



Project 113 Discussion Paper 1: Objectives, Consent and Mistake of Fact

The Law Reform Commission has released Volume 1 of a Discussion Paper which outlines options and poses questions about changing Western Australia's sexual offence laws in order to guide drafting of submissions.

This online survey addresses only selected issues from the [Discussion Paper](#). All the questions are listed in the Discussion Paper. You can still make a submission via email or via online submission.

This survey has been divided into 5 Parts as listed below.

- **Part 1 - Chapters 1 and 3 – Language and Statutory Objectives**
- **Part 2 - Chapter 4 – Consent**
- **Part 3 - Chapter 5 – Mistake of fact defence**
- **Part 4 - Chapter 6 and 7– Jury directions and special verdicts**
- **Part 5 - Chapter 8 – Implementation**

You may choose to answer some or all of the questions.

If you do not want to answer a question, please leave it blank and select Next.

Important notice - please read before continuing

This online submission:

- **Does not have the capacity to save information** as the user progresses through the questions, therefore please do not attempt to return to the previous page as the online form may return you to the start of the survey.
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1. Name

First Name

Last Name

Note: Submissions may be made anonymously. This question is optional. You do not need to include your name.

2. You have provided your name above. Do you consent to it being listed in any Law Reform Commission WA publications? *

Yes

No

2 (a). If you do not ask for your submission to be kept confidential, we will treat it as public. We may refer to it in our final report or if relevant to the Office of the Commissioner for Victims of Crime (OCVOC) review, we may forward it to OCVOC. Do you want to your submission, to be confidential? *

Yes

No

3. Email *

Enter a valid email address only. Re-enter your email for confirmation.

4. Do you want to receive an acknowledgement email and copy of your submission? *

Yes

No

5. Is your response as an individual, or on behalf of an organisation? *

Individual

Organisation

5a. Name of organisation *

6. Would you like to tell us something about yourself? Eg why are you making a submission or your experiences relevant to this reference?

No

If your response is longer than 500 characters, please upload a separate document above.0/500

7. Do you wish to upload a prepared submission or answer the set of questions from the Discussion Paper? *

Upload document

Answer a set of questions

Upload and Answer a set of questions

Part 1: Chapters 1 and 3 – Language and Statutory Objectives

8. Do you want to answer questions from Chapter 1 about our guiding principles and terminology? *

Yes

No

The Commission has identified six principles to guide its review:

- Principle 1: Sexual offence laws should protect sexual autonomy and bodily integrity.
- Principle 2: Sexual offence laws should protect people who are vulnerable to sexual exploitation.
- Principle 3: Sexual offence laws should incorporate a model of shared responsibility.
- Principle 4: Sexual offence laws should be non-discriminatory.
- Principle 5: Sexual offence laws should be clear.
- Principle 6: When reviewing sexual offence laws, the interests of complainants, accused people and the community must all be considered.

10. Are these principles appropriate and (or) are there any other principles that should guide the our review?

Part 1: Chapters 1 and 3 – Language and Statutory Objectives

9. What language should we use in our future publications to refer to incidents of sexual violence, the people who experience sexual violence, and the people who commit acts of sexual violence? (see Discussion Paper volume 1 paras 1.5-1.14).

11. Do you want to answer questions from Chapter 3 about whether the Criminal Code should contain objectives and guiding principles for sexual offences?

Yes

No

12. Should the Criminal Code specify objectives and/or guiding principles concerning sexual offending?

Yes

No

Do not know

13. Why?

14. If the Criminal Code does specify objectives and/or guiding principles concerning sexual offending, what objectives and/or guiding principles should be included or excluded?

Part 2: Chapter 4 – Consent

15. Do you want to answer questions from Chapter 4 about consent to sexual activity? *

Yes

No

Part 2: Chapter 4 – Consent

The Criminal Code says that for the majority of sexual offences:

- a. consent means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;
- b. where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;
- c. a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.

