
Issues paper 4.71 -

circumstances in which there is no consent?



A third approach would be to restrict the provision to subjectively serious frauds, deceptions or mistakes. This would be determined by considering whether the complainant considered it to be a serious matter. This could perhaps be ascertained by asking whether the complainant



The main advantage of such an approach is that it accepts that certain acts, such as failing to disclose one's HIV positive status, do negate consent (as they undermine the other participant's ability to make a free and voluntary choice about their sexual activities), while at the same time accepting that there may be countervailing reasons for nevertheless choosing not to criminalise such conduct.

The main disadvantages of this approach arise from the fact that it leaves it to the court to decide, on a case-by-case basis, whether the accused's interests outweigh the complainant's interests. This means that:

- People may not be able to determine, in advance, whether they are permitted to engage in a sexual activity;
- Police and prosecutors may not be sure whether an offence has been committed; and
- Juries may apply the law inconsistently, reaching different conclusions in relation to similar factual situations.

It may be possible to address some of these concerns through the drafting of the provision or the use of legislated examples. For example, the *Code* could provide the example of a person's privacy interests in keeping their gender history co0 g0 G[Coi.)-coni-(a)4(ev)-(e)-oo0utwe()-2gh