

Issues paper 4.5 - Consent in sexual offences: Introduction: should the Code contain a list of circumstances in which there is no consent to sexual activity?

The *Code* currently provides that consent for sexual activity is not freely and voluntarily given if it is 'obtained by force, threat, intimidation, deceit, or any fraudulent means'. This is the least exhaustive list in Australia.

We have summarised the issues relating to the statutory list of circumstances in which there is no consent in a number of issues papers. Each issues paper deals with a different aspect of the topic:

Issues Paper 4.5	Introduction: Should the <i>Code</i> contain a list of circumstances in which there is no consent to sexual activity?
Issues Paper 4.6	Circumstances in which a participant lacks capacity to consent to sexual activity (e.g., where they are asleep or unconscious).
Issues Paper 4.7.1-4.7.4	Circumstances where a participant lacks relevant information about the sexual activity (e.g., where they are defrauded or make a mistake).
Issues Paper 4.7.1	Should the phrase deceit, or any fraudulent means be retained as the part of the list of circumstances in which there is no consent?
Issues Paper 4.7.2	How could the list of circumstances in which there is no consent because a participant has inaccurate information be expanded?
Issues Paper 4.7.3	Should the list of circumstances in which there is no consent include Stealthing?
Issues Paper 4.7.4	Should the list of circumstances in which there is no consent include inaccurate information about the fertility, sex, gender and related issues and sexual health of a participant?
Issues Paper 4.8	Circumstances in which a participant is under pressure to take part in sexual activity (e.g., where they are threatened or harmed).

We start this issues paper by raising the issue whether the language introducing the list of circumstances should be changed. Then we consider whether WA needs to change its list of circumstances in which there is no consent to sexual activity.

Introductory language: The *Code* currently specifies various circumstances in which 'consent is not freely and voluntarily given'. This phrasing states that consent was obtained, but it was not given freely and voluntarily (and so is statutorily negated). This may be the

case in some circumstances, such as where the (apparent) consent was obtained by fraud. However, in other circumstances, such as where one of the participants was asleep or unconscious when the sexual activity occurred, consent may never have been obtained.

The terms ‘negating’ or ‘vitiating’ circumstances, which are sometimes used in this context, may also be misleading. As was noted by the NSWLRC, ‘if a circumstance in the list exists, a person does not consent by definition. It is not the case that an otherwise valid consent is negated’. Given the NSWLRC’s view that consent was not true consent if certain circumstances existed, it recommended that the introductory wording to the relevant provision should state ‘A person does not consent to a sexual activity if–’, and the heading section should refer to ‘circumstances in which there is no consent’. This approach has been implemented in NSW and the ACT. A similar approach is taken in most other Australian jurisdictions, which begin their list of circumstances with phrases such as ‘a person does not freely agree to an act if...’, ‘a person is not taken to freely and voluntarily agree to sexual activity if...’ or ‘circumstances in which a person does not consent to an act include...’.

We are interested to hear your views on the wording that should be used to introduce the list of circumstances.

Retaining, removing or changing the list of circumstances: A non-exhaustive lists of circumstances which either do not constitute consent or which negate any ostensible consent for the purposes of the relevant sexual offences are considered useful for numerous reasons. They can:

- provide guidance to police, prosecutors, judicial officers and jurors about the meaning of consent, helping to resolve any legal uncertainties.
- make it easier for the prosecution to prove that the complainant did not consent, by confirming that sexual activity is never consensual in certain circumstances. This may result in prosecution in circumstances where they may otherwise not be brought.
- help achieve consistent outcomes in similar cases, while allowing for flexibility.
- validate the experience of people who have experienced sexual violence, by confirming that a sexual encounter was not consensual. This may encourage reporting.
- educate the community about the situations in which sexual activity is not permitted.

However, some stakeholders consider these lists of circumstances to be unnecessary, given the broad and flexible definition of consent. They have suggested that the focus of a sexual offence trial should be on the question of whether the complainant’s consent was freely and voluntarily given, and that these lists may divert attention away from that issue.

If the list is to be retained in some form, the QLRC and the Queensland Taskforce have provided the arguments for and against expanding the list.

The list of circumstances in which there is no consent contained in the Queensland Code is similar to that contained in the *Code*, although it is somewhat more expansive: it covers circumstances in which consent is obtained by force; threat or intimidation; fear of bodily harm; exercise of authority; false and fraudulent representations about the nature or purpose

of the act; or a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

The QLRC did not recommend making any changes to the Queensland list because the list has the advantage of flexibility, is non-exhaustive and is expressed in broad terms. 'It is capable of covering many circumstances, including those which may not have been contemplated at the time of drafting. It can also adapt to relevant changes in community standards or expectations. It avoids the inflexibility (and potential unfairness) of narrowly drafted circumstances addressed to specific issues that may arise through case law from time to time. A more extensive and specific list might produce unsatisfactory outcomes'. Another reason for retaining a list of circumstances which is broad and non-specific is that the social concerns addressed in the list may reduce or disappear over time, leaving the legislation to appear outdated and otiose.

The Queensland Taskforce reached a different conclusion than the QLRC. It was of the view that 'there would be real benefits to community education about consent if Parliament was more explicit as to its intentions by giving common examples'. It considered that this was especially important in relation to the issue of intoxication, as research shows juries find the concept of consent difficult to apply where intoxication is involved, and judges sometimes misdirect them. Consequently, it recommended that Queensland should expand its list of circumstances to include all of the following circumstances, which are contained in the NSW Act:

- (a) the person does not say or do anything to communicate consent
- (b) the person does not have the capacity to consent to the sexual activity
- (c) the person is so affected by alcohol or another drug as to be incapable of consenting to the sexual activity
- (d) the person is unconscious or asleep
- (e) the person participates in the sexual activity because of force, fear of force or fear of serious harm of any kind to the person, another person, an animal or property, regardless of—
 - (i) when the force or the conduct giving rise to the fear occurs, or
 - (ii) whether it occurs as a single instance or as part of an ongoing pattern
- (f) the person participates in the sexual activity because of coercion, blackmail or intimidation, regardless of—
 - (i) when the coercion, blackmail or intimidation occurs, or
 - (ii) whether it occurs as a single instance or as part of an ongoing pattern
- (g) the person participates in the sexual activity because the person or another person is unlawfully detained
- (h) the person participates in the sexual activity because the person is overborne by the abuse of a relationship of authority, trust or dependence
- (i) the person participates in the sexual activity because the person is mistaken about—
 - (i) the nature of the sexual activity, or
 - (ii) the purpose of the sexual activity, including about whether the sexual activity is for health, hygienic or cosmetic purposes

- (j) the person participates in the sexual activity with another person because the person is mistaken—
 - (i) about the identity of the other person, or
 - (ii) that the person is married to the other person
- (k) the person participates in the sexual activity because of a fraudulent inducement.

We discuss the individual circumstances in the above list in issues papers 4.7.2-4.7.4 and 4.8.

The Taskforce noted that while this reform was unlikely to change the law (as it was of the view that all of these circumstances are probably covered by the requirement that consent be freely and voluntarily given), including these circumstances in the Queensland Code would 'make it very clear how Parliament intended the law to be applied in what are some of the most frequently occurring scenarios in which sexual violence takes place'.

Should the *Code* continue to list circumstances in which consent is not freely and voluntarily given?

Why or why not?

If the Code continues to list circumstances in which consent is not freely and voluntarily should the list be changed from 'obtained by force, threat, intimidation, deceit, or any fraudulent means'?

Why or why not?