Issues Paper 5.7 – Mistaken belief in consent – reverse the onus of proving the mistake of fact defence

Currently in WA when the mistake of fact defence is raised at trial the prosecution must disprove that defence. That is, the prosecution must prove, beyond reasonable doubt, that the accused did not have an honest and reasonable belief in consent.

One option for reform is to instead place the burden for proving the defence onto the accused. The accused would have to prove, on the balance of probabilities, that they had an honest and reasonable belief in consent.

This differs from the options in Issue Papers 5.5 that the accused be required to take measures to ascertain the complainant's consent. Such a reform would place an onus on the accused to demonstrate they took such measures, but an evidentiary onus rather than a legal onus. Where the accused raises evidence that they took such measures, the onus would remain on the prosecution to prove that they did not have an honest and reasonable mistake of fact. By contrast, if this reform were to be implemented, the accused would need to prove that their mistake of fact was honest and reasonable.

Although the prosecution usually must disprove defences, there are other instances in which this burden has been placed on the accused. For example, an accused person has a defence to a charge of persistent sexual conduct with a child under 16 if they believed, on reasonable grounds, that the child was over 16 and they were not more than 3 years older than the child. The onus is on the accused to prove this defence.

Reasons to reverse the onus of proof for the mistake of fact defence include:

- The accused is best placed to provide proof of their belief in the complainant's consent. Rather than requiring the prosecution to disprove what was going on in the accused's mind – which can be quite difficult, in the absence of any confessions or admissions – it is preferable to place the responsibility on the accused to prove that they held such a belief.
- It would prevent the accused from raising a spurious claim of belief in consent based on misconceptions, assumptions or stereotypes, and hoping that the prosecution is unable to disprove it. It would be necessary for the accused to provide sufficient support for their claim to persuade the jury of its veracity and reasonableness.

Reasons not to reverse the onus of proof for the mistake of fact defence include:

- The onus in this regard has not been reversed in any other Australian jurisdiction or nor in other common law jurisdictions such as England, Wales and Canada.
- Justification for the reversal of such a fundamental and long-standing common law principle are inadequate.
- Reversing the onus of proof would increase the risk that a defendant might be wrongfully convicted which is particularly problematic given the seriousness of sexual offences, both in terms of their penalties and the stigma that follows conviction.
- This reform would likely require the accused to give evidence at trial, to prove that they held an honest and reasonable belief, which undermines the right of the accused to remain silent.
- The prosecution is often required to prove what was in the accused's mind at the time of the offence, for example, in offences in which the accused's intention is an element, which it can do by leading evidence of facts from which a relevant inference can be drawn.

- Whilst the onus of proof has been reversed in certain cases, such as in relation to proof of mistake of age in child sexual offences, the victims of these offences fall into classes of special vulnerability with that vulnerability justifying the shift in the onus of proof.

Should the burden be placed on the accused to prove, on the balance of probabilities, that they honestly and reasonably believed the complainant was consenting?

A full discussion of these issues appears at Discussion Paper Volume 1 paragraphs 5.142 – 5.152.