

Issues paper 4.6 - Consent in sexual offences: Introduction: should the Code contain a list of circumstances in which there is no consent to sexual activity?

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-related issue that is explicitly addressed in the *Code*'s consent provision relates to children: section 319(2)(c) states that 'a child under the age of 13 years is incapable of consenting to an act which constitutes an offence'. Offences against individuals who lack the capacity to understand the nature of the act or to guard themselves against sexual exploitation are discussed in Discussion Paper volume 2.

By contrast, all other Australian jurisdictions specifically refer to broader capacity-related issues in their statutory definitions of consent or lists of circumstances in which a person does not consent to sexual activity. These provisions fall within the following three categories:

- General incapacity to consent
- Sleep and unconsciousness
- Intoxication

General incapacity to consent: WA is the only Australian jurisdiction to limit its reference to incapacity to children. All other jurisdictions have broader provisions which provide that there is no consent where any person (adult or child) is incapable of understanding the nature of the act or of consenting to it for some other reason (see Table 4.2 on page 56 of the Discussion Paper volume 1).

None of the other jurisdictions' provisions provide that a person is incapable of consenting to sex simply by virtue of having a particular condition or disability (such as a cognitive impairment). Their focus is on the individual's capacity to consent to a particular activity at a specific time. None of these provisions require the accused to have caused or induced the incapacity in any way. The focus is simply on the complainant's capacity to consent to the sexual activity at the relevant time.

On the surface, the provisions fall into two broad categories: **those which provide that a person does not consent to a sexual activity if they do not have the capacity to consent;** and **those which provide that a person does not consent if the person is incapable of understanding the (sexual) nature of the act.** It seems, however, that this is a difference of form rather than substance. This is because courts have held that in both cases a person does not consent to a sexual activity if they do not understand the physical nature of the acts that will take place (E.g., that their vagina will be penetrated by a penis); the sexual character of the acts; or that they can refuse to consent.

Causes of Incapacity: There is, however, a distinction in the way the provisions address the cause of the person's incapacity. While most of the provisions do not explicitly refer to a specific cause, Queensland refers to the person's 'cognitive capacity' to consent; and SA refers to people who are unable to consent due to a 'physical, mental or intellectual condition or impairment'.

Location of the provisions: There is also a distinction in the location of the provisions. While most jurisdictions include incapacity in their list of circumstances in which there is no consent, in Queensland the issue is addressed in the definition of consent. The Hong Kong

LRC has also recommended a provision that states that a person consents to sexual activity if the person (a) freely and voluntarily agrees to the sexual activity; and (b) has the capacity to consent to such activity.

Compare the Scottish provision that relates to the capacity of a person with a 'mental disorder' (which is defined to mean a person with any mental illness, personality disorder or learning disability) to consent to sexual activities. It states that a mentally disordered person is incapable of consenting to conduct where, by reason of mental disorder, the person is unable to do one or more of the following—

- a) understand what the conduct is,
- b) form a decision as to whether to engage in the conduct (or as to whether the conduct should take place),
- c) communicate any such decision.

Hong Kong LRC recommended adopting the Scottish approach. It was of the view that this approach struck an appropriate balance 'between respect for the right of mentally disordered persons to engage in sexual activity and protecting them from sexual exploitation'. By contrast, the NSWLRC did not consider it necessary to define capacity to consent. It was of the view that 'the common law provides adequate guidance on this phrase' and that a definition 'could unintentionally limit this circumstance'. As WA is a code jurisdiction, it may be preferable to define capacity to consent, rather than rely on the common law definition.

Incapacity caused by sleep or unconsciousness: Legislation in most Australian jurisdictions provides that a person does not consent if they are asleep or unconscious. This is not, however, the case in WA or Queensland, where this matter has been left to the courts to address. While courts in both jurisdictions have held that a person who is unconscious is incapable of consenting, the Queensland Court of Appeal has suggested in some circumstances, such as where the participants have an existing relationship, it may be acceptable to commence a sexual activity with a person who is asleep.

This raises the question of whether it should be permissible for a person to consent in advance to sexual activity occurring while they are asleep or unconscious. For example, a person may ask their sexual partner to wake them up with a sexual act, or they may choose to engage in acts of erotic asphyxiation that result in unconsciousness. This is not currently permitted in any of the jurisdictions which have addressed this issue in legislation. In its review of sexual offences, the NSWLRC noted that some of the submissions and survey responses it received supported this approach. It also has some support in the academic literature, where it has been argued that allowing people to consent to sexual activities in advance aligns with the principle of sexual autonomy, and that the resulting acts lack harmfulness and so should not be criminalised. For these reasons, the Scottish LC has previously recommended that the relevant provision should state that a person does not consent 'where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances'.

By contrast, the NSWLRC rejected this approach. It saw it to be inconsistent with its general approach to the timing of consent, which it recommended must exist at the time of the sexual activity. It also considered there to be strong reasons for treating all sexual activity involving unconscious or sleeping people as non-consensual, noting the high vulnerability of people who are unconscious or asleep. It was of the view that the 'principles of autonomy and freedom of choice require that consent, once given, can be withdrawn', and was concerned that a 'person who initially agrees to certain sexual acts occurring, is unaware of and unable to modify or withdraw consent in response to a change in circumstances'. Consequently, it recommended that the law explicitly state that a person does not consent to sexual activity if the person is unconscious or asleep. The timing of consent is considered further below.

