legislation was subsequently enacted to require the judge to warn the jury that a delay in making a complaint of sexual assault does not necessarily mean that the allegation is false.[98]

10. In *Crofts v The Queen*[99], the complainant reported that she had been sexually assaulted by a family friend over a period of six years, and made a complaint six months after the last assault. The trial judge directed the jury, as required by the Victorian equivalent of section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* (NT), that delay in complaint did not necessarily indicate that the allegation of sexual assault was false and that there were good reasons why a complainant might delay making a complaint.

11. The High Court held that the Act does not preclude the court from giving a *Kilby* direction or from commenting that delay in complaint of sexual assault may affect the credibility of the complainant. It considered that the purpose of the Victorian equivalent of section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* (NT), is to 'restore the balance' and rid the law of stereotypical notions as to the unreliability of sexual assault complainants, but not to immunise complainants from critical comment where necessary in order to secure a fair trial for the accused.

12. The Court held that a *Kilby* direction must be given where the delay is 'substantial'. Two qualifications were placed on this requirement: first, the direction need not be given where the facts of the case and the conduct of the trial do not suggest the need for a direction to restore the balance of fairness (for example, where there is an explanation for the delay); and secondly, the warning must not be expressed in terms that suggest a stereotyped view that sexual assault complainants are unreliable.[100]

13. As a result, subject to the two qualifications, where a trial judge gives the jury the statutory direction that delay in complaint does not necessarily indicate that the allegation is false and that there may be good reasons why a victim of sexual assault hesitates in complaining about it,[101] the judge should also consider giving the direction that 'delay in complaint may be taken into account in evaluating the evidence of the complainant and in determining whether or not to believe the complainant'.[102]

14. The *Crofts* warning has attracted a great deal of comment and criticism. Major criticisms of the *Crofts* warning include that:[104]

    (a) It has produced uncertainty about when a judge is to direct the jury that it is entitled to take into account delay in assessing the complainant's credibility.[105] As a result, to limit the risk of a successful appeal on the basis of a potential miscarriage of justice, trial judges 'as a general rule' direct in this way irrespective of whether the complainant is the sole witness and even where reasons have been advanced for the delay in complaint.[106]

    (b) It requires trial judges to give competing and apparently contradictory statutory and common law warnings. That is, 'to balance the explanation that evidence of a failure to complain of an assault, at the earliest reasonable opportunity, does not necessarily mean that the complaint was untrue ... with a direction that the jury can take that delay into account as reducing the complainant's credibility, is also problematic'.[107] The unnecessary complexity may confuse jurors and render the warnings meaningless.[108]

    (c) The near mandatory nature of the requirement to direct the jury that it is entitled to take delay into account in assessing the complainant's credibility risks 'undermining the purpose of the legislative provisions which was to avoid misconceptions about the behaviour of victims of sexual abuse'.[109]

(d) The premise on which the *Crofts* warning is given reflects discredited assumptions as to the nature of sexual assault and the behaviour of sexual assault complainants. It may be misleading and unfairly disadvantageous to a complainant to give a *Crofts* warning 'if there is no evidentiary basis for suggesting a nexus between delay and fabrication of the complaint'.[110]

Options for reform

15. A number of law reform bodies have considered the *Crofts* warning, the existing statutory responses to the warning and the appropriateness of those statutory responses. The recommendations and proposals are discussed below.

Victorian Law Reform Commission (2004)

16. The VLRC's 2004 report, *Sexual Offences*,[111] recommended an amendment to s 61 of the *Crimes Act 1958* (Vic) which was subsequently enacted as section 61(1)(b)(ii), referred to in this Report as the 's 61 Victorian amendment'. This provides that the judge must not warn, or suggest in any way to, the jury that the credibility of the complainant is affected by the delay unless, on the application of the accused, the judge is satisfied that there is *sufficient evidence* tending to suggest that the credibility of the complainant is so affected to justify the giving of such a warning.[112]

Australian, New South Wales Law and Victorian Law Reform Commissions, Uniform Evidence Law

17. In the 2005 ALRC Report 102 on Uniform Evidence Law, the ALRC, NSWLRC and VLRC concluded that the problems created by the *Crofts* warning should be dealt with in offence-specific legislation and by judicial and practitioner education on the 'nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault'.[113]

NSW Criminal Justice and Sexual Offences Taskforce

18. Also in 2005, the NSW Criminal Justice and Sexual Offences Taskforce recommended an amendment in similar terms to the s 61 Victorian amendment.[114] That recommendation was subsequently enacted in the *Criminal Procedure Act 1986* (NSW). Section 294(2) requires the judge to warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false.

