

PUBLIC ISSUES COMMITTEE

PAPER ON HISTORIC SEXUAL ABUSE COMPLAINTS

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Public Issues Committee

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*Historic Sexual Abuse Complaints
in the New Zealand Criminal Justice System*

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SUMMARY

From time to time criminal prosecutions, usually of sexual complaints, are advanced where, because of the long passage of time between the criminal conduct complained of and the trial, it is found that a fair trial is not likely to be available. Under New Zealand and international law, a criminal trial should not continue if a fair hearing of the charge is unlikely. The usual problem encountered that impairs the due process of trial is the absence of material or human evidence, independent of the complaint itself, by which the contending allegation and denial can be assessed. The law asks fact finders who are chosen for jury duty not to make their decisions influenced by sympathy or prejudice.

Our concern to provide support to victims and to encourage their trust in the criminal process has succeeded, with our more open ability to accept and contend with sexual complaints, to produce an appreciable number of prosecutions that do not get to trial for 20 and more years from the criminal events alleged. There is often understandable reason for a victims' delay in making such complaint. We have a natural desire to vindicate the victims of predatory behaviour with criminal sanction against their abusers.

In the recent Australian Federal Court case of *Maloney v New Zealand* (21 April 2006, apparently under appeal) it was determined that the extradition law of Australia barred the application by the New Zealand government for an order for delivery for trial here of two alleged sexual abuse offenders, because it would be unjust and oppressive. That Court found that the different rules developed in New Zealand for processing the criminal prosecution of an historic sexual complaint, materially disadvantaged an accused person when measured against the rules developed in Australia. Putting aside any question of cross Tasman rivalry, or how this affects New Zealand's international standing in the field of

criminal justice, this Committee felt that a review of our rules was warranted by such a provocative judgment from a respected Court.

Our report considers the law of New Zealand on this subject, analyses the *Moloney* decision, and suggests a number of considerations for change in procedural rules. The most notable suggestions are: when exceptionally old historic cases are allowed to proceed to trial there should be a clear warning to the jury as to the difficulty for defendants in trying to defend such old allegations; and when a question arises as to whether such a case should be allowed to proceed to trial, it should not be for the defendant to demonstrate that a fair trial is unlikely, but the question should be measured against a balanced standard without any presumption.

*Historic Sexual Abuse Complaints
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Spokesperson, David James, lawyer, Kerikeri

Purpose

1. The Australian judgment in *Maloney v New Zealand*, [2006] FCA 438 (21 April 2006, apparently now on appeal) has drawn our attention to the New Zealand legal position relative to historic, [meaning old], criminal allegations of sexual abuse, and how we determine whether a fair trial process is likely for a particular accused who denies such allegations.
2. Let us posit three categories: of *historic complaint*, of *old historic complaint*, and of *exceptionally old historic complaint*. So that a criminal allegation, not earlier complained of to the police or a related public authority, that is first presented 6 years after the alleged incident(s), is an *historic complaint*. Six years is the primary limitation period for the commencement of civil actions (Limitation Act 1950), after which the action, if not earlier formally commenced, is subject to being permanently struck out. And let us further suggest that such historic criminal complaints that are first presented 6 to 20 years after the alleged incident, are *old historic complaints*; and, that such complaints, older than 20 years, may fall into the category of *exceptionally old historic complaints*.
3. Such is our impression, from the reported cases and media and learned discussion, of the frequency with which sexual offending from childhood can, often, only be effectively reported well after the age of majority, the concern of this paper will be primarily with the category of *old* and *exceptionally old historic complaint*.
4. It is proposed in this paper to describe how, in the prosecution of sexual abuse complaints, special rules exist in New Zealand to facilitate the process for complainants, to reduce the apparent trauma that the process of criminal proof creates for those already emotionally injured by the alleged crime. We say they are *special*

rules because they exist exclusively for sexual offending and for historic and longer delayed complaints in that field.

5. This position will then be discussed, with reference to the case noted above which provoked this review, to see why, for at least one Australian jurist, it was demonstrated that the process of justice, achieved to the standard found in the Australian criminal justice system, is not available in New Zealand.
6. We hope to describe where the New Zealand approach has deviated from the Australian position; and to suggest how the structure of the New Zealand outlook in legislation, and in the broad sphere of judicial discretion may have contributed to an arguably over indulgent appreciation of the likelihood for a full and fair trial in some of these cases.

