Issues Paper 5.1 – Mistaken belief in consent - the current law & criticisms of the current law

The current law

Section 24 of the *Code* provides that:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

Section 24 applies to sexual offences. It allows an accused to be acquitted if they have made an honest and reasonable mistake about the complainant's consent.

The mistake of fact defence only needs to be addressed where the evidence justifies its consideration by the jury. Where that is the case, the prosecution will need to disprove the defence beyond reasonable doubt. It can do so in two ways: by proving that the accused did not honestly believe the complainant was consenting, or by proving that their belief was not reasonable.

The honesty component of the defence is called the **subjective element**. The accused must have held a positive belief that the complainant was consenting. The defence will not succeed if the accused simply failed to consider the issue.

The reasonableness component of the defence is called the **mixed element**, as it contains both subjective and objective aspects. In *Aubertin v The State of Western Australia (2006)* 33 WAR 87 the Supreme Court explained the mixed element as follows:

> The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself.

The jury must put itself into the accused's shoes, asking whether it was reasonable for a person with the accused's personal attributes and characteristics to make that mistake.

However, the jury must only consider those attributes or characteristics which could affect the accused's perception of the circumstances in which they found themselves. This includes matters over which the accused has no control, such as age (maturity), gender, ethnicity, physical, intellectual and other disabilities'. It does not include the accused's 'values, whether they be informed by cultural, religious or other influences'. For example, it does not include 'values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn'.

Additionally, the jury must not consider any impairment arising from the accused's intoxication. That is, reasonableness is not to be assessed by reference to the perception or appreciation of an alcohol or drug impaired accused.

Other matters which courts have held should be considered in assessing the reasonableness of the accused's belief include the accused's language disabilities and mental health problems.

Criticisms of the current law

The mistake of fact defence may be seen as undermining the law of consent, as well as the effectiveness of any future reforms in the area.

Even if certain factors are irrelevant to the question of consent, the accused is able to 'cite those factors as inducing or rationalising [their] mistaken belief as to consent'. For example, WA law states that a failure to physically resist does not of itself constitute consent, but an accused could argue that because the complainant did not resist they honestly believed they were consenting, and that in light of the lack of resistance their belief was reasonable. (However, jury may find that a belief that is based solely on a lack of resistance is not a reasonable belief).

The mistake defence may also allow misconceptions about consent and assumptions and stereotypes about sex, sexuality, race and gender to emerge in court. For example, an accused could argue that their belief in consent was reasonable given the clothes the complainant wore or the complainant's flirtatious behaviour. Such arguments may succeed if the accused's views are commonly held (rather than being extreme views resulting from the accused's particular values).

The mistake defence may also result in an undue focus at trial on the complainant's behaviour. For example, where the accused argues that the complainant's words, actions or level of intoxication reasonably led them to believe the complainant consented, the jury will need to closely consider the complainant's conduct. This can lead to the 'perception that it is the complainant's credibility, rather than the accused's culpability, that is on trial'. It has been suggested that it would instead be preferable to focus on the steps the accused took to ascertain the complainant's consent.

Concerns have also been raised about the breadth of attributes and characteristics that can be considered as part of the mixed element. The mixed element's purpose is to ensure the accused's belief was reasonable, but it has been argued that the incorporation of so many personal matters removes much of its purported objectivity. It is also not clear how a person's ethnicity may affect the reasonableness of their beliefs (as suggested in Aubertin), given the jury may not take into account the accused's cultural or religious values.

These concerns are seen to be particularly significant, given the central role that the mistake of defence fact can play in a trial. In this regard, the preliminary submission from the ODPP noted that:

> The necessity for the State to disprove, beyond reasonable doubt, that an accused had an honest and reasonable but mistaken belief that the complainant was consenting – even if the State proves the complainant did not consent – is often the real difficulty in prosecuting sexual offences, particularly in the context of intimate partnerships.

A full discussion of these issues appears at Discussion Paper Volume 1 paragraphs 5.1 – 5.26.