Chapman inquiry into sexual assault laws and South Australian legislation

19. Following the 2006 Chapman inquiry into sexual assault laws in South Australia,[115] s 34M of the *Evidence Act 1929* (SA) was enacted. Section 34M(1) abolishes the *Crofts* warning.

20. Section 34M(2) states that:

    (a) no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

21. This means that in SA evidence relating to how and why the complainant made his or her complaint, and to whom, is admissible.[116] If such evidence is admitted, the judge

> must direct the jury that it is admitted to inform the jury as to how the allegation first came to light; as evidence of the consistency of conduct of the alleged victim; and it is not admitted as evidence of the truth of what was alleged. The judge must direct that there may be varied reasons why the alleged victim of a sexual offence made a complaint of the offence at a particular time or to a particular person but that, otherwise, it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.[117]

Tasmania Law Reform Institute

22. In 2006, the Tasmania Law Reform Institute (TLRI) criticised the s 61 Victorian amendment on the basis that it could be interpreted as simply enacting *Crofts*.[118] The view of the TLRI was that the *Criminal Code* (Tas) should be amended so as to prohibit entirely trial judges giving the *Crofts* warning.[119] That recommendation has not been implemented.

NSW Law Reform Commission

23. In its 2008 consultation paper on jury directions, the NSWLRC asked whether s 294(2) of the *Criminal Procedure Act 1986* (NSW) is sufficient to address 'the issue of what (if any) warning judges should give the jury on the impact of delay on the complainant's credibility'.[120] The NSWLRC considered the competing arguments in respect of s 294(2). On the one hand, it is considered that to prevent a judge from warning a jury that 'delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning'[121] is 'simply a reiteration of the High Court's ruling in *Crofts*'.[122] On the other hand, reinforcing the 'sufficient evidence' requirement may serve to prevent judges from indiscriminately giving the *Crofts* direction for the main purpose of 'appeal-proofing' the case, particularly in cases where there was in fact no delay, or where there are indisputably good reasons for a delay.[123]

Victorian Law Reform Commission (2009)

24. In its 2009 report on jury directions, the VLRC noted that s 61 of the *Crimes Act 1958* (Vic) 'acknowledges that there may be cases where the credibility of the complainant is affected by delay in making a complaint'. In order to avoid that acknowledgment being used to justify a mandatory warning 'the legislation describes the circumstances in which a warning may be given and its content'.[124]

25. The main issue the VLRC identified was in relation to the 'extent to which the judge should be involved in giving the jury directions about the credibility of the complainant'.[125] The VLRC questioned whether a threshold assessment about 'sufficient evidence' by the judge on the question of credibility 'can be justified when it is the task of the jury to assess the credibility of witnesses and decide whether they accept or reject their evidence'.[126] The VLRC's final view was that:

> the trial judge should not be obliged to give the jury directions about delayed complaint but should have a discretionary power to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences.[127]

26. The VLRC recommended that legislation should provide that the issue of the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant

should be a matter for argument by counsel and for determination by the jury and that:

(i) Subject to subsection (ii), save for identifying the issue for the jury and the competing contentions of counsel, the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial.

