

## Issues paper 4.8 - Circumstances in which a participant is under pressure to take part in sexual activity.

The third category of non-consensual sexual activity arises where a person is pressured into engaging in the activity. In this issues paper we consider whether the *Code* should address circumstances in which a person participates in a sexual act due to:

- The use of force;
- Threats, intimidation, coercion or blackmail;
- Harm;
- Fear of force or harm;
- Unlawful detention; or
- Abuse of a relationship of authority, trust or dependence.

**Use of force:** Legislation in all Australian jurisdictions, including WA, specifies that a person does not consent where they have participated in the sexual activity because of the use of force (Discussion Paper volume 1 page 94 Table 4.5).

The Queensland and WA provisions simply state that a person does not consent if the consent is obtained by force. While this applies to cases in which the complainant participates in a sexual activity because of the use of force against them personally, it is unclear whether it also extends to circumstances where force is used against another person, an animal or property. All other jurisdictions clarify this issue. In all cases it includes force directed at another person. The ACT, NSW and new Victorian Acts include the use of force on animals. The ACT and NSW also include the use of force on property. It would be possible for the *Code* to clarify the precise scope of the provision.

NSW and the new Victorian Act also make it clear that there is no consent whenever the force was used or whether a person participated in the sexual act due to one incident of force or an ongoing pattern of force. This approach has been taken to ensure that the provision 'capture(s) situations of domestic and family violence, which is often characterised by repeated patterns of threatening, coercive or abusive behaviour (rather than a single incident)'. Sexual violence is often used as a form of family violence. For example, ABS data shows that in 2020 more than a quarter (27%) of sexual assaults in WA were related to domestic or family violence. The use of sexual violence as a controlling sexual behaviour is considered in detail in the Background Paper.

In recommending its approach, the NSWLRC mentioned that concern that it extended the law too far, by including cases where there was a long delay between the use of force and the sexual activity, was unwarranted as the prosecution would still be required to prove that the person participated in the sexual activity because of the use of force. By contrast, while the QLRC did not consider it necessary to amend its laws to address domestic violence.

**Threats, intimidation and coercion:** All Australian jurisdictions other than the NT include a reference to threats or intimidation in their legislation (Discussion Paper volume 1 page 97 Table 4.6).

Six key questions arise in this context. **First**, there is a question of what type of behaviour should be covered by this provision. The *Code* currently includes threats or intimidation. Other jurisdictions have extended this to include coercion, extortion or blackmail.

Inclusion of coercive conduct is often seen to be important given the relationship between sexual violence and family violence. It covers a much broader range of conduct than threats

or intimidation. For example, the NSWLRC was of the view that it would cover ‘verbal aggression, begging and nagging, physical persistence, social pressuring, and emotional manipulation’.

The NSWLRC noted that blackmail would already be covered by the term coercion. However, its inclusion was justified because there were significant community concerns about the use of blackmail to obtain consent to sex. E.g., use of ‘revenge porn’, and threats to release naked photos.

In its preliminary submission, the Centre for Women’s Safety and Wellbeing argued that the list should also explicitly refer to domestic or family violence as the ‘resulting law would be more effective in recognising non-consent when it involves humiliating, unwanted or painful sexual acts.

**Secondly** (and relatedly), there is a question of whether the nature of the threat or intimidatory behaviour should be specified? E.g., SA makes it clear that threats to apply force, degrade, humiliate, disgrace or harass are all covered. The ACT also includes threats to use force or harass, making it clear that the harassment may be physical or mental in nature. By contrast, the *Code* does not currently specify the type of threat or intimidation required. However, in *Michael* the Court made it clear that the current provision does not just cover threats of physical violence. It is sufficiently broad to cover other types of threat, including threats of substantial economic harm or blackmail.

