



Community Legal Assistance Society Stand Informed / SHARP Lawyer Training

Understanding Consent & the
Privacy Rights of Complainants
in Sexual Offence Prosecutions

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Introduction

- Navigating the criminal justice system can be particularly difficult for complainants in sexual offence cases: the system is slow and complicated, the law of consent and evidence is complex, and complainants are often unrepresented at critical stages in the process.
- This presentation provides an overview of the kind of sexual misconduct that can lead to a prosecution, the law of consent, key steps in the criminal justice process, and advice to consider at each step in order to effectively assist, inform, and advocate for complainants.

General best practices for advising complainants

- Use a trauma-informed approach
- Manage expectations about the criminal justice process – be clear about what it is (an adversarial process between accused and the state) and what it is not (an adversarial process between accused and complainant)
- Remember that every complainant is different – there is no “one size fits all” advice

What kind of sexual misconduct is criminal?

- Sexual Assault
 - Sexual touching without complainant consent where accused knew, was wilfully blind, or was reckless as to the lack of consent (s. 271 of the *Criminal Code*)
- Sexual Exploitation
 - Touching or invitation to touch, for a sexual purpose, of a young person (16 or 17 yrs old) by an accused in a position of power (s. 153)
- Sexual Interference
 - Touching of person under 16 for sexual purpose (s.151)
 - Saying/doing something to get person under 16 to touch themselves, the adult, or another person (s. 152)
- Invitation to Sexual Touching
 - Surreptitiously observing or recording a person in circumstances giving rise to REP, if (a) the person is in a place where a person can reasonably be expected to be nude, exposing genitals/breasts, or engaged in explicit sexual activity; (b) is nude/exposed/engaged in sexual activity and observation/recording intended to capture that conduct; or (c) if observation/recording done for sexual purpose(s. 162)
- Voyeurism

What is “consent” in the criminal law context?

- Consent = person’s *voluntary agreement* to engage in the *specific* sexual activity at issue (s. 273.1(1))
- Whether or not consent existed is based entirely on what was in the mind of the complainant at the time of the sexual activity
 - Subjective analysis
 - Absence of consent not determinative of accused’s guilt for sexual offence
 - *Criminal Code* has provisions outlining circumstances in which no consent is obtained as a matter of law: see s. 265(3), s. 273.1(2)

Consent as an element of the accused's *mens rea*

- *Mens rea* = the mental element(s) of an offence (as compared to the *actus reus*, which are the action/conduct elements of an offence)
- Accused will have “guilty mind” if they knew, were wilfully blind, or were reckless as to the absence of consent
 - Limits in *Criminal Code* (e.g. s. 273.2) and common law re: what accused can rely on when arguing they did not have a guilty mind
- “Defence” of honest but mistaken belief in communicated consent
 - Requires accused to have taken reasonable steps to ascertain consent (s. 273.2(b))

Advising complainants at each stage of a case

- Before police involved: complainant decides whether to report to police
 - Criminal case vs. civil case
 - Advise re: nature of police investigation and criminal prosecution so client can make informed decision
- Police investigation: police receive report of complainant's allegations and conduct investigation
 - Advise re: nature of police interview and possibility of intrusive questioning
 - Discuss any key information client should provide, importance of telling the truth
 - Pros and cons of providing certain documents/records to police, such as diary entries, medical records, or text messages – complainant has privacy rights!

Advising complainants at each stage of a case

- Charge approval stage: police provide file to Crown for assessment
 - Advise client re: process, timeline, and charge assessment analysis
 - Crown Counsel Policy Manual (online) outlines charge assessment policy in detail, as well as other policies relevant to sexual offence prosecutions
- Court proceedings begin: bail, remand court, disclosure
 - Advise client re: process, timeline, limited role of complainant in initial stages
 - Complainant's counsel can communicate with Crown counsel if necessary – e.g. to express concerns about release conditions

Advising complainants at each stage of a case

- Resolution negotiations: discussions between Crown and defence counsel
 - Complainant typically has chance to give perspective on proposed resolution, and Crown must consider it, but it is not determinative
 - Potential resolution avenues:
 - restorative justice / diversion programs
 - stays of proceedings
 - peace bonds
 - guilty pleas
 - If unable to resolve → case will be set down for trial

Representing complainants at pre-trial applications

- Common pretrial applications in sexual offence proceedings:
 - Section 278.3: third-party records applications
 - Section 276: defence seeks to admit evidence of compl's "other sexual activity"
 - *Seaboyer & Kinamore*: Crown seeks to admit evidence of compl's "other sexual activity" or sexual inactivity, respectively
 - Section 278.92: defence seeks to admit "records" in which complainant has REP
- Complainants have right to counsel and access to counsel via Legal Aid
- Best practices for lawyers:
 - Listen to client – what info do they need to share to tell their story?
 - Opposing is not always in client's best interests
 - Consider limiting the information provided to client to avoid allegations of tainting

Advising complainant's re: trial and sentencing

- Trial preparation and trial proper:
 - Crown counsel will conduct pre-trial witness interview
 - Advise complainant re: types of assistance they can request
 - Victim Services worker
 - Testimonial accommodation
 - Advise compl of nature of direct examination and cross-examination
- Sentencing:
 - Assist complainant in preparing Victim Impact Statement
 - *Criminal Code* outlines ways of presenting VIS, limits to VIS content (s. 722)
 - Be aware of avenues for ensuring complainant safety and security through court-ordered conditions

QUESTIONS?