

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,

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.