28. Other Trial Processes

Contents

Introduction

28.1 This chapter deals with the giving of jury warnings, the cross-examination of complainants and other witnesses in sexual assault proceedings and other aspects of giving evidence.

28.2 As noted in the preceding chapter, these issues have been selected because the application of law in these areas has a direct and significant impact on the experiences in the criminal justice system of women and children who have suffered sexual assault including in a family violence context—the focus of the Commissions' Terms of Reference.

Jury warnings

28.3 In jury trials, the judge directs 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. This task also encompasses a responsibility to give an appropriate warning or caution where acting upon particular evidence involves potential 'dangers'.

28.4 Where a warning is required, this is usually in respect of legal matters about which the court is said to have 'special experience' not possessed by members of the

jury. The duty of a trial judge to give appropriate and adequate warnings stems from the overriding duty to ensure a fair trial. The failure to give an appropriate jury warning may lead to a miscarriage of justice.[1]

28.5 Judges are required to give a number of specific, and sometimes quite complex, jury directions in criminal trials. These reflect both common law and statutory developments in the criminal law.[2]

28.6 In this Inquiry, the ALRC and New South Wales Law Reform Commission (NSWLRC) only consider warnings about unreliable evidence and corroboration, and warnings about delay in complaint, in the context of sexual assault proceedings.

28.7 The Tasmania Law Reform Institute (TLRI) delivered a report on jury warnings in sexual offences cases relating to delay in complaint in 2006.[3] In 2009 the Victorian and Queensland law reform commissions each released completed reviews of directions and warnings given by judges to juries in criminal trials.[4] The NSWLRC's inquiry into jury directions is ongoing.[5]

28.8 The purpose of jury warnings in the context of sexual assault has changed over time. Historically, they served to protect the accused against an unfair conviction. Increasingly, however, they serve to 'counter myths about sexual assault and to ensure that complainants, as well as people charged with sexual offences, are treated fairly'.[6]

28.9 In a sexual assault trial, numerous complex directions and warnings 'which focus on the unique characteristics of sexual assault such as delay, one witness to the offence and a lack of corroborating evidence' may be required.[7] The duties of the trial judge to direct the jury in a manner which is clear, intelligible, relevant, brief and insulated from appeal, and the duty of jurors to comprehend and apply each direction are problematic to discharge.[8]

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1 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), [18.1]–[18.2].

2 Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), 50.

3 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006).

4 Victorian Law Reform Commission, *Jury Directions: Final Report* (2009); Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009).

5 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008).

6 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.7] (footnotes omitted). For a discussion of the popular myths surrounding sexual assault, see D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women; D Boniface, 'Ruining a Good Boy for the Sake of a Bad Girl: False Accusation Theory in Sexual Offences, and New South Wales Limitations Periods—Gone But Not Forgotten' (1994) 6 *Current Issues in Criminal Justice* 54; A Cossins, 'Complaints of Child Sexual Abuse: Too Easy to Make or Too Difficult to Prove?' (2001) 34 *Australian and New Zealand Journal of Criminology* 149.

7 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 67.

8 For a summary of both the common law and uniform Evidence Act directions, which highlights the complexity of a trial judge's task see, *R v BWT* (2002) 54 NSWLR 241, 250–251.

28.10 The Commissions recognise that community knowledge about sexual assault, especially in the family violence context, is limited and susceptible to influence by inaccurate misconceptions and myths.[9] As members of the judiciary and jury are also members of the community, it stands to reason that they are vulnerable to be influenced by inaccurate understandings in making an assessment of a sexual assault case.[10] Jury directions

> go some way in providing jury members with accurate, objective information on sexual assault, and may assist in counteracting any misperceptions or adherence to rape myths in jury members or members of the judiciary.[11]

Warnings about unreliable evidence and corroboration

28.11 Historically, sexual assault complainants[12] and children[13] were considered by the common law, as classes of witness, to be inherently unreliable.[14] Their unreliability was considered a matter capable of affecting the evaluation of the evidence and about which judges had special knowledge or experience beyond the jury's appreciation.[15]

28.12 For this reason, the common law required corroboration warnings to be given by trial judges to juries in respect of the evidence of both sexual assault complainants and child witnesses. The common law corroboration warning has two components:

- the corroboration component—the caution that, as it is dangerous to convict on a child or sexual assault complainant's 'uncorroborated' evidence, it was necessary to have corroborating evidence; and
- the reliability component—the caution that, as children and sexual assault complainants as classes of witness are unreliable, the evidence of a particular child or complainant had to be treated with care.[16]

28.13 Corroboration warnings about the potential unreliability of categories of witnesses are now recognised as discriminatory and based on prejudice rather than empirical evidence.[17]

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9 Australian Institute of Family Studies, *Submission FV 222,* 2 July 2010.

10 Ibid.

11 Ibid.

12 *Kelleher v The Queen* (1974) 131 CLR 534.

13 *Hargan v The King* (1919) 27 CLR 13.

14 For example, Brennan J in *Bromley v The Queen* (1989) 161 CLR 315 noted: 'The courts have had experience of the reasons why … [children and sexual assault complainants] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses': 324. See also *JJB v The Queen* (2006) 161 A Crim R 187; *R v TN* (2005) 153 A Crim R 129, [69].

15 Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), [7.80].

16 This analysis was put forward in Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 32.

17 For a review of the literature on suggestibility studies and the reliability of children's evidence, see A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 114–124 and the Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009), 28–40.

Statutory response to the corroboration component

28.14 All Australian jurisdictions have enacted legislation that abolishes the *requirement* that a judge warn the jury that it is dangerous to act on uncorroborated evidence. These provisions do not, however, *prohibit* a warning that it would be dangerous to convict on uncorroborated evidence.[18] Under such legislation, trial judges retain their general powers and obligations to give appropriate warnings 'necessary to avoid the perceptible risk of miscarriage of justice arising from the circumstances of the case'.[19]

28.15 The South Australian and the Northern Territory (NT) provisions deal exclusively with the uncorroborated evidence of child witnesses,[20] whereas the provisions in other jurisdictions have general application to uncorroborated evidence.[21]

28.16 These statutory responses to the common law requirement to give a corroboration warning recognise that the typical sexual assault offence takes place in private, without other witnesses.[22] While corroboration for an assault may exist by way of 'an admission, DNA evidence, medical evidence, recent complaint, or tendency evidence … for the most part, particularly in child sexual assault matters, such evidence may be rare'.[23]

Statutory response to the reliability component

28.17 In all Australian jurisdictions, except Queensland, a judge is prohibited from warning or suggesting to the jury that children as a class are unreliable witnesses.[24] This statutory response addresses the misconception that the evidence of children is inherently less reliable than that of adults.

28.18 New South Wales (NSW), Victoria, the ACT and the NT[25] have enacted legislation pursuant to which a judge must not warn, or suggest in any way to, the jury that it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness. These provisions mirror the

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18 *Conway v The Queen* (2002) 209 CLR 203, [53].

19 *Longman v The Queen* (1989) 168 CLR 79, 86. See also *Tully v The Queen* (2006) 230 CLR 234; *Robinson v The Queen* (1999) 197 CLR 162; *Bromley v The Queen* (1989) 161 CLR 315.

20 *Evidence Act 1929* (SA) s 12A; *Evidence Act 1939* (NT) s 9C.

21 *Evidence Act 1995* (Cth) s 164(3); *Evidence Act 1995* (NSW) s 164(3); *Evidence Act 2008* (Vic) s 164(3); *Criminal Code* (Qld) s 632(2); *Evidence Act 1906* (WA) s 50; *Evidence Act 1929* (SA) s 12A; *Criminal Code* (Tas) s 136; *Evidence Act 2001* (Tas) s 164; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 69, 70; *Evidence Act 1939* (NT) s 9C.

22 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

23 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 103.

24 *Evidence Act 1995* (Cth) s 165A; *Evidence Act 1995* (NSW) s 165A; *Evidence Act 2008* (Vic) s 165A; *Evidence Act 1906* (WA) s 106D; *Evidence Act 1929* (SA) s 12A; *Evidence Act 2001* (Tas) s 164(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 70; *Evidence Act 1939* (NT) s 9C. *Criminal Code* (Qld) s 632(2) provides only that 'a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness'.

25 *Criminal Procedure Act 1986* (NSW) s 294AA; *Crimes Act 1958* (Vic) s 61; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5).

prohibition on the warning that children as a class are unreliable witnesses, and prevent judges from stating or suggesting to the jury that complainants in sexual assault proceedings are unreliable witnesses as a class.[26]

28.19 These provisions do not prevent a judge from making any comment on evidence given in a trial that it is appropriate to make in the interests of justice—for example, warning that a particular child's or complainant's evidence, or the particular circumstances of the witness, may affect the reliability of that evidence.[27]

Murray warning

28.20 The *Murray* warning is named after the NSW Court of Criminal Appeal case in which it was discussed.[28] The warning, which may be given by a trial judge pursuant to common law powers, cautions about the danger of convicting on the uncorroborated evidence of a sexual assault complainant—including a child complainant. It is frequently given in sexual assault trials, if requested by the defence,[29] and is generally to the effect that:

> where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in.[30]

28.21 Legislation that prohibits a judge from stating or suggesting to a jury that complainants in sexual offence proceedings are unreliable witnesses as a class[31] may have been enacted with the parliamentary intention of relieving a trial judge from giving a *Murray* warning.[32] However, because those provisions are directed at warnings that refer to complainants of sexual offences as an unreliable class of witness and not whether the evidence of one witness must be scrutinised with great care, they are unlikely to prevent a trial judge from giving the *Murray* warning.[33]

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26 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

27 The Commissions note also that judges in the uniform Evidence Acts jurisdictions are obliged to give a warning in respect of evidence that may be unreliable, including several broadly described categories of evidence, unless there is good reason for not doing so: Uniform Evidence Acts, s 165. As s 165 concerns warnings in respect of *categories of evidence*, rather than *categories of witnesses*, it is not of immediate relevance to the present discussion.

28 *R v Murray* (1987) 11 NSWLR 12.

29 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 373–374; J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996); J Cashmore, 'The Prosecution of Child Sexual Assault: A Survey of NSW DPP Solicitors' (1995) 28 *Australian and New Zealand Journal of Criminology* 32, 43.

30 *R v Murray* (1987) 11 NSWLR 12, 19.

31 *Criminal Procedure Act 1986* (NSW) s 294AA; *Crimes Act 1958* (Vic) s 61; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5).

32 See, eg, *Criminal Procedure Act 1986* (NSW) s 294AA; New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

33 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.39]; Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <www.judcom.nsw .gov.au/publications/benchbks/sexual_assault/index.html> at 14 April 2010 24 March 2010.

28.22 Criticisms of the *Murray* warning include that it:

- is 'superfluous where the complainant's unreliability [is] obvious or useless where the complainant [is] a skilled and convincing liar';[34]
- is 'patently obvious';[35]
- is supported by a rationale that is inconsistent with the psychological literature;[36]
- potentially undermines a complainant's evidence and perpetuates myths about women;[37] and
- may be interpreted by jurors as an invitation to acquit.[38]

28.23 It is open to question whether the standard directions regarding the burden and standard of proof adequately address the situation where the only evidence comes from the complainant. Some commentators argue the warning is unnecessary given the judge will direct the jury not to convict unless they are satisfied of the guilt of the accused beyond reasonable doubt.[39] Other sources suggest the *Murray* warning is a useful reinforcement of the direction on the standard of proof.[40] Another view questions what the *Murray* warning actually means and suggests that it is likely to confuse jurors as to whether there is a difference between being 'satisfied beyond reasonable doubt' and 'scrutinising the evidence with great care'.[41]

28.24 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should prohibit a judge in any sexual assault proceedings from:

- warning a jury, or making any suggestion to a jury, that complainants as a class are unreliable witnesses; and
- warning a jury of the danger of convicting on the uncorroborated evidence of any complainant.[42]

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34 D Boniface, 'The Common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warning in Sexual Assault Trials' (2005) 11 *University of New South Wales Law Journal* 5, 265.

35 Ibid, 267.

36 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 107–109.

37 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004).

38 Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), [7.82].

39 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.35].

40 Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html> at 14 April 2010.

41 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), [17]–[20].

42 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 18–11.

Submissions and consultations

28.25 There was significant support among stakeholders for the Consultation Paper proposal.[43]

28.26 National Legal Aid agreed with the proposal except to the extent that it provided that a trial judge be prohibited from warning a jury of the danger of convicting on the uncorroborated evidence of any complainant, on the basis that a corroboration warning may be required in a particular case.[44]

28.27 Dr Anne Cossins supported the proposal but considered that it did not go far enough in restricting the ability of trial judges to give the *Murray* warning, particularly in the case of child complainants.[45] Cossins noted that the proposal—by extending the basic terms of s 165A of the uniform Evidence Acts to all complainants—preserves the trial judge's power to give common law warnings, including the *Murray* warning. Cossins considered that, although s 165A(1)(b) appears to address the problems associated with the *Murray* warning, it does not abolish the use of the words 'scrutinised with great care' and its effect is merely that a warning or suggestion must not be given to a jury that a child's evidence requires greater scrutiny than an adult's evidence.

28.28 Cossins acknowledged that, in some circumstances, the evidence of a child will be considered to be unreliable for particular reasons but that those reasons should be grounded on up-to-date research rather than suppositions about age, memory or reliability or outdated prejudice and assumptions.

28.29 Ultimately, Cossins submitted that the power of trial judges to give common law warnings in relation to the reliability of a child witness' evidence should be abolished, and that a warning concerning a child's evidence should only be given in exceptional and particular circumstances prescribed by legislation.

Commissions' views

28.30 It is now generally accepted that judges should be prohibited from warning or suggesting to the jury that children as a class are unreliable witnesses.[46] In the Commissions' view, similar provisions should prohibit warnings about complainants in sexual assault cases generally.

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43 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; J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179,* 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172,* 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149,* 25 June 2010; Confidential, *Submission FV 130,* 21 June 2010; A Cossins, *Submission FV 112,* 9 June 2010.

44 National Legal Aid, *Submission FV 232,* 15 July 2010.

45 A Cossins, *Submission FV 112,* 9 June 2010.

46 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 104.

28.31 The Commissions also consider that legislation should prohibit a judge from giving general warnings to a jury about the danger of convicting on the uncorroborated evidence of any complainant or witness who is a child. As the NSW Taskforce observed:

> this would prevent a general warning being given about scrutinising the evidence of the complainant with great care, simply because he or she is alleging sexual assault. However, where there is specific evidence, which suggests that aspects of a complainant's evidence may be unreliable, a comment may still be made about needing to treat such evidence with care.[47]

28.32 Legislation of the kind proposed by the Commissions would preserve a trial judge's power to give a *Murray* warning in an appropriate case. The Commissions consider that judicial education should be undertaken and judicial bench books updated to assist judges to identify, with reference to recent literature on the matter, the circumstances in which it is in the interests of justice to give a warning about the danger of convicting on the uncorroborated evidence of a particular complainant or child witness.[48]

Recommendation 28–1 Federal, state and territory legislation should prohibit a judge in any sexual assault proceedings from:

(a) warning a jury, or making any suggestion to a jury, that complainants as a class are unreliable witnesses; and

(b) giving a general warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant or witness who is a child.

Recommendation 28–2 Australian courts and judicial education bodies should provide judicial education and training, and prepare material for incorporation in bench books, to assist judges to identify the circumstances in which a warning about the danger of convicting on the uncorroborated evidence of a particular complainant or child witness is in the interests of justice.

Warnings about delay in complaint

28.33 At common law it was assumed that 'a genuine sexual assault victim would make a complaint at the first opportunity and the failure to do so was considered relevant to the complainant's credibility'.[49]

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47 Ibid.

