Issues Paper 6.3 – Possible reforms- legislated jury directions

In Discussion Paper volume 1 chapter 6 we discuss possible jury directions that could be legislated for sexual offence trials. All of these are mentioned in this issues paper other than directions about delay in lodging a complaint and the Longman direction (see issues paper 6.4). These possible directions arise from common misconceptions about the meaning of consent and the nature of and reactions to sexual violence (see Discussion Paper volume 1 Chapter 1 and the Background Paper).

Consent: It would be possible to require a judge to direct the jury about the meaning of consent or the circumstances in which a person does not consent. E.g., in Victoria the prosecution or defence may request that the judge inform the jury:

- That a person can consent to an act only if the person is capable of consenting and free to choose whether or not to engage in or allow the act.
- That where a person has given consent to an act, the person may withdraw that consent either before the act takes place or at any time while the act is taking place.
- Of the relevant circumstances in which the law provides that a person does not consent to an act.

The judge may also direct the jury that if it is satisfied beyond reasonable doubt that one of the legal circumstances in which a person does not consent to an act existed in relation to the complainant (E.g., the complainant was asleep or unconscious), it must find that the complainant did not consent.

WA judges already direct the jury about the meaning of consent. It may therefore be thought that such a reform is unnecessary. However, legislating such directions may help ensure that the judge directs the jury about all relevant aspects of the law of consent. This may become more important if the law of consent is reformed in any way (see Discussion Paper volume 1 Chapter 4).

Responses to sexual violence: A common misconceptions about sexual violence is that 'real' victims of sexual violence will resist and fight off the offender. To address this misconception, NSW has legislated that, where appropriate, judges be required to direct the jury that:

- There is no typical or normal response to non-consensual sexual activity;
- People may respond to non-consensual sexual activity in different ways, including by
- freezing and not saying or doing anything; and
- The jury must avoid making assessments based on pre-conceived ideas about how people respond to non-consensual sexual activity.

Absence of injury, violence or threat: Other common misconceptions about sexual violence are that acts of sexual violence usually involve the use of physical force, and that 'real' victims of sexual violence will show signs of physical injury. It would be possible to address these misconceptions by legislating a jury direction about the absence of injury, violence or threat. E.g., the NSW Criminal Procedure Act requires a judge, in an appropriate case, to direct the jury that:

> a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
> b) the absence of injury or violence, or threats of injury or violence, does not

necessarily mean that a person is not telling the truth about an alleged sexual offence.

Other sexual activity: One of the options for reforming the law of consent (see Discussion Paper volume 1 Chapter 4) is for the Code to specify that a person does not consent to a sexual activity with another person simply because they had previously consented to sexual activity with that person or someone else; or sexual activity of that kind or any other kind.

It would be possible to accompany this reform with a legislated jury direction to this effect. Such a provision will be included in the amended Victorian Jury Directions Act. The provision requires the judge, where there are good reasons to do so, to inform the jury that:

> Experience shows that people who do not consent to a sexual act with a particular person on one occasion may have, on one or more other occasions, engaged in or been involved in consensual sexual activity—
>
> a) with that person or another person; or
> b) of the same kind or a different kind.

Personal appearance and irrelevant conduct: Another common misconception is that consent to sexual activity may be assumed or inferred from the complainant's personal appearance or conduct.

To address this issue, the amended Victorian Jury Directions Act will require judges, where there are good reasons to do so, to give a direction informing the jury that it should not be assumed that a person consented to a sexual act just because the person –

> a) wore particular clothing; or
> b) had a particular appearance; or
> c) drank alcohol or took any other drug; or
> d) was present in a particular location; or
> e) acted flirtatiously.

In respect of d) above, the Act gives the examples of the complainant attended a nightclub or went to the accused's home. The NSW Criminal Procedure Act contains a similar provision, although without inclusion of the examples or reference to the person acting flirtatiously. A provision to this effect was also recommended by the Queensland Taskforce.

This direction does not tell the jury that the listed matters are irrelevant to their consideration of the complainant's consent. It simply provides that they should not draw assumptions about the complainant's consent solely on that basis. This is presumably in recognition of the fact that, in conjunction with other evidence, such matters may provide valid evidence of consent. It may be thought that this undermines the strength or usefulness of this direction.

This direction does not have a bearing on the jury's assessment of the mistake of fact defence. This means that the jury may be permitted to draw assumptions from the listed matters when determining whether the accused had an honest and reasonable belief in consent. This may create the possibility for confusion amongst jurors about how and when they can use evidence of this type. This problem could, however, be overcome by also prohibiting the jury from drawing such assumptions in the mistake of fact context: see the section on 'Reasonable belief' below.

