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29 November 2023

His Hon Justice Matthew Palmer
Chair of the Board, Te Kura Kaiwhakawā

By email: tekura@justice.govt.nz

Tēnā koe Justice Palmer,

Re: Example directions for responding to misconceptions about sexual offending, s 126A of the Evidence Act 2006

Introduction

1. Thank you for your letter of 6 October 2023, and for the additional time afforded to come back to you with details of our concerns around the *Example Directions Responding to Misconceptions about Sexual Offending* (**the Example Directions**).
2. At the outset, the Law Society conveys its appreciation for Te Kura Kaiwhakawā's commitment to further engagement, and the establishment of a Working Group to consider the concerns the profession has raised. We acknowledge your comments about this being an ongoing and iterative process, and thank you for the addition of an interim cautionary note to accompany the Example Directions. We also acknowledge the significant work Te Kura Kaiwhakawā provides to enhance the work of the Courts and that reform in many areas is necessary.
3. However, we remain concerned that some aspects of the Example Directions do not accurately reflect the position that myths and misconceptions (in some respects) remains the subject of expert controversy. These concerns are addressed in more detail below.
4. We welcome the opportunity to discuss this further with the Working Group if that would be helpful.

Overall tenor and structure of the Example Directions – impact on defence case

5. Our primary concern relates to the overall tenor and structure of the Example Directions, which we believe may be read as creating a presumption of guilt, or at the very least a presumption that issues raised by the defence are irrelevant or incorrect.
6. The drafting of some of the directions is problematic, and read as though the Judge is weighing in on the evidence provided by the Defence. For example, many of the Example Directions use phrases such as "the Crown says...the defence says..." prior to a (sometimes lengthy) statement intended to provide a position on research relating to the misconception. While such a structure may work for other judicial directions, the content of the Example Directions and the misconceptions addressed by them means they are more likely to go to the heart of the defence case, or at the very least a live issue. In that light, their structure gives the impression that the Judge is commenting on the merits of the defence case, rather than the misconception, often with a substantial concluding paragraph of text that goes against the defence proposition and could be interpreted as endorsing the prosecution's submissions. Overall, feedback we have

received suggests the Example Directions discount relevant issues of credibility and reliability and render the defence criticism of this redundant.

7. The right to a fair trial is "absolute."[1] In sexual violence cases, the issue of consent and/or reasonable belief there was consent will almost always be the crux of a case. As such it is important the Example Directions strike the right balance between directing the jury on a possible misconception but not at the expense of the defence case. The England and Wales Crown Court Compendium, on which the Example Directions appear to have been based,[2] usefully provides:[3]

> *It is a matter of judgement for the trial judge as to the extent to which a jury should be given warnings about such matters that are not legal directions.... Whenever it is given it is advisable to discuss the proposed direction with the advocates. Considerable care is needed to craft the direction to reflect the facts of the case and to retain a balanced approach.*
> *...*
> *However, it is important that the comment should not assume the guilt of the defendant, and that the defendant's case should be made clear.*

8. We do not think the necessary balance has quite been achieved in all of the Example Directions. For example:

    a. At 4.1.1: The discussion above this example direction notes a careful balance is required when giving a direction relating to a delayed disclosure, and states that although delay does necesarily mean a complaint is untrue, the reliability of recall may be impacted. However, this balance is not reflected in the example directions, which refers only to the misconception. There is no prompt to consider, where the defence has made live the issue of inaccuracies in the complainant's version of events, clarifying that the misconception does not mean the reliability of the complainant's recall is unaffected.

    b. At 4.4.1: it is of course correct that 'a person who engages in sexual activity is entitled to choose how far that activity goes.' However, the preceding paragraphs of the Example Direction relate to behaviour prior to the alleged offending such as flirtation and other physical contact. This may, depending on the circumstances of the case, be directly relevant to a defendant's claim that they held a reasonable belief the complainant consented to the subsequent sexual activity. However, the Example Direction suggests the Judge the summarise the respective positions of the Crown and defence, before going on to comment specifically that despite the conduct that occurred prior to the alleged offence, it is not necessarily reasonable that the defendant believed the complainant to be consenting. This goes beyond noting to the jury that there can be misconceptions around the prior conduct of a complainant.

    c. At 4.10.1: this direction contains a useful note about when it ought to be used. However it does also include a statement that evidence suggests a false complaint is not easy to make or hard to disprove. The preceding paragraphs, however, set out no research relating to the ease with which false reports are made, and how difficult (or not) it is to

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1 *R v Condon* [2006] NZSC 62 at [77]; New Zealand Bill of Rights Act 1990, s 25(a) and (e).

2 Noting in particular their length, which is characteristic of the Crown Compendium but not other examples, such as the Canadian Model Jury Directions and the statute-based Australian examples.

3 England and Wales Crown Court Compendium, Part 1: Jury and Trial Management and Summing Up, June 2023, at p 20-2.

disprove false allegations. The cited research covers only prevalence. In addition, the statement regarding the 2019 study of 110 police files is unhelpful – it is not clear why any importance should be attached to the fact that none of the cases classified by Police as 'no offence or false complaint' proceeded to prosecution. This is of no significance – if a case is classified as such, of course it has proceeded no further.

