

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.