16. Do any aspects of the current definition of consent give rise to particular concern or create problems in practice?

Yes

No

Do not know

17. What are your concerns or the practical problems with the current Criminal Code definition of consent?

18. Should the Criminal Code define consent as a free and voluntary agreement, rather than as, currently, something that is given by a person? (see Discussion Paper volume 1 paragraphs 4.15 – 4.27).

Yes

No

Do not know

20. If the Criminal Code required participants to say or do something to indicate their consent to a sexual activity, should the provision: (see Discussion Paper volume 1 paragraphs 4.28 – 4.42).

20 (a). Require that the complainant ‘indicate’ consent or should it require that they ‘communicate’ consent?

Yes

No

Do not know

20 (b). Require a participant to say or do something to indicate or communicate consent, or should it say that a person who freezes or is unable to respond to a sexual act does not consent to a sexual activity?

Yes

No

Do not know

20 (c). Be included as part of the definition of consent or should it be included in the list of circumstances in which there is no consent?

No
Do not know

20 (d). Be accompanied by statutory jury directions which mirror the relevant principle?

Yes
No
Do not know

21. Should the Criminal Code specify that a person does not consent only because they: (see Discussion Paper volume 1 paragraphs 4.43 – 4.59).

21 (a). Failed to verbally resist the accused:

Yes
No
Do not know

21 (b). Consented to a different act with the same accused person:

Yes
No
Do not know

21 (c). Had previously consented to a sexual activity with that accused person or someone else:

Yes
No
Do not know

21 (d). Had previously consented to a sexual activity of that kind or any other kind:

Yes
No
Do not know

21 (e). Had entered into an agreement for commercial sexual services?

Yes
No
Do not know

22. The Criminal Code currently provides that consent is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. Should the Criminal Code's list of circumstances in which there is no consent be amended by providing

that:

22 (a). A person who is unconscious or asleep during sexual activity does not consent to the sexual activity (see Discussion Paper volume 1 paras 4.80-4.83).

Yes

No

Do not know

22 (b). A person participates in a sexual activity while intoxicated does not consent to the sexual activity (see Discussion Paper volume 1 paras 4.84-4.98).

Yes

No

Do not know

22 (c). A person who does not have the capacity to consent to the sexual activity (for example because of immature age or cognitive impairment) is incapable of consenting to sexual activity (see Discussion Paper volume 1 paras 4.70-4.79).

Yes

No

Do not know

23. Should the Criminal Code's list of circumstances in which there is no consent be amended by defining the types of fraud or deceit which do not constitute consent as including fraud or deception about:

23 (a). The nature or purpose of the sexual activity (see Discussion Paper volume 1 paras 4.129-4.132 and 4.138-4.142).

Yes

No

Do not know

23 (b). The identity of the participants in the sexual activity (see Discussion Paper volume 1 paras 4.133-4.137).

Yes

No

Do not know

23 (c). The marital status of the participants in the sexual activity (see Discussion Paper volume 1 paras 4.143-4.146).

Yes

Do not know

23 (d). The use, disruption or removal of a condom or other device used to prevent pregnancy or sexually transmitted infections (see Discussion Paper volume 1 paras 4.147-4.174).

Yes

No

Do not know

23 (e). Payment for sexual services (see Discussion Paper volume 1 paras 4.175-4.183).

Yes

No

Do not know

23 (f). The fertility of the participants in the sexual activity (see Discussion Paper volume 1 paras 4.184-4.186).

Yes

No

Do not know

23 (g). The sexual health of the participants in the sexual activity (see Discussion Paper volume 1 paras 4.199-4.209).

Yes

No

Do not know

24. Should the Criminal Code's list of circumstances in which there is no consent be amended by including a case where a participant in sexual activity has a mistaken belief which was not induced by the accused about: (see Discussion Paper volume 1 paras 4.120-4.128)

24 (a). The nature or purpose of the sexual activity.

Yes

No

Do not know

24 (b). The identity of the participants in the sexual activity.

Yes

No

Do not know

24 (c). The marital status of the participants in the sexual activity.