The *Moloney* Decision: Facts

7. In *Moloney* the Federal Court was determining an application to review a Magistrate's judgment under the Extradition Act 1988 (Cth) where he found the applicants were eligible for surrender to New Zealand. The two applicants succeeded in persuading the Court that to surrender them to New Zealand would be unjust and oppressive pursuant to s 34 (2) of that Act.
8. The applicants were alleged to have severally committed a series of sexual offences against boys in their care during the period 1971 to 1980. As to one applicant the allegations concerned 12 complainants; and, as to the other, two, one of whom was also of the 12 alleging criminal conduct by the first applicant. The complaints were first brought to the applicants' attention in June 2003 and charges laid in New Zealand in November 2003. As at April 2006 one applicant was 71 years old and the other 59. An associated institution in Australia had been proactive in inviting complaints. There had been considerable publicity on both sides of the Tasman. "... there are," said the Court (at para 25) "serious grounds for concern as to the extent to which the reliability of much of the complainant's evidence might have been compromised...". The applicants' health conditions were problematic, but this was not found to be a ground for denying the extradition request.

The *Moloney* Decision: principles

9. This reviewing Court proceeded on the footing:
 - "... a conclusion that it would be 'unjust' or 'oppressive' ought not lightly be reached." (para 71);

- “there is no discretion in the magistrate (or reviewing court) to decline to give effect to a conclusion that relevant injustice or oppression or both are established because of some view of the public interest, or as to the desirability of Australian and New Zealand judicial officers giving effect to their generally held mutual respect.” (at para 72);
- “a view about the strength or weakness of the prosecution case is irrelevant to the task” (at para 73);
- and as *obiter*: “my preference would be that the legislation should make it plain that New Zealand courts should deal with these problems and, in cases of such serious allegations, Australia should accept any degree of injustice to Australian judicial eyes that is not shared by our genuinely respected New Zealand counterparts...’ (at para 132).

The *Moloney* Decision: findings

10. A description of the problem of injustice caused by delay in the hearing of criminal allegations is set out from *Moloney* in full:

“75 It is axiomatic that neither in New Zealand nor in Australia is there any statute of limitations for criminal offences. The mere passage of time cannot of itself permit the guilty to remain free of judicial denunciation and punishment. It is equally axiomatic in both countries that no one should be subjected to an unfair trial, if a trial that might have the potential for some elements of unfairness cannot be made fair.

“76 There is, of course, a wide range of circumstances in which a lengthy period may have elapsed between the alleged commission of offences generally and intended extradition of the alleged perpetrators. A person aggrieved by the offence may have initially consciously resolved, for any of a variety of reasons, not to pursue the matter with the police. A guilty person may have fled, or may have coerced the victim’s initial silence.

“77 A particularly problematic situation arises in the case of alleged sexual abuse of a child by a carer and/or an authority figure – family members, teachers and religious advisors immediately come to mind. In the space of a generation, there has been a mushrooming of such allegations in the courts in western countries. This outcome, a result of various social changes is, in general, a matter of satisfaction. To doom victims of a debauched childhood to effective silence and to suffer their violators to go unpunished are generally seen to have been vices in need of amelioration. There have, however, also been well-publicised cases of injustice to accused persons arising from allegations subsequently and with great difficulty shown to have been false. Good faith on the part of initial investigator has not prevented this. The well-known and recent Belgian scandal comes to mind.

“78 Where such abuse has occurred, it is common for the abuser explicitly to have insisted on silence from the child or at least to have relied with some confidence on their unequal positions and the circumstances to guarantee silence. Either way, there is likely to have been an oppressive element in the predator’s conduct which has materially contributed to the child’s silence. The sexual assault of the child is apt frequently to induce a sense of shame, confusion and betrayal which, in some instances, can have long-lasting consequences. It is a common enough phenomenon that only when an abused child has attained his or her maturity, acquires self-confidence, a degree of trust in authority figures and motivation and the fortitude to reveal what has occurred and to seek legal vindication for it, that legal processes are invoked.

“79 In cases of alleged childhood sexual abuse, a sense of justice towards victims and putative victims militates against undue concern for any difficulty which delay might occasion to a perpetrator or accused perpetrator.

