

Issues paper 4.3 - Should the definition of consent in the Criminal Code be clarified by expanding the negative indicators of consent?

The *Code* currently contains one provision which helps clarify the meaning of free and voluntary consent: section 319(2)(b) explains that it is not constituted by a mere lack of physical resistance. It would be possible for the *Code* to also address other negative indicators of consent. In this issues paper we address three possibilities: a lack of verbal resistance; consent to other sexual acts; consent to sexual activities on other occasions.

Clarifying consent in the context of agreements to provide commercial sexual services is discussed in a separate issues paper.

One view is that the value of statutory negative indicators of consent is that they ‘challenge stereotypes about situations when people, especially women, are deemed to be giving consent to sexual activity where they do not expressly state their consent’. However, the Scottish LC did not recommend that such indicators be included in Scotland’s statutory provisions on consent as picking some, but omitting others, may give rise to the unwelcome risk of an inference of consent in those situations which are not included. Further, if the main purpose of indicators is to block the use of inference based on unacceptable stereotypes or social conventions, this goal might be more appropriately done by way of jury directions, education and public awareness campaigns.

Lack of verbal resistance: The *Code* currently states that a failure by a person ‘to offer physical resistance does not of itself constitute consent to the act’. An option is for the *Code* to also provide that a mere failure to offer **verbal** resistance does not constitute consent. It has been argued that this reform would address the common misconception that people who experience non-consensual sexual activity will voice opposition to it and recognise that people commonly freeze out of fear and do not respond verbally.

Most other Australian jurisdictions address this issue in their legislation. However, they do so in two different ways:

- The NSW, ACT and new Victorian Acts include it as a negative indicator, specifying that a person does not consent only because they did not verbally or physically resist.
- The ACT, NT, SA and current and new Victorian Acts include it as a jury directions issue. In the ACT, NT and SA the judge must direct the jury that a person is not to be regarded as consenting only because they did not protest or physically resist. In Victoria the judge may direct the jury that ‘people who do not consent to a sexual act may not protest or physically resist the act’.

Consent to other sexual acts: It would be possible for the *Code* to make it clear that consent relates to a particular sexual activity, and that consent to one sexual activity does not constitute consent to any other sexual activity. For example, consent to vaginal intercourse does not constitute consent to anal intercourse.

The NSWLRC considered such a provision to be important for three reasons:

- It can help challenge assumptions that a person who consents to one sexual activity is consenting to any sexual contact.
- It can help communicate to the jury that consent is an ongoing process which often involves the making of multiple decisions during a sexual encounter.

- It can help educate people in the community about consent, including people who may be considering making a complaint but are unsure whether ‘the law would treat them as having consented to a particular sexual activity because they consented to a different one’.

Various other jurisdictions have enacted laws addressing this issue. Two different approaches have been taken:

- Some jurisdictions have addressed it as part of the definition of consent. E.g. the ACT states that a person does not consent to an act with the accused person only because they consented to ‘another act with the accused person’.
- Some jurisdictions have addressed it as a jury directions matter. E.g. SA the states that a judge must direct the jury that a person is not to be regarded as having consented to a sexual activity merely because ‘the person freely and voluntarily agreed to sexual activity of a different kind with the defendant’.

In NSW the provision about consent to other acts is used to address the issue of non-consensual condom removal (stealthing). (See separate issues paper on this issue).

Consent on other occasions: The *Code* is currently silent about the relevance to consent of the complainant’s past sexual activities . By contrast, some jurisdictions make it clear that a person does not consent to a sexual activity with a person simply because they had previously consented to:

- A sexual activity with that person or someone else; or
- A sexual activity of that kind or any other kind.

The NSWLRC recommended the inclusion of a prior consent provision as it would highlight the fact that ‘consent is required for every instance of sexual activity’. It would also address any false assumptions that:

- a person who consents to sexual activity at one time will necessarily consent again in the future, and
- a person who engages in sexual activity with one person will, or is likely to, engage in sexual activity with another person.

While evidence of prior consensual sexual activity will generally be inadmissible in court, it can be admitted in certain circumstances. Where this does occur, this type of provision aims to deter jurors from reasoning ‘ that a complainant who has had certain experiences might be the “kind of person” who is more likely to consent to the sexual activity in question’. On the other hand, it may be reasoned that this is a matter of common sense which jurors are expected to, and do, apply.

NSW addresses it as part of the definition of consent; SA and the NT address it as part of the jury directions on consent; and the ACT and the new Victorian provisions address it as both a definitional matter and a jury directions issue.

Should the definition of consent state that negative indicators of consent are:

- a lack of verbal resistance;
- consent to other sexual acts; and/or
- consent to sexual activities on other occasions?

A full discussion of these issues is contained in Discussion Paper volume 1 paras 4.43-4.59.