

Issues Paper 6.2 – When should a judge be required/permitted to give legislated jury directions and what should the legislation require?

This issues paper considers, if jury directions are to be legislated, whether the legislation should specify:

- that the directions are mandatory or discretionary?
- if a direction is discretionary, the circumstances in which it should or should not be given?
- when during the trial the directions are to be given (timing)?
- the directions or should it only specify the topics and general message to be conveyed?

Mandatory or discretionary? Arguments in favour of mandatory directions include that they would:

- Ensure that consistent directions are given across cases.
- Reduce the incentive for defence counsel to rely on misconceptions.
- Ensure that juries have accurate understandings of non-consensual sexual activity.

Arguments against mandatory directions include that they would:

- Limit the judge's ability to tailor directions to the circumstances of the individual case. This may result in a direction which does not fit the facts of the case, and which may highlight irrelevant facts.
- Increase the risk of misdirections and appeals.
- Intrude into the independence of the judiciary by the legislature.

If discretionary, when the directions ought to be given? Various options are available. E.g., legislation could specify that a judge must:

- Give a direction if there are good reasons to do so.
- Give a direction when requested by a party unless there are good reasons for not doing so.
- Not give a direction which has not been requested by a party unless there are substantial and compelling reasons for doing so.

Timing: WA Judges give introductory directions to juries before the evidence opens and most of their directions just before the jury retires to consider its verdict. Some judges give directions during the course of the evidence but legislation does not say whether they can or must do this. One possibility for reform would be to require judges to give certain directions earlier in a trial.

Research suggests that jurors' attitudes are strongly influenced by the opening addresses in the case; that directions may be more effective in counteracting any assumptions or misconceptions that jurors may hold if those assumptions and misconceptions are addressed at an early stage of the trial; and repetition of jury directions helps jury comprehension.

The Royal Commission recommended that if legislation is required to permit trial judges to give relevant directions earlier in the trial or to otherwise assist juries by providing them with more information about the issues in the trial, the legislation be introduced. It does not seem

that legislation would be required to permit WA judges to give relevant directions earlier in the trial because they do so and it has not been criticised.

Legislation would, however, be required if judges were to be mandated to give directions at a specific time during the trial. Such legislation has previously been enacted in WA. E.g., where the accused has requested the judge give a direction on family violence, the Evidence Act requires the judge to give the direction 'as soon as practicable after the request is made' (unless there are good reasons for not giving the direction) and empowers the judge to 'give the direction before any evidence is adduced in the trial'. Similar provisions have been enacted in Victoria.

This approach has the merit of ensuring that the direction is given in advance of the relevant evidence, which may make it more effective. However, it removes from the judge the ability to decide when a direction is best given. This could have the result of prejudicing the prosecution or defence case where it is wrongly anticipated that the relevant evidence will be given. It is therefore arguable that it may be best to wait until the evidence is adduced before giving the direction.

For the sake of clarity (if not necessity), it would also be possible to specify that a direction may be given at any point in the trial, and that it may be repeated. E.g., NSW states, in relation to a particular direction that a judge may, as the judge sees fit, give a direction in this section at any time during a trial, and give the same direction on more than one occasion during a trial. One concern with this approach is that it may create uncertainty about whether judges are able to give other directions during the course of a trial, if legislation does not state that judges may do so.

The Queensland Taskforce were evenly divided in their views about legislation that outlines the timing in which a judge can give and repeat jury directions during the trial proceedings. Some members of the Taskforce questioned whether a section in the legislation was really required, and suggested it would represent too much change too quickly for Queensland.

Specific directions or topics and general message to be conveyed? An option is for legislation to specify the directions to be given in detail. The remaining issues papers about jury directions discuss the options if specific directions are to be legislated. An alternative from New Zealand requires the judge to give any direction they consider 'necessary or desirable to address any relevant misconception relating to sexual cases'. The provision provides that misconceptions relating to sexual cases (all or any of which the Judge may consider relevant in the case) include, but are not limited to, misconceptions -

- a) about the prevalence or features of false complaints in sexual cases;
- b) that a victim or an offender in a sexual case has, or does not have, stereotypical characteristics;
- c) that sexual offending is committed only by strangers, or is less serious when committed by a family member (including, but not limited to, a spouse, civil union partner, or de facto partner) or by an acquaintance;
- d) that sexual offending always involves force or the infliction of physical injuries;
- e) that, in a sexual case, a complainant is less credible or more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant—
 - i. dressing provocatively, acting flirtatiously, or drinking alcohol or taking drugs;
 - ii. being in a relationship with a defendant, including a sexual relationship;
 - iii. maintaining contact with a defendant, or showing a lack of visible distress, after the alleged offending.

If jury directions are to be legislated, should the legislation specify:

- **That the directions are mandatory or discretionary?**
- **If a direction is discretionary, the circumstances it should or should not be given?**
- **When during the trial the directions are to be given (timing)?**
- **The directions or should it only specify the topics and general message to be conveyed?**

These issues are considered in full in Discussion Paper volume 1 paras 6.60–6.63, 6.123, 6.129–6.140.