- Yes
- No
- Do not know

24 (d). The use, disruption or removal of a condom or other device used to prevent pregnancy or sexually transmitted infections.

- Yes
- No
- Do not know

24 (e). Payment for sexual services.

- Yes
- No
- Do not know

24 (f). The fertility of the participants in the sexual activity.

- Yes
- No
- Do not know

24 (g). The sexual health of the participants in the sexual activity.

- Yes
- No
- Do not know

25. Should the Criminal Code's list of circumstances in which consent is not freely and voluntarily be given be amended by limiting the scope of the fraud, deception or mistake provisions to objectively or subjectively serious frauds, deceptions or mistaken beliefs (see Discussion Paper volume 1 paras 4.210-4.220)?

- Yes
- No
- Do not know

25 (a). Why?

26. Should the Criminal Code's list of circumstances in which there is no consent be amended by excluding from the scope of the fraud, deception or mistake provisions, certain matters such as fraudulent or deceptive representations or mistaken beliefs about:

26 (a). A person's sex, sexual characteristics, gender identity, gender history, sexual orientation (see Discussion Paper volume 1 paras 4.187-4.198).

Yes

No

Do not know

26 (b). A person's sexual health (see Discussion Paper volume 1 paras 4.199-4.209).

Yes

No

Do not know

26 (c). Matters which may be considered trivial, such a person's wealth, occupation or feelings for the other participant (see Discussion Paper volume 1 paras 4.216-4.220).

Yes

No

Do not know

27. Should the Criminal Code's list of circumstances in which there is no consent be amended by excluding from the scope of the fraud, deception or mistake provisions circumstances in which the complainant's interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern, such as the accused's right to privacy about their sexual health (see Discussion Paper volume 1 paras 4.221-4.224)?

Yes

No

Do not know

27 (a). Why?

28. Should the Criminal Code's list of circumstances in which there is no consent be amended by clarifying the circumstances in which a person does not consent due to the use of force, threats or intimidation (see Discussion Paper volume 1 paras 4.227-4.250)?

Yes

No

Do not know

28 (a). Why?

29. Should the Criminal Code's list of circumstances in which there is no consent be amended by including situations in which a person participates in a sexual activity due to:

29 (a). Forms of pressure, such as coercive conduct or blackmail (see Discussion Paper volume 1 paras 4.227-4.250).

Yes

No

Do not know

29 (b). The accused having caused them harm (see Discussion Paper volume 1 paras 4.251).

Yes

No

Do not know

29 (c). The accused causing them to fear the use of force or harm if they do not participate in the sexual activity (see Discussion Paper volume 1 paras 4.254-4.258).

Yes

No

Do not know

29 (d). Being unlawfully detained by the accused (see Discussion Paper volume 1 paras 4.259-4.261).

Yes

No

Do not know

29 (e). A relationship of authority, trust or dependency with the accused (see Discussion Paper volume 1 paras 4.262-4.265).).

Yes

No

Do not know

30. If you would like to do so, provide your reasons for your answers to questions 22-29 and if you have answered that the Criminal Code's list of circumstances in which there is no consent should be amended, provide further information as to how the existing or new circumstances in which there is no consent ought to be defined?

31. Should the Criminal Code specify when consent must be given, or the agreement reached, to engage in sexual activity?

Yes

No

Do not know

32. What should the Criminal Code say about when consent must be given, or the agreement reached, to engage in sexual activity? In particular should it say that consent must be given at the time the sexual activity occurs, or should it be permissible to consent to sexual activity in advance of the time that it is anticipated that it will occur?

33. Should the Criminal Code specify that consent to sexual activity may be withdrawn?

Yes

No

Do not know

34. What should the Criminal Code say about when consent may be withdrawn? In particular, should the Criminal Code require the withdrawal of consent to be communicated by words or conduct?

Part 3: Chapter 5 – Mistake of fact defence

35. Do you want to answer questions from Chapter 5 about the mistake of fact defence? *

Yes

No

Part 3: Chapter 5 – Mistake of fact defence

The mistake of fact defence in the Criminal Code states:

"A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist."

