

Issues Paper 5.2 – Mistaken belief in consent – possible reform - exclude operation of the mistake of fact defence in sexual offence cases

One option for reform would be to provide that the mistake of fact defence does not apply to sexual offences.¹

This would mean that even if the accused honestly and reasonably believed the complainant was consenting, they would be convicted if the State could prove that the accused engaged in a relevant sexual act without the complainant's consent.

Advantages of this possible reform:

- It would prevent the accused from relying on misconceptions about consent or gendered stereotypes to support their argument that they had an honest and reasonable belief in consent
- It would overcome any concerns about the breadth of the mixed element (which would be abolished)
- It may address the concern that the current law results in an undue focus at trial on the complainant's behaviour, as it would no longer be necessary for the jury to decide whether the complainant's words and actions led the accused to reasonably believe that they were consenting.

Disadvantages or limitations of this possible reform:

- It may not resolve the concern that the current law results in an undue focus at trial on the complainant's behaviour as it may simply result in defence counsel shifting from cross-examining the complainant about what they did and said to cause the accused to have a mistaken belief about consent, to cross-examining the complainant about whether their words and actions were consistent with their claim that they were not consenting.
- It may allow an accused to be convicted in circumstances where they could not have known that the complainant was not consenting. For example, it would make an accused liable to conviction where unknown to them the complainant was being coerced to engage in the sexual activity or lacked the capacity to consent. This would be the case even if the accused had repeatedly taken reasonable steps to ensure the complainant was consenting and had been convincingly assured that they were. The mere fact that they had engaged in a non-consensual sexual activity would be sufficient for a conviction. This is arguably unfair to the accused, who would be punished for behaviour which is not subjectively wrongful.
- This reform would mean that sex offences would be treated very differently from all other offences to which the mistake of fact defence would continue to apply. This arguably discriminates against people who are charged with sexual offences.

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

A full discussion of these issues is available in Discussion Paper Volume 1 paragraphs 5.27 – 5.31.

¹ This could be done by specifically identifying the relevant offences or by providing that the defence does not apply to all of the offences in Chapter XXXI of the *Code*.