

## Appendix 2: List of Questions asked in the Discussion Paper

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### Chapter 1: Introduction

#### *Terminology*

1. What language should we use in our future publications to refer to incidents of sexual violence, the people who experience sexual violence, and the people who commit acts of sexual violence?

#### *Commission's guiding principles*

2. The Commission has identified six principles to guide its review:
  - Principle 1: Sexual offence laws should protect sexual autonomy and bodily integrity.
  - Principle 2: Sexual offence laws should protect people who are vulnerable to sexual exploitation.
  - Principle 3: Sexual offence laws should incorporate a model of shared responsibility.
  - Principle 4: Sexual offence laws should be non-discriminatory.
  - Principle 5: Sexual offence laws should be clear.
  - Principle 6: When reviewing sexual offence laws, the interests of complainants, accused people and the community must all be considered.

Are these principles appropriate? Are there any other principles that should guide the Commission's review?

### Chapter 3: Objectives and guiding principles

3. Should the *Code* specify objectives and/or guiding principles concerning sexual offending? Why/why not?
4. If the *Code* does specify objectives and/or guiding principles concerning sexual offending, how should the relevant provision(s) be framed?
5. If the *Code* does specify objectives and/or guiding principles concerning sexual offending, what should be included or excluded?

### Chapter 4: Consent

#### *Defining consent*

6. Do any aspects of the current definition of consent give rise to particular concern or create problems in practice?
7. Should the *Code* define consent? If so, how should it be defined?

#### *Communicating consent*

8. Should the *Code* require participants to say or do something to indicate their consent to a sexual activity? If so, how should this requirement be framed?

#### *Clarifying the meaning of consent*

9. Should the *Code* clarify the meaning of consent in any way? For example, should it make it clear that a person does not consent only because they:
  - Failed to verbally resist;
  - Consented to a different act with the same person;
  - Had previously consented to a sexual activity with that person or someone else;
  - Had previously consented to a sexual activity of that kind or any other kind; and/or

- Had entered into an agreement for commercial sexual services?

If so, what matters should be addressed and how should they be addressed? For example, should they be addressed as part of the definition of consent and/or in jury directions?

10. Should the *Code* continue to list circumstances in which consent is not freely and voluntarily given, such as when it is obtained by force, threat or fraud? Why/why not?

***Listing the circumstances in which consent is not freely and voluntarily given***

11. The *Code* currently provides that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. Should this list of circumstances be amended in any way? For example, should the *Code*:

- a. Address cases in which a person is unconscious or asleep during a sexual act (see paras 4.80-4.83).
- b. Address cases in which a person participates in a sexual activity while intoxicated (see paras 4.84-4.98).
- c. Address other circumstances in which a person is incapable of consenting to a sexual act (see paras 4.70-4.79).
- d. Define the types of fraud or deceit which negate consent, such as fraud or deception about:
  - i. The nature or purpose of the act (see paras 4.129-4.132 and 4.138-4.142).
  - ii. The identity of the participants (see paras 4.133-4.137).
  - iii. The marital status of the participants (see paras 4.143-4.146).
  - iv. The use, disruption or removal of a condom or other device used to prevent pregnancy or sexually transmitted infections (see paras 4.147-4.174).
  - v. Payment for sexual services (see paras 4.175-4.183).
  - vi. The fertility of the participants (see paras 4.184-4.186).
  - vii. The sexual health of the participants (see paras 4.199-4.209).
- e. Address cases in which a person has a mistaken belief about a matter, such as those listed in para d, which was not induced by the accused (see paras 4.120-4.128).
- f. Limit the application of the fraud, deception or mistake provisions to objectively or subjectively serious frauds, deceptions or mistaken beliefs (see paras 4.210-4.220).
- g. Exclude certain matters from the scope of the fraud, deception or mistake provisions, such as fraudulent or deceptive representations or mistaken beliefs about:
  - i. A person's sex, sexual characteristics, gender identity, gender history, sexual orientation (see paras 4.187-4.198).
  - ii. A person's sexual health (see paras 4.199-4.209).
  - iii. Matters which may be considered trivial, such a person's wealth, occupation or feelings for the other participant (see paras 4.216-4.220).
- h. Provide that the fraud, deception or mistake provisions do not apply if the interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern (see paras 4.221-4.224).

- i. Clarify the circumstances in which a person does not consent due to the use of force, threats or intimidation (see paras 4.227-4.250).
- j. Address cases in which a person participates in a sexual activity due to other forms of pressure, such as coercive conduct or blackmail (see paras 4.227-4.250).
- k. Address cases in which a person participates in a sexual activity due to having suffered harm (see paras 4.251-Error! Reference source not found.).
- l. Address cases in which a person participates in a sexual activity due to fear of force or harm (see paras 4.254-4.258).
- m. Address cases in which a person participates in a sexual activity during unlawful detention (see paras 4.259-4.261).
- n. Address cases in which a person participates in a sexual activity with a person with whom they have a relationship of authority, trust or dependency (see paras 4.262-4.265).

