

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

legislative guidance on the assessment of reasonableness.<sup>1</sup>

Advantages of this possible reform include:



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.

on a general assumption about the circumstances in which people consent to a sexual act. It

This reform would help address the concern 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

ief arose

It seems these provisions would not apply to cases of inadvertent recklessness; an accused that they were consenting (as is required by the mistake of fact defence).

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.