“80 What is problematic is the tension between such considerations and the concept of a criminal trial in Australia and other common law legal systems, such as New Zealand. A criminal trial in such systems is not, as some might wish it to be, a search in an imperfect world for the best approximation to the truth

about a contested past event which official inquiry can achieve. For us, a criminal trial is a procedure, with many protections (to guard against repetition of proven past injustices to accused persons) set in place, to examine whether, to a very high degree of confidence, it is shown to an impartial tribunal that it is so likely that a person has done what he or she is accused of that it would be safe for the State to impose serious criminal punishment. Our law recognises that even truth may be achieved at too high a price.

“81 In particular it has been recognised that long delays in initiating trials for old offences may impair fairness to the accused, in some cases to the point where there simply cannot be a fair trial – where very firm warnings by a judge to the jury (or other steps) cannot provide a safe remedy. In such cases, both in Australia and New Zealand, the courts have declined, even where there have been many understandable reasons for the delay, to allow themselves to be used to permit what they consider would be unfair trials and permanent stays of the criminal proceedings have been granted.

“82 A further concomitant of accusations by people well into their adulthood of their having been sexually assaulted in childhood is often, and again perfectly understandably, that they can give few concrete details of the time and place of the events alleged which might enable the testing of the accusations.

“83 The usual or ‘presumptive’ results of long delay are the possibility of honest unreliability on the part of the complainants, including possible unconscious substitution of an imagined reality for what actually occurred, the fading and loss of recollection of pertinent details by an innocent accused and the loss of legitimate opportunities to test the detail of allegations and marshal evidence pointing to innocence. McHugh J (in remarks later approved in *Crampton v The Queen* (2000) [206 CLR 161](#) by Gaudron, Gummow and Callinan JJ, said in *Longman v R* (1989) [168 CLR 79](#) at 107:

‘The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to “remember” is well documented. The longer the period between an “event” and its recall, the greater the margin for error. Interference with a person’s ability to “remember” may also arise from talking or reading about or experiencing other events of a similar nature or from the person’s own thinking or recalling. Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine:

No matter how honest the recollection of the complainant in this case, the long period of delay between her formal complainant and the occurrence of the alleged events raised a significant question as to whether her recollection could be acted upon safely. ... Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be. Certainly, some incident or accumulation of incidents seems to have affected the complainant’s attitude to her stepfather. She testified that, because of his conduct towards her in sexual matters, “I don’t hate him but I do hate what he’s done and the problems it’s caused in my life”. However, the existence of this feeling towards the applicant increased, rather than decreased, the need to examine carefully whether the complainant’s honest recollection of events concerning the applicant was not distorted by this hatred.

To the potential for error inherent in the complainant’s evidence must be added the total lack of opportunity for the defence to explore the surrounding circumstances of each alleged offence. By reason of the delay, the absence of any timely complaint, and the lack of specification as to the dates of the alleged offences, the defence was unable to examine the surrounding circumstances to ascertain whether they contradicted or were inconsistent with the complainant’s testimony.’

“84 While the judgment of what is or is not unjust or oppressive in a s 34 case concerns only the particular case and is the judgment of the particular magistrate or judge making the decision, it is natural that judicial decision-makers should look for broad guidance to decisions made in analogous cases, for example, those dealing with stay applications. The picture, however both in Australia and New Zealand, is very variable. In order to try to avoid a judgment which is merely of the ‘Chancellor’s foot’ variety, it seems to me that the following considerations may provide some structure or guideline to assist with the present case, however imprecise and flexible such an attempt must be.

“85 Experience shows that the specific conditions attending ‘childhood’ that contribute to the difficulties many sexually assaulted young people have in telling their stories mostly no longer apply in the cases of young persons so assaulted after about 18 years of age. Generally, by that time young people can make a more or less ‘adult’ decision about whether to invoke the criminal law, and they are in law adults. Many mature, sexually assaulted adults choose, for a variety of reasons, not all of them the result of direct or indirect oppression, never to do so. On the other hand, it is rare to find complaints made in adulthood of molestation before the complainant was aged 5. The ages of the complainants in the present cases at the time of the alleged offences appear to range from about 8 to about 15.

“86 Often enough, in general it is not until people are in their thirties that they are able and impelled to put their allegations before the police.

“87 Thus, in the case of comparatively serious allegations, which the present cases certainly involve, to concede that the ‘presumptive prejudice’ to an alleged offender sought to be deported to New Zealand of less than something approaching 20 years’ delay might outweigh the interests of truthful complainants, could unreasonably disadvantage an undue number of complainants. In other words, I suggest that courts should be very slow in most cases to act on the merely ‘presumptive’ or usually-expected incidents of delay where the delay does not exceed 20 years.