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

In the context of sexual offences, it will most commonly be argued that the accused had an honest and reasonable but mistaken belief that the complainant was consenting to the relevant sexual activity. This is the mistake we focus on.

36. Should the Criminal Code exclude the mistake of fact defence from sexual offences?

- Yes
- No
- Do not know

37. Do you want to answer further questions about the mistake of fact defence?

- Yes
- No

38. Should the mistake of fact defence be made more objective, by providing that the jury should not take the accused's attributes and characteristics into account when determining whether the accused's mistaken belief in consent was reasonable?

- Yes
- No
- Do not know

39. Should the Criminal Code provide legislative guidance to assist juries to determine whether a mistaken belief in consent was reasonable?

- Yes
- No
- Do not know

40. If the Criminal Code should provide legislative guidance to assist juries to determine whether a mistaken belief in consent was reasonable, should the Criminal Code:

40 (a). Specify that, in determining whether an accused's belief in consent was reasonable, the jury must consider any of the accused's attributes or characteristics which could affect their appreciation or perception of the circumstances in which they found themselves but not consider the accused's values, whether they be informed by cultural, religious or other influences (see Discussion Paper volume 1 paras 5.47-5.52).

- Yes
- No
- Do not know

40 (b). Define the attributes or characteristics of the accused which the jury must consider (e.g. age, gender, disabilities, mental health problems) (see Discussion Paper volume 1 paras 5.53-5.57).

No
Do not know

40 (c). Require the jury to consider the community's expectations in assessing the reasonableness of the accused's belief in consent (see Discussion Paper volume 1 paras 5.58-5.60).

Yes
No
Do not know

40 (d). Prohibit the jury from taking the accused's self-induced intoxication into account in determining whether the accused's belief was honest and/or reasonable (see paras 5.61- 5.72).

Yes
No
Do not know

40 (e). Define the circumstances in which the accused's intoxication will be considered self-induced (see Discussion Paper volume 1 paras 5.73-5.76).

Yes
No
Do not know

40 (f). Specify that a belief in consent is not reasonable if it is based on general assumptions about the circumstances in which a person consents (see Discussion Paper volume 1 paras 5.77-5.78).

Yes
No
Do not know

40 (g). Specify that a belief in consent is not reasonable if it is based on specific assumptions about consent, such as assumptions arising from the complainant's style or state of dress, consumption of alcohol or other drugs, silence or failure to physically resist, or previous engagement in sexual conduct with the accused or another person (see Discussion Paper volume 1 paras 5.79-5.81).

Yes
No
Do not know

40 (h). Specify that a belief in consent is not reasonable if there is no evidence that the complainant said or did anything to indicate consent (see paras Discussion Paper volume 1 5.82-5.85).

Yes

No
Do not know

40 (i). Specify that a belief in consent is not reasonable if the accused knew or was aware of the existence of at least one of the circumstances listed in the Criminal Code in which there is no consent (see Discussion Paper volume 1 paras 5.86-5.90).

Yes
No
Do not know

40 (j). Specify that a belief in consent is not reasonable if it arose from the accused's recklessness (see Discussion Paper volume 1 paras 5.91-5.96).

Yes
No
Do not know

41. Should the Criminal Code provide that an accused's belief in consent is not honest and/or reasonable if the accused did not take measures to ascertain the complainant's consent?

Yes
No
Do not know

42. If the Criminal Code should provide that an accused's belief in consent is not honest and/or reasonable if the accused did not take measures to ascertain the complainant's consent, should the relevant provision:

42 (a). Refer to both the honesty and reasonableness of the accused's belief, or solely the assessment of reasonableness.

Yes
No
Do not know

42 (b). Require the accused to have taken 'reasonable steps' to ascertain consent, or require them to have 'said or done something' to find out if the complainant consented.

Yes
No
Do not know

42 (c). Refer to the timing of the accused's measures to ascertain consent. For example, specify that the accused must have said or done something to ascertain consent at the time of the sexual activity, or within a reasonable time before that activity.