(ii) If evidence is given, or a question is asked, or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence of that kind may delay making or fail to make a complaint in respect of the offence.[128]

National Child Sexual Assault Reform Committee

27. The National Child Sexual Assault Reform Committee criticised the s 61 Victorian amendment because it did 'not abolish the *Crofts* warning, nor specify what amounts to "sufficient evidence"'.[129] The Committee recommended that new provisions be introduced in each jurisdiction, except Queensland and South Australia, to abolish the *Crofts* warning.[130]

Queensland Law Reform Commission

28. In Queensland, s 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) provides that the *Crofts* warning cannot be given,[131] although the judge may make such other comments on the complainant's evidence as may be appropriate in the interests of justice, including on any remarks made by a party that might be based on erroneous or poorly based stereotypical assumptions about complainants.[132] The main criticism of this response is that 'it does not allow the judge to make any comment that might be warranted in the light of comments by the parties, especially defence counsel'.[133] This means, for example, where defence counsel have raised the issue of delay, the judge may be prevented from commenting that there may be good reasons for delay in complaint. Section 4A may produce less fair outcomes for complainants—particularly where little evidence is adduced by the prosecution about the reason for the complainant's delay in complaint—than the current s 61 of the *Crimes Act 1958* (Vic) approach to warnings.[134]

29. To address this concern, the QLRC's discussion paper proposed an amendment to s 4A to give judges the power to 'give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences'.[135] In its final report, the Commission considered that any amendment 'should not permit the re-introduction into Queensland of directions and warnings based on outdated and discredited assumptions' and considered that no further amendment to the *Criminal Law (Sexual Offences) Act 1978* (Qld) was warranted.[136]

ALRC/NSWLRC joint Consultation Paper (2010)

30. In the joint Consultation Paper – Family Violence- Improving Legal Frameworks (ALRC CPS 1) the Commissions asked whether warnings about the effect of delay on the credibility of complainants are necessary in sexual assault proceedings. [137]

31. The Commissions also proposed two options for reform.[138] the first was for federal, state and territory legislation modelled on the VLRC's recommendation in its 2009 report on jury directions, [139] discussed above.

32. The second and alternative option was for federal, state and territory legislation modelled on elements of the Queensland provision[140] including the amendment proposed by the QLRC,[141] and the Victorian provision.[142]

33. This proposal would provide that, in sexual assault proceedings, the judge: must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about the assault; 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 complaint; maintains a discretion to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences; and maintains a discretion to comment on the reliability of the complainant's evidence in the particular case.[143]

Submissions and consultations on the joint Consultation Paper

34. Some stakeholders[144] considered that warnings about the effect of delay on the credibility of the complainants are unnecessary or inappropriate in sexual assault proceedings, including because:

    (b) delay is the norm rather than the exception, and is even greater when the offender is a family member or intimate partner of the victim;[145]

    (c) there are different schools of thought about how delay affects a victim's testimony;[146] and

    (d) delay may occur for a range of reasons, including the adjournment of the criminal proceedings.[147]

35. Other stakeholders considered that warnings about the effect of delay on credibility of complainants are necessary in some cases, for example to ensure the jury is aware that delay is common in reporting sexual offences and the reasons why this is so.[148]

36. Some stakeholders supported the Consultation Paper proposal modelled on a recommendation of the VLRC.[149] Where stakeholders took this view they generally considered that the alternative proposal, modelled on Queensland and Victorian legislation, may confuse juries if the warning is given without an evidentiary basis,[150] or expressed the view that the jury should continue to be directed in the terms of *Crofts*.[151]

37. Another group of stakeholders supported the alternative proposal.[152] Professor Julie Stubbs of the Women's Legal Service Queensland preferred this option because, in

her view, it is more likely to result in consistent handling of the issue by judicial officers.[153]

38. The Public Defenders Office NSW opposed both alternatives on the basis that significant restrictions have been recently introduced in NSW by virtue of s 294(2)(c) of the *Criminal Procedure Act 1986* and there is 'no justification for further erosion of the rights of the accused in this area'.[154]

39. Annie Cossins, in *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), a paper prepared for the National Child Sexual Assault Reform Committee, also opposed both alternatives. In response to the first option, modelled on a recommendation of the VLRC, Cossins commented that leaving it to counsel to comment on the issue of delay removes the authoritative voice of the trial judge informing juries that there are good reasons why a victim may delay. Further, 'it is a clumsy way of getting rid of the *Crofts* warning' because it is likely that either the evidence, or counsel, will suggest to the jury that the complainant delayed or failed to make a complaint and, in those circumstances, the judge must tell the jury that there may be good reasons for the delay. In response to the second option, the proposal modelled on Queensland and Victorian legislation, Cossins commented that that proposal retains the ability of the trial judge to give a *Crofts* warning.

