

## Issues paper 4.9 - Timing and withdrawal of consent to sexual activity

**The timing of consent:** The *Code* is currently silent about whether consent needs to be given at the time of the sexual activity or if it can be given in advance.

In its review of sexual offences, the NSWLRC noted that some stakeholders considered that people should be allowed to consent to sexual activity in advance. E.g., it should be possible for a person to consent to another person having sex with them while they are asleep or very intoxicated. These stakeholders suggested that the law should specify that consent must be given 'before or at the time of the sexual activity' to reflect that.

Notwithstanding those stakeholder views, the NSWLRC ultimately considered that the definition of consent should provide that consent must exist at the time of the sexual activity. It considered that this approach reflects a key principle of the communicative model: that consent is an ongoing process throughout sexual activity, rather than a form of permission granted at a single moment. Consent can be changed or revoked. Therefore, consent must be assessed at the time that the sexual activity occurs.

The NSWLRC considered it necessary to address this issue in legislation, given that a complainant's prior conduct may be used to suggest there was consent and mock jury research suggests that some jurors regard certain behaviours, such as inviting the accused person home and remaining in their company for a prolonged period of time, to imply a willingness to engage in later sexual activity.

NSW now states that a person consents to a sexual activity 'if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity'. Similarly, in Canada, where the law specifies that 'consent must be present at the time the sexual activity in question takes place'.

The NSW definition would not seem to prevent the jury from taking into account words and conduct at any time prior to the sexual activity. It may be that the NSW definition does not change the present law which requires that the particular sexual activity took place without consent.

**Withdrawing consent:** The principle of sexual autonomy requires freedom to refuse to engage in sexual activities at any time for any reason, including withdrawing consent and stopping the activity.

The *Code* does not explicitly address the withdrawal of consent. However, the definition of sexual penetration sets out a range of ways in which a person can sexually penetrate another, including where they 'continue sexual penetration'. This means that where a participant withdraws their initial consent to sexual penetration, it will be an offence for another participant to continue the penetration. The WA Court of Appeal has held that they must immediately cease the penetration upon the withdrawal of consent: it is not sufficient to stop within a reasonable time.

A similar approach is taken in Tasmania and the NT. All other Australian jurisdictions explicitly address the withdrawal of consent in their legislation (Discussion Paper volume 1 Table 4.10).

We address three issues relating to the withdrawal of consent:

- Whether the *Code* should explicitly address the issue;

- If so, whether the provision should require the withdrawal of consent to be communicated; and
- How the withdrawal provision should be framed.

**Addressing withdrawal:** It may be unnecessary to explicitly address the withdrawal of consent in the *Code*, given it is already an offence to continue sexual penetration after consent has been withdrawn.

However, the NSWLRC and the QLRC both considered it important for the legislation to state that consent may be withdrawn at any time. The NSWLRC suggested that clarity about the withdrawal of consent could 'empower people who have experienced sexual offending to report the incident to police'. A similar provision was also recommended in Northern Ireland, Scotland and Hong Kong.

**Communicating withdrawal:** If the withdrawal of consent is addressed in the *Code*, should the provision require the withdrawal to be positively communicated to the other participant? E.g., NSW and Queensland state that a person may withdraw consent 'by words or conduct'. An argument against requiring communication is that under an affirmative model of consent, an accused should be required to actively seek ongoing consent throughout the sexual activity: it should not be necessary for the complainant to demonstrate that they have withdrawn consent. Such a provision was seen to be particularly problematic for people who wish to withdraw but 'freeze'.

The NSWLRC and the QLRC both recommended that the relevant provision require the withdrawal of consent to be positively communicated. The NSWLRC considered that 'fairness dictates that, if consent has been freely and voluntarily given, its withdrawal should be communicated before a person acting on the consent that had been given could be convicted of a criminal offence'. The QLRC also noted that for an offence to be prosecuted in these circumstances, 'it is necessary to be able to identify the point at which the complainant withdrew their consent and communicated that withdrawal and to prove that the defendant did not cease the relevant act'.

**Framing the withdrawal provision:** If withdrawal of consent is to be explicitly addressed in the *Code*, it will be necessary to determine the best way in which to do this. Three broad approaches have been taken to this issue in other jurisdictions:

- Including it as a negative indicator of consent (NSW, Qld);
- Including it in the list of circumstances in which a person does not consent (ACT, Vic);
- Including it in the definition of rape (SA).

The QLRC recommended that the relevant section provide that 'if an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent'. It was of the view that such a provision would make it clear that a person can withdraw their consent any time before an act takes place or, if the act has already begun, during the act. It does not extend to circumstances in which consent is withdrawn after an act is completed. The QLRC considered that that would be 'inconsistent with the position that consent must exist at the time of the relevant act and would place the other person in the position of being unable to respond to the withdrawal'.

**Should the *Code* specify when consent should be given? If so, should it specify that consent must be given at the time of the offence, or should it be permissible to give consent in advance?**

**Should the *Code* explicitly address the withdrawal of consent? If so, how should this be done? For example, should the provision require the withdrawal of consent to be communicated by words or conduct?**