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
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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~~ has 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

> a warning or make a comment in relation to the credibility of the complainant. In cases where there is evidence to support the suggestion that the delay in complaint bears some relation to the credibility of the complainant, such matters should be the subject of counsel's address, rather than the subject of a judicial warning.[159]

44. Whether, in a particular case, evidence of delay in complaint *could* substantially affect the assessment of the credibility of the complainant is a matter for the court to determine.[160] This is the standard which the court must apply in determining whether credibility evidence is admissible under s 103 of the *Evidence (National Uniform Legislation) Act* 2011 (NT). It is imperative that judicial officers and legal practitioners receive appropriate education, training and assistance to ensure that their reasoning in determining this question is not based on stereotypical assumptions about sexual assault complainants.

45. However, whether, in a particular case, delay does *in fact* affect the complainant's credibility is a matter for the jury. The assessment is not one about which a judicial officer has 'special experience' not possessed by members of the jury. 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.

46. In the AGD's view, legislation should adopt provisions modelled on the recommendations of the 2009 VLRC report on jury directions.[161] The advantages of this approach include that it:

    a) better acknowledges the adversarial nature of the criminal trial process and is more consistent with the roles of judge and jury;

    b) is consistent with the simplification of the law; and

    c) 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.[162]

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.

Footnotes (numbering commences at 96)

[96] *Kilby v The Queen* (1973) 129 CLR 460.
[97] Ibid, 472.
[98] *Criminal Procedure Act 1986* (NSW) s 294; *Crimes Act 1958* (Vic) s 61(1)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1906* (WA) s 36BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71.
[99] *Crofts v The Queen* (1996) 186 CLR 427.
[100] This history is taken from 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), [18.147]–[18.151].
[101] *Criminal Procedure Act 1986* (NSW) s 294; *Evidence Act 1906* (WA) s 35BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71; *Sexual Offences (Evidence and Procedure) Act 1983* (NT). Under *Crimes Act 1958* (Vic) s 61(1)(b) the judge is not required to warn the jury that delay in complaint does not necessarily indicate that the allegation is false. *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4) differs from all the other provisions.
[102] New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.66].
[104] See also, Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.123]; 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), [18.152]–[28.258].
[105] See, eg, Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.122]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [2.1.6]; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.88].
[106] See, eg, *R v Markuleski* (2001) 52 NSWLR 82, [175], [187].
[107] J Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003).
[108] Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 97.
[109] Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.123].
[110] Ibid.
[111] Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).
[112] *Crimes Act 1958* (Vic) s 61(1)(b)(ii) (emphasis added).
[113] 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), [18.172]–[18.173].
[114] Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), Rec 37.
[115] L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia.
[116] *Evidence Act 1929* (SA) s 34M(3).
[117] Ibid s 34M(4). See also s 34M(5): 'It is not necessary that a particular form of words be used in giving the direction under subsection (4)'.
[118] Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), 24. That is, the Victorian amendment makes provision for the trial judge to warn the jury where he or she is 'satisfied that there exists sufficient evidence in the particular case to justify such a warning. The facts of *Crofts* itself, as viewed by the High Court, arguably satisfy this condition': Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), 24. See also, New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), 151.
[119] Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), 33.
[120] New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), Issue 7.8.
[121] *Criminal Procedure Act 1986* (NSW) s 294(2).
[122] New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.75].
[123] Ibid, [7.76].
[124] Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.125]–[3.126].
[125] Ibid, [3.135].
[126] Ibid, [5.88].
[127] Ibid, [5.94].

[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].