

– SEXUAL HEALTH ISSUE BRIEF –

Consent to Sexual Activity: Definitions, Issues, and Priorities for Sexual Health Education

Public awareness of the issue of consent as it applies to sexual activity has recently increased due in part to high profile legal cases involving issues of consent and a growing discussion of the importance of educating young people about consent issues. In this *Sexual Health Issue Brief*, we discuss a) how the *Criminal Code* of Canada defines consent to sexual activity, b) the provisions in the *Criminal Code* governing the ages at which young people can give legal consent to engage in sex with older people, c) how alcohol intoxication affects a person's ability to consent to sex, d) how the *Criminal Code* addresses consent with respect to BDSM practices, e) adding "yes means yes" to "no means no" approaches to sexual assault prevention, and f) integrating consent issues into effective sexual health education.

The legal definition of consent to sexual activity

As it is commonly understood, consent to sexual activity or "consensual sex" refers to a situation where both partners mutually agree to participate in sexual activities. How consent to sex is understood and operationalized can vary considerably between individuals and groups within society. For sexual health educators, the information and messages provided to students and other audiences about sexual consent issues should be consistent with the legal definition of consent.

Not surprisingly, the definition of consent that is outlined in the *Criminal Code of Canada* emphasizes circumstances in which consent to sexual activity does not exist, in other words, when the law has been broken. Thus the *Criminal Code* is somewhat vague in specifying the affirmative conditions in which consent exists, stipulating only that there must be "voluntary agreement" and is more specific in laying out the circumstances in which consent does not exist. Nevertheless, in terms of its implications for sexual health education, the standard for consent (i.e., voluntary agreement) set out in the *Criminal Code* suggests that the communication of an affirmative "yes" or the expression of a lack of agreement ("no") form the basic criteria through which consent or lack thereof is determined.

It should also be noted that because the definition of consent provided in the *Criminal Code* is geared towards the enforcement and prosecution of sexual assault offenses, the language used to discuss consent, as it applies to the way people interact with each other, is couched in adversarial legal terms such as the "accused" and the "complainant." Outlined below is the definition of consent to sexual activity provided by the Department of Justice.

Among the notable features of the *Criminal Code* definition of consent is that a person can express a "lack of agreement" to engage in sex either verbally (e.g., saying "no") or through conduct such as physically resisting the advances of a partner. The *Criminal Code* also makes clear that a person, after initially giving consent to engage in sex, can revoke consent at any time by expressing a lack of agreement to continue engaging in sexual activity.

A Definition of Consent to Sexual Activity

Subsection 273.1(1) defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question. Conduct short of a voluntary agreement to engage in sexual activity does not constitute consent as a matter of law.

For greater certainty, subsection 273.1(2) sets out specific situations where there is no consent in law; no consent is obtained where the:

- agreement is expressed by the words or conduct of a person other than the complainant
- complainant is incapable of consenting to the activity
- accused induces the complainant to engage in the activity by abusing a position of trust, power or authority
- complainant expresses, by words or conduct, a lack of agreement to engage in the activity, or
- complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Excerpted from: Department of Justice. A Definition of Consent to Sexual Activity. Policy Centre for Victim Issues, Department of Justice Canada. <http://www.justice.gc.ca/eng/cj-jp/victims-victimes/def.html>

Age of consent

Determining the circumstances and at what age young people can legally consent to engaging in sexual activity has arisen in recent discussions about integrating consent issues into sexual health education. The intent and implications of the laws regarding the ages at which young people can legally consent to sexual activity are sometimes misunderstood.

In 2008, the Canadian government passed the *Tackling Violent Crime Act* which included an increase in the age of consent from 14 to 16 years. Among the reasons put forward by the government for raising the age of consent was that it would increase the ability of law enforcement to protect young people from exploitation and harm. Another reason was that it would bring Canada in line with other countries such as England, where it is 16, and the United States, where the age of consent in different states ranges from age 16 to 18. It is important to understand that the purpose of raising the age of consent within the *Criminal Code* was to protect young people from being sexually exploited by older people - not to make it illegal for them to engage in otherwise mutually consensual sexual activities with their peers. This is made clear in Section 150 of the *Criminal Code* which spells out several close in age exceptions which apply to the ages at which young people can consent to engaging in sex (Government of Canada. <http://laws-lois.justice.gc.ca/eng/acts/C-46/>).

Close in age exceptions

One close in age exception is that 12 and 13 year-olds can consent to sexual activity with peers who are not more than 2 years older than themselves. The other is that 14 and 15 year-olds are able to consent to sex with partners who are not more than 5 years older than themselves (Government of Canada, <http://laws-lois.justice.gc.ca/eng/acts/C-46/>). For example, a 14 year-old can legally consent to sexual activity with an 18-year-old. However, a 15-year-old cannot legally consent to engage in sex with a 21 year-old and in that case the 21 year-old would be guilty of sexual interference.

Anal intercourse

It should be noted that in a separate section (159) of the *Criminal Code*, different standards for consent and lawful sexual behaviour are specifically listed for anal intercourse. That is, engaging in anal intercourse is an indictable offense punishable by up to 10 years imprisonment with several exceptions (Government of Canada, <http://laws-lois.justice.gc.ca/eng/acts/C-46/>). Two exceptions apply: 1) if the act of anal intercourse is engaged in by a husband and wife and 2) if both partners are

18 years of age or older and are consenting. In effect, while it is possible for a person as young as 12 to legally consent to other forms of sexual activity, it is not possible for a person to legally consent to or engage in anal intercourse until they are 18 years of age unless they are part of a heterosexual married couple. Section 159 also stipulates that anal intercourse must take place in private and if more than two people are present, it is not considered private. It should be noted that criminal charges are rarely, if ever, laid based on section 159 which likely reflects an awareness in the law enforcement and legal communities that anal intercourse should not be legally evaluated separately from other common sexual behaviours.

Sexual exploitation of youth by people in a position of trust or authority

An important aspect of the laws regarding sexual consent concerns sexual activity between a younger person and an older person who is in a “position of trust or authority” in relation to the younger person (Government of Canada, <http://laws-lois.justice.gc.ca/eng/acts/C-46/>). Here, the age of consent is 18 (Section 153). