Issues Paper 5.4 – Mistaken belief in consent – possible reform – legislative guidance on the assessment of 'reasonableness'

An option for reform is to retain the 'mixed element' (see Issues Paper 5.1) but provide legislative guidance on the assessment of reasonableness.[1]

Advantages of this possible reform include:

- It may help address concerns about the different ways that juries may understand the concept of reasonableness.
- Jurors would be provided with specific guidance on what constitutes a reasonable belief, and what factors they may or may not consider in making their assessment.

Disadvantages or limitations of this possible reform include:

- If the law specifies matters that the jury should not take into account the jury might erroneously believe the listed matters are exhaustive. (Such a view, however, challenges the assumption that jurors follow judicial directions).
- Defining reasonableness in legislation is difficult, and it is preferable for the jury to determine what is reasonable, informed by community standards, appropriate expert evidence and jury directions.
- The mistake defence extends beyond sexual offences; if this reform is implemented the defence will operate differently depending on the offence charged. This may be considered wrong in principle. Additionally, difficulties may arise where the accused is charged with both sexual and non-sexual offences and seeks to raise the mistake of fact defence in relation to both.

Option 1: Legislate the *Aubertin* principles

A provision could be added to the *Code* reflecting the *Aubertin* principles.

This reform would have the advantage of making the law clear. However, it would not address any of the perceived problems with the current law.

Option 2: Refine the scope of the matters the jury should take into account

Another option is to legislate to confine or expand the scope of the matters the jury may consider when assessing whether the accused's belief was reasonable.

The Irish LRC recommended legislation specifying that the jury only be allowed to consider the accused's: physical disability, mental or intellectual disability, mental illness, age and maturity.

It argued that this approach retains a largely objective test, while also addressing the 'potentially harsh effects of holding someone with a disability, who did not have the capacity to understand whether the complainant was consenting, to the community standard of "reasonableness"'.

Option 3: Require the jury to consider community expectations.

Another possibility is to legislate to require the jury to consider the community's expectations when assessing the reasonableness of the accused's belief in consent.

In Victoria counsel may request the judge direct the jury that it must 'consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent'.

The NSWLRC considered this approach unworkable, stating that 'the concept of "community standards" is hard to define and may be difficult for fact finders to apply. It may also be an ineffective filter, as research reveals that certain misconceptions exist within the community'.

Option 4: Exclude consideration of intoxication

An accused who is intoxicated by alcohol or other drugs may subsequently claim that, in their intoxicated state, they mistakenly believed the complainant was consenting. Case law states:

- The jury may take an accused's intoxication into account in determining whether they honestly believed the complainant was consenting; but
- The jury may not take an accused's intoxication into account in deciding whether their belief was reasonable.

This principle only applies to self-induced intoxication.

One possible reform would be to explicitly address this issue in legislation.

In NSW and Tasmania self-induced intoxication may not be considered when determining whether the accused's belief was either honest or reasonable.

In NT, Queensland and Victoria self-induced intoxication may be considered when assessing the honesty of the accused's belief. However, it may not be considered when determining whether that belief was reasonable.

Self-induced intoxication is not defined in the NSW, Queensland or Tasmanian Acts. In the NT and Victorian Acts, intoxication is defined to be self-induced unless it came about:

- Involuntarily;
- As a result of fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force;
- From the use of a drug for which a prescription is required and that was used in accordance with the directions of the person who prescribed it; or
- From the use of a drug for which a prescription is not required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

However, intoxication that comes about in the final two circumstances is considered self-induced if the person using the drug knew, or had reason to believe, when taking the drug that it would significantly impair their judgement or control.

It is not clear how cases in which the intoxication results from the combined use of licit and illicit intoxicants fit within the approach taken in the NT and Victoria.

Option 5: Specify that a belief is not reasonable if it is based on certain assumptions

Another possibility is to legislate that an accused's belief in the complainant's consent is not reasonable if it is based on circumstances that by community standards would indicate that consent was not given or could not be given. It could be made clear that this includes assumptions which are informed by cultural, religious or other influences.

