

Issues Paper 6.4 – Legislated jury directions about delay and the Longman direction

Effect of delay in making a complainant on the complainant's credibility: Another common misconception is that 'real' victims of sexual violence would report their experience immediately, and if they delay, they are likely to be lying (Discussion Paper volume 1 Chapter 1).

At common law judges remain obliged to warn juries in sexual assault trials that, when deciding whether to believe the complainant, they can take into account the complainant's failure to complain at the earliest reasonable opportunity. Juries are entitled to conclude that failure to complain or delay in complaining casts doubt upon the reliability of the evidence given by the complainant. However, it does not necessarily do so, particularly where there was an explanation for the failure or delay.

This problem has been addressed to some extent by section 36BD of the Evidence Act, which provides that where there is evidence that tends to suggest an absence of complaint or a delay in making a complaint, the judge must warn the jury that:

- Absence of or delay in complaining does not necessarily indicate that the allegation is false; and
- There may be good reasons why a victim of an offence such as that alleged may hesitate in making or may refrain from making a complaint of that offence.

However, this provision does not relieve a judge from the common law obligation to direct the jury, where fairness and the interests of justice demand it, that the absence of a complaint or the delay in making one may be taken into account when evaluating the evidence of the complainant and in determining whether to believe them.

This issue was considered by the Royal Commission, which recommended that legislation in every Australian jurisdiction should provide that:

- There is no requirement for a direction or warning that delay affects the complainant's credibility;
- The judge must not direct, warn or suggest to the jury that delay affects the complainant's credibility unless the direction, warning or suggestion is requested by the accused and is warranted on the evidence in the particular circumstances of the trial; and
- In giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.

The WA government has 'accepted in principle' each of these recommendations. It has not yet, however, introduced a Bill to give effect to this in principle acceptance.

The NSW provision on this issue is similar to the WA provision. However, the NSW Criminal Procedure Act also provides that the judge 'must not direct the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a direction'.

The Victorian Jury Directions Act prohibits the judge, prosecution and defence counsel from saying, or suggesting in any way, that 'complainants who delay in making a complaint or do not make a complaint are, as a class, less credible or require more careful scrutiny than other complainants'. The judge also must not say, or suggest in way, that because the complainant delayed in making a complaint, or did not make a complaint that:

- It would be dangerous or unsafe to convict the accused; or
- The complainant's evidence should be scrutinised with great care.

The amended Victorian Jury Directions Act will also require the judge to inform the jury that experience shows that:

- People react differently to sexual offences, and there is no typical, proper, or normal response to a sexual offence;
- Some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint;
- Delay in making a complaint in respect of a sexual offence is a common occurrence; and
- There may be good reasons why a person may not complain, or may delay in complaining, about a sexual offence.

The Longman direction–delay resulting in forensic disadvantage: In WA, where there is evidence that suggests that the accused has suffered a forensic disadvantage as a result of a delay in a complaint being made, the judge may be required to give a direction known as a Longman direction or Longman warning that:

- Due to a substantial delay in the making of a complaint, the accused has lost the chance to adequately test the complainant's evidence and the chance to adequately marshal a defence; and
- Although the jury can convict the accused solely on the basis of the complainant's evidence, if it is satisfied beyond reasonable doubt of the truth and accuracy of the complainant's evidence, it must scrutinise their evidence with great care and take into account any facts and circumstances (including the forensic disadvantage suffered by the accused as a result of the substantial delay) which have a logical bearing on the truth and accuracy of that evidence.

The Longman direction is based on the recognition that 'had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and perhaps to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial'. However, due to the delay this is no longer possible, disadvantaging the accused.

The Longman direction must be given 'as a direction which the jury is bound to follow – rather than a mere comment'. Although there are no set words required, and there is no requirement to use the words 'dangerous to convict', it is clear that:

The language used must convey the warning in 'unmistakable and firm' or 'clear and emphatic' terms, given with the weight of the judge's office. It must convey the long experience of the courts that the impact of delay on the forensic process makes it dangerous or unsafe to convict on the uncorroborated testimony of a complainant unless the jury is completely satisfied of the veracity of that evidence, evaluated with an appreciation of the forensic disadvantages suffered by an accused where the trial occurs many years after the alleged offences.