“88 Likewise, it can hardly be doubted that to require an innocent accused person to try to defend himself or herself against accusations more than 20 years old is, in very many cases (though not all), to raise probable or ‘presumptive’ difficulties of mounting a defence of a high order. To reach back more than 20 years into memory is to try to recapture the circumstances and events of a different age. The 40 year old is a different person from when he or she was 20, and the difficulty likely increases for a person who is now 50, 60, 70, or older. The difficulties for an innocent person of recovering or reconstructing what may be the telling details of events 20 or more years old of which, ex hypothesi one likely had no reason to regard as of any special significance are plainly formidable.

“89 Of course, if the potential extraditee is guilty of the sexual abuse of a child then, because of the overt or implicit oppressive element calculated in most cases to produce silence forever, there will be a benefit to that person of a kind which is both unjust to the victim and to the authorities seeking to vindicate the law, and an affront to the reasonable public conscience, as well as destructive of the victim’s and public confidence in the criminal justice system. The problem is, however, that there is no way of establishing such guilt under our system except by a fair trial and, until they are proven guilty in that way, people are presumed to be innocent.

“90 On the hearing of an application for a permanent stay of a criminal trial because of the extreme age of the allegations, a better judgment can be come to because it is possible for the judge to form an impression of the strength of the prosecution case. A very strong Crown case, for example, may render nugatory the actual, practical unfairness of the long delay, whatever its presumptive difficulties for the accused. On the other hand, a case resting on the uncorroborated evidence of events long ago from a single complainant may possibly increase the prospect of unjust conviction.

“91 However, under the Act [Extradition] it is not permissible, neither is there any fair way, to form any impression of the strength of the cases of the New Zealand law enforcement authorities: nothing can be heard of the evidence that might cast doubt upon it. Counsel for New Zealand, quite properly in these circumstances, did not attempt to put a one-sided version of matters before the Court. One is driven to judge the matter on the unaided presumption that the accused applicants are each innocent until proven guilty. There is, therefore, merely a possibility, of unknown strength, that either or both of them is guilty of any of the intended charges. That is, if anything, a reason in favour of giving full weight to the presumptive difficulties of delay exceeding some reasonable period in all the circumstances for the kinds of offences in question. I have suggested that a period of less than 20 years will rarely be such a reasonable period.”

11. The Court lists some of the matters that add to the applicants’ difficulties in getting justice:

- at para 95 a **lack of specificity as to time**
- at para 96 **loss of potential witnesses and records**
- at para 100 the complaints **emerged after an “orchestrated campaign”**
- at para 104 to 113 New Zealand does not have Australia’s **mandatory jury warning** about an accused person’s ‘loss of those means of testing the complainant’s allegations which would be open to him **had there been no delay...**’ (citing *Longman*, (1989), 168 CLR 79); and see (*Crompton v The Queen* (2000), 206 CLR 161 “...the denial to an accused of the forensic weapons that reasonable contemporaneity provides constitutes a significant disadvantage which a judge must recognise and to which an unmistakeable

and firm voice must be given by appropriate directions.” (cited in, *Maloney v New Zealand*, para 105).

- at paras 115 to 123 it is unlikely that **joint trials** of the applicants would proceed in Australia; but in New Zealand there is authority that the different complaints against different applicants might be ‘cross-admissible’ *to explain for example why no complaints were made earlier*, without measuring whether the prejudicial effect of such evidence might not well outweigh its probative, or fair value, as evidence (see para 118); therefore the position in New Zealand is less clear
- New Zealand allows the Crown prosecutor to allege **representative counts** [the charges in the indictment shown to the jury] which is prohibited by the judge made law in Australia: compare New Zealand, where, if the prosecution evidence does not enable the conduct to be alleged with more particularity than that it occurred a number of times over quite a long period, such as a year or more, the practice is to specify that period in a count; and, to obtain a conviction, the prosecution must then satisfy the jury beyond reasonable doubt, that at least one criminal act of the description alleged was committed by the accused during that period, and the count is noted as ‘representative’; whereas, Australia rejects such a practice as involving a ‘duplicitous’ (referring to more than one uninterrupted incident) charge, lacking specificity, with the result that were such a practice to be allowed, although the jury might not fully agree on a single particular instance having occurred, a conviction could still result – one or more but not all jury members finding one incident, and one or more others finding only that another alleged incident in that period occurred [so called ‘latent ambiguity’] (compare, *S v The Queen*, (1989) 168 CLR 266 and *KBT v The Queen*, (1997), 191 CLR 417, with *R v Accused*, [1993] 1 NZLR 385 (CA)).