If the list of circumstances is to be amended, how should the included circumstances be defined?

### ***Timing of consent***

- 12. Should the wording introducing the list of circumstances in which there is no consent be changed? If so, what wording should be used?
- 13. Should the *Code* specify when consent should be given? If so, should it specify that consent must be given at the time of the offence, or should it be permissible to give consent in advance?

### ***Withdrawal of consent***

- 14. Should the *Code* explicitly address the withdrawal of consent? If so, how should this be done? For example, should the provision require the withdrawal of consent to be communicated by words or conduct?

### ***Application of the consent provision***

- 15. Should the application of the consent provision be amended in any way?

### ***Location of the consent provision***

- 16. Should the consent provisions be put in a separate section of the *Code*?

## **Chapter 5: Mistake of Fact**

### ***Excluding operation of the mistake of fact defence***

- 17. Should the law provide that the mistake of fact defence does not apply to sexual offences?

### ***Making the mistake of fact defence more objective***

- 18. Should the mistake of fact defence be made more objective, by providing that the jury should not take the accused's attributes and characteristics into account when determining whether their mistaken belief in consent was reasonable?

### ***Providing legislative guidance on the assessment of reasonableness***

- 19. Should the *Code* provide legislative guidance to assist juries to determine whether a mistaken belief in consent was reasonable? If so, what guidance should be provided? For example, should the *Code*:
  - Specify that, in determining whether an accused's belief in consent was reasonable, the jury:

- Must consider any of the accused's attributes or characteristics which could affect their appreciation or perception of the circumstances in which they found themselves.
- Must not consider the accused's values, whether they be informed by cultural, religious or other influences (see paras 5.47-5.52).
- Define the attributes or characteristics of the accused which the jury must consider (eg age, gender, disabilities, mental health problems) (see paras 5.53-5.57).
- Require the jury to consider the community's expectations in assessing the reasonableness of the accused's belief in consent (see paras 5.58-5.60).
- Prevent the jury from taking the accused's self-induced intoxication into account in determining whether the accused's belief was honest and/or reasonable (see paras 5.61-5.72).
- Define the circumstances in which the accused's intoxication will be considered self-induced (see paras 5.73-5.76).
- Specify that a belief in consent is not reasonable if it is based on general assumptions about the circumstances in which a person consents (see paras 5.77-5.78).
- Specify that a belief in consent is not reasonable if it is based on specific assumptions about consent, such as assumptions arising from the complainant's style or state of dress, consumption of alcohol or other drugs, silence or failure to physically resist, or previous engagement in sexual conduct with the accused or another person (see paras 5.79-5.81).
- Specify that a belief in consent is not reasonable if there is no evidence that the complainant said or did anything to indicate consent (see paras 5.82-5.85).
- Specify that a belief in consent is not reasonable if the accused knew or was aware of the existence of one of the listed circumstances in which consent is not freely and voluntarily given (see paras 5.86-5.90).
- Specify that a belief in consent is not reasonable if it arose from the accused's recklessness (see paras 5.91-5.96).

### ***Addressing the measures the accused took to ascertain the complainant's consent***

20. Should the *Code* provide that a belief in consent is not honest and/or reasonable if the accused did not take measures to ascertain the complainant's consent? If so, how should this requirement be framed? For example, should the relevant provision:

- Refer to both the honesty and reasonableness of the accused's belief, or focus solely on the assessment of reasonableness.
- Require the accused to have taken 'reasonable steps' to ascertain consent, or require them to have 'said or done something' to find out if the complainant consented.
- Refer to the timing of the accused's measures to ascertain consent. For example, it could specify that the accused must have said or done something to ascertain consent at the time of the sexual activity, or within a reasonable time before that activity.
- Make allowances for people whose capacity to actively seek consent may be impaired in some way. For example, it could specify that the provision does not apply if the accused has a cognitive impairment or mental illness, and that condition was a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to the sexual activity. The burden could be placed on the accused to prove these matters.

21. Should the *Code* require or permit the jury to consider any measures the accused took to ascertain consent in determining whether their belief in consent was honest and/or reasonable? If so, how should this provision be framed? For example, should the relevant provision:

- Require the jury to consider any measures the accused took to ascertain consent or simply permit them to have regard to those measures.
- Refer to the 'steps' the accused took to ascertain consent, or to anything the accused 'said or did' to find out if the complainant consented.
- Refer to the timing of the accused's measures to ascertain consent. For example, it could refer to anything the accused said or did at the time of, or immediately before, the sexual activity.
- Complement a provision requiring the accused to take measures to ascertain the complainant's consent or act as an alternative to such a provision.