48 Although the Australasian Institute for Judicial Administration's bench book for children giving evidence in Australian courts does not specifically address the *Murray* warning, the bench book is illustrative of how legal and psychological material may be collated in a text which is intended for use by judicial officers in court: Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009).

49 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), [18.72]

28.34 This assumption has since been discredited by research.[50] Delay in complaint is now known to be a typical feature of reporting sexual assault. Parliaments in a number of jurisdictions have responded to these developments by enacting legislative provisions to

> require the trial judge to warn the jury that delay in complaint does not necessarily indicate that the allegation is false and that a person may have a good reason for delaying in making a complaint.[51]

28.35 Arguably, these legislative reforms have subsequently been undermined by the High Court decisions in *Longman v The Queen*[52] and *Crofts v The Queen*[53] which discussed what are now referred to as the *Longman* and *Crofts* warnings respectively.

Longman warning

28.36 In *Longman*,[54] a complaint was made more than 20 years after the alleged offence. In general terms, the case requires that the jury be warned that, because of the passage of a number of years, it would be 'dangerous to convict' on the complainant's evidence alone unless the jury is satisfied of its truth and accuracy, having scrutinised the complainant's evidence with great care.[55] The rationale for the warning is that a significant delay puts the accused at a forensic disadvantage because he or she has lost the 'means of testing the complainant's allegations which would have been open to him [or her] had there been no delay'.[56]

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50 For details of this research see, Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [2.43]. See also, 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), [18.72]–[18.73]; A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

51 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), [18.73]. See, eg, *Crimes Act 1958* (Vic) s 61(1)(b).

52 *Longman v The Queen* (1989) 168 CLR 79.

53 *Crofts v The Queen* (1996) 186 CLR 427.

54 *Longman v The Queen* (1989) 168 CLR 79.

55 Ibid, 91. See also 108–109.

56 Ibid, 91.

28.37 The *Longman* warning has attracted a great deal of comment and criticism,[57] including that:

- the combined effect of *Longman* and subsequent High Court cases[58] has been to 'give rise to an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainant's evidence'[59] and, as a result, trial judges are required to give the warning irrespective of whether the accused has in fact been prejudiced or suffered a forensic disadvantage;
- warning the jury in the terms that it would or may be 'dangerous or unsafe' to convict 'risks being perceived as a not too subtle encouragement by the trial judge to acquit',[60] thereby encroaching improperly on the fact-finding task of the jury;
- the actual length of delay which necessitates the giving of a *Longman* warning is unclear;[61]
- a practice has developed of giving the *Longman* warning to 'appeal-proof' trial judges' directions even if it is unnecessary in the particular case;[62] and
- the warning is given even where there is corroboration of the complainant's evidence.[63]

28.38 The *Longman* warning also raises a range of other issues in relation to perpetuating myths and misconceptions about sexual assault and discriminatory attitudes towards women and children. For example, at common law, the warning focuses on the evidence of the complainant, rather than the forensic disadvantage

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57 See, eg, Victorian Law Reform Commission, *Jury Directions: Final Report* (2009); Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009); New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008); 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 8 (2006); 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); Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002). See also A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

58 *Dyers v The Queen* (2002) 210 CLR 285; *Doggett v The Queen* (2001) 208 CLR 343; *Robinson v The Queen* (1999) 197 CLR 162; *Crampton v The Queen* (2000) 206 CLR 161.

59 *R v BWT* (2002) 54 NSWLR 241, [14]–[15].

60 Ibid, [34].

61 Ibid,[95]. See, eg, *R v Heuston* (2003) 140 A Crim R 422.

62 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 89–90. See also, New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.49]–[7.54]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [2.1.1]–[2.2.1], [2.3.1]–[2.3.2].

63 A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

suffered by the defendant.[64] Also, the warning continues to link delay in complaint with the complainant's credibility and reflects discredited assumptions as to the reliability of memory, particularly that of children.[65]

Uniform Evidence Acts approach

28.39 In ALRC Report 102, the ALRC, NSWLRC and Victorian Law Reform Commission (VLRC) identified two options for reform to address the concerns raised in relation to the *Longman* warning: to legislate to abolish the warning in its entirety; or to legislate to clarify, modify or limit its operation.[66]

28.40 Ultimately the ALRC and the VLRC, but not the NSWLRC, recommended that:

> the uniform Evidence Acts be amended to provide that where a request is made by a party, and the court is satisfied that the party has suffered significant forensic disadvantage as a result of delay, an appropriate warning may be given.
>
> The provision should make it clear that the mere passage of time does not necessarily establish forensic disadvantage and that a judge may refuse to give a warning if there are good reasons for doing so.
>
> No particular form of words need to be used in giving the warning. However, in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.[67]

28.41 The recommendation was subsequently enacted as s 165B of the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW) and *Evidence Act 2008* (Vic).[68]

28.42 In its 2008 consultation paper on jury directions, the VLRC considered whether s 165B of the uniform Evidence Acts provided a satisfactory approach to warning the jury in relation to the forensic disadvantage because of delay and whether such a warning continues to be necessary, or the matter ought to be left to counsel to address.[69] The VLRC concluded that s 165B of the *Evidence Act 2008* (Vic) appropriately deals with *Longman* warnings:

> Section 165B provides that the judge must be satisfied that the accused has suffered forensic disadvantage because of the delay before giving the jury a warning. The

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64 Ibid.

65 See Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [2.1.22].

66 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), [18.100]. See [18.101]–[18.102] for the principal arguments in support of each of these options.

67 Ibid,[18.116]–[18.129], Rec 18–3. See also [18.130]–[18.146] for the NSWLRC's views in relation to this recommendation.

68 Differences between these provisions include that in s 165B(2) of the Commonwealth and Victorian Acts, application must be made by 'the defendant', while in s 165B(2) of the NSW Act application must be made by 'a party'. Also, the NSW Act is alone in providing a non-exhaustive list of factors that may be regarded as establishing a significant forensic disadvantage, see *Evidence Act 1995* (NSW) s 165B(7). No such provision has been enacted in Tasmania, although it is a uniform Evidence Acts jurisdiction. For further discussion see, Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [3.3.1]–[3.3.22].

69 As discussed in the final report: Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), 105.

> judge is probably better placed than the jury to make this threshold assessment. If the judge makes this determination he or she must inform the jury of the nature of the disadvantage and instruct them to take it into account when considering their verdict.
>
> Section 165B of the *Evidence Act* is activated by a request from counsel for a warning. The trial judge has a discretionary power to refuse to give a warning which has been requested when satisfied that 'there are good reasons for not doing so'. This approach is consistent with our recommendations concerning all directions other than those which are mandatory.[70]

28.43 Cossins has identified a number of weaknesses and limitations in the operation of s 165B of the uniform Evidence Acts.[71] The limitations arise, in her view, because:

- s 165B 'does not affect any other power of the judge to give any warning to, or to inform, the jury',[72] meaning that trial judges are still able to give a *Longman* warning; and
- the *Longman* warning is mandatory in nature but s 165B warnings are dependent on an application by 'a party'[73] or 'the defendant'.[74]

28.44 The National Child Sexual Assault Reform Committee has identified a number of issues that may arise in practice as a result.[75] These are that:

- a trial judge could give both *Longman* and s 165B warnings;[76]
- a trial judge may be persuaded to give the *Longman* warning instead of a s 165B warning to 'appeal-proof' the case;[77] and
- in the federal and Victorian jurisdictions, the defendant must request the s 165B warning before it can be given, and it is doubtful whether the defence would make such a request if the more advantageous *Longman* warning can be given in the alternative.

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70 Ibid, 105–106, Rec 37: 'The issue of delay in complaint in criminal trials should be governed by a provision in the legislation, substantially adopting s 165B of the *Evidence Act 2008*, in lieu of s 61 of the *Crimes Act 1958*'.

71 A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

72 Uniform Evidence Acts, s 165B(5).

73 *Evidence Act 1995* (NSW) s 165B.