The new New Zealand balance

12. The leading New Zealand cases on the arrest of a trial process as a consequence of an accused's impaired capacity to defend arising from delay, under the principle of abuse of process, are *R v Accused* (CA 160/92) [1993] 1 NZLR 385; (1994), 12 CRNZ 78 and *R v Accused* (CA 260/92) [1993] 2 NZLR 286 (CA). Cooke P (as he then was) gave the decision in both cases. His judgments support the proposition that, “...where the period of delay is long, it can be legitimate for the Court to infer prejudice without proof of specific prejudice” (CA 260/92 at 288 II 10 – 15).

13. In, *Regina v Accused* (CA 160/92), Cooke P reviewed the defence contention, "...that the balance has swung too far against the defence in sexual abuse trials" (at [1993] 1 NZLR 391 at LL53-54). He listed the following matters argued in support:

- The difficulty of defending charges "on events many years in the past" [in the case in question the period was 1972 to 1984 with 3 complainants, alleging incidents 20 years to 8 years in the past].
- The difficulty where the range of dates is wide making alibi defences difficult and cross-examining on details nigh impossible.
- Evidence Act 1908 section 23A, limit on cross-examination of previous sexual experience of the complainant.
- 23AB, no requirement of corroboration warning as had been a requirement understood to exist in the common law.
- 23C to 23I, restrictions on the opportunity to confront child complainants.
- Summary Proceedings Act 1957, section 185C, the preclusion except with leave of a Judge of the right to cross-examine the complainant at the preliminary inquiry.
- His Honour also notes other shifting balance elements including the availability of electronics surveillance, DNA testing, and the fairly generous application of the rule on allowing similar fact evidence [see, joint trials discussion above para 11].
- His Honour might well have added:
 - (1) the availability in New Zealand procedural law of the opportunity by the Crown to lay indictments with counts which are representative charges, above noted;
 - (2) the jury warning to be considered by the Judge in her charge to the jury under the Evidence Act 1908, s 23AC,

"Where, during the trial of any person for an offence against any of sections 128 to 144A of the Crimes Act 1961 or for any other offence against the person of a sexual nature, evidence is given or a question is asked or a comment is made that tends to suggest an absence of complaint in respect of the alleged offence by the person upon whom the offence is alleged to have been committed, or to suggest delay by that person in making any such complaint, the Judge may tell the jury that there may be good reasons why the victim of such an offence may refrain from or delay in making such a complaint."

14. His Honour accepts that these things have "significantly shifted the balance in sexual trial, especially perhaps those relating to child abuse" (at page 392, line 18); but he

finds that, the basic ingredients of a fair trial remain (at 392 lines 21-22). He notes in support of that conclusion that:

- The accused has protections against self-incrimination and there is a limited custodial interrogation.
- He has extensive rights of disclosure.
- He has notice of evidence to be called against him.
- He can give evidence himself.
- He has the benefit of the doubt.
- He has a right of appeal.
- “There is the safety net for exceptional cases of the Royal prerogative and section 406 of the Crimes Act “(at 392 lines 23 to 35).

15. He concludes this discussion by referring again to the shifting elements against the Defendant, and he says:

“But they have been accompanied, at least since *Police v Hall* [1976] 2 NZLR 678 and *R v Hartley* [1978] 2 NZLR 199, with affirmation of the Court’s inherent jurisdiction to prevent unfair trials; and that jurisdiction would be available if truly needed in a case in the present field.

“It is possible to imagine a case in which allegations of sexual misconduct are so vague or relate to a time so long ago, without justification for the delay, that it would be unfair to place an accused on trial upon them. Then the possibility of exercising the protective inherent jurisdiction would fall for consideration in all the circumstances of the particular case. But the present case is clearly not in that class. The reasons for the delay in complaining have not been explored; the defence did not apply for leave to cross-examine the complainants at the preliminary hearing. The three complainants give vivid and detailed accounts of the conduct alleged by each against the accused and the surrounding circumstances. A reading of their written statements produces a sense that the accused’s claims of vagueness are largely unreal.”