No

Do not know

42 (d). Make allowances for people whose capacity to actively seek consent may be impaired in some way. For example, specify that the provision does not apply if the accused has a cognitive impairment or mental illness, and that condition was a substantial cause of the accused not saying or doing anything to find out whether the complainant consented to the sexual activity.

Yes

No

Do not know

43. Should the Criminal 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?

Yes

No

Do not know

44. If the Criminal Code required or permitted the jury to consider any measures the accused took to ascertain consent in determining whether the accused's belief in consent was honest and/or reasonable so, should the relevant provision:

44 (a). require the jury to consider any measures the accused took to ascertain consent or simply permit them to have regard to those measures.

Yes

No

Do not know

44 (b). Refer to the 'steps' the accused took to ascertain consent, or to anything the accused 'said or did' to find out if the complainant consented.

Yes

No

Do not know

44 (c). Refer to the timing of the accused's measures to ascertain consent. For example, it could refer to anything the accused said or did at the time of, or immediately before, the sexual activity.

Yes

No

Do not know

44 (d). Be in addition to a provision requiring the accused to take measures to ascertain the

complainant's consent.

Yes

No

Do not know

46. If you would like to do so, provide your reasons for your answers to questions 36-45 or are there any other reforms that should be made to the mistake of fact defence?

Part 4: Chapter 6 – Jury directions

47. Chapter 6: Do you want to answer questions from Chapter 6 about jury directions? *

Yes

No

Part 4: Chapter 6 – Jury directions

48. Should Western Australia further codify its jury directions relevant to sexual offence trials? (see Discussion Paper volume 1 paragraphs 6.48 – 6.59).

Yes

No

Do not know

49. Why should/should not Western Australia further codify its jury directions relevant to sexual offence trials?

50. Do you want to answer questions about legislated jury directions for sexual offence trials?

Yes

No

51. If there are to be legislated jury directions for sexual offence trials, should there be a statutory discretion for trial judges to direct juries in sexual offence trials:

45. 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?

Yes

No

Do not know

51 (a). That there is not a typical response to sexual violence, including the 'freeze' response? (see Discussion Paper volume 1 paragraphs 6.69 – 6.71).

Yes

No

Do not know

51 (b). That people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and that the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence? (see Discussion Paper volume 1 paragraphs 6.72 -6.74).

Yes

No

Do not know

51 (c). As to the significance (or lack thereof) of inconsistencies or differences in a complainant's account of sexual offending? (see Discussion Paper volume 1 paragraphs 6.114 – 6.119).

Yes

No

Do not know

51 (d). As to the significance (or lack thereof) of a complainant's behaviour and clothing? (see Discussion Paper volume 1 paragraphs 6.77 – 6.82).

Yes

No

Do not know

51 (e). As to the manner in which a complainant gives evidence? (see Discussion Paper volume 1

paragraphs 6.120 – 6.122).

Yes

No

Do not know

51 (f). As to the relevance of other sexual activities in which the complainant has engaged? (see Discussion Paper volume 1 paragraphs 6.75 – 6.76).

Yes

No

Do not know

52. If there was a statutory discretion to give any of the directions specified in the previous question, in what circumstances should the directions be required to be given: (see Discussion Paper volume 1 paragraphs 6.60 – 6.63).

52 (a). Only if the trial judge believes it is in the interests of justice to do so?

Yes

No

Do not know

52 (b). At the request of one of the parties and if the judge believes it is in the interests of justice to give the direction?

Yes

No

Do not know

52 (c). At the request of one of the parties, even if the judge does not believe it to be in the interests of justice to give the direction?

Yes

No

Do not know

53. Are the warnings specified in section 36BD of the Evidence Act 1906 (WA), which relate to the use the jury may make of evidence that the complainant failed to complain or delayed in making a complaint, sufficient? (see Discussion Paper volume 1 paragraphs 6.94 – 6.103).

Yes

No

Do not know

54. Should there continue to be a requirement for trial judges to give juries a Longman direction (a

direction to the jury about the forensic disadvantages for the accused that have arisen from a delayed complaint) (see Discussion Paper volume 1 paras 6.103–6.113)?