In this regard, it should be borne in mind that threatening and coercive behaviour can take many forms. E.g., in a submission to the NSWLRC, the Australian Queer Students’ Network has argued the law should be broad enough to cover situations such as: the coercion of sexual acts in exchange for access to money, freedom, children, space, affection and medication; the threat of ‘outing’ someone as an LGBTIQ+ person, as someone of HIV+ status or as a sex worker; and the threat of limiting access to specific medications or medical assistance (such as hormones for gender affirmation or treatment for HIV).

By contrast, defence counsel in *Michael* argued for limitations to be placed on the scope of this provision. They suggested, e.g., that consent should not be negated where a person threatens to stop dating their partner if they do not have sex with them. While the Court agreed that ‘difficulties may arise if any threat is to suffice’, it was of the view that Parliament had chosen ‘to impose a subjective test which does not have regard to the nature of the threat except insofar as the jury is required to assess whether the victim’s consent was in fact “obtained by” the threat or intimidation’. Consequently, it appears that the current *Code* provision may cover any type of threat or intimidation, as long as it causes a person to participate in the sexual activity. This includes threats which are overwhelming to that person but would be of no significant consequence to anyone else.

**Thirdly**, should the provision specify to whom the behaviour must have been directed? E.g., Tasmania and SA clarify that the threat need not be made against the complainant: it can be made against any person. The ACT extends this to threats to inflict violence or force on animals or property. By contrast, the *Code* provision does not address this issue. The WA Court of Appeal has, however, indicated that the threat does not need to have been directed at the victim. A person will not have consented to a sexual activity if they participated due to a threat directed at another person, such as their spouse or sibling.

**Fourthly**, there is a question of whether the provision should make it clear that the threat can be express or implied, as is the case in SA? While this is not currently addressed in the *Code*, the wording of the provision appears sufficiently broad to cover both types of threat.

**Fifthly**, there is a question of whether the provision should address the timing of the conduct? E.g., NSW and new Victorian Acts state that it does not matter when the conduct occurred: what is important is whether that conduct caused the person to participate in the sexual activity. This issue is not currently addressed in the *Code*, although the Court of Appeal has made it clear that the accused does not need to have threatened immediate harm: a person ‘may be as much induced to consent by a threat of something that is to happen in the future as by something that will happen more immediately’.

**Sixthly**, there is a question of whether the provision should specify that it does not matter if the conduct constitutes a single incident or is part of an ongoing pattern, as is the case under the NSW and new Victorian Acts. There does not need to have been a particular incident that caused the complainant to participate in the sexual activity. They will not have consented if they participated due to the cumulative effects of a pattern of coercive and controlling behaviours.

**Harm:** Another matter which could be included in the list of circumstances in which a person does not consent is where a person submits to a sexual act because of any type of harm. The focus here is not on the type of action that has been used against the complainant (e.g., force or threats). It is on the way in which the complainant has experienced those actions. The new Victorian Act is the only Australian Act to include harm in its list of circumstances. It provides that there is no consent where a person submits to an act because of harm of any type, whether to that person or someone else or to an animal, regardless of when the harm occurs or whether it is a result of a single incident or part of an ongoing pattern. The Act provides the following examples of types of harm that can be done to a person being (a) economic or financial harm; (b) reputational harm; (c) harm to the person's family, cultural or community relationships; (d) harm to the person's employment; (e) family violence involving psychological abuse or harm to mental health; and (f) sexual harassment.

**Fear of force or harm:** Another matter which could be addressed in the list of circumstances is fear of force or harm. The focus here is on the complainant's apprehension that force will be used or harm will be caused in the future if they do not participate in the sexual activity. All jurisdictions other than WA include participation in a sexual activity due to fear in their list of circumstances in which a person does not consent (Discussion Paper volume 1 page 102 Table 4.7).