Full and Fair Trial; Abuse of Process

16. Old and exceptionally old historic complaints may produce a prosecution that is oppressive to the accused because it is not likely he will receive a fair trial. In that event the accused may instruct counsel to apply for the exceptional remedy of dismissal of the charges or an order that the indictment not be presented to the trial court. A defendant’s expectation right of a fair trial arises from:

- The common law: “It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury (cf s 354 Crimes Act).” [*R v McLoughlin & Isaacs*, (1984) 1 CRNZ 215 (CA) at 216].
- The New Zealand Bill of Rights Act s 25 (a) The right to a fair and public hearing by an independent and impartial court
- The Crimes Act 1961, s 347
 - (1) Where any person is committed for trial, the Judge may, in his discretion,—

.....

 - (b) After giving both the prosecutor and the accused reasonable opportunity to be heard on the matter; and
 - (c) After perusal of the depositions and consideration of such other evidence and other matters as are submitted

.....

direct that no indictment shall be filed, or, if an indictment has been filed, direct that the accused shall not be arraigned thereon; and in either case direct that the accused be discharged.

.....
 - (3) The Judge may in his discretion, at any stage of any trial, whether before or after verdict, direct that the accused be discharged.
- international instruments, including,
 - The *International Covenant on Civil and Political Rights*, 1966, [referred to in the New Zealand Bill of Rights Act 1990, preamble] provides that:
 - (Art 10, 1)

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent human dignity of the human person.”
 - (Art 14, 1)

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...
 - The *Universal Declaration of Human Rights*, 1948, provides that:
 - (Art 10) “Everyone is entitled in full equality to a fair and public hearing ... in determination...of any criminal charge”;

(Art 11) “Everyone charged with a penal offence has the right to be presumed innocent ...in a public trial at which he has had all the guarantees necessary for his defence.”

17. The determination of an application to dismiss charges because of unfairness or oppression caused by long delay, contends with a series of warring opposites. The central pairing is that of the complainant’s allegation faced off against the denial of the accused. In some cases of long historic complaint, there is such a stark contrast of allegation and response, a jury is abandoned to the naked consideration of whether to believe the complainant with the certainty necessary for belief *beyond reasonable doubt*. The long passage of time has hidden away or destroyed, through death or destruction, those surrounding intricacies of circumstance and material evidence, which, often, where professionally preserved and intelligently presented, help decision makers feel sure that what a witness says sounds a ring of authenticity. And without these helpful elements being available, leaving a jury alone with bare allegation and unadorned denial, is to risk a mere intuitive or sentimental type of decision-making, and the real possibility of a perverse verdict. There is, in a number of these historic cases, independent indication neither that the abuse actually occurred, nor that it was actuated by the accused.

The Australian Jury Warning for New Zealand?

18. The Australian trial requirement of warning a jury in the manner commented on in *Moloney* should commend itself to New Zealand. The virtue of this proposal should not be dependent on the outcome of New Zealand’s pending appeal in the *Moloney* case. The imperative to strike a fair balance between Crown and defence, and to ensure the substance and appearance of a fair trial, either warrants accepting such a proposal, without any further indication from an Australian case, or it does not. The proposed mandatory jury caution in all old historic cases warns of the definite disadvantage suffered by an apparently innocent defendant in defending historic allegations. Such a warning is a fair balance against,
 - a) the Evidence Act 1908 optional warning (noted at the end of para 13 above) that [to paraphrase] there may be good reason, other than that she took time to make it up, why the complainant took so long to present her allegations;
 - b) the deletion of the common law corroboration warning, leaving as discretionary only, any comment by a judge on the absence of unequivocal and independent evidence showing the commission of the offence (see, para 13 above).

In Conclusion: Other Considerations for Change

19. Where a trial is delayed for 20 years or more there should be an assumption that some impairment to a fair trial is apparent. And an inquiry may be instigated by the Court, the prosecution or the defence to determine whether a fair trial remains probable. In that inquiry largely confined to the papers, there should not be a burden of proof on the defence, as there is now, where nearly all applications for dismissal, based on *abuse of process*, are instigated by the defence.

20. In determining the likelihood of a fair trial after lengthy delay the Court, as now, may consider the existence of evidence of the offending independent of the complaint, the loss of physical evidence, missing witnesses, the conduct of the defendant in the intervening years (has he shown a pattern of conduct with strikingly similar hallmarks? has he extorted silence?), the complainant's explanation for her silence, the competence of public authorities in assisting the complainant to proceed, the age and health of the defendant, and his conduct during the process in availing himself of such pre trial actions as might sensibly assist his defence without undermining his right to remain silent.

.....