

Issues paper 4.71 - Should the phrase 'deceit or any fraudulent means' be retained as part of the list of circumstances in which there is no consent?

While the position that for a person to be able to consent to an activity, sexual or otherwise, they must have the capacity to do so, appears to be the law in WA – for example, it has been held that a person who is unconscious is incapable of consenting – the only capacity- The second broad category of circumstances in which a person arguably does not consent to a sexual activity is where they engaged in that activity on the basis of incomplete or incorrect information. These circumstances include where they were defrauded or deceived in some way.

The law has traditionally taken a restrictive approach to when fraud negates consent in sexual offences. The High Court in *Papadimitropoulos v R* a case in which the accused tricked the complainant into believing that they were married held that consent to sexual penetration required:

a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual, the inducing causes cannot destroy its reality and leave the man guilty of rape.

In *Papadimitropoulos*, as the complainant understood that she was participating in a sexual activity, her consent was not negated. The Court did note, however, that the accused could be convicted of a less serious offence, such as procuring sexual intercourse by fraud.

The restrictive common law approach to fraud was widely criticised following the Victorian case of *R v Mobilio*. In that case the accused was a radiographer, who conducted internal vaginal examinations on several patients using an ultrasound transducer. There was no medical value to these scans: they were done solely for the accused's sexual gratification. The accused was charged with rape, on the basis that the women's consent had been undermined by his deception. He was, however, acquitted on the basis that the complainants understood the nature of the act and the identity of the accused. The common law has taken a similarly restrictive approach to fraudulent representations about payment for sexual services and about the use of a condom.

By contrast, most Australian jurisdictions have enacted provisions which take a much broader approach to the circumstances in which fraud, deception or mistake negate consent (see Discussion Paper volume 1 page 65 Table 4.4).

The *Code* states that consent does not mean consent obtained by '**deceit or any fraudulent means**'. The WA Court of Appeal has held that these terms require proof of six matters:

- a) The accused made the alleged representation.
- b) The accused intentionally made the alleged representation.
- c) The alleged representation was false.
- d) The accused knew that the alleged representation was false.
- e) The complainant believed that the alleged representation was true.
- f) If the alleged representation had not been made, the complainant would not have consented to the accused's alleged indecent act or alleged sexual penetration.

It is not clear whether the provision applies regardless of the nature of the false representation, or whether it is restricted in some way. This matter was considered by the Court in *Michael v The State of WA* (Michael), with each judge drawing a different conclusion. Steytler P adopted a broad interpretation, suggesting that the provision covers consent obtained by any fraudulent representation. EM Heenan AJA adopted a restrictive interpretation, stating that the provision only applies to consent obtained by fraudulent representations about the nature or purpose of the activity, the identity of the participants, or that the participants are married to each other. Miller JA rejected EM Heenan AJA's restrictive interpretation but did not express a view about the precise scope of the provision.

This issue was considered again in the recent case of *HES v The State of WA* (HES). However, once more the judges did not clearly agree on the scope of the provision. Only Buss P expressed a decided view and adopted a broad interpretation, holding that in enacting the relevant provision Parliament had 'intended to reform significantly the strict approach to the vitiation of consent' previously taken, and to 'expand significantly the circumstances in which consent would be vitiated'.

Although in Michael Steytler P was of the view that the provision covered any fraudulent representation, he expressed concern about the breadth of its scope and considered that some limitations should be placed on the meaning of the words. His Honour concluded that 'the most appropriate solution' to these difficulties is to amend the legislation. In HES, Buss P reiterated this point. He noted that although the reasons for the judgment in Michael were published in March 2008, no legislative amendment has been made to these words.

Alternatively, there may be some particular acts of fraud which should come under the criminal law. However, these ought to be the subject of some lesser offence such as those relating to procurement'. We discuss the possibility of using a specifically tailored offence to address such conduct in Discussion Paper Volume 2.

Seriousness of the fraud, deception or mistake: One of the main concerns is that a broadly drawn fraud provision may capture circumstances which should not be criminalised. For example, it may not be appropriate to criminalise deceptions or mistakes about seemingly trivial matters, such as a person's profession or wealth. The difficulty, however, is working out to strike the balance between protecting people's sexual autonomy but not criminalising minor fraudulent behaviour.

One way is to explain the types of misrepresentations or mistakes that should or should not be covered by the relevant provision. A number of issues papers discuss these options.

A second approach would be to focus on the seriousness of the misrepresentation or mistake rather than its content. There are three main ways in which this could be done. First, the provision could be restricted to objectively serious frauds, deceptions or mistakes. This could be determined by considering whether the reasonable or ordinary person would consider the fraud, deception or mistake to have been serious, or by simply leaving it to the jury to determine.