If fear is to be included in the list of circumstances, it will be necessary to determine precisely what the person must fear. Various approaches to this issue have been taken across Australia:

- The ACT has the broadest approach, providing that a person does not consent where they participate because of fear. This includes a fear of public humiliation or disgrace.
- SA and Tasmania have restricted their provision to fear of force.
- Queensland has restricted its provision to fear of bodily harm.
- NSW, NT and Victoria refer to fear of both force and harm. In relation to the fear of harm:
- The NT and Victoria cover fear of harm of, whereas NSW is limited to fear of serious harm.
- The new Victorian Act makes it clear that harm is to be expansively.

One issue to consider is whether the provision should be limited to reasonable fears, as is the case in Tasmania. This could help prevent the provision capturing situations where the complainant's fear is unjustified or unsubstantiated. This approach was not recommended by the NSWLRC.

Other matters that could also be addressed in the provision include:

- Extension to fear of force or harm to other people, animals and/or property. This could help capture situations that often arise in the family violence context.
- Clarification that the timing of the conduct that caused the fear does not matter.
- Specification to cover single incidents and acts that form part of an ongoing pattern.

**Unlawful detention:** All jurisdictions other than WA and Queensland include unlawful detention in their lists of circumstances in which a person does not consent (Discussion Paper volume 1 page 104, Table 4.8). While the *Code* does not explicitly address unlawful detention, a person who participates in a sexual activity due to unlawful detention may not have given their consent freely and voluntarily. In addition, there may be the use of force, threats or intimidation to detain the person.

There are various ways in which a provision on unlawful detention could be framed, as indicated by the different approaches taken by Australian and international jurisdictions:

- It could be limited to circumstances in which the complainant is detained (Victoria, SA, NT) or include circumstances in which another person is detained (ACT, NSW, Tasmania).
- It could apply whenever a person engages in a sexual activity while unlawfully detained (ACT, SA), or it could require proof that the person participated in that activity because of the detention (NSW, Tasmania, NT, Victoria).
- It could be limited to circumstances in which the complainant was detained but the accused was not (UK; not the law in any Australian jurisdiction).
- It could be limited to circumstances in which the accused was responsible for the detention (Scottish LC, but is not the approach taken in any Australian jurisdiction).

**Abuse of a relationship of authority, trust or dependence:** Some jurisdictions include in their list of circumstances cases in which a person has abused a relationship of authority, trust or dependence (Discussion Paper volume 1 page 105 Table 4.9). The *Code* does not currently include such a provision, although it does contain specific offences for people who sexually offend against those who are in their care or under their supervision or authority (Discussion Paper Volume 2).

Various approaches have been taken to specifying the nature of the relationship which must exist between the participants to the sexual activity. Queensland requires there to be a relationship of authority. The new Victorian Act refers to a relationship of authority or trust. NSW and the ACT both refer to a relationship of authority, trust or dependence. The ACT also refers to a professional relationship. Tasmanian does not require there to have been a specific relationship, instead, relying on a general assessment of the nature or position of the other person.

The Australian jurisdictions which address this issue also differ in whether the accused must have used their position of authority, trust or dependence, as well as the effect of it on the complainant. In Queensland, it is sufficient if the complainant participated due to an exercise of authority. The ACT, NSW, Tasmanian and new Victorian Act requires the accused to have abused their relationship with the complainant. The NSW, Tasmanian and new Victorian Acts also require the complainant to have been overborne by the accused's abuse of the relationship.

---

**Should the Code's list of circumstances in which a person does not consent due to the use of force, threats or intimidation address cases in which a person participates in a sexual activity;**

- **due to other forms of pressure, such as coercive conduct or blackmail (Discussion Paper vol 1 paras 4.227-4.250);**
- **due to having suffered harm (Discussion Paper vol 1 paras 4.251)**
- **due to fear of force or harm (Discussion Paper vol 1 paras 4.254-4.258).**
- **during unlawful detention (Discussion Paper vol 1 paras 4.259-4.261).**
- **with a person with whom they have a relationship of authority, trust or dependency (Discussion Paper vol 1 paras 4.262-4.265).**

**If so, how should the provisions be framed?**