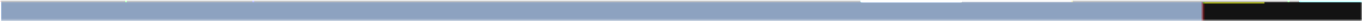

**Issues paper 4.5 - Consent in sexual offences: Introduction:
should the Code contain a list of circumstances in which
there is no consent to sexual activity?**

The *Code* currently provides that consent for sexual activity is not freely and voluntarily given



case in some circumstances, such as where the (apparent) consent was obtained by fraud. However, in other circumstances, such as where one of the participants was asleep or unconscious when the sexual activity occurred, consent may never have been obtained.

The terms 'negating' or 'vitiating' circumstances, which are sometimes used in this context, may also be misleading. As was noted by the NSWLRC, 'if a circumstance in the list exists, a person does not consent by definition. It is not the case that an otherwise valid consent is negated'. Given the NSWLRC's view that consent was not true consent if certain circumstances existed, it recommended that the introductory wording to the relevant provision should state 'A person does not consent to a sexual activity if-', and the heading section should refer to 'circumstances in which there is no consent'. This approach has been implemented in NSW and the ACT. A similar approach is taken in most other Australian jurisdictions, which begin their list of circumstances with phrases such as 'a person does not freely agree to an act if...', 'a person is not taken to freely and voluntarily agree to sexual



of the act; or a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

The QLRC did not recommend making any changes to the Queensland list because the list has the advantage of flexibility, is non-exhaustive and is expressed in broad terms. 'It is capable of covering many circumstances, including those which may not have been



- (j) the person participates in the sexual activity with another person because the person is mistaken—
 - (i) about the identity of the other person, or
 - (ii) that the person is married to the other person
- (k) the person participates in the sexual activity because of a fraudulent inducement.

We discuss the individual circumstances in the above list in issues papers 4.7.2-4.7.4 and 4.8.

The Taskforce noted that while this reform was unlikely to change the law (as it was of the view that all of these circumstances are probably covered by the requirement that consent be freely and voluntarily given), including these circumstances in the Queensland Code would 'make it very clear how Parliament intended the law to be applied in what are some of the most frequently occurring scenarios in which sexual violence takes place'.

Should the *Code* continue to list circumstances in which consent is not freely and voluntarily given?

Why or why not?

If the Code continues to list circumstances in which consent is not freely and voluntarily should the list be changed from 'obtained by force, threat, intimidation, deceit, or any fraudulent means'?

Why or why not?