74 *Evidence Act 1995* (Cth) s 165B; *Evidence Act 2008* (Vic) s 165B.

75 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 78.

76 The Committee contends this may occur where the prosecution makes an application for a s 165B warning to be given and the defence reminds the judge of the *mandatory* nature of the *Longman* warning. The Committee also contends that in this situation, it would be more likely that the judge will refuse to give the s 165B warning (pursuant to *Evidence Act 1995* (NSW) s 165B(3)) and give the *Longman* warning instead.

77 The Committee explains that a s 165 warning is less advantageous to a defence case than the *Longman* warning. A defendant who is convicted by a jury who has been directed in the terms of *Longman* would therefore be unlikely to assert on appeal that the trial judge failed to give a s 165B warning. By comparison, a defendant who is convicted by a jury who has been directed in terms of a s 165B warning is more likely to assert on appeal that the conviction should be overturned because the trial judge failed to warn the jury in the terms of *Longman*.

Options for reform

28.45 The Queensland Law Reform Commission (QLRC) and the TLRI have recommended the enactment of legislative provisions to override the *Longman* warning in terms which are broadly consistent with the uniform Evidence Acts approach.[78]

28.46 South Australia has pursued an alternative reform option by enacting s 34CB of the *Evidence Act 1929* (SA). Section 34CB of the *Evidence Act 1929* (SA) was enacted with the clear intention of abolishing the *Longman* warning.[79] Arguably, however, the drafting abolishes the trial judge's obligation to give the *Longman* warning, without limiting the power to give the warning, providing that a 'rule of law or practice obliging a judge in a trial of a charge of an offence to give a warning of a kind known as a *Longman* warning is abolished'.[80]

28.47 As a result, s 34CB of the *Evidence Act 1929* (SA) differs from s 165B of the uniform Evidence Acts to the extent that it abolishes the trial judge's obligation to give the *Longman* warning.

28.48 In practice, however, the provisions may differ little in the extent to which they regulate the trial judge's general power to give a *Longman* warning.[81] The key distinction which emerges between s 165B of the uniform Evidence Acts and the South Australian provision is that under the uniform Evidence Acts, a judge may be obliged to give a *Longman* warning—irrespective of whether a s 165B warning is requested—whereas a judge under s 34CB of the *Evidence Act 1929* (SA) is not obliged to give a *Longman* warning.

28.49 Other points of difference between s 165B of the uniform Evidence Acts and s 34CB of the *Evidence Act 1929* (SA) include that:

- a judge under the uniform Evidence Acts is not obliged to give a s 165B direction to the jury if it is not requested,[82] whereas a judge under s 34CB of the *Evidence Act 1929* (SA) must do so if the court is of the opinion 'that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage to the defendant';[83]

78 Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), Rec 15–1; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), Rec 2. At the time of writing, neither recommendation had been implemented.

79 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1449 (M Atkinson—Attorney-General, Minister for Justice, Minister for Multicultural Affairs).

80 A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review, 35.

81 Cf Uniform Evidence Acts, s 165B(5).

82 Ibid s 165B(2).

83 *Evidence Act 1929* (SA) s 34CB(2).

- a judge under the uniform Evidence Acts provision has a discretion to refuse to give a warning relating to delay where the defendant is forensically disadvantaged if there are good reasons for doing so,[84] whereas no such discretion is available to a judge under s 34CB of the *Evidence Act 1929* (SA); and
- the uniform Evidence Acts do not explicitly require that the direction given must be specific to the circumstances of the particular case, whereas the South Australian provision makes this explicit.[85]

28.50 The National Child Sexual Assault Reform Committee has proposed an alternative provision to address the inadequacies of s 165B of the uniform Evidence Acts.[86] The Committee proposed that the defendant should have to show—on the balance of probabilities—'actual forensic disadvantage' before the court is required to give a s 165B warning.[87] The Committee also proposes that s 165B should prescribe the exact wording of the warning and prohibit any other form of words being used.[88] Section 165B should, in the Committee's view, require the trial judge to give reasons for not giving a warning and explicitly abrogate the court's power to give a *Longman* warning.

Consultation Paper

28.51 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that:

> (a) if the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence;
>
> (b) the judge need not comply with (a) if there are good reasons for not doing so; and
>
> (c) no particular form of words needs to be used in giving the warning pursuant to (a), but in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.

28.52 The Commissions also asked what issues arise in practice pursuant to s 165B of the uniform Evidence Acts and whether the abrogation of the trial judge's obligation and power to give a *Longman* warning under s 165B(5) is sufficiently explicit.

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84 Uniform Evidence Acts, s 165B(3).

85 *Evidence Act 1929* (SA) s 34CB(3)(a).

86 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 79–82.

87 Ibid, Rec 2.1.

88 The proposed wording would require the judge to inform the jury that they 'may' take the forensic disadvantage into account in determining whether the prosecution has proved its case beyond reasonable doubt. Uniform Evidence Acts s 165B(2) provides the court must 'inform the jury of the nature of that disadvantage and the *need* to take the disadvantage into account when considering the evidence' (emphasis added).

Submissions and consultations

28.53 Many stakeholders supported the Consultation Paper proposal.[89] Some members of the NSW legal profession observed that s 165B of the uniform Evidence Acts works satisfactorily in practice and does not lead to trial judges giving *Longman* warnings in addition to, or instead of, s 165B warnings.[90]

28.54 National Legal Aid noted that the *Longman* warning has a strong effect on trial outcomes and that, before the uniform Evidence Acts were enacted, research suggested that judicial misdirection in relation to the *Longman* warning was a common ground of criminal appeal and a common basis for successful criminal appeals in NSW.[91] Nonetheless, National Legal Aid considered that it is appropriate that *Longman* warnings be given where the defendant is at a forensic disadvantage in, for example, locating witnesses, testing or adducing evidence, where there has been substantial delay.[92]

28.55 Cossins did not support the Consultation Paper proposal, because it would not abolish the *Longman* warning or the power of trial judges to give the warning. In her view, there is 'no reason to think that [the proposal] will change the practice of giving the warning, particularly since trial judges know that the failure to give a *Longman* warning is an obvious and common ground of appeal'.[93] Cossins questioned the grounds on which a trial judge can refuse to give a *Longman* warning, if requested by the defence, and argued that very clear words of abrogation need to be included to remove the power to give a common law warning.[94]

28.56 In Cossins' view, the preferred reform would replace *Longman* with an alternative warning and specify a particular form of words to describe the disadvantages suffered by the defendant because of delay in complaint. This alternative warning should only be given where the defendant can show that he or she has suffered an actual forensic disadvantage as a result of a delay in complaint. It is necessary, Cossins argues, to restrict the form of words used by the trial judge.[95]

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89 National Legal Aid, *Submission FV 232,* 15 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179,* 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172,* 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149,* 25 June 2010; Confidential, *Submission FV 130,* 21 June 2010.

90 Barrister, *Consultation*, Sydney, 10 June 2010; NSW Legal Assistance Forum, *Consultation*, Sydney, 10 May 2010.

91 National Legal Aid, *Submission FV 232,* 15 July 2010.

92 Ibid.

93 A Cossins, *Submission FV 112,* 9 June 2010.

94 Dr Cossins refers to *Crimes Act 1958* (Vic) s 61(1E) and *Evidence Act 1929* (SA) s 34B as examples of clear abrogation. Those parts of *Crimes Act 1958* (Vic) s 61 which affect *Longman* warnings were displaced by *Evidence Act 2008* (Vic) s 165B.

95 A Cossins, *Submission FV 112,* 9 June 2010.

Commissions' views

28.57 In the Commissions' view, s 165B of the uniform Evidence Acts provides a satisfactory approach to the problems raised by the *Longman* warning. In forming this view, the Commissions recognise that delay in complaint is a typical feature of reporting sexual assault and that the mere passage of time ought not to 'count against' a complainant in sexual offence proceedings.

