

## Issues paper 4.72 - How could the list of circumstances in which there is no consent because a participant has inaccurate information be expanded

If the 'deceit or fraudulent means' circumstance negating consent is to be amended in any way, it is necessary to consider how it should be framed. Other Australian jurisdictions address six specific areas in which a person does not consent due to inaccurate or insufficient relevant information (see Discussion Paper volume 1 page 65 table 4.4). These are where they are mistaken, deceived or defrauded about:

- The nature of the sexual act.
- The identity of a participant in the sexual act.
- The purpose of the sexual act.
- The marital status of the participants.
- Stealthing (use of a condom) by a participant.
- Payment for sexual services.

In this issues paper, after considering a preliminary issue relating to mistaken beliefs, we raise issues about each of these areas, other than stealthing which is discussed in issues paper 4.7.3. In issues paper 4.7.4 we discuss issues about circumstances in which the complainant lacks relevant information about another participant's fertility, sexual health, sex, sex characteristics, sexual orientation, gender identity or gender history.

**Mistaken beliefs:** The *Code* does not currently refer to mistaken beliefs: it only covers circumstances in which consent was obtained by deceit or any fraudulent means. By contrast, legislation in all other Australian jurisdictions provides that consent is negated where the complainant was mistaken about a relevant matter, such as the nature of the sexual act or the identity of the other participant. It would be possible to adopt such an approach in WA.

In the sections below we consider some specific mistaken beliefs that could be addressed in the *Code*. If any of these mistaken beliefs are to be legislatively addressed, four key questions will need to be determined.

**First**, should the provision be confined to mistaken beliefs that were induced by the accused (as is the case in Queensland), or should it apply whenever the complainant held a relevant mistaken belief (as is the case in the other jurisdictions)?

**Secondly**, should the provision require the complainant's mistaken belief to have been reasonable (as is the case in Tasmania) or should it simply provide that a person does not consent if they were mistaken about the relevant matter (as is the case in the other jurisdictions)?

**Thirdly**, should the provision require the complainant to have participated in the sexual activity because of the mistaken belief (as is the case in NSW), or should it simply require the complainant to have held the relevant belief (as is the case in the other jurisdictions)? In this regard, the NSWLRC was of the view that the law should not criminalise cases 'where a person participates while under a mistake, but the person would have consented to the activity even if not mistaken'.

**Fourthly**, should the fraud provision be replaced by a provision focussing solely on mistaken beliefs, or should the provision refer to fraud, deception and mistaken beliefs? In this regard,

legislation in the ACT, the NT and Tasmania includes references to both mistaken beliefs and fraudulent conduct. By contrast, the legislation in SA and Victoria refers solely to mistaken beliefs. In these jurisdictions, a lesser offence of procuring a sexual act by fraud is used to address cases in which a sexual act occurs due to the accused's fraudulent conduct.

The latter approach reflects the High Court's decision in *Papadimitropoulos*. The Court was of the view that the key issue in these cases was what the complainant believed, not whether that belief was induced by the accused. It consequently held that there is no consent if the complainant is mistaken about the nature and character of the act or the identity of the accused, regardless of how the complainant came to hold that belief.

The main argument in favour of retaining a focus on the accused's role in fraud or deception is that it 'ensures that the conduct on the part of the defendant has the appropriate criminality, rather than being inadvertent or accidental'. However, it is important to bear in mind that even if the law were to specify that consent is negated by a mistaken belief, that does not mean an accused person will be convicted of an offence simply because the complainant held a mistaken belief at the time of their sexual encounter. If they were unaware that the complainant was mistaken about the relevant matter, and their lack of awareness was reasonable in the circumstances, they should be able to rely on the mistake of fact defence.

However, if they exploited the complainant's misunderstanding or were aware of the possibility that the complainant was consenting because of it, they may be guilty of an offence. We consider issues surrounding the accused's mental state in Discussion Paper volume 1 Chapter 5.

**Nature of the act:** One of the two circumstances in which the common law recognises that a lack of relevant information may undermine consent is where a person does not understand that the act is sexual in nature. For example, in *R v Williams* the complainant was a teenager whose singing teacher told her that inserting his penis into her vagina would improve her singing. She agreed, unaware that she was participating in a sexual activity. It was held that her apparent consent was negated.

This issue is not specifically addressed in the *Code*. However, it will be covered by the fraud provision if the accused falsely misrepresented the act to be non-sexual. Other Australian jurisdictions (other than ACT and Queensland) provide that a person does not consent whenever they are mistaken about the sexual nature of the act, regardless of the accused's role in inducing that mistake.