In Victoria counsel can ask the judge to direct the jury that:

- a belief in consent based solely on a general assumption about the circumstances in which people consent to a sexual act (whether or not that assumption is informed by any particular culture, religion or other influence) is not a reasonable belief; and
- a belief in consent based on a combination of matters including such a general assumption is not a reasonable belief to the extent that it is based on such an assumption.

This approach requires jurors to determine the extent to which the accused's belief is based on a general assumption about the circumstances in which people consent to a sexual act. It may be unfair to an accused if their beliefs reflect reasonable community standards, or where the jury is of the view that the accused's belief was reasonable despite the fact that they relied on a general assumption.

Alternatively, the law could specify that a belief in consent is not reasonable if it is based on specific assumptions, such as:

- The complainant's style or state of dress.
- The fact that the complainant had consumed alcohol or other drugs.
- The complainant's silence or failure to physically resist.
- The fact that the complainant had previously engaged in sexual conduct with the accused or another person.

Option 6: Specify that a belief is not reasonable if the complainant had not communicated consent

A potential reform regarding consent is to amend the *Code* to require participants to say or do something to indicate their consent to a sexual activity. It would be possible to complement this reform with a provision that states that the jury should only find the accused's belief to be reasonable if it accepts that the complainant said or did something to indicate consent.

This reform would address the concern that the mistake defence may undermine the law of consent, as well as the effectiveness of any future reforms.

However, this approach could result in an accused being convicted in circumstances where they have a condition, such as a cognitive impairment, which means that they are unable to understand that the complainant was not consenting. This fact would not be considered in assessing their criminal liability: their belief in consent would be deemed unreasonable simply because there was no evidence that the complainant had said or done anything to indicate consent.

Option 7: Specify that a belief is not reasonable if the accused was aware of a listed circumstance

The *Code* currently says consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. The *Code* could also specify that an accused's belief is not reasonable if they were aware of the existence of one of the listed circumstances.

In Victoria counsel may request that the trial judge direct the jury that, if they conclude that the accused knew or believed one of the listed circumstances existed, 'that knowledge or belief is enough to show that the accused did not reasonably believe that the person was consenting to the act'.

This reform would help address the concern that that the mistake defence may undermine the law of consent, as well as the effectiveness of any future reforms. For example, if the *Code* were to specify that a person cannot consent when they are asleep, such a provision would ensure that the accused could not argue that although they were aware the complainant was sleeping, they reasonably believed the complainant consented to the sexual activity.

Option 8: Specify that an accused cannot rely on mistake if they were reckless about consent

Another option is to legislate so that an accused cannot rely on the mistake defence if they were reckless as to whether the complainant consented.

Recklessness can be advertent (if the accused realised that it was possible that the complainant was not consenting but went ahead with the sexual activity anyway) or inadvertent (if they failed to consider whether or not the complainant was consenting).

In Tasmania, the law provides that a mistaken belief is not honest and reasonable if the accused 'was reckless as to whether or not the complainant consented'.

In Canada, an accused's belief in consent does not excuse their behaviour if the belief arose from 'the accused's recklessness or wilful blindness'.

It seems these provisions would not apply to cases of inadvertent recklessness; an accused person who has given no thought to the complainant's consent cannot hold a positive belief that they were consenting (as is required by the mistake of fact defence).

A provision which specifies that an accused's belief in consent is not reasonable if it arose from the accused's recklessness would make it clear that whenever the accused is aware of the possibility of non-consent, they must not continue with the sexual activity. They have an obligation to ensure, prior to doing so, that the complainant really is consenting.

However, it is already likely that a jury would find that a person who is aware of the risk of non-consent does not hold a reasonable belief in consent.

Should the *Code* provide legislative guidance to assist juries to determine whether a mistaken belief in consent was reasonable? If so, should one of the above 8 options be used? Or should a different option be used?

A full discussion of these issues appears at Discussion Paper Volume 1 paragraphs 5.38 – 5.99.