

Issues paper 4. 74 - Should the list of circumstances in which there is no consent include inaccurate information about fertility, sex, gender and related issues and sexual health?

Fertility: Another issue to consider is whether the Code should address cases in which a

This issue arose in the English case of *R v Lawrence* in which the complainant told the accused that she would not have unprotected sex with him if he were fertile. The accused misled her into believing that he had had a vasectomy. They had unprotected sex and the consent because it was not closely connected to the nature or purpose of the sexual act; and it did not deprive the complainant of the freedom to choose whether or not to have sex.

The Court held that deception about fertility differs from deception about condom use. In the context of non-consensual condom removal, the deception relates to the nature of the physical act in which the parties engage (sex with or without a condom). In the fertility case, view, deception about the quality of the ejaculate (i.e., whether it is capable of leading to pregnancy or not) is fundamentally different to deception about whether ejaculate will enter the vagina.

sexual autonomy has been undermined, and the complainant would not have agreed to the sexual activity had they had not been misled. Therefore, the question arises as to whether the Code should protect against the undermining of sexual autonomy and still attach criminal consequences to deception regarding fertility notwithstanding that the deception is about the consequences of the sexual act and not the physical act itself.

Sex, sex characteristics, sexual orientation, gender identity and gender history:

Another issue to consider is whether the Code should address cases in which a person is deceived about:

- x The physical or biological characteristics a participant was born with (their sex).
- x The physical features relating to sex that a participant has at the time of the sexual activity (their sex characteristics).

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contrast, it is contended that there is no fraudulent misrepresentation about gender identity
in these circumstances, as the person is truly representing their personal sense of gender.
Sharpe has argued also that requiring a person to disclose their sex or gender history would
be incompatible with the right to privacy.

The corollary to that is the argument that some stakeholders make that a participant in

However, the approach taken by the Canadian courts has been the target of significant criticism. It has been argued that:

- x Non-disclosure of a STI is a health issue. It is inappropriate to treat it as a sexual offence.
- x It is unnecessary to address this issue in the sex offence context, given the other public health and criminal law mechanisms that are in place.
- x