Issues Paper 5.6 – Mistaken belief in consent – require or permit the jury to consider any measures the accused took 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)).

An option would be to enact a provision that requires or permits the jury, when determining whether the accused's belief in consent was honest and/or reasonable, to consider any measures the accused took to ascertain the complainant's consent.

Such an approach is currently taken in NSW (reasonable), Queensland (honest and reasonable) and Victoria (reasonable).

In NSW this provision complements the provision which requires the accused to have taken measures to ascertain consent. This means that if the accused did not say or do something to find out if the complainant consented, their belief will be unreasonable. However, even if they did actively seek consent, the jury will need to consider whether what their efforts were adequate. If they were not, then the jury may find that their belief was unreasonable.

In the other jurisdictions while there is no legal duty imposed on the accused to do or say anything to find out if the complainant consented, their (lack of) words and conduct will be a factor for the jury to consider when determining whether their belief in consent was reasonable. A failure by the accused to take active steps to ascertain consent would usually count strongly against the belief being a reasonable one.

Under this approach, the jury's determination is likely to depend, in part, on the pre-existing relationship between the parties. For example, they may find that a belief formed based on very subtle or non-verbal measures is reasonable in the context of a longstanding, intimate relationship, but that it is not reasonable if the parties have just met.

Recent reports by the NSWLRC, QLRC, ILRC, the Northern Ireland Gillen Review, and the view expressed by the minority of the Queensland Taskforce favoured this approach. They considered it an appropriate balance between directing the jury's attention to the accused person's behaviour while also respecting fundamental criminal law principles.

A potential weakness of this approach is that it does not tell the jurors what weight they should place on the measures the accused took to ascertain consent. It is possible that they will give little weight to the fact that the accused did not say or do anything to find out if the complainant consented, and find that their belief in consent was nevertheless reasonable.

Victorian research suggested that this approach did not shift the focus of trials from the complainant to the accused, as had been hoped. An analysis of Victorian trial transcripts showed that complainants continued to be questioned, by both prosecution and defence, about whether they resisted verbally or physically. In the rare cases where the accused gave evidence, the cross-examination did not feature questions about the steps they had taken to find out whether the complainant consented.

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?

A full discussion of these issues appears at Discussion Paper Volume 1 paragraphs 5.130 – 5.141.