Intoxication: Data shows that at least half of all complainants were intoxicated at the time of an alleged sexual offence. Research indicates that where evidence of a complainant's intoxication is given in rape trials the conviction rate is lower than when they are sober. Various reasons have been suggested for this finding, including that:

- jurors are frequently told to use their common knowledge about intoxication to interpret this evidence, but there may be a wide gap between jurors' understandings of intoxication and what medical research shows; and
- a complainant who was intoxicated at the time of the assault may be viewed as less credible.

Legislation in all Australian jurisdictions other than Queensland and WA explicitly addresses the relevance of the complainant's intoxication to consent (see table 4.3 at page 60 of the Discussion Paper volume 1). The various phrases that are used are that a person does not consent to sexual activity if they are:

- incapable of agreeing to the act because of intoxication (ACT).
- so affected by alcohol or another drug as to be incapable of consenting (NSW and NT).
- so intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity (SA).
- so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required (Tas).
- so affected by alcohol or another drug as to be incapable of consenting to the act or withdrawing consent to the act (Vic).

The laws are concerned only with circumstances in which alcohol or other drugs affect a person's capacity to agree to the relevant activity freely and voluntarily. The provisions also do not draw a distinction based on whether the person became intoxicated voluntarily or involuntarily, or whether the intoxication was caused by alcohol or other drugs. All that matters is the extent to which the person was intoxicated.

Arguments in favour of including intoxication as a circumstances in which there is no consent to sexual activity are that such a provision could help mitigate the influence of misconceptions about intoxication and consent, as well as having 'an educative effect, by emphasising the importance of ensuring that an intoxicated person is capable of consenting before engaging in sexual activity with them'. It also would make WA law consistent with the laws of most other Australian states and territories.

Arguments against including intoxication as a circumstances in which there is no consent are that the general requirement that a person have the cognitive capacity to give consent already allows evidence of the complainant's intoxication to be taken into account, and that any amendment could introduce confusion and ambiguity into an already settled area of law. Others have suggested that any issues would be better addressed by the increased use of expert evidence given that evidence of a complainant's intoxication 'frequently took the form of self-assessment by the complainant, using (understandably) imprecise and colloquial language about how they felt, recollections of how much they had consumed, or answers to a question that asked them to rate their intoxication on a 1–10 scale'. Little guidance was provided to jurors about how to relate this evidence to the legal standard.

If intoxication is to be addressed in the *Code*, consideration must be given to the way in which it is addressed. Most of the provisions from other Australian jurisdictions provide little guidance about the effects the intoxication had on the person's capacity to consent. The NSWLRC was of the view that the meaning of this phrase is sufficiently clear, and that it 'allows fact finders to determine whether a complainant is incapable of consenting as a

question of fact, based on the evidence and circumstances of the case'. A similar conclusion was reached by the Scottish LC, which argued that it is not possible to 'set a test for when a person lacks capacity to consent as a consequence of taking drink or drugs', due to the varying degrees to which a person may become intoxicated:

A person may become so intoxicated that she falls asleep or becomes unconscious, in which case the particular definition dealing with these scenarios may come into play. At the other end of the scale, taking drink or drugs may lead to someone losing his or her inhibitions and then doing things whilst drunk that he or she would not have done when sober. The drunken activity is nonetheless based on consent, and sexual activity in this situation would be based on consent. But there is also an effect of intoxication that a person's capacity to make decisions, including the capacity to consent to sexual activity, progressively diminishes until it eventually disappears. There is, then, a distinction between intoxication which results in a lack of capacity to consent and intoxication which alters a person's choices but does not deprive him of the capacity to consent. The difficulty lies in applying this distinction in practical settings. On which side of this line any case falls is a matter of its particular facts and circumstances.

The Tasmanian Code does provide some guidance on this issue, referring to circumstances in which a person is so affected by alcohol or another drug as to be 'unable to form a rational opinion' in respect of the relevant matter.

As an alternative to the inclusion of intoxication in the list of circumstances that negate consent, where the issue of the effect of the complainant's intoxication is relevant, trial judges could be required to give jury directions of the kind described by the Scottish LC. Some judges would give such a direction without a legislative direction to do so. It would also be possible for the *Code* to address the relevance of the complainant's intoxication to the withdrawal of consent. Victoria is currently the only jurisdiction that has a provision specifically on this issue. The NSWLRC did not recommend the inclusion of such a provision, as it was of this view that this situation was already captured by the general requirement that consent be present at the time of the sexual activity.

One final issue that could be addressed in the *Code* is whether it should be permissible for person to consent in advance to having sex whilst extremely intoxicated. The Scottish LC, recommended that the relevant provision should be qualified by the words 'unless consent had earlier been given to engaging in the activity in that condition'. This approach raises broader issues of whether a person must consent to sexual activity at the time of the act, or if they can give consent at an earlier time.

Should the *Code's* list of circumstances in which there is no consent address cases in which a complainant:

- **Is unconscious or asleep during a sexual act;**
- **Participates in a sexual activity while intoxicated; and/or**
- **Is for other reasons is incapable of consenting to a sexual act?**

A full discussion of these issues is contained in Discussion Paper volume 1 paras 4.67-4.98.