

## Issues paper 4.9 - Timing and withdrawal of consent to sexual activity

**The timing of consent:** The *Code* is currently silent about whether consent needs to be given at the time of the sexual activity or if it can be given in advance.

In its review of sexual offences, the NSWLRC noted that some stakeholders considered that people should be allowed to consent to sexual activity in advance. E.g., it should be possible for a person to consent to another person having sex with them while they are asleep or very intoxicated. These stakeholders suggested that the law should specify that consent must be

Notwithstanding those stakeholder views, the NSWLRC ultimately considered that the definition of consent should provide that consent must exist at the time of the sexual activity. It considered that this approach reflects a key principle of the communicative model: that consent is an ongoing process throughout sexual activity, rather than a form of permission granted at a single moment. Consent can be changed or revoked. Therefore, consent must be assessed at the time that the sexual activity occurs.

The NSWLRC considered it necessary to address this issue in legislation, given that a research suggests that some jurors regard certain behaviours, such as inviting the accused person home and remaining in their company for a prolonged period of time, to imply a willingness to engage in later sexual activity.

NSW now states that a person consents to a sexual

The NSW definition would not seem to prevent the jury from taking into account words and conduct at any time prior to the sexual activity. It may be that the NSW definition does not change the present law which requires that the particular sexual activity took place without consent.

**Withdrawing consent:** The principle of sexual autonomy requires freedom to refuse to engage in sexual activities at any time for any reason, including withdrawing consent and stopping the activity.

The *Code* does not explicitly address the withdrawal of consent. However, the definition of sexual penetration sets out a range of ways in which a person can sexually penetrate

participant withdraws their initial consent to sexual penetration, it will be an offence for

