

## **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 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:

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.

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Evidence from other jurisdictions indicates it is unlikely to change trial practices.

Whether the Code  
consent.

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- The NSW and new Victorian Acts both require the accused to have said or done 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 should this requirement be framed?**

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