28.58 Provisions consistent with s 165B should be adopted by all jurisdictions because a jury could fail to appreciate that delay can cause forensic disadvantage to a defendant. Where (and only where) a significant forensic disadvantage is identified and has an evidentiary basis, the court ought to inform the jury of the nature of that disadvantage and the need to take it into account when considering the evidence.

28.59 The Commissions acknowledge that, in some cases, the existence of a very long delay may satisfy the court that the defendant has suffered a significant forensic disadvantage such as to require a s 165B warning, but also consider that the provision makes it clear that the mere passage of time does not necessarily establish forensic disadvantage.

Recommendation 28–3 State and territory legislation should provide, consistently with s 165B of the uniform Evidence Acts, that:

(a) if the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence;

(b) the judge need not comply with (a) if there are good reasons for not doing so; and

(c) no particular form of words needs to be used in giving the warning pursuant to (a), but in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.

Crofts warning

28.60 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.

28.61 The *Crofts* warning originates from a jury direction mandated by the High Court in *Kilby v The Queen*.[96] In *Kilby v The Queen*, 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

96 *Kilby v The Queen* (1973) 129 CLR 460.

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.

28.62 Legislation was subsequently passed in a number of 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.[98] 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*.[99]

28.63 In *Crofts v The Queen*, 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 s 61(1)(b) of the *Crimes Act 1958* (Vic), 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.

28.64 The High Court held that s 61(1)(b) 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 s 61(1) and like provisions 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.

28.65 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]

28.66 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

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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

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]

28.67 As with the *Longman* warning, the *Crofts* warning has attracted a great deal of comment and criticism.[103] Major criticisms of the *Crofts* warning include that:[104]

- 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]
- 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]
- 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]
- 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]

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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].

103 See, the list of reports cited in relation to *Longman* above.

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.

Options for reform

28.68 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 made by these bodies are briefly discussed below.

28.69 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 s 61(1)(b)(ii), in this Report, referred to 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]

28.70 In ALRC Report 102, 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]

28.71 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.

28.72 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 *Kilby* and *Crofts* directions.

28.73 Section 34M(2) states that:

> 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.

28.74 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

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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).

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]

28.75 In 2006, the 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.

28.76 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]

28.77 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]

28.78 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

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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)'. For a discussion of concerns which arise in respect of s 34M of the *Evidence Act 1929* (SA), see Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), [18.276].

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].

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]

28.79 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]

28.80 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]

28.81 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

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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).

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 jury warnings.[134]

28.82 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 warning based on outdated and discredited assumptions' and considered that no further amendment to the *Criminal Law (Sexual Offences) Act 1978* (Qld) was warranted.[136]

Consultation Paper

28.83 In the Consultation Paper the Commissions asked whether warnings about the effect of delay on the credibility of complainants are necessary in sexual assault proceedings.[137]

28.84 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.

28.85 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]

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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).

28.86 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

28.87 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:

- 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]
- there are different schools of thought about how delay affects a victim's testimony;[146] and
- delay may occur for a range of reasons, including the adjournment of the criminal proceedings.[147]

28.88 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]

28.89 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

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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.

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]

28.90 Another group of stakeholders supported the alternative proposal.[152] Professor Julie Stubbs preferred this option because, in her view, it is more likely to result in consistent handling of the issue by judicial officers.[153]

28.91 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]

28.92 Cossins 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.

28.93 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]

Commissions' views

28.94 As discussed above, 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.

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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.

28.95 The views of stakeholders, in response to the Consultation Paper proposals, are 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]

28.96 In dealing with this issue, the Commissions reiterate the views expressed in ALRC Report 102:

> 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.
>
> 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]

28.97 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 uniform Evidence Acts. 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.

28.98 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.

28.99 In the Commissions' view, federal, state and territory 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: better acknowledges the adversarial nature of the criminal trial process and is more consistent with the roles of judge and jury; is consistent with the simplification of the law; and overcomes the

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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.

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]

Recommendation 28–4 Federal, state and territory legislation should provide that, in sexual assault proceedings:

(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 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.

Cross-examination

28.100 Cross-examination is a feature of the adversarial process and is designed, among other things, to allow the defence to confront and undermine the prosecution's case by exposing deficiencies in a witness' testimony, including the complainant's testimony. Under the common law, the uniform Evidence Acts and other legislation, limitations have been placed on inappropriate and offensive questioning under cross-examination. It has been argued, however, that the effect of these provisions in practice has not provided a sufficient degree of protection for complainants in sexual assault proceedings. The following section:

- briefly discusses the cross-examination of children and other vulnerable witnesses in sexual assault cases; and
- examines issues concerning cross-examination where the defendant is not represented by a lawyer.

Cross-examination of children and vulnerable witnesses

28.101 Cossins has documented inquiries relating to the prosecution of child sex offences, and children as witnesses within the criminal justice system over the last 14

162 Ibid, [3.137].

years.[163] She found that cross-examination is one of the most difficult parts of testifying for children; children are subject to complex, developmentally inappropriate and repetitive questioning and questioning deliberately designed to confuse and create inconsistencies; and the powers of judicial officers to intervene to prevent improper questioning are either 'exercised sparingly' or sometimes have no effect on defence counsel questioning.[164]

28.102 Unless they have a cognitive impairment, adults are much less vulnerable than children during cross-examination. Nonetheless, they can be subject to the same types of leading, repetitive, aggressive, intimidating and humiliating questions as children. There is, however, much less information available about the impact of cross-examination on adult sexual assault complainants, particularly recent information. Because of the extent of juror misconceptions about how women and children respond to sexual assault, cross-examination is likely to play a central role in confirming the pre-existing attitudes and beliefs of jurors.[165]

Improper questioning

28.103 The Commonwealth, NSW and ACT uniform Evidence Acts impose a positive duty on the court to intervene to disallow improper ('disallowable') questions.[166] Under this provision a court 'must' disallow a question that:

- is misleading or confusing; or
- is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age, or mental, intellectual or physical disability).[167]

28.104 When recommending, in ALRC Report 102, that such a duty should be enacted, the ALRC, the NSWLRC and the VLRC considered the duty was necessary to: protect vulnerable witnesses from improper questioning; ensure 'the best evidence

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163 A Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 73.

164 Ibid, 73–74; quoting Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 314. See also C Eastwood and W Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002).

165 The *Heroines of Fortitude* report highlighted the experience of Indigenous women under cross-examination in sexual offence proceedings: J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996), 99–103.

166 Uniform Evidence Acts, s 41. Such provisions were previously enacted under *Criminal Procedure Act 1986* (NSW) s 275A, which also imposed a positive duty on the court 'to intervene in relation to a range of improper questions, irrespective of whether or not the other party raised an objection': See A Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 93.

167 *Evidence Act 1995* (Cth) s 41(1); *Evidence Act 1995* (NSW) s 41(1).

is received by the court'; and overcome judges' long standing reluctance to intervene in cross-examination.[168]

28.105 The Commonwealth, NSW and ACT provisions apply to all witnesses, not just vulnerable ones.[169] The equivalent provision in Victoria is specific to vulnerable witnesses, defined to include persons: under the age of 18 years; who have a cognitive impairment or an intellectual disability; or whom the court considers to be vulnerable, having regard to the characteristics of the witness and the context in which the questions are put.[170]

28.106 Apart from South Australia,[171] no other Australian jurisdiction places a positive duty on the court to disallow improper questions.[172]

Further reform

28.107 Perceived problems with the reluctance of judicial officers to intervene to protect witnesses in criminal trials and to control cross-examination have led to proposals for reform. For example, Cossins and the National Child Sexual Assault Reform Committee have set out a range of recommendations aimed at enabling children to give their best evidence in sexual assault trials. These include recommendations to:

- prohibit suggestive questions or statements that are designed to persuade the child to agree with the proposition or suggestion put to them;
- prohibit asking the same question or making the same statement more than once;
- prohibit questions or statements made by the defence that directly accuse the child of lying or being a liar;
- place restrictions on the use of prior inconsistent statements by the defence; and
- introduce court-appointed intermediaries (social workers, psychologists or other relevant professionals) trained in child cognition, language and development to assess defence questions during the cross-examination of a child complainant.[173]

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168 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), [5.114].