Yes

No

Do not know

55. If so, should the terms of the typical Longman direction be changed in any way?

56. Should trial judges be required by statute to give any directions at a specific time during a sexual offence trial? (see Discussion Paper volume 1 paragraphs 6.129 – 6.140).

Yes

No

Do not know

57. If trial judges are required by statute to give any directions at a specific time during a sexual offence trial, which directions should include a timing requirement and when should those directions be given?

51 (g). To address misconceptions about sexual violence generally? (see Discussion Paper volume 1 paragraph 6.123).

Yes

No

Do not know

58. Should expert evidence on issues relating to sexual offending be admissible in Western Australia in sexual offence trials? (see Discussion Paper volume 1 paragraphs 6.145 – 6.157).

Yes

No

Do not know

59. If expert evidence on issues relating to sexual offending is admissible, what should be the purpose of such evidence and what topics should it be permitted to cover?

60. If expert evidence on issues relating to sexual offending is to be admissible, should the legislature provide for the creation of a panel of approved experts? (see Discussion Paper volume 1 paragraphs 6.157).

Yes

No

Do not know

Part 4: Chapter 7 – Special verdicts

61. Chapter 7: Do you want to answer questions from Chapter 7 about special verdicts? *

Yes

No

Part 4: Chapter 7 – Special verdicts

62. Should trial judges be statutorily empowered to ask juries to return a special verdict in relation to:

62 (a). Any question of fact that has arisen in a sexual offence trial? (see Discussion Paper volume 1 paragraphs 7.39 –7.45).

Yes

No

Do not know

62 (b). Any question of fact relevant to conviction? (see Discussion Paper volume 1 paragraphs 7.46 – 7.48).

No

Do not know

63. If trial judges have the power to ask juries to return a special verdict in relation to any question that has arisen in a sexual offence trial, should the provision permit juries to return a general verdict only and to decline to return a special verdict?

Yes

No

Do not know

64. Should trial judges be statutorily empowered to direct juries that if they should return a not guilty verdict in a sexual offence trial, to return a special verdict as to whether the accused was not guilty by reason of mistake of fact? (see Discussion Paper volume 1 paragraphs 7.49 – 7.52).

Yes

No

Do not know

65. If trial judges have the power to ask juries to return a special verdict as to whether the accused was not guilty by reason of mistake of fact, should the provision permit juries to return a general verdict of not guilty only and to decline to return a special verdict? (see Discussion Paper volume 1 paragraphs 7.49 – 7.52).

Yes

No

Do not know

66. Should trial judges be statutorily empowered to direct juries in sexual offence trials to return a special verdict of not proven if the jury was satisfied that the prosecution had proved an offence on the balance of probabilities but not to the higher standard of beyond reasonable doubt? (see Discussion Paper volume 1 paragraphs 7.53 – 7.56).

Yes

No

Do not know

67. Should trial judges be statutorily empowered or prohibited from requiring a jury to deliver a special verdict about which sexual acts alleged by the prosecution had or had not been proved in a trial for an offence of persistent sexual conduct with a child under 16 years? Alternatively, is no reform necessary in this regard? (see Discussion Paper volume 1 paragraphs 7.57 – 7.60).

Part 5: Chapter 8 – Implementation

68. Chapter 8: Do you want to answer questions from Chapter 8 about implementation and monitoring? *

Yes

No

Part 5: Chapter 8 – Implementation

69. What recommendations, if any, should the Commission make about juror or community education or training specific to sexual offending?

70. What recommendations, if any, should the Commission make about the monitoring of sexual offence reforms?

71. What recommendations, if any, should the Commission make about data collection about sexual offending and/or sexual offence prosecutions?

Conclusion

72. Are there any issues or options for reform that have not been raised in the topics in Discussion Paper volume 1 or these questions that you think the Commission should consider or would you like to tell us something that has not been included in your responses?

Thank you for providing your responses to the discussion paper.