

The Hon Martin Pakula MP

Attorney-General
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Jury Directions Bill 2015

Dear Attorney-General

We write regarding the Jury Directions Bill 2015, introduced into the House of Assembly in March 2015. We support the overall intent of the Bill, being to further simplify the law relating to jury directions. We are, however, concerned about several elements of the Bill, discussed further below.

Sexual offence trials and the removal of mandatory jury directions

The Jury Directions Bill 2015 includes a proposal to repeal Part 5 of the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 and will instead include relevant amendments regarding jury directions in sexual offence trials in the proposed new Jury Directions Act.

The Federation of Community Legal Centres wishes to raise again its concern regarding the removal of certain mandatory jury directions in sexual offence trials. We consider the Jury Directions Bill 2015 provides an opportunity to retain the mandatory directions, noting that the relevant provisions of the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 have not yet taken effect.

As we advocated in relation to the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014, **it is essential that jury directions concerning consent and the accused's reasonable belief be mandatory**. We note that this view was expressed in 2014 not only by the Federation, but by a further eleven organisations including Victorian Centres Against Sexual Assault, Domestic Violence Victoria and the Victorian Council of Social Services.

We are extremely concerned about the removal of the mandatory requirement for jury directions on consent (clause 46, Jury Directions Bill 2015) and on the accused's reasonable belief in consent (clause 47). As we stated in 2014, removing mandatory jury directions on these issues runs counter to the recommendations of the 2004 Victorian Law Reform Commission's Sexual Offences Review and to the spirit of the Victorian Law Reform Commission's Jury Directions Review with respect to sexual offences.

We believe that removing these mandatory directions could work against the spirit of other recent sexual offences reforms by increasing unjust outcomes for

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some victims and resulting in traumatic and expensive appeals that would otherwise be unnecessary.

Our experience suggests that placing the onus on prosecution or defence to not only request the direction but also to specify which direction is required, will increase unjust outcomes for victims and is also likely to result in increased numbers of appeals, which jury directions reform is intended to reduce.

The complexities confronting juries without appropriate guidance are likely to be multiplied when this proposal is combined with the lack of specificity in the new sexual offences legislation with regard to the meaning of consent, consent-negating circumstances, and the accused's reasonable belief.

Further arguments to support mandating these directions include:

- Proposed s16 requires the trial judge to give a direction even though it has not been requested. However, this is a higher threshold than simply mandating a direction, and also a two-step process, as it entails the judge deciding whether there are substantial and compelling reasons for doing so, after inviting submissions from prosecution and defence.
- Retaining mandatory jury directions is even more important given that the relationship between consent-negating circumstances and the accused's reasonable belief is not spelled out in the new sexual offences legislation. We advocated, unsuccessfully, for this in our responses to the DOJ Sexual Offences Review and the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014, which would have also made the legislation consistent with how it treats the jury's task in determining whether an accused who was intoxicated had a reasonable belief. At the very least, a judge should direct the jury that, for example, if the alleged victim was asleep (a consent-negating circumstance), it is not reasonable for the accused to believe that she was consenting. At present, the legislation spells out the effect of intoxication on reasonable belief, but not the effect of consent-negating circumstances on reasonable belief. It should expressly relate the element of reasonable belief to the accused's knowledge of a circumstance that precludes consent. Mandatory jury directions would help juries to understand what consent means and whether the accused reasonably believed the complainant consented. We say that such directions are also consistent with clause 5(4)(a) of the Guiding Principles of the Jury Directions Bill 2015.
- To not mandate these directions is inconsistent with clause 52 of the Bill, which includes a mandatory direction on delay or lack of complaint. The Explanatory Memorandum states that this is necessary because (with regard to clause 52(4)):
 - ‘Subclause (4) requires trial judges to inform the jury that experience shows that—
 - people may react differently to sexual offences and there is no typical, proper or normal response to a sexual offence; and
 - some people may complain immediately to the first person they see, while others may not complain for some time and others may never make a complaint; and

- delay in making a complaint in respect of a sexual offence is a common occurrence.

These matters draw on similar directions in England and reflect the findings of, and language used in, numerous research studies and law reform commission reports. These matters are commonly misunderstood by the broader community. The provision enables such misconceptions to be addressed with the jury if these issues are likely to arise, or do arise, in the trial. (pp 32-3)

We say that matters of consent and what it is reasonable for the accused to believe are also commonly misunderstood by the broader community. This is supported by research, for example the most recent National Community Attitudes Survey found that about 20% of Australians think a woman is partly to blame for being sexually assaulted if she was drunk or drug affected. It would therefore be consistent to retain the essence of the current mandatory jury directions in sections 37, 37AAA and 37AA of the *Crimes Act 1958*.

Family violence

Similar concerns and reasons apply to the non-mandatory nature of the jury directions in Part 6 of the Jury Directions Bill 2015. These directions apply in criminal proceedings in which self-defence or duress in the context of family violence is in issue. They may only be made at the request of defence counsel or, in the case of an unrepresented accused, at the request of the accused or by the trial judge without request.

Just as we cannot assume that members of a jury understand the nature and dynamics of family violence, we cannot assume that all defence counsel have a sufficiently sophisticated understanding of this issue and will request relevant directions in each case. We recommended last year in the context of the Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 that these directions should be mandatory and we remain of that view.

We thank you for taking these concerns into account.

Yours sincerely



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