Under current WA law, judges are required to ensure that juries do not misuse evidence, by telling them how evidence can and cannot be used to prove certain matters, and by correcting any misstatements by counsel. Consequently, if defence counsel was, for example, to suggest to a jury that evidence of a complainant's clothing could be used as the

sole basis on which to determine consent, a judge would be expected to correct such a submission. It may be thought that this sufficiently addresses the problem, without the need to legislate further.

Relationship between sexual offence perpetrators and victim-survivors: Other common misconceptions about sexual violence are that acts of sexual violence are usually committed by strangers, and that 'real' victims would discontinue any relationship they have with the perpetrator.

It would be possible to require judges to address these misconceptions. The amended Victorian Jury Directions Act will require a judge, where there are good reasons to do so, to give a direction that:

a) there are many different circumstances in which people do and do not consent to a sexual act; and
b) sexual acts can occur without consent between all sorts of people, including—
    i. people who know each other;
    ii. people who are married to each other;
    iii. people who are in a relationship with each other;
    iv. people who provide commercial sexual services and people for whose arousal or gratification such services are provided;
    v. people of the same or different sexual orientations;
    vi. people of any gender identity, including people whose gender identity does not correspond to their designated sex at birth.

The amended Victorian Jury Directions Act will also require the following directions to be given where there is, or is likely to be, evidence of a 'post-offence relationship':

a) people may react differently to a sexual act to which they did not consent, and
    i. there is no typical, proper or normal response; and
b) some people who are subjected to a sexual act without their consent will never again contact the person who subjected them to the act, while others—
    ii. may continue a relationship with that person; or
    iii. may otherwise continue to communicate with them; and
c) there may be good reasons why a person who is subjected to a sexual act without their consent—
    iv. may continue a relationship with the person who subjected them to the act; or
    v. may otherwise continue to communicate with that person.

NSW also requires judges, in appropriate cases, to direct the jury that non-consensual sexual activity can occur in many circumstances, and between different kinds of people including people who know one other, or are married or are in an established relationship with one another.

Reasonable belief: We raise various options for reforming the mistake of fact defence (see Discussion Paper Volume 1 Chapter 5). If any of these reforms are implemented, it would be possible to accompany them with a relevant statutory jury direction.

E.g., one option we raise is to provide legislative guidance on the assessment of reasonableness. One way in which this could be done is by requiring the judge to direct the jury about matters which they may or may not consider when determining whether the accused had an honest and reasonable belief that the complaint consented to the sexual

activity. The Victorian Jury Directions Act provides that the prosecution or defence may request that the judge direct the jury that:

> If it concludes that the accused knew or believed that [one of the circumstances in which the law provides that a person does not consent] existed in relation to a person, that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act.
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> In determining whether the accused who was intoxicated had a reasonable belief at any time—
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> i. If the intoxication was self-induced, regard must be had to the standard of a reasonable person who is not intoxicated and who is otherwise in the same circumstances as the accused at the relevant time.
> ii. If the intoxication is not self-induced, regard must be had to the standard of a reasonable person intoxicated to the same extent as the accused and who is in the same circumstances as the accused at the relevant time.
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> In determining whether the accused had a reasonable belief in consent, the jury must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent.
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> In determining whether the accused had a reasonable belief in consent, the jury may take into account any personal attribute, characteristic or circumstance of the accused.

A judge in Victoria must give the requested direction(s) unless there are good reasons for not doing so. The Act provides that a good reason for not giving the last-mentioned direction is that the personal attribute, characteristic or circumstance:

- Did not affect, or is not likely to have affected, the accused's perception or understanding of the objective circumstances;
- Was something that the accused was able to control; or
- Was a subjective value, wish or bias held by the accused, whether or not that value, wish or bias was informed by any particular culture, religion or other influence.

The amended Victorian Jury Directions Act will also provide that, where there are good reasons to do so, the judge must inform the jury that:

- A belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
- If a belief in consent is based on a combination of matters including a general assumption of that kind, then, to the extent that it is based on that general assumption, it is not a reasonable belief.

The amended Victorian Jury Directions Act provides the following examples of the types of general assumptions it is referring to:

- That a person who gets drunk and flirts with another person consents to a sexual act with that other person.
- That a person who dresses in a way that is considered sexually provocative, and who visits another person's home, consents to a sexual act with that other person.

Some of these directions will already be given in WA. E.g., in WA for the purpose of the current mistake of fact defence, a reasonable person is not intoxicated. Judges are expected to give this direction to the jury when there is evidence in a trial that the accused was intoxicated. Further, in determining whether the accused's belief was reasonable the jury may take into account the accused's sex, age and other personal attributes.