169 The VLRC did not agree that s 41 should apply to all witnesses. Rather, it concluded that 'a specific duty in relation to vulnerable witnesses offers the best prospect of changing the culture of judicial non-intervention': Ibid, [5.123].

170 *Evidence Act 2008* (Vic) s 41(4). The Victorian and Tasmanian Acts provide a discretion to disallow improper questions put to any witness in cross-examination: *Evidence Act 2008* (Vic) s 41(1). See also *Evidence Act 2001* (Tas) s 41. See also *Crimes Act 1914* (Cth) s 15YE in relation to cross-examination of children in proceedings for sexual offences.

171 *Evidence Act 1929* (SA) s 25(4).

172 See *Evidence Act 1977* (Qld) s 21(2); *Evidence Act 1906* (WA) s 26(3); *Evidence Act 2001* (Tas) s 41(2); *Evidence Act 1939* (NT) s 16(2).

173 A Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 99–101.

28.108 Such matters, as with duties to disallow improper questioning, are aspects of vulnerable witness protection. The Standing Committee of Attorneys-General (SCAG) is developing, through the National Working Group on Evidence, proposed amendments to the uniform Evidence Acts dealing with vulnerable witness provisions. Model provisions are expected to be drafted later in 2010.

28.109 The Terms of Reference instruct the ALRC, in undertaking this Inquiry, to be 'careful not to duplicate … the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model … vulnerable witness protections'. For this reason, the Commissions do not make any proposals for reform of these aspects of vulnerable witness protection.

Unrepresented defendants

28.110 Every Australian jurisdiction, with the exception of Tasmania, has enacted legislation to place restrictions on the cross-examination of complainants in sexual offence proceedings by unrepresented defendants.[174]

28.111 In some jurisdictions this protection is only afforded to child complainants and child witnesses.[175] In other jurisdictions it has application beyond sexual offences, and applies to a broader range of legal proceedings or wider class of witness. In Western Australia, the court's power to prohibit personal cross-examination by the defendant is discretionary (albeit for a wider class of witness across a range of criminal proceedings).[176]

28.112 The NSWLRC explored the issue of cross-examination by an unrepresented accused in detail.[177] It canvassed the competing interests of the rights of the accused to a fair trial—the critical consideration being the ability to test the evidence against them—and the rights of the complainant (that is, the need to reduce the potential distress and humiliation to complainants caused by personal cross-examination).

28.113 In regard to this last area, the NSWLRC drew attention to the particular nature of sexual offences, the nature of the evidence that needs to be elicited from the complainant, the length of cross-examination, and its focus on issues of credibility and consent. To be personally cross-examined by the defendant was seen as having a negative impact on the complainant's ability to answer questions, thus affecting the quality and nature of the evidence received. This is likely to be amplified in those cases where the complainant and the defendant have, or have had, an intimate or family relationship.[178] The VLRC and QLRC, who dealt with this issue as part of broader

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174 *Crimes Act 1914* (Cth) ss 15YF–15YG; *Criminal Procedure Act 1986* (NSW) s 294A; *Criminal Procedure Act 2009* (Vic) s 356; *Evidence Act 1977* (Qld) ss 21N–21S; *Evidence Act 1906* (WA) s 25A; *Evidence Act 1929* (SA) s 13B; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.

175 See *Crimes Act 1914* (Cth) ss 15YF–15YG.

176 *Evidence Act 1906* (WA) s 25A(1).

177 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003).

178 Raised in submissions to Ibid, [2.11].

inquiries, also emphasised the negative effect of personal cross-examination on child complainants and child witnesses.[179]

28.114 In order to 'strike a balance' between the rights of the accused to test the evidence against them, and the importance of limiting the traumatic experience of complainants in sexual offence proceedings, most jurisdictions prohibit personal cross-examination. However, jurisdictions differ as to:

- whether this protection applies to witnesses other than sexual assault complainants or alleged victims and whether it applies in other legal proceedings; and
- who asks the questions on behalf of the unrepresented defendant and whether that person has any role or responsibility in providing advice to the defendant.

Which witnesses are protected?

28.115 In some jurisdictions, protection from cross-examination by an unrepresented defendant is limited to the cross-examination of a complainant in sexual offence proceedings,[180] or to child complainants and child witnesses in sexual offence proceedings,[181] while in others it applies to a wider range of proceedings and witnesses:

- In Victoria, the protection applies to 'protected witnesses' in sexual offence proceedings and offences that would amount to family violence within the meaning of the *Family Violence Protection Act 2008* (Vic).[182]
- In Queensland, the protection applies to witnesses under 16 years of age, witnesses with an 'impairment of the mind' and alleged victims in a 'prescribed special offence' (this covers rape and sexual assault along with a range of other offences) or, subject to conditions, victims of a 'prescribed offence'.[183]
- In the ACT, the protection applies to the complainant or a 'similar act witness' in a sexual offence proceeding, a serious violent offence proceeding, and to a less serious violent offence proceeding where the witness and the accused have

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179 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.122]. See also Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 272–273.

180 *Criminal Procedure Act 1986* (NSW) s 294A prohibits personal cross-examination by an unrepresented accused in 'prescribed sexual offence proceedings' which are defined in s 3; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.

181 *Crimes Act 1914* (Cth) s 15YF prohibits the cross-examination of a child complainant (that is the child who is alleged to be the victim of the offence) and s 15YG prohibits the cross-examination of a child witness (other than the child complainant) unless the court grants leave to do so. Both of these sections apply to sexual offence proceedings as specified in s 15Y. These protections apply to committal proceedings and other proceedings related to the prosecution of the prescribed offences: s 15Y(2).

182 *Criminal Procedure Act 2009* (Vic) s 354. 'Protected witness' is defined broadly and includes the complainant, a family member of the complainant, a family member of the accused person, and any other witness that the court declares protected.

183 'Prescribed special offence' and 'prescribed offence' are defined in *Evidence Act 1977* (Qld) s 21M(3).

been in an intimate relationship[184] or the court considers that the witness has some particular vulnerability.[185]

- In South Australia, the protection applies to children or witnesses who are the alleged victims of a 'serious offence', or an offence of contravening or failing to comply with a domestic violence restraining order or a restraining order.[186]
- The provision in Western Australia is discretionary, but it is open to the court to 'forbid' such personal cross-examination for any witness in a criminal proceeding.[187]

Who asks the questions?

28.116 In the Commonwealth, NSW and ACT jurisdictions, the defendant's cross-examination questions are to be asked on their behalf by 'a person appointed by the court'. The role of the appointed person is simply to ask the questions. In NSW and the ACT it is made clear that this appointed person 'must not independently give the accused person legal or other advice'.[188]

28.117 In Western Australia, South Australia and the NT, the defendant's cross-examination questions are either put by the court or a person appointed by the court.[189] In Western Australia and the NT the questions must be 'repeated accurately' by the judge or other appointed person.[190] In South Australia, however, the legislation makes it clear that only those questions 'determined by the judge to be allowable' will be asked of the witness.[191]

28.118 In Victoria[192] and Queensland,[193] the person who asks the questions must be a legal practitioner and has a more active legal role in asking the questions. In Victoria the court 'must order Victoria Legal Aid to provide legal representation' to the accused for the purpose of cross-examining the protected witness.[194] The legal practitioner provided by Victoria Legal Aid 'must act in the best interests of the accused person if

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184 'Intimate relationship' is defined in *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38B(2)–(4).

185 Ibid s 38D(1). The protection also applies to a child or person with a disability who is giving evidence in a sexual or violent offence proceeding (i.e. where they are not the complainant who is already protected): *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(2).

186 *Evidence Act 1929* (SA) s 13B(5).

187 *Evidence Act 1906* (WA) s 25A.