9. This issue of balance is further exacerbated by insufficient cautioning around the use of directions and the need to amend them as appropriate in cases where they relate to live issues raised by the defence. By way of example, there is an appropriate caution at 4.6.2, noting that the defence may legimately raise the absence of injury where the allegations suggest injury would be highly likely, and the general direction about avoiding misconceptions and false assumptions contains a useful caution.[4] In addition to altering the phrasing of the Example Directions, similar cautions could be included throughout.

Reference to disputed or mischaracterised research

10. As noted by the Supreme Court in *DH v R*,[5] judicial directions about erroneous beliefs or assumptions can be worthwhile where there is general acceptance of the topic. The Court further noted:[6]

> If all the areas that would otherwise be covered by expert evidence are amenable to jury direction, this would obviate the need for the evidence and it would no longer be substantially helpful. If not, the jury directions could reduce the scope of the evidence to topics not covered in the directions.

11. However, the current drafting of the Example Directions appears to be premised on the position that this topic (of myths and misconceptions) is based on settled evidence and research.[7] Feedback we have received in preparing this response suggests this is not correct and that disagreement among experts exists, if not about the findings of the research, then with regard to how the research is characterised and whether it speaks to the magnitude of the impact of misconceptions. For example, recent research in the United Kingdom by Professor Cheryl Thomas, casts doubt on the prevalence of some of the commonly held misconceptions. Her recent study with real jurors shows that a majority do not believe many of the commonly held myths and misconceptions.[8] While we do not suggest this disproves earlier research, it does add complexity to our overall understanding of myths and misconceptions, and jury behaviour.

12. Our concerns around the use of research include:

    a. As discussed further below, the example directions at 4.7 have been included despite the preceding discussion of research tending to suggest that there is no agreed

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4 This states: "I add the obvious: this direction says nothing about the defendant's guilt or innocence. As I have explained, the defendant must be presumed innocent unless the Crown establishes guilt beyond reasonable doubt".

5 *DH v R* [2015] NZSC 35, at [111].

6 Ibid.

7 On many occasions, the example directions instruct the judge to tell the jury that: "Research shows that…", "Research tells us…" or "We know from research that…". See for example: [3.2.1], [3.2.2], [4.1.1], [4.6.1], [4.6.2], [4.7.2], [4.9.1].

8 Thomas, C (2020) The 21st century jury: contempt, bias and the impact of jury service. Criminal Law Review (11), at p 20. Interestingly, this research is cited as a reference in the Example Directions, at page 32.

understanding of whether and how misconceptions about emotional response impact juror decision-making.

b. There is dated research throughout the article, for example the 1983 *Rape Study*, Gunby et al's[9] research on alcohol consumption and allegations of rape, and Finch et al's study on stereotypes and the attribution of blame.[10] While older research on the existence and nature of myths and misconceptions is not necessarily undemrined by the passage of time, we do have concerns about reliance on this information in respect of the prevalence and strength of misconceptions, given the strength of societal influences on these misconceptions.

c. At 4.8, there is a statement that '*Jurors should never be invited by counsel to conclude that witnesses who make inconsistent statements are less accurate than those who do not.'* It is not clear what research is relied on when making this statement, however it seems logically impossible. A witness who makes inconsistent statements is in fact less accurate than a witness who does not. The research cited could support a conclusion that such inconsistencies arise due to the falliability of human memory, and that one inconsistency does not necessarily render unreliable an entire account of events, but it cannot support a suggestion that an inconsistent witness is not inaccurate. This statement appears to go so far as to render challenge to a complainant's account almost impossible.

13. We also note that any time an example direction instructs the judge to say "we know from the research" (for example), that "research" is not put before the jury for their own individual assessment, nor will it be tested under cross-examination. While some of the research cited has been undertaken in New Zealand, it is overall rather limited. This is important, as results from overseas have varied depending on where the studies are undertaken. There is also limited research available on the impact of judicial directions. While some research exists in respect of how well directions can mitigate misconceptions,[11] we are not aware of any significant research considering how directions impact a defendant's ability to offer a defence.[12] This suggests caution is required.

14. Finally, as evidenced in recent years and understandably given the social influence on these myths and misconceptions, this is an area that will continue to evolve with time. As such, the Example Directions will require regular review and updating. However, it may also be appropriate to include reference to the limitations of research and to research that offers additional perspectives.

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9 Clare Gunby, Anna Carline and Caryl Beynon "Regretting it After? Focus Group Perspectives on Alcohol Consumption, Non-consensual Sex and False Allegations of Rape" (2012) 22 Social & Legal Studies 87. This study involving 18- to 24-year-olds was conduct over 10 years ago. Notably, the student in the scenario acquitted the defendant, whereas the real life trial from which the scenario was taken resulted in conviction.

10 Emily Finch and Vanessa E Munro "Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants" (2005) 45 British Journal of Criminology 25. This pilot study is now some 20 years old.

