

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

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.

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 people who are strangers to the victim-survivor, and that 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;

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.

In determining whether the accused who was intoxicated had a reasonable belief at any time-

- 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.

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.

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 of the objectkind,(s)-2) 2 r6-3m7-4te4(h7ch)0101k to eccuyessno

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

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

credible or 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 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.

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