188 *Criminal Procedure Act 1986* (NSW) s 294A(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(5). The NSW legislation does not accord with the conclusion of the NSWLRC which had recommended that the person appointed to conduct the cross-examination should be the legal representative for the accused for the purposes of that cross-examination: see New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.38], Rec 7.

189 *Evidence Act 1906* (WA) s 25A(1)(c); *Evidence Act 1929* (SA) s 13B(2)(b); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b).

190 *Evidence Act 1906* (WA) s 25A(1)(c); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b).

191 *Evidence Act 1929* (SA) s 13B(2)(b).

192 *Criminal Procedure Act 2009* (Vic) s 357.

193 *Evidence Act 1977* (Qld) s 21O(2)(b).

194 *Criminal Procedure Act 2009* (Vic) s 357(2).

the accused person does not give any instructions to that legal practitioner'.[195] In Queensland, the lawyer appointed to ask the questions on behalf of the accused is 'the person's legal representative for the purposes only of the cross-examination'.[196]

28.119 In all the jurisdictions where this alternative mode of cross-examination is conducted, the judge is required to explain to the jury that this is a 'standard' or 'routine' procedure, and that they are not to draw any adverse inferences from this practice, nor are they to give the witness' evidence any greater or lesser weight.[197]

28.120 A key difference of approach in the jurisdictions—and in the literature on this issue—is whether the person appointed to ask the cross-examination questions on behalf of the accused should be legally trained and in a position to provide the accused with legal advice in the context of the cross-examination only.

28.121 The NSWLRC's report on this issue canvassed whether it was necessary for the person to be a legal practitioner. Reasons for not having a legal practitioner included the fact that the person has 'already decided against legal representation' and that it is not a necessary requirement.[198] Ultimately, the NSWLRC concluded that a legal practitioner should cross-examine the complainant as 'this is not only in the interests of the accused, but also of the administration of justice, particularly since sexual offences are such serious charges'.[199]

28.122 The approach in NSW, which involves the appointment of a person who is not necessarily legally trained and is specifically not to provide legal advice, has been held to be valid.[200] It has, however, been criticised, including by judicial officers.[201] The NSWLRC and the VLRC both recommended that the appointed representative should be legally trained and in a position to provide legal advice for the purposes of cross examination. This is the approach that has been enacted in Victoria.[202]

Submissions and consultations

28.123 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should: prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual assault proceedings; and provide that any person conducting such cross-examination is a legal practitioner representing

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195 Ibid s 357(4). Where an accused refuses this representation, the court must warn them that they will not be allowed to adduce evidence from another witness that contradicts the evidence of the protected witness where the protected witness has not been given the opportunity to respond to that contradictory evidence: *Criminal Procedure Act 2009* (Vic) s 357(5). The ACT also makes this explicit in its legislation: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(4)(b). This is known as the rule in *Browne v Dunn*: *Browne v Dunn* (1893) 6 R 67.

196 *Evidence Act 1977* (Qld) s 21P.

197 *Criminal Procedure Act 1986* (NSW) s 294A(7); *Criminal Procedure Act 2009* (Vic) s 358; *Evidence Act 1977* (Qld) s 21R; *Evidence Act 1929* (SA) s 13B(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(7); *Evidence Act 1939* (NT) s 21A(3).

198 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.6].

199 See Ibid [5.19]–[5.20].

200 See *Clark v The Queen* (2008) 185 A Crim R 1; *R v MSK* (2004) 61 NSWLR 204.

201 For example, by the trial judge (Sully J) in *R v MSK* (2004) 61 NSWLR 204.

202 *Criminal Procedure Act 2009* (Vic) s 357.

the interests of the defendant.[203]There was no objection to the proposal that restrictions on the cross-examination of complainants in sexual offence proceedings by unrepresented defendants should apply in all Australian jurisdictions. The Commissioner for Children (Tas), for example, submitted further that Tasmania should legislate to prohibit 'personal cross-examination of child witnesses by an unrepresented accused in all cases, not just those of a sexual nature'.[204]

28.124 Stakeholders expressed different views, however, on who should ask questions on the defendant's behalf. While some stakeholders agreed that the person asking the questions should be a legal practitioner,[205] most stakeholders who responded to the second aspect of the proposal opposed the requirement that the questioner be a legal practitioner or expressly supported the NSW model, under which questions may be asked by any person appointed by the court.[206]

28.125 The Law Society of NSW, for example, observed that 'it is not appropriate for a legal practitioner to undertake the role of questioner' in NSW because a person appointed by the court is limited to asking the complainant only the questions that the accused person requests,[207] and is therefore 'acting merely as a mouthpiece' for the defendant.

> The limited terms of engagement impact on a practitioner's ability to act in the client's interests, and to prepare and conduct a full interrogation of the witness. Acting in such a capacity conflicts with a practitioner's legal, professional and ethical obligations to the client and the court.[208]

28.126 The Law Council of Australia agreed that the person conducting a cross-examination should be a person appointed by the court to act as the defendant's 'mouthpiece' and 'not representing his or her interests of the defendant'.[209]

Commissions' views

28.127 The Commissions recommend that federal, state and territory legislation prohibit an unrepresented defendant from personally cross-examining any complainant, child witness or other vulnerable witness in any sexual assault proceeding.

28.128 The widely accepted rationale for prohibiting an unrepresented defendant from personally cross-examining any complainant in sexual assault proceedings is to avoid causing unnecessary distress or humiliation to complainants.[210] Only Tasmania currently has no express restrictions on cross-examination of complainants by unrepresented defendants in sexual assault proceedings. As discussed above, existing

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203 Consultation Paper, Proposal 18–14.
204 Commissioner for Children (Tas), *Submission FV 62,* 1 June 2010.
205 National Legal Aid, *Submission FV 232,* 15 July 2010; Barrister, *Consultation*, Sydney, 10 June 2010.
206 Legal Aid NSW, *Submission FV 219,* 1 July 2010; Law Society of New South Wales, *Submission FV 205,* 30 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010.
207 *Criminal Procedure Act 1986* (NSW) s 294A(3).
208 Law Society of New South Wales, *Submission FV 205,* 30 June 2010.
209 Law Council of Australia, *Submission FV 180,* 25 June 2010.
210 N Friedman and M Jones, *Children Giving Evidence of Sexual Offences in Criminal Proceedings: Special Measures in Australian States and Territories* (2005), 168.

prohibitions vary in relation to the categories of witness covered. In the Commissions' view, it is also important to protect child witnesses and other witnesses defined as vulnerable.

28.129 The Commissions consider that it is inappropriate to have the judicial officer ask questions on behalf of the accused. Such an approach (which exists in the NT and Western Australia) places a judicial officer in a difficult position in determining the admissibility of the questions and may raise perceptions of bias.[211]

28.130 There are differences of opinion about who should ask questions on behalf of the defendant and the extent to which legal representation should be provided. On one hand, the critical advantages of legal practitioner involvement include: benefits associated with the professional duty the lawyer owes to the court and the client; the skills that lawyers bring to this work in terms of understanding the rules of evidence; the public interest in testing the evidence presented by the witness, and in addressing the imbalance between the prosecution and the unrepresented defendant.[212]

28.131 On the other hand, there are practical problems in requiring legal representation to be provided by legal aid commissions or otherwise and, in effect, forcing legal representation for these purposes onto a defendant. There may also be ethical problems for legal practitioners required to ask questions on behalf of a defendant. For these reasons, the Commissions do not recommend that legislation require any person conducting cross-examination on behalf of an unrepresented defendant to be a legal practitioner.

28.132 In the Commissions' view, an unrepresented defendant in sexual assault proceedings should be permitted to examine the complainant through a person appointed by the court to ask questions on behalf of the defendant. Such a person need not be a legal practitioner and should not independently give the defendant legal or other advice.