### ***Reversing the onus of proving the mistake of fact defence***

22. Should the burden be placed on the accused to prove, on the balance of probabilities, that they honestly and reasonably believed the complainant was consenting?

23. Are there any other reforms that should be made to the mistake of fact defence?

## **Chapter 6: Jury Directions**

### ***Legislating jury directions***

24. Should Western Australia legislate jury directions for sexual offence trials? Why/why not?

### ***Directions about consent***

25. Should there be a legislated jury direction about the meaning of consent in sexual offence cases and/or the circumstances in which a person does not consent? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about responses to sexual violence***

26. Should there be a legislated jury direction about the way in which people may respond to sexual violence? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about the absence of injury, violence or threat***

27. Should there be a legislated jury direction about the absence of injury, violence or threat? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about other sexual activity***

28. Should there be a legislated jury direction about the relevance of other sexual activities in which a person has engaged? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about personal appearance and irrelevant conduct***

29. Should there be a legislated jury direction about the assumptions that may not be drawn from the complainant's personal appearance or conduct? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about the relationship between perpetrators and victim-survivors***

30. Should there be a legislated jury direction about the relationship between sexual offence perpetrators and people who experience sexual violence? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about reasonable belief***

31. Should there be a legislated jury direction about the circumstances in which an accused's belief in mistake should not be considered reasonable? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about absent or delayed complaint***

32. Are the current warnings specified in section 36BD of the *Evidence Act 1906* (WA), which relate to the use the jury may make of evidence that the complainant failed to complain or delayed in making a complaint, sufficient? If not, what should the provision state?
33. Should there continue to be a requirement for a Longman warning (warning the jury about the forensic disadvantages that have arisen from a delayed complaint) to be given in sexual offence trials? If so, should the terms in which the warning is given be changed in any way?

### ***Directions about differences in the complainant's accounts***

34. Should there be a legislated jury direction about differences in the complainant's accounts? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about responses to giving evidence***

35. Should there be a legislated jury direction about the ways in which complainants may respond to giving evidence? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about misconceptions***

36. Should there be a legislated jury direction allowing judges to address misconceptions about sexual violence generally? If so, what should that direction say? In what circumstances should it be given?

### ***Directions about unreliable witnesses***

37. Should the law prohibit judges from warning the jury that certain complainants are, as a class, less credible or require more careful scrutiny than other complainants? If so, which complainants should the prohibition address?

### ***Timing of directions***

38. Should judges be required to give any directions at a specific time during the trial? If so, which directions should include a timing requirement? When should those directions be given?

### ***Juror education***

39. Should jurors be provided with education specific to sexual offending? If so, what should be the content of such education? How and when should it be delivered?

### ***Use of expert witnesses***

40. Should expert evidence on issues relating to sexual offending be admissible in Western Australia? If so, what should be the purpose of such evidence and what topics should it be permitted to cover?
41. If expert evidence on issues relating to sexual offending is to be admissible, should the legislature provide for the creation of a panel of approved experts?

## **Chapter 7: Special verdicts**

### ***Special verdicts on any question of fact***

42. Should the *Code* empower judges to ask juries to return a special verdict in relation to any question that has arisen in a sexual offence trial? If so, should the provision permit juries to return a general verdict only and to decline to return a special verdict?

### ***Special verdict on specific facts relevant to conviction***

43. Should the *Code* empower judges to ask juries to return a special verdict on a specific fact relevant to conviction?

### ***Special verdict of not guilty by reason of mistake of fact***

44. Should the *Code* empower judges to ask juries to return a special verdict of not guilty by reason of mistake of fact in a sexual offence trial? If so, should the provision permit juries to return a general verdict only and to decline to return a special verdict on this issue?

### ***Special verdict of not proven***

45. Should the *Code* empower judges to ask juries to return a special verdict of not proven in a sexual offence trial? If so, when should the jury be permitted to return such a verdict?

### ***Special verdict on the acts proven for the offence of persistent sexual conduct with a child under 16***

46. Should the *Code* specifically empower or prohibit a judge from requiring a jury to deliver a special verdict about which sexual acts alleged by the prosecution had or had not been proved in a trial for an offence of persistent sexual conduct with a child under 16 years, or is no reform necessary in this regard?

## **Chapter 8: Implementation and monitoring**

### ***Education and training***

47. What recommendations, if any, should the Commission make about education or training?

### ***Monitoring of reforms***

48. What recommendations, if any, should the Commission make about the monitoring of reforms?

### ***Data collection***

49. What recommendations, if any, should the Commission make about data collection?

### **Conclusion**

50. Are there any issues or options for reform that have not been raised in the Discussion Paper that you think the Commission should consider?