

Issues Paper 5.5 – Mistaken belief in consent – require the accused to have taken measures to ascertain consent

Under current WA law the jury may consider any measures the accused took to ascertain the complainant's consent in determining whether their belief in consent was honest and reasonable. However, it is not required to do so. There is also no statutory requirement placed on the accused to demonstrate that they did or said anything to ascertain consent.

By contrast, legislation in other Australian jurisdictions:

- Specifies that the accused's belief in consent is not honest (Tas) or reasonable (ACT, NSW, Tas, Vic (new)) if they did not take measures to ascertain consent; and/or
- Requires or permits the jury to consider anything the accused said or did when determining whether their belief was honest (Qld) or reasonable (NSW, Qld, Vic (current)).

One possibility would be for the law to specify that the accused's belief in consent should not be considered honest and/or reasonable unless the accused did or said something to find out whether the complainant was consenting.

Advantages of this potential reform include:

- It justifiably criminalises people who make no effort to ascertain consent.
- It may encourage people to actively seek consent, rather than presuming its existence.
- It ensures a reasonable standard of care is taken to ensure a person is consenting, before engaging in potentially harmful behaviour.
- Where it is unclear whether the complainant consented, it should be for accused to take steps to resolve that ambiguity. Given how simple this is to do, there is no justification for failing to do so.
- It moves away from the traditional passive model of male assertiveness and female acquiescence, towards a model of sexual relations based on mutuality and equality that better reflects modern Australian views.
- It may help shift the current undue focus at trial on the complainant's behaviour, and whether they clearly indicated non-consent, to the accused's responsibility to obtain consent and the actions they took.
- It reduces the scope for the accused to argue that the complainant implicitly consented, or to argue that their belief in consent was reasonable due to misconceptions, assumptions or stereotypes.
- It would educate people about their responsibilities prior to engaging in sexual activity.
- It would further the harmonisation of consent laws across Australia.

Disadvantages or limitations of this potential reform include:

- It wrongly criminalises people who have a reasonable belief in consent but have not actively sought to ascertain the complainant's consent. This turns very serious offences into absolute liability offences, which is contrary to fundamental criminal law principles. It may result in unjust convictions.
- It inappropriately criminalises people who are unable to take measures to ascertain the complainant's consent due to personal circumstances beyond their control, such as those who have a cognitive impairment.

- It does not reflect the diversity of sexual practices that exist in the community. It will often be the case that people have sex consensually in the absence of explicit words or actions. These are not morally problematic.
- It 'reduces what is spontaneous or nuanced human behaviour into an artificial transactional analysis of the behaviour'.
- Evidence from other jurisdictions indicates it is unlikely to change trial practices.
- It unfairly shifts the onus to the accused to demonstrate that they took measures to ascertain consent, or to demonstrate that those measures were reasonable. This impinges on the presumption of innocence and the accused's right to a fair trial. It could result in an accused person being convicted not because they committed the offence, but because they could not overcome the burden placed on them to demonstrate that they did not.
- The role of the criminal law is not to promote good behaviour. Its role is to punish wrongs.
- The criminal law is an ineffective tool for achieving cultural change, which is better achieved through other means, such as community education.
- It may make the law more complex and lead to more appeals.
- It would inappropriately limit the relevance of any previous intimate interactions between the accused and the complainant in the jury's assessment of the accused's belief about consent.

In NSW and Victoria the relevant 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.

Questions to be considered if a requirement to take measures to ascertain consent is to be introduced as part of the mistake defence:

- Whether the accused's failure to take measures to ascertain consent should have a bearing on the jury's assessment of one or both of the honesty and reasonableness of their belief.
 - In the ACT, NSW, Tasmania and Victoria the accused's belief in consent is not reasonable if they did not take measures to ascertain consent. The Tasmanian Code also specifies that the accused's belief in consent is not honest in such circumstances.
- Whether the Code should require the accused to take 'reasonable steps' to ascertain consent or to 'say or do something' to find out if the complainant consented.
 - The Tasmanian Code requires the accused to have taken 'reasonable steps' to ascertain consent. A similar approach was previously taken in NSW, where the law required the jury to have regard to 'any steps' the accused took to ascertain consent. The concept of a 'step' was interpreted to mean a positive act, including 'a person's consideration of, or reasoning in response to, things or events which he or she hears, observes or perceives'.
 - In the ACT, NSW and Victoria a mistaken belief is not reasonable if the accused did not 'say or do anything' to find out whether the complainant consented.

- Whether the Code should refer to the timing of the accused's measures to ascertain consent.
 - The NSW and new Victorian Acts both require the accused to have said or done something to ascertain consent 'within a reasonable time before or at the time' of the sexual activity. There is an issue as to whether this places an unfair and unrealistic burden on long term sexual partners.
- Whether the Code should make allowances for people whose capacity to actively seek consent may be impaired in some way.
 - The NSW and new Victorian Acts both state that the relevant provision does not apply if the accused has a cognitive impairment or mental illness, and that condition is a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to the sexual activity. It is for the accused to prove these matters on the balance of probabilities. Such a provision is not included in the ACT Act or Tasmanian Code.

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?

A full discussion of these issues appears at Discussion Paper Volume 1 paragraphs 5.103 – 5.129.