11 Even here, results appear to be mixed. In a 2022 examination of jury directions in New South Wales and Victoria, Julia Cooper suggests that directions cannot correct 'rape myths,' which operate 'below the level of juror consciousness and… are unable to be effectively challenged by directions.' See: Cooper, Julia 'Judges as myth-busters: a re-examination of jury directions in rape trials' (2022) Griffith Law Review 31:4, pp. 485 – 512.

12 If such research does exist, it does not appear to have been included in the Example Directions.

Guidance on when to give a direction

15. It may be beneficial to include in the Example Directions some guidance (and/or examples) around when the use of a direction under section 126A may be necessary. We are concerned the overall presentation of the research somewhat favours the giving of a direction, and could lead judges to the view that some misconceptions are more prevalent or pervasive than they actually are. For example:

    a. At 4.7, example directions are provided in relation to the display of, or lack of, an emotional response by the complainant. This is despite reference to research suggesting that this does not impact on deliberations in a consistent way, and that while distress can be associated with recounting of a traumatic event, the benefit of observing demeanour was sceptically viewed by the others. While there is reference to research suggesting that some people may expect a consistent emotional response across time, it is clear there is no an accepted position. Despite this inconsistency, example direction 4.7.2 then follows the structure of outlining the defence proposition, followed by reference to 'research' that effectively disproves it.

    b. At 4.11, as noted above, reference is made to a 1983 study in which over half of men present at a symposum agreed that an allegation of sexual offending was easy to make but hard to disprove. This is very dated research, and it is unknown whether such a high proportion of jurors would now hold this belief. However, having read this, a judge could be forgiven for considering a direction to be highly necessary.

16. Further, we have been advised of some cases where District Court judges have given out all the example directions, not just picking one or two that are relevant to the particular case. Directions should only be considered necessary where a case raises the prospect of a misconception(s) that is established by uncontested research to be a misconception widely held by jurors *and* likely to impact their consideration of the evidence and subsequent decision-making.

17. We also suggest that where expert evidence has been admitted as to a misconceptions about sexual offending, a Judge should be hesitant to provide the jury with a direction on that same matter. Rather, in such a case it is more properly the role of the jury to assess that evidence and determine its impact on their assessment of the Crown's case. As noted by the Supreme Court, where such expert evidence is provided, *'it should not be linked to the circumstances of the complainant in the case in which the evidence is being given... The witness should make it clear that the witness is not commenting on the facts of the particular case.'*[13] Further, where such evidence is admitted, the judge must instruct the jury that:[14]

    > *... it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.*

18. Where expert evidence about sexual offending misconceptions is admitted, the defence will also have the opportunity to either cross-examine the witness or address the issues raised by their evidence in summing up. It is therefore a 'safer' option than a judicial direction referring

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13 Above, n 4, at para [30].

14 Ibid.

generically to 'research' in a manner that undermines the defence case, and any direction issued by the judge, if necessary, can instead relate to use of the evidence.

19. Overall, we consider the Example Directions would benefit from additional notices throughout, to draw to the attention of judges when a direction may/may not be appropriate.

Misconceptions about child complainants

20. The Law Society recommends removal of the section relating to misconceptions about child complainants. We consider that any materials on this, including Example Directions, would be best undertaken as a seperate piece of work, considering first whether example directions in relation to child complainants are appropriate and beneficial. This is a highly complex area, raising issues relating to the questioning of child complainants during investigation, delayed disclosure, and child event recall.[15]

21. Some aspects of the evidence canvassed in the Example Directions tends to suggest that certain misconceptions (such as continued contact) are no longer widely held. As noted above, we are concerned at the potential use of directions in circumstances where they may be unnecessary. A separate piece of work relating to child complainants would also enable the consideration of a broader range of research[16] (or expansion of the references cited).

Lawyers' experience with directions under s 126A

22. We are able to provide some feedback on how the example directions are operating so far.

23. As noted above, we have been advised of recent District Court cases in which judges have not selected only relevant example directions or tailored the directions appropriately, and have instead read out a series of the Example Directions.

24. Similarly we are aware of cases where the Example Directions have not been used at all.

25. We will continue to monitor this area.

Reliance on appeal rights to address potential issues with the Example Directions

26. We note in your letter of 6 October, the Example Directions on misconceptions, like other example directions in judicial bench books, do not have any particular status in law. We agree it is important for each judge to decide for themselves what directions to give, on a case-by-case basis, in the context and circumstances of each particular trial. However, we do not agree that "the legal parameters of what directions are lawful, and what are not, are tested on appeal in the usual way".

27. Appeals should not be a fallback position particularly in an area where a person's liberty is likely to be at stake.Wherever possible, any direction on a misconception should be right the first time to reduce the likelihood of an appeal being required. As such, we agree it is important to ensure an open dialouge on the wording of any direction between the judge and counsel before it is given.

15 These issues are of course exemplified in the Peter Ellis case [2022] NZSC 115.

16 For example, that of Associate Professor Deirdre Brown at Otago University.

Conclusion

28. We hope these comments have been helpful. If further discussion would assist, please contact aimee.bryant@lawsociety.org.nz.

Nāku iti noa, nā

Frazer Barton
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