It will usually (although not always) be necessary for a judge to give examples of the way in which delay has hindered the accused's ability to test the complainant's evidence and mount a positive defence. The disadvantages may be the loss of the chance to identify the occasion of the allegations with any specificity, the loss of the chance to identify or locate witnesses or documents, the loss of a chance of a medical or forensic examination of the complainant or the accused, and the loss of the chance to establish an alibi.

The Longman direction has attracted significant criticism over recent years, including that:

- The combined effect of Longman and subsequent High Court cases 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' and, as a result, judges are required to give the warning irrespective of whether the accused has in fact been prejudiced or suffered a forensic disadvantage.
- The length of delay which necessitates the giving of a Longman warning is unclear.
- A practice has developed of giving the Longman warning to 'appeal-proof' judges' directions, even if it is unnecessary in the particular case.
- The warning is given even where there is corroboration of the complainant's evidence.

The Longman direction has also been criticised by the WA Court of Appeal. E.g., in *Anderson v The State of WA*, President McClure (with whom Mazza and Buss JJ agreed) stated:

As substantial delay in complaining is frequently a factor in child sexual abuse cases, Longman warnings are routinely given. No doubt out of an abundance of caution, Longman type warnings are now being given after relatively short delays, as in this case. Trial judges have been permitted to soften the warning by omitting any reference to it being 'dangerous to convict'. However, given the now proven magnitude of past sexual offending against children and the scepticism which allowed it to flourish, the time may have arrived to reassess the rationale for or terms of the warnings given in child sexual abuse trials.

The Longman direction was considered by the Royal Commission. It stated that in its view 'the time' has arrived to reform the law in WA. It recommended that legislation should provide that:

- There is no requirement for a direction or warning as to forensic disadvantage to the accused.
- The judge must not warn or suggest to a jury that delay has caused forensic disadvantage to the accused unless the direction, warning or suggestion is requested by the accused and there is evidence that the accused has suffered significant forensic disadvantage.
- The mere fact of delay is not sufficient to establish forensic disadvantage.
- In giving any direction, warning or comment, the judge should inform the jury of the nature of the forensic disadvantage suffered by the accused.
- In giving any direction, warning or comment, the judge must not use expressions such as 'dangerous or unsafe to convict' or 'scrutinise with great care'.

The WA government has again 'accepted in principle' each of these recommendations. It has not yet introduced a Bill to give effect to this in principle acceptance. Various other states have legislated. E.g., the Evidence Act 1995 (NSW) provides that if the judge is satisfied that the accused has suffered a 'significant forensic disadvantage because of the consequences of delay', they must 'inform the jury of the nature of that disadvantage and the need to take it into account when considering the evidence'. However, they 'must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay'. Given that the WA Court of Appeal has said already that trial judges are not required to use that language there is an issue as to whether such a provision is required in WA.

The NSW Act makes it clear that a 'significant forensic disadvantage' is not established merely by the existence of a delay between the occurrence of and reporting of the alleged offence. The factors that may be regarded as establishing a significant forensic delay include, but are not limited to, the fact that any potential witnesses have died or are not able to be located, and the fact that any potential evidence has been lost or is otherwise unavailable.

The Explanatory Note to the NSW provision states that:

The section is intended to make it clear that (contrary to the tendency at common law following *Longman v The Queen* (1989) 168 CLR 79 for judges to routinely give warnings in relation to forensic disadvantage arising from delay) information about forensic disadvantage need only be given if a party applies for it, and should only be given where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time.

Similar provisions exist in Victoria and Queensland. Given that a Longman direction should only be given where there is an identifiable risk of prejudice to the accused, there is an issue as to whether such legislation would be of utility in WA.

Are the current warnings specified in section 36BD of the Evidence Act 1906 (WA), which relate to the use the jury may make of evidence that the complainant failed to complain or delayed in making a complaint, sufficient? If not, what should the provision state?

Should there continue to be a requirement for a Longman direction (warning the jury about the forensic disadvantages that have arisen from a delayed complaint) to be given in sexual offence trials? If so, should the terms in which the warning is given be changed in any way?