

Issues Paper 3 – Should the Criminal Code specify objectives and/or guiding principles for sexual offence prosecutions

In passing legislation, the Parliament will sometimes include an objects or purposes provision. An objects or purposes provision will usually explicitly state the objective or goal that is sought to be achieved, be it social, economic or political, or a combination of those things, by the whole or part of an Act.

Parliament may also (or alternatively) set out principles which should guide the interpretation or application of the whole or part of an Act. While guiding principles provisions may be used for the same reasons as objects provisions, their main focus is on providing guidance to judicial officers or other decision-makers about the interpretation or application of the (relevant part of the) Act.

These types of provisions are aids to interpretation of a law, but they do not override clear statutory language.

At present, the Code does not include any objects or guiding principles, either generally or specifically in relation to sexual offences. In Chapter 3 we consider whether it should specify any sexual offence-specific objectives or guiding principles.

Victoria, NSW and the ACT have legislated sexual offence-specific objectives.

There are five main arguments which have been made in support of legislative sexual offence-specific objectives or guiding principles:

- They can help ensure that the law is applied and interpreted consistently, and in accordance with the goals of the legislation. WA courts are required to interpret statutory provisions in a manner that is likely to promote the purposes or objects of the relevant statute.
- They can play an educative role, helping to address common misconceptions about sexual offending.
- They can affirm Parliament's commitment to the underlying principles of sexual offence laws.
- They can enhance the weight of any directions the judge gives to the jury about the specified matters.
- They can provide a benchmark against which to measure the effectiveness of the law.

The main arguments which have been made against legislative sexual offence-specific objectives or guiding principles include:

- They are unnecessary if the sexual offence laws are clearly expressed.
- They would not fit in the structure of the Code (which does not contain any other objectives or guiding principles).
- If the jury's attention is drawn to a relevant objective or guiding principle, the specified matter may be given undue weight and may be considered as affecting the accused's right to a fair trial.
- It is the jury's role to make factual determinations. If the judge directs the jury about the type of factual matters included in the Victorian guiding principles, they will be trespassing into the jury's domain.

- It is unnecessary to specify the types of matters included in the Victorian Act, as these can be included in the Act's second reading speech.
- Criminal laws are not the appropriate place for educative measures. While such measures are important, other means should be used to transmit the relevant information. An alternative is to include the relevant information in a sexual assault bench book or a training program for lawyers and judicial officers.

If it is decided that the Code should include sexual offence-specific objectives and/or guiding principles, it will be necessary to decide which type(s) of provision should be enacted and how the provision(s) should be framed. Key issues to consider when addressing this issue include:

- Whether the Code should include an objectives provision and/or a guiding principles provision.
- Whether the provision should explicitly state that the relevant factors must be considered by the judge and/or the jury.
- Whether the provision should specify that a judge 'must take into account', 'have regard to' or 'be guided by' the guiding objectives or guiding principles.
- Whether the provision should be accompanied by statutory jury directions which mirror the relevant objectives or guiding principles.

If it is decided that the Code should include sexual offence-specific objectives and/or guiding principles, it will also be necessary to determine what the relevant provision(s) should address. This is likely to depend on whether an objectives provision or a guiding principles provision is enacted.

Four objectives have been specified in the Victorian, NSW and ACT Acts:

- i. Upholding the right to choose whether or not to participate in a sexual activity.
- ii. Protecting children and persons with a cognitive impairment or mental illness from sexual exploitation. Recognising that the consent to a sexual activity is not to be presumed.
- iii. Recognising that consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the participants.

Victorian provisions expand on the final objective, by stating that 'each person should seek the consent of each other person in a way and at a time that makes it clear whether they consent'.

Victoria is the only Australian jurisdiction to include a guiding principles provision which sets out various factual matters to which courts must have regard when interpreting and applying Victoria's sexual offence provisions. These include the prevalence of sexual offending; the under-reporting of sexual offending; and the circumstances in which sexual offending commonly occurs.

The ALRC and NSWLRC recommended that the guiding principles should also address the relationship between sexual violence and family violence.

There are many other factual matters that could also be addressed in guiding principles, including the harmfulness of sexual offending, the various ways in which people may respond to sexual offending and common misconceptions about sexual offending or consent.

Should the Code include sexual offence-specific objectives and/or guiding principles?

Why or why not?