This approach would have the benefit of flexibility. It would also arguably reflect the community's views on whether a fraud, deception or mistake is so grave that the complainant should not be seen to have consented in the circumstances. However, it would not provide clear guidance to people about the scope of consent laws and could result in inconsistent decisions being made by different juries. In addition, by judging the seriousness of a matter from an objective perspective it disregards the complainant's experience of the matter. This may lead to great dissatisfaction with the criminal justice process and could result in an increased reluctance to report or prosecute cases due to fear that the fraud, deception or mistake will not be considered sufficiently serious.

A third approach would be to restrict the provision to subjectively serious frauds, deceptions or mistakes. This would be determined by considering whether the complainant considered it to be a serious matter. This could perhaps be ascertained by asking whether the complainant would have engaged in the sexual activity had they known the truth (i.e., was it a 'deal-breaker' for them).

This approach would address many of the concerns raised above: it takes the complainant's perspective seriously, allowing them to determine the bounds of their sexual autonomy. However, it raises other potential problems. E.g., it may be difficult to determine whether a matter was considered serious by the complainant. In an attempt to disprove this, defence counsel may seek to rely on the complainant's prior sexual history which could increase the trauma for the complainant. It is also not clear whether this would place any significant limits on the scope of the provision, as a complainant could potentially consider any matter to be a deal-breaker.

A fourth approach would be to specify that the provision does not apply to trivial matters, or to specifically exclude certain trivial matters from its scope. E.g., the Code could specify that the fraud provision does not apply to misrepresentations about a person's marital status or occupation.

This approach was considered by the NSWLRC, but it did not recommend adopting it for the following reasons:

Fraud is a concept that is well understood in the civil and criminal law, and does not extend to cases of trivial or less serious deceptions. The criminal law has historically distinguished between fraud and 'puffery' (for example, in general fraud offences). Our view is that deceptions such as lies about a person's marital status or occupation would be most likely viewed as puffery, and therefore not within the concept of fraud, and unlikely to be charged or prosecuted in the first place. Case law from Australian states and territories also demonstrates that fraud provisions have been applied in cases involving serious conduct.

The NSW Government, however, took a different view. In its recent reforms to NSW's consent laws it explicitly excluded misrepresentations about a person's income, wealth or feelings from the scope of its fraud provision, by defining the term fraudulent inducement (which negates consent) to exclude those things. In its second reading speech, the Government stated that these exclusions were not intended to be exhaustive: it was of the view that other matters, such as employment status or marital status, would also be excluded from the scope of the fraud provision. The Government's intention was that the provision only cover serious deceptions. However, it is unclear to us whether that intention is achieved having regard to the exhaustive nature of the definition of fraudulent inducement.

One of the difficulties with this approach is determining which matters should be excluded: there are a vast number of matters which could be considered insufficiently serious. While the legislation could simply specify that the provision does not apply to trivial matters, the problem with this approach is that different people have different views about whether a matter is trivial.

Balancing conflicting interests and public policy concerns: An alternative way to address the problem of excessive breadth would be to broadly define the circumstances in which consent is negated due to fraud, deception or mistake (in order to protect people's sexual autonomy), but to provide that a person should not be convicted if their interest in sexual autonomy is outweighed by a conflicting interest or compelling public policy concern.

The main advantage of such an approach is that it accepts that certain acts, such as failing to disclose one's HIV positive status, do negate consent (as they undermine the other participant's ability to make a free and voluntary choice about their sexual activities), while at the same time accepting that there may be countervailing reasons for nevertheless choosing not to criminalise such conduct.

The main disadvantages of this approach arise from the fact that it leaves it to the court to decide, on a case-by-case basis, whether the accused's interests outweigh the complainant's interests. This means that:

- People may not be able to determine, in advance, whether they are permitted to engage in a sexual activity;
- Police and prosecutors may not be sure whether an offence has been committed; and
- Juries may apply the law inconsistently, reaching different conclusions in relation to similar factual situations.

It may be possible to address some of these concerns through the drafting of the provision or the use of legislated examples. For example, the *Code* could provide the example of a person's privacy interests in keeping their gender history confidential outweighing another person's sexual autonomy interests in having that history disclosed to them prior to engaging in sexual activity with the first person. However, it is arguable that the provision of statutory examples may make ethical judgements that should be made on a case-by-case basis by the jury having knowledge of all the relevant facts.

A preliminary question to be considered is whether the phrase in the *Code*'s list of circumstances in which there is no consent that consent does not mean consent obtained 'by deceit or any fraudulent means' should be retained or changed in any way?

If it is to be limited, how should the limitation be framed?

A full discussion of these issues is contained in Discussion Paper volume 1 paras 4.99–4.117 and 4.210–4.224.