

Issues paper 4.74 - Should the list of circumstances in which there is no consent include inaccurate information about fertility, sex, gender and related issues and sexual health?

Fertility: Another issue to consider is whether the *Code* should address cases in which a person is deceived about a sexual participant's fertility status.

This issue arose in the English case of *R v Lawrence* in which the complainant told the accused that she would not have unprotected sex with him if he were fertile. The accused misled her into believing that he had had a vasectomy. They had unprotected sex and the complainant became pregnant. The Court held that the accused's deception did not negate consent because it was not closely connected to the nature or purpose of the sexual act; and it did not deprive the complainant of the freedom to choose whether or not to have sex.

The Court held that deception about fertility differs from deception about condom use. In the context of non-consensual condom removal, the deception relates to the nature of the physical act in which the parties engage (sex with or without a condom). In the fertility case, the deception relates to the possible consequences of the act (pregnancy). In the Court's view, deception about the quality of the ejaculate (i.e., whether it is capable of leading to pregnancy or not) is fundamentally different to deception about whether ejaculate will enter the vagina.

Despite the Court's view, there is still an argument that in both cases the complainant's sexual autonomy has been undermined, and the complainant would not have agreed to the sexual activity had they had not been misled. Therefore, the question arises as to whether the *Code* should protect against the undermining of sexual autonomy and still attach criminal consequences to deception regarding fertility notwithstanding that the deception is about the consequences of the sexual act and not the physical act itself.

Sex, sex characteristics, sexual orientation, gender identity and gender history:

Another issue to consider is whether the *Code* should address cases in which a person is deceived about:

- The physical or biological characteristics a participant was born with (their sex).
- The physical features relating to sex that a participant has at the time of the sexual activity (their sex characteristics).
- A participant's current personal sense of their gender (their gender identity). This includes trans, gender-diverse and non-binary gender identities.
- A participant's previous gender-related identity or identities (their gender history).
- A participant's emotional, affectional or sexual attraction to people of a different gender, the same gender or more than one gender (their sexual orientation).

Difficult questions are raised about whether a participant with inaccurate information about one or more of these issues has consented to the sexual activity. Courts in England and Wales have held that they may not have done so. E.g., in *R v McNally* the Court stated:

while, in a physical sense, the acts of assault by penetration of the vagina are the same whether perpetrated by a male or a female, the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male.

These cases have been criticised on the basis that they are discriminatory, as they are based on the assumption that being trans is a form of gender identity fraud: that a person

who was born male but has a female gender identity is lying about their 'true' gender. By contrast, it is contended that there is no fraudulent misrepresentation about gender identity in these circumstances, as the person is truly representing their personal sense of gender. Sharpe has argued also that requiring a person to disclose their sex or gender history would be incompatible with the right to privacy.

The corollary to that is the argument that some stakeholders make that a participant in sexual activity is deceiving their partner if they purport or appear to be of one biological sex but were not born that sex.

On one view, the resolution of this issue might be said to require a balancing between the right to privacy on the one hand, which would be undermined if a person was required to disclose their gender history, and the right to sexual autonomy, which is undermined when a person is not provided with relevant information on which to base their decisions. However, as discussed above, that view is premised on the assumption that there is some deception involved in not disclosing a person's gender history and that what must be disclosed is to be determined by reference to biological sex characteristics and without reference to the person's personal sense of gender identity. Further, there are some stakeholders who argue that 'disclosure of biological sex before, during, or after a sex act carries significant risk for trans and gender diverse people'. In its preliminary submission, Sexual Health Quarters argued that amending the *Code* to require disclosure of such matters 'would be a catastrophic blow to human rights and human dignity'.

One option to address this issue would be to prioritise the interests of trans and gender diverse people, by inserting into the *Code* that failing to disclose one's sex, sexual characteristics, gender identity, gender history or sexual orientation does not constitute fraud for consent and sex offences.

Another option would be to prioritise sexual autonomy, by retaining a broad fraud provision. This was the approach taken by the NSWLRC in its review of consent. It was of the view that 'the law must offer protection to complainants who are fraudulently induced to participate in sexual activity'. Consequently, it recommended that the legislation provide that a person does not consent to a sexual activity if the person participates in the sexual activity because of a fraudulent inducement'. The question of what constitutes a fraudulent inducement might vary depending on the circumstances.

A third option would be to only criminalise fraudulent or deceptive conduct which the complainant has made clear is materially important to them. In the current context this would require the complainant to have made it clear to the accused that they will only engage in a sexual activity with a person if they know their sex, gender history, gender identity, sexual orientation or and/or sexual characteristics, and the accused intentionally fails to disclose a relevant matter or deceives the complainant about it. The advantage of such an approach is that it would not require people to disclose private matters in all cases, but it would offer protection to complainants for whom such matters were particularly important. However, it would still require disclosure of private matters in certain cases, noting that there is increasing progress towards ensuring that these attributes are duly protected in areas of public life under discrimination laws. . In this regard, Sharpe has argued that gender history should not be considered a material fact, as it casts doubts upon the authenticity of gender identities. There may also be practical difficulties in ascertaining when a complainant considers a matter to be material.

A fourth option would be to specify that mere non-disclosure of a person's sex, sex characteristics, sexual orientation, gender identity or gender history is not sufficient to negate consent: that only active fraudulent misrepresentations which are deliberately intended to induce a person to engage in sexual activities negate consent. This would require the accused to have set out to deceive the complainant about one of the relevant matters, rather

than simply remaining silent. Such an approach may overcome the privacy concerns raised above. However, it may be difficult to draw a line between an active fraudulent misrepresentation of a fact and non-disclosure. For example, is a person who was born female but who uses a traditionally male name, dresses in traditionally male clothing, and wears a penile prosthesis, misrepresenting themselves to be a biological male?

Sexual health: Another issue to consider is whether the *Code* should address cases in which a person is deceived about a sexual participant's sexual health. One of the earliest cases on sexual fraud (*Clarence*) involved the accused failing to disclose that he had a sexually transmissible infection (STI). In *Clarence* the court held that the complainant's consent had not been negated, as the fraud did not relate to the nature of the act or the identity of the participants.

It is unclear how the *Code's* consent provision would apply to fraud or deception about sexual health: this will depend on whether a broad or restrictive interpretation is given to the provision. The transmission of diseases is, however, addressed by other areas of the law.

For example:

- Under the *Public Health Act 2016 (WA)*, there are a range of offences which deal with circumstances where a person's conduct might endanger public health, including where the person has a notifiable infectious disease. The Chief Health Officer also has the power to issue a public health order requiring a person to be treated or refrain from engaging in certain behaviour where there is a material risk to public health (and the statutory requirements are otherwise met).
- Where a person intentionally does an act that is likely to result in another person having a serious disease, they can be convicted of the offence of committing an act intended to cause grievous bodily harm.
- Where a person unlawfully causes a person to contract a serious disease, they can be convicted of unlawfully causing grievous bodily harm.

These mechanisms have different areas of focus: e.g., the *Public Health Act 2016 (WA)* is concerned with stopping the spread of infectious diseases for the benefit of public health. By contrast, the main concern of sexual offences requiring proof of lack of consent is the protection of the complainant's sexual autonomy.

No Australian jurisdictions explicitly address the issue of fraud or deception about sexual health in their legislation. It is, however, addressed in Singapore's Penal Code, which provides that a person is guilty of procurement of sexual activity by deception or false representation if the deception or false representation relates to the risk of contracting a STI.

The issue has also been addressed by courts in Canada, it has been held that the relevant fraud provision applies to cases in which the accused does not disclose their HIV positive status to the complainant, and there is a realistic possibility of HIV transmission. There is no realistic possibility of transmission where the accused has a low viral load and uses a condom.

The main argument in favour of criminalising the failure to disclose the accused's STI status is that it upholds the right of people to determine the risks involved in their sexual activities. This is an essential aspect of sexual autonomy. In addition, it has been suggested that it is unlikely that it will have any impact on public health objectives, especially as it has long been a crime to recklessly or intentionally to inflict a grievous bodily disease on a person.

However, the approach taken by the Canadian courts has been the target of significant criticism. It has been argued that:

- Non-disclosure of a STI is a health issue. It is inappropriate to treat it as a sexual offence.
- It is unnecessary to address this issue in the sex offence context, given the other public health and criminal law mechanisms that are in place.
- It may undermine public health objectives. For example, ‘people may avoid STI testing out of fear of being charged with sexual assault, or so they can maintain plausible deniability in the event of a negation of consent accusation based on STI transmission or exposure.
- It undermines the participants’ right to autonomy and privacy.
- It may result in unintentional net-widening, with allegations of sexual assault being made whenever a person contracts common STIs such as herpes, chlamydia or gonorrhoea.
- It inappropriately places the responsibility for preventing STI transmission onto the person with the STI alone, rather than adopting a shared responsibility model.
- It stigmatises people with STIs and has a discriminatory impact on LGBTIQ+ populations.

In the context of HIV, it has also been suggested that adopting such an approach in Australia ‘would make the law involving HIV inconsistent with state and national HIV strategies and undermine other commitments to stigma reduction’. Australia’s National Guidelines for Managing HIV Transmission Risk Behaviours state that ‘Prosecution of people for the transmission of HIV, or for risking the transmission of HIV to others, perpetuates and worsens negative stereotypes of people living with HIV’.

The resolution of this issue requires a consideration, and balancing, of the conflicting rights of the participants. That could involve the following options:

- Prioritise the interests of people with STIs, by explicitly providing that failing to disclose information about one’s sexual health does not undermine consent.
- Prioritise sexual autonomy, by explicitly providing that failing to disclose information about one’s sexual health negates consent. If this approach were adopted, it would be necessary to determine whether it would apply to all STIs or only serious diseases, and whether it would apply in all cases or only where there is a real risk of transmission.
- Do not specifically address the issue but retain a broad fraud provision.
- Only criminalise fraudulent or deceptive conduct which the complainant has made clear is materially important to them. In the current context this would require the complainant to have made it clear to the accused that they would not engage in a sexual activity with a person who does not disclose their sexual health status or who has a sexual health condition which is experienced by the accused.
- Specify that mere non-disclosure of a person's sexual health conditions is not sufficient to negate consent: that only active fraudulent misrepresentations which are deliberately intended to induce a person to engage in sexual activities negate consent. This would require the accused to have set out to deceive the complainant about their sexual health by words or actions.

Should the Code address fraud or deception about the following issues, either in the list of circumstances in which there is no free and voluntary consent to sexual activity or in some other way:

- i. **Fertility (Discussion Paper vol 1 paras 4.184-4.186; 4.138-4.142).**
- ii. **Sex, sex characteristics, sexual orientation, gender identity and gender history (Discussion Paper vol 1 paras 4.187-4.198).**
- iii. **Sexual health (Discussion Paper vol 1 paras 4.199-4.209).**