

## Issues Paper 6.1 – Should WA legislate jury directions for sexual offence trials?

It has been suggested that the unique nature of sexual offences means that jurors sitting on sexual offence trials are at a particular disadvantage. This is because:

... sexual violence is one that is commonly misunderstood by people without training or education in the area. Research has revealed that widely held assumptions about how frequently sexual violence occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual violence ...

The problem is not necessarily individual juror prejudice and sexist views; rather, it is the idea that 'common sense' and experience can be applied to the facts of a specific form of criminal offending which, because of its distinctive features, is at risk of illegitimate reasoning and incorrect decision making when handled by people who have no prior experience in the area.

These concerns were confirmed by research that the Queensland Taskforce commissioned.

A way to address the potential for the jury to hold these misconceptions is through jury directions. E.g., the jury could be told that people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything. This could help ensure that the jury does not infer, from the fact that the complainant did not resist or fight off the accused, that they consented to the sexual activity.

Even if it is thought that such a direction is desirable, that does not mean that it should be legislated. Under the current law WA judges already give directions which are specifically tailored to the case they have heard and are required to properly explain the elements of the charged offence(s). Whether or not the judge gives such a direction will depend on the circumstances of the case and the judge's views about the importance of the issue. They may be guided in this regard by submission from the parties and by the directions that are included in the District Court bench book.

In the UK relevant directions have been included in the Crown Court Compendium (UK), without the need for any legislative intervention.

An alternative approach would be to legislate jury directions. The relevant legislation could:

- Set out the required content of the direction.
- Require the judge to give the direction in certain circumstances or permit them to do so.
- Specify the circumstances in which the judge should or may give the direction.
- Specify the time at which the direction should or may be given.

There are potential benefits to legislating sexual offence jury directions, including:

- It would enable parliament to require judges to dispel social myths that may exist in jurors' minds about the nature of sexual violence and people's responses to it.
- It may result in greater clarity, consistency and certainty about jury directions. It may be particularly advantageous where, as in WA, there is no published bench book.
- It would result in modern directions being given that reflect current social norms; rather than the archaic views of common law judges enunciated sometimes centuries earlier.
- It would bring to the judge's attention the directions that may usefully be given, ensuring that they do not overlook a relevant matter.
- It would allow judges to easily find the required content of a particular direction without having to sift through many appellate decisions.

The potential disadvantages to legislating sexual offence jury directions, include:

- Legislation may lack flexibility. E.g., if a direction is mandated, it may result in it being given in cases in which it is not relevant/necessary. If a direction is discretionary, a judge may decide to err on the side of caution and give the direction; when it is not applicable.
- Judges may tend to assume that if they give a direction in the form of the statutory words, they meet the obligation. Directions may become formulaic and not apt to meet the case.
- Template directions may not help the jury to fulfil their role as decision-makers and may not be effective at countering misconceptions about sexual violence.
- Spelling out basic matters to the jury, such as that there is no typical or normal response to non-consensual sexual activity may be insulting to their common sense. It is fundamental to the jury system that jurors exercise practical, common sense judgement.
- Legislation may be less reactive to cultural change than the common law. The common law has the capacity to do change when cultural norms change and to ensure that directions are given in the correct way, when appeals indicate that a direction is being given by trial judges in a manner that does not reflect the law, or a previous appellate judgment has failed to give sufficient clear guidance to trial judges about the content of a direction. E.g., the Longman warning, over 30 years, has been simplified and clarified by appellate courts. Arguably, this process could not have occurred as efficiently through legislative amendment.
- It may increase the complexity of the law. E.g., the directions on sexual offences in the current Victorian Jury Directions Act occupy more than 11 pages, and the directions in the amended Victorian Jury Directions Act will occupy nearly twice that number of pages.
- Unless parliament codifies all jury directions, there would be inconsistency between directions given in sexual offence trials and directions given in other trials. In some circumstances, there may be no valid reason for differentiating between the directions which should be given in sexual offence trials and other trials that involve similar issues.

Legislating jury directions may also be considered unnecessary in the WA context. In this regard, we noted above that Victoria's reforms were preceded by two concerns: that judges' directions had become unduly lengthy and complicated; and that a significant number of convictions were being overturned on appeal due to mistakes in the judge's directions. There is no reliable WA data to indicate that WA has these problems to the same, or any, extent. It may be that the same problems exist in WA but not to the same level as existed (or potentially still exist) in Victoria.

There may also be a matter of principle involved in legislating jury directions. Some people may consider the legislature, as a political body open to acting according to the ideology of the party in government, not to be the appropriate body to determine jury directions. Others may consider that the common (judge-made) law, is not the appropriate avenue for developing jury directions in a sensitive area such as sexual offence trials. I.e., it may be thought that jury directions ought to be prescribed by elected politicians who are answerable to the community.

There are alternatives to legislating jury directions such as jury education and expert evidence.

### **Should WA legislate jury directions for sexual offence trials?**

#### **Why or why not?**

A full discussion of these issues in Discussion Paper volume 1 paras 6.48-6.59; 6.141-6.144 (jury education) and 6.145-6.157 (expert evidence).