

Issues paper 4.3 - Should the definition of consent in the Criminal Code be clarified by expanding the negative indicators of consent?

The *Code* currently contains one provision which helps clarify the meaning of free and voluntary consent: section 319(2)(b) explains that it is not constituted by a mere lack of physical resistance. It would be possible for the *Code* to also address other negative indicators of consent. In this issues paper we address three possibilities: a lack of verbal resistance; consent to other sexual acts; consent to sexual activities on other occasions.

Clarifying consent in the context of agreements to provide commercial sexual services is discussed in a separate issues paper.

stereotypes about situations when people, especially women, are deemed to be giving consent to sexual ac

provisions on consent as picking some, but omitting others, may give rise to the unwelcome risk of an inference of consent in those situations which are not included. Further, if the main purpose of indicators is to block the use of inference based on unacceptable stereotypes or social conventions, this goal might be more appropriately done by way of jury directions, education and public awareness campaigns.

Lack of verbal resistance: The *Code*

to also provide that a mere failure to offer **verbal** resistance does not constitute consent. It has been argued that this reform would address the common misconception that people who experience non-consensual sexual activity will voice opposition to it and recognise that people commonly freeze out of fear and do not respond verbally.

Most other Australian jurisdictions address this issue in their legislation. However, they do so in two different ways:

The NSW, ACT and new Victorian Acts include it as a negative indicator, specifying that a person does not consent only because they did not verbally or physically resist.

The ACT, NT, SA and current and new Victorian Acts include it as a jury directions issue. In the ACT, NT and SA the judge must direct the jury that a person is not to be regarded as consenting only because they did not protest or physically resist. In Victoria the judge

Consent to other sexual acts: It would be possible for the *Code* to make it clear that consent relates to a particular sexual activity, and that consent to one sexual activity does not constitute consent to any other sexual activity. For example, consent to vaginal intercourse does not constitute consent to anal intercourse.

The NSWLRC considered such a provision to be important for three reasons:

It can help challenge assumptions that a person who consents to one sexual activity is consenting to any sexual contact.

It can help communicate to the jury that consent is an ongoing process which often involves the making of multiple decisions during a sexual encounter.

It can help educate people in the community about consent, including people who may be
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