40. Cossins submitted instead that legislation should clearly abrogate the *Crofts* warning;[155] permit a warning by the judge to the jury that delay in making a complaint of sexual assault does not necessarily mean that the allegation is false;[156] and require trial judges to instruct the jury about the specific reasons why the complainant delayed his or her complaint, where those reasons are admitted into evidence in the trial.[157]

Conclusion and Proposed Reform

41. Since 2004 many different law reform bodies have considered the *Crofts* warning and the most appropriate statutory response to the warning. No clear consensus about the best option for reform has emerged from these deliberations.

42. The views of stakeholders, in response to the ALRC/NSWLRC joint Consultation Paper 2010 proposals, were also disparate and difficult to reconcile. It is clear, however, that the credibility of sexual assault complainants should not be determined by stereotypical assumptions, including those based on the timing of complaints.[158]

43. In dealing with this issue, the AGD adopts the views expressed in ALRC Report 102:

> [18.170] While there may be cases in which delay in complaint accompanies fabrication, there is nothing inherent in delay that makes it likely that the complainant is being untruthful. On the contrary, delay in reporting sexual assault is well within the spectrum of expected responses to sexual assault. Rather than balancing the statutory direction explaining that there are reasons why a sexual assault complainant might delay in reporting an assault, the *Crofts* warning undermines the purport of those legislative provisions and unfairly disadvantages the prosecution.
>
> [18.171] Further, in an oath against oath trial, as sexual assault cases almost invariably are, the credibility and reliability of the complainant's evidence is likely to be one of the central issues. Given that this is the case, it is questionable whether there is any need for the judge to give

[128] Ibid, Rec 38.
[129] A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 101. See also, *Crimes Act 1958* (Vic) s 61(2) 'nothing in subsection (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice'. Other commentators also consider that the words 'sufficient evidence' do 'not make clear the standard of persuasion or standard of proof required': H Donnelly, 'Delay and the Credibility of Complainants in Sexual Assault Proceedings' (2007) 19(3) *Judicial Officers' Bulletin* 17, 19.
[130] A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 106, Recs 2.2, 2.3.
[131] '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': *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4).
[132] Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), [15.102].
[133] Ibid, [15.67]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [3.4.5].
[134] Note that *Crimes Act 1958* (Vic) s 61(1)(b)(i) provides that the judge 'must inform the jury that there may be good reasons why a victim of sexual assault may delay or hesitate in complaining about it'. See also A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 102–103; L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia, 114.
[135] Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), Proposal 7–2.
[136] Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), [15.100]–[15.101].
[137] Consultation Paper, Question 18–12.
[138] Ibid, Proposal 18–13.
[139] Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), Rec 38.
[140] *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4).
[141] Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), Proposal 7–2.
[142] *Crimes Act 1958* (Vic) s 61(1).
[143] See, Consultation Paper, Proposal 18–13(b).
[144] Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179,* 25 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111,* 9 June 2010.
[145] Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010.
[146] Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111,* 9 June 2010.
[147] Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179,* 25 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111,* 9 June 2010.
[148] Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.
[149] National Legal Aid, *Submission FV 232,* 15 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172,* 25 June 2010.
[150] National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172,* 25 June 2010.
[151] National Legal Aid, *Submission FV 232,* 15 July 2010.
[152] J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010.
[153] J Stubbs, *Submission FV 186,* 25 June 2010.
[154] Public Defenders Office NSW, *Submission FV 221,* 2 July 2010.
[155] For example, in the terms of s 34M of the *Evidence Act 1929* (SA).
[156] Cossins refers to this as a 's 61-type direction', referring to *Crimes Act 1958* (Vic) s 61.
[157] A Cossins, *Submission FV 112,* 9 June 2010.
[158] Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [5.86].

[159] Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.170] [18.171].
[160] Uniform Evidence Acts, ss 101A 103.
[161] Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), Rec 38.
[162] Ibid, [3.137].