Differences in the complainant's accounts: In WA the direction to the jury, which is given in any trial in which it is suggested that a witness has made a prior inconsistent statement, may include one or both of the following as is appropriate in the case:

- Anything said by a witness out of court is not evidence in the trial that what the witness said on the previous occasion, which is inconsistent with their testimony in court, occurred.
- If the jury finds that, on a previous occasion, a witness said something which was inconsistent with the evidence the witness gave in court, the jury can take the inconsistency into account when assessing the witness' credibility and reliability

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The implication that inconsistencies in a complainant's account make it inherently less credible or reliable coincides with the commonly held view that 'real' victims will give a complete and consistent account of the offending. However, research shows that inconsistencies or differences are common because of the way the complainant retains and recalls memories, the context in which the disclosure is being made, or feelings of stress or embarrassment.

It would be possible to legislate a direction that addresses this issue. E.g., NSW legislation requires judges to tell juries, in appropriate cases, that:

a) Experience shows that:
    i. People may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time;
    ii. Trauma may affect people differently, including affecting how they recall events;
    iii. It is common for there to be differences in accounts of a sexual offence; and
    iv. Both truthful and untruthful accounts of a sexual offence may contain differences.
b) That it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.

Complainant responses to giving evidence: Complainants can respond to giving evidence in different ways: they may appear emotional, distressed, anxious, irritable, numb or controlled.

The NSW Criminal Procedure Act requires judges, in appropriate cases, to direct the jury that:

- Trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not; and
- The presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.

A similar provision is contained in the amended Victorian Jury Directions Act. The Queensland Taskforce also recommended that Queensland judges be permitted to direct juries about complainant responses to giving evidence.

Unreliable witnesses: At common law, sexual offence complainants and children were considered to be classes of witness whose evidence should be treated with caution. The Royal Commission has recommended that legislation should provide that judges must not direct, warn or suggest to the jury:

- That sexual offence complainants or children as a class are unreliable witnesses;
- That it is 'dangerous or unsafe to convict' on the uncorroborated evidence of a sexual offence complainant or a child (uncorroborated evidence warning); or
- That the uncorroborated evidence of a complainant or a child should be 'scrutinised with great care'.

The Royal Commission recommended that judges be prohibited from giving a direction or warning about, or commenting on, the reliability of a child's evidence solely on account of the child's age.

The WA government has 'accepted in principle' each of these recommendations. While it has not yet introduced a Bill to give full effect to this in principle acceptance, the common law rules have already been abrogated to the extent that judges are no longer required to give a warning to jurors in all cases involving sexual offence complainants. They may only give such a warning if they are satisfied that it is justified in the circumstances. They are also prohibited from warning the jury, or suggesting in any way, that it is unsafe to convict on the uncorroborated evidence of a child because children are classified by the law as unreliable witnesses. However, WA legislation is currently silent about scrutinise with care warnings. An example of a circumstance in which a judge may choose to give a scrutinise with care warning is where a person gives unsworn evidence. Judges are also not currently prohibited from commenting on the reliability of a child's evidence based solely on the child's age.

In various other Australian jurisdictions judges are already prohibited from warning or suggesting to the jury that complainants or children as a class are unreliable witnesses, or that it is dangerous to convict on the uncorroborated evidence of a sexual offence complainant or a child. Under the amended Victorian Jury Directions Act, the judge, prosecution and defence will also be prohibited from saying, or suggesting in any way, that:

- Complainants who provide commercial sexual services are, as a class, less credible or require more careful scrutiny than other complainants.
- Complainants who have a particular sexual orientation are, as a class, less credible or require more careful scrutiny than other complainants.
- Complainants who have a particular gender identity (including complainants whose gender identity does not correspond to their designated sex at birth) are, as a class, less credible or require more careful scrutiny than other complainants.

It is not obvious that any of these sorts of warnings are currently given in WA so there may be no utility of addressing them in legislation.

Should there be a legislated specific jury directions about any of the following:

- **The meaning of consent in sexual offence cases and/or the circumstances in which a person does not consent?**
- **The way in which people may respond to sexual violence?**

- **The absence of injury, violence or threat?**
- **The relevance of other sexual activities in which a person has engaged?**
- **The assumptions that may not be drawn from the complainant's personal appearance or conduct?**
- **The relationship between sexual offence perpetrators and people who experience sexual violence?**
- **The circumstances in which an accused's belief in mistake should not be considered reasonable?**
- **Differences in the complainant's accounts?**
- **The ways in which complainants may respond to giving evidence?**
- **That certain classes of witnesses are less credible or require more careful scrutiny than other complainants?**

If so, what should that particular direction say? In what circumstances should it be given?

These issues are discussed in full in Discussion paper volume 1 paras 6.64-6.128.