

Issues Paper 5.3 – mistaken belief in consent – possible reform – make the mistake defence more objective

An option for reform is to replace the ‘mixed element’ (see Issues Paper 5.1) with a purely objective element. Instead of requiring the jury to consider the accused’s attributes and characteristics when determining whether their mistaken belief in consent was reasonable the jury would decide whether the hypothetical reasonable person would have believed the complainant was consenting.

Advantages of this potential reform:

- A person who fails to realise the complainant is consenting when the hypothetical reasonable person would have done is arguably sufficiently blameworthy to be held criminally liable.
- It would address the concern that the purported objectivity of the law is undermined by the incorporation of so many of the accused’s personal attributes and characteristics.
- It would help to ensure that a reasonable standard of care is taken, by setting a common standard which everyone is expected to meet.
- It would arguably be easier for jurors to apply, as they would not need to try to place themselves in the accused’s shoes, taking into account certain attributes and characteristics but not others. Instead, they would simply need to ask what a reasonable person would have believed in the circumstances.

Disadvantages or limitations of this potential reform:

- It is not clear that this reform alone would overcome concerns about the accused being able to rely on misconceptions about consent and gendered assumptions and stereotypes. Some misconceptions, assumptions and stereotypes are so widely held that, without further guidance, the jury may find they would have been held by a reasonable person.
- A test which assesses the accused’s belief solely by reference to the hypothetical reasonable person arguably moves attention too far from the individual accused. In comparison a mixed test avoids a purely objective approach but still appropriately directs some focus on the specific accused.
- This reform would prevent a jury from considering a condition such as a cognitive impairment that meant the accused was unable to meet the objective standard of reasonableness. It has been suggested that this would be unjust, as it would assess the accused’s behaviour by reference to a criterion which they cannot possibly achieve.

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 their mistaken belief in consent was reasonable?

A full discussion of these issues appears at Discussion Paper Volume 1 paragraphs 5.32 – 5.37.