28.133 As discussed above, SCAG is developing, through the National Working Group on Evidence, proposed amendments to the uniform Evidence Acts dealing with vulnerable witness provisions. Model provisions are expected to be drafted later in 2010 and may deal with aspects of this issue.[213]

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211 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.141]; New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.11]–[5.12], [5.21]; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 291–292.

212 See New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.7]–[5.10].

213 Australian Government Attorney-General's Department, *Submission FV 166,* 25 June 2010.

Recommendation 28–5 Federal, state and territory legislation should:

(a) prohibit an unrepresented defendant from personally cross-examining any complainant, child witness or other vulnerable witness in sexual assault proceedings; and

(b) provide that an unrepresented defendant be permitted to cross-examine the complainant through a person appointed by the court to ask questions on behalf of the defendant.

Other aspects of giving evidence

28.134 Leaving aside the specific issue of cross-examination, some jurisdictions provide 'alternative' or 'special' arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings. Aspects of these arrangements were discussed in Chapter 26, in relation to the use of pre-recorded evidence.

28.135 These regimes provide a range of measures dealing with the giving of contemporaneous evidence by closed circuit television (CCTV) or video-link, the use of screening to restrict contact between the witness and the defendant, and the exclusion of persons from the court.[214] All jurisdictions also permit a complainant in sexual offence proceedings to have a support person present with them while they give evidence.[215]

28.136 There are some variations among jurisdictions. In most jurisdictions, the giving of evidence by way of alternative or special arrangements 'may' be ordered by the court.[216] In other cases, the arrangements are something to which, subject to exceptions, the complainant is entitled,[217] or are mandatory (especially in the case of evidence given by children).[218]

28.137 Some methods for giving evidence by complainants, such as the use of CCTV, are broadly used. However, not all jurisdictions expressly permit, for example, the use of screens or planned seating arrangements;[219] or require evidence of the complainant in sexual offence proceedings to be given in closed court.[220]

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214 For example, *Criminal Procedure Act 1986* (NSW) s 294B; *Criminal Procedure Act 2009* (Vic) s 13.

215 For example, *Criminal Procedure Act 1986* (NSW) s 294C; *Criminal Procedure Act 2009* (Vic) s 360(c).

216 For example, *Evidence Act 1906* (WA) s 106R; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8.

217 For example, *Criminal Procedure Act 1986* (NSW) s 294B; *Evidence Act 1929* (SA) s 13.

218 For example, *Crimes Act 1914* (Cth) s 15YI.

219 For example, Tasmania.

220 For example, while a court in Victoria may direct that only persons specified by the court be permitted to be present while the witness is giving evidence, in NSW, proceedings must be held in closed court when the complainant gives evidence: *Criminal Procedure Act 1986* (NSW) s 291; *Criminal Procedure Act 2009* (Vic) s 360(d).

28.138 In the Consultation Paper, the Commissions asked whether there are significant gaps or inconsistencies among Australian jurisdictions in relation to 'alternative' or 'special' arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings.[221]

28.139 The Magistrates' Court and Children's Court of Victoria noted that, in Victoria, special hearings are not available in summary proceedings and, that in terms of consistency of policy, it is not clear why 'child complainants in Children's Court rape prosecutions should not be able to have their evidence visually recorded, and if necessary replayed on appeal'. The definition of a sexual offence for the purpose of accessing alternative arrangements was also criticised for not extending to all offences in which the offending conduct is of a sexual nature.[222]

28.140 The SCAG National Working Group on Evidence is expected to include consideration of 'alternative' or 'special' arrangements for the giving of evidence by vulnerable witnesses.[223] The Commissions do not, therefore, make any proposals for reform of these aspects of vulnerable witness protection.

Evidence on re-trial or appeal

28.141 Chapter 26 noted that some jurisdictions provide that pre-recorded audiovisual evidence of complainants in sexual offence proceedings may be admissible in evidence in a re-trial or appeal.[224]

28.142 Such provisions may also apply to a recording of a complainant's evidence at trial. For example, the *Criminal Procedure Act 2009* (Vic) provides that such a recording 'is admissible in evidence as if its contents were the direct testimony of the complainant', including, unless the relevant court otherwise orders, in 'any new trial of, or appeal from, the proceeding'.[225]

28.143 NSW has introduced broader provisions relating to evidence in re-trials of sexual offence proceedings.[226] The *Criminal Procedure Act 1986* (NSW) provides that if a person is convicted of a prescribed sexual offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial 'a record of the original evidence of the complainant', despite the rule against hearsay evidence.[227] While the original evidence might include any pre-recorded evidence used in the trial,[228] it covers 'all evidence given by the complainant in the proceedings from which the conviction arose', including court transcripts of

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221 Consultation Paper, Question 18–13.

222 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010. On 26 June 2010, the application of div 4 of the *Criminal Procedure Act 2009* (Vic) was extended to include the summary offences of obscene, indecent, and threatening language, offensive or indecent behaviour and indecent exposure.

223 Australian Government Attorney-General's Department, *Submission FV 166,* 25 June 2010.

224 For example, *Criminal Procedure Act 1986* (NSW) pt 5 div 3; *Criminal Procedure Act 2009* (Vic) s 374.

225 *Criminal Procedure Act 2009* (Vic) s 379.

226 *Criminal Procedure Act 1986* (NSW) pt 5 div 3 inserted by the *Criminal Procedure Amendment (Evidence) Act 2005* (NSW).

227 *Criminal Procedure Act 1986* (NSW) s 306B.

228 Such as a recording of a police interview: Ibid s 306U.

evidence.[229] If a record of the original evidence of the complainant is admitted in proceedings, the complainant is not compellable to give any further evidence in the proceedings, including for the purpose of any examination in chief, cross-examination or re-examination.[230]

28.144 The problem addressed by the provision was described as being that:

> Not surprisingly, some complainants who have given evidence that resulted in a conviction decide they simply cannot return to give evidence again if a new trial is ordered on appeal. Significant time will have passed and the complainant will have tried as best as possible to put the matter out of their mind.[231]

28.145 Similar, but more limited, provisions have been enacted in other jurisdictions. For example, in South Australia, an 'official record' of the evidence of a vulnerable witness may be admitted as evidence in later proceedings, at the discretion of the court. Where such evidence is admitted it 'may relieve the witness, wholly or in part, from an obligation to give evidence in the later proceedings'.[232]

Submissions and consultations

28.146 In the Consultation Paper, the Commissions asked whether federal, state and territory legislation should permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal.[233] The Commissions suggested that such legislation might be modelled on that in NSW.

28.147 Stakeholders who addressed the question generally expressed support for such reform.[234] The National Association of Services Against Sexual Violence noted that such provisions alleviate 'the need to apply more stress on a victim and re–traumatise them by having to repeat evidence, often years after the event. It prevents them from being able to get on with their lives and can effectively put their lives "on hold" '.[235] The Women's Legal Service Queensland noted concerns that, if the jury on re-trial do not see the complainant, re-trials simply using records of the original evidence 'may just become yet another acquittal'.[236]

Commissions' views

28.148 In the Commissions' view it would be desirable to harmonise federal, state and territory approaches to the use in re-trials, of records of the original evidence of the complainant—including pre-recorded or recorded audiovisual evidence. The NSW

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229 Ibid s 306B.
230 Ibid s 306C.
231 New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 March 2005, 14649 (B Debus—Attorney General and Minister for the Environment).
232 *Evidence Act 1929* (SA) s 13D.
233 Consultation Paper, Question 18–14.
234 For example, National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Justice for Children, *Submission FV 148,* 24 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010.
235 National Association of Services Against Sexual Violence, *Submission FV 195,* 25 June 2010.
236 Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.

legislation, discussed above, provides the most comprehensive model on which to base reform.

28.149 The Commissions note that the SCAG National Working Group on Evidence work is expected to include consideration of using audiovisual records of a witness to give evidence in a re-trial.[237]

Recommendation 28–6 Federal, state and territory legislation should permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal.

237 Australian Government Attorney-General's Department, *Submission FV 166,* 25 June 2010.