In its review of consent laws, the NSWLRC recommended that this issue be addressed in the legislation. While it noted that it is only likely to arise in very limited situations, it was of the view that where it does arise consent should be legally invalid.

If this matter is to be explicitly addressed in the *Code* it will be necessary to determine whether the law should provide that a person does not consent whenever they are mistaken about the sexual nature of the act, or whether the provision should be confined to circumstances in which the accused fraudulently induced that belief. It will also be necessary to determine whether the complainant's mistake needs to have been reasonable, and whether the complainant needs to have participated in the sexual activity because of the mistaken belief. These issues are discussed in the section 'Mistaken beliefs' above.

**Identity of the participants:** The second circumstance in which the common law recognises that a lack of relevant information may undermine consent is where a person is mistaken about the identity of the other participant. For example, they may believe they are engaging in a sexual activity with their sexual partner, when in fact it is their partner's twin.

This issue is not explicitly addressed in the Code. However, if the accused induced the false belief, it would be covered by the fraud provision. By contrast, all other Australian jurisdictions explicitly address this issue.

If this issue is to be addressed in the Code, it will need to be decided whether it should apply whenever the complainant was mistaken about the accused's identity or if the accused needs to have played a role in causing them to hold that belief. All Australian jurisdictions other than Queensland simply require the complainant to have been mistaken. By contrast, in Queensland the accused must have induced the mistaken belief. A similar approach is taken in the UK.

It will also be necessary to decide whether the provision should be limited to specific types of mistakes about identity. For example, the Queensland Code requires the complainant to have mistakenly believed that the accused was the complainant's sexual partner, and legislation in the UK requires the accused to have impersonated a person known personally to the complainant. In recommending this formulation, the Scottish LC stated:

The requirement that the impersonation must be of someone known to the victim helps to avoid problems about distinguishing between a person's identity and attributes. The definition does not cover the situations where the accused induced the victim into having sex by claiming falsely that he was a famous film star or football player or that he was rich, situations to be decided by applying the general definition.

By contrast, all other Australian jurisdictions simply require the complainant to have been mistaken about the accused's identity. In recommending this approach, the NSWLRC noted that concerns had been raised that 'this circumstance could capture mistakes about personal characteristics, such as a person's gender identity, sex characteristics or sexual health status'. However, it was not aware of any cases where this had occurred, and was of the view that such a broad interpretation 'would be inconsistent with the reason why this category of mistaken belief was added' to the legislation.

**Purpose of the act:** Another way in which a person may lack relevant information about a sexual activity is if they mistakenly believe that sexual activity is being performed for a non-sexual purpose. Although not specifically addressed in the Code, where the accused induces such a belief this is likely to be covered by the fraud provision. By contrast, most other Australian jurisdictions explicitly address this issue in their legislation.

If this issue is to be addressed in the Code, it will need to be decided whether the relevant provision should only apply to cases in which the accused defrauded or deceived the complainant about their purpose (Queensland), or whether it should apply to all cases in which the complainant was mistaken about the accused's purpose (NSW, the NT, Tasmania and Victoria).

It will also need to be decided whether the provision should apply to all frauds/mistakes about the accused's purpose, or whether this should be limited in any way. The NSWLRC recommended that the provision apply to all mistakes as to purpose. It recommended including the examples of where a person mistakenly believes the activity is done for health, hygienic or cosmetic purposes. The first two of these examples were already the law in NSW at the time, while the third 'recognises that cosmetic procedures involving intimate areas of the body are growing in popularity'. These recommendations were enacted by the NSW Government.

Slightly different approaches have been taken in other Australian jurisdictions:

- The Queensland Code refers broadly to all false or fraudulent representations about the purpose of the act.
- The Tasmanian Code refers broadly to mistakes about the purpose of the act, but requires the mistake to have been reasonable.
- The Victorian Acts limit the scope of this ground to mistaken beliefs that the act is for medical, hygienic, veterinary, agricultural or scientific research purposes.
- The NT Code draws a distinction between cases of fraud and mistake: the fraud provision applies to all false representations about the accused's purpose; the mistake provision is limited to mistaken beliefs that the act is for medical or hygienic purposes.

**Marital status of the participants:** In *Papadimitropoulos* the accused tricked the complainant into believing that they were married. The High Court held that this did not undermine the complainant's consent, as she understood that she was participating in a sexual activity with the accused. In response, NSW enacted a provision which states that a person does not consent to a sexual activity if they mistakenly believe they are married to the other person. No other Australian jurisdiction has explicitly addressed this issue.

In its recent review of consent laws, the NSWLRC noted that stakeholders were mixed in their views on this provision. While some supported it, others criticised it on the basis that it:

- suggests that marriage implies consent;
- privileges marriage as a factor that influences whether a person consents without a reason for doing so; and
- is too narrow because it only captures one type of relationship.

The NSWLRC was of the view that these criticisms were misplaced. It considered that the provision was 'introduced to address a specific case, with particular facts', and did not think that it needed to 'be broadened to cover other relationship types'. While it acknowledged that the circumstance was unlikely to be raised in many cases, it recommended that it be retained in case it does arise in the future.

It should be noted that the NSW provision only applies to mistakes that the people are married to each other. It does not apply to other mistakes about marital status, such as that a person is unmarried. Such a provision would have much broader application and would raise concerns about the role of the criminal law in regulating adultery.

**Stealth (non-consensual condom removal): See separate issues paper.**

**Payment for sexual services:** In its review of consent laws, the NSWLRC noted that 'a range of submissions, survey responses and researchers express concern about the lack of protection afforded to people who work in the sex industry who are fraudulently promised payment for sexual services. Submissions argue that this should be considered sexual assault. One way to address these concerns would be to provide that consent is negated where a person has been defrauded or deceived about payment for a sexual act.

At common law courts have held that consent is not negated where a person has been deceived about payment for sexual services because misrepresentations about payment are not mistakes about the nature of the act or the identity of a participant.

By contrast, it is possible that this type of conduct would be captured by the *Code's* fraud provision. This was held to be the case in the ACT, which has a similarly broad provision. In *Livas v R* the accused failed to pay a person engaging in sex work the agreed fee for the

sexual activities in which they had engaged. He was convicted of rape, on the basis that her consent was negated by his fraudulent representation.

In its review of consent laws, the QLRC did not recommend specifically addressing this issue. It noted that sex workers are already offered some protection by the scope of the consent provision, which requires consent to be freely and voluntarily given, as well as by specific offences that may apply in the circumstances, such as fraud. It was unwilling to recommend any further protections, as it was of the view that the subject 'raises broader policy questions about the regulation and protection of sex workers, and their experiences within the criminal justice system' that were outside the scope of its review.

Later, the Queensland Taskforce noted that the QLRC had subsequently been asked to recommend a framework for a decriminalised sex work industry. Consequently, the Taskforce did not consider it appropriate to make any recommendations. However, it noted that the majority of sex workers and advocates consulted by the Taskforce were firmly of the view that non-payment constitutes rape or sexual assault. Other sex workers have expressed publicly that they are somewhat ambivalent about whether non-payment should constitute rape (noting the higher likelihood of violence being involved) or a less-serious charge. These sex workers, however, emphasised that this conduct was more serious than fraud because of the fraudulent invasion of their bodily integrity.

Victoria is the only Australian jurisdiction to have addressed this issue. The new Victorian provisions state that a person does not consent if 'the act occurs in the provision of commercial sexual services and the person engages in the act because of a false or misleading representation that the person will be paid'. The Act provides that 'a false or misleading representation may be made by words or conduct (including by omission) and may be explicit or implicit'.

We have received a preliminary submission suggesting that the list of circumstances in which a person does not consent should include the circumstance where a person 'consents to a sexual act under a mistaken belief induced by the other person that there will be a monetary exchange in relation to the sexual act'. By contrast, Magenta argued that this issue should be addressed by the creation of a new, specifically targeted offence:

Currently the law fails to provide adequate clarification for conditional consent, or consent obtained by fraud. Failing to pay for a sexual service when payment was agreed... is a special type of sexual offending. Under the current offences detailed in Chapter XXXI of the code, this should exceed the current criteria for 'indecent assault' while also not meeting the current severity of 'sexual penetration without consent' – therefore Magenta suggests it requires a new offence, unless these sections are rewritten significantly.

In considering this issue, it should be borne in mind that most sex industry-related activities are currently illegal in WA, although there is no prohibition on an adult without prescribed convictions working as a sex worker. Consequently, it may be considered preferable for this issue to be addressed in the context of a broader review of prostitution laws

**Should the Code's list of circumstances in which there is no free and voluntary consent define the types of fraud or deceit which negate consent, such as fraud or deception about:**

- i. **The nature or purpose of the act (Discussion Paper vol 1 paras 4.129-4.132; 4.138-4.142).**
- ii. **The identity of the participants (Discussion Paper vol 1 paras 4.133-4.137).**
- iii. **The marital status of the participants (Discussion Paper vol 1 paras 4.143-4.146).**
- iv. **Payment for sexual services (Discussion Paper vol 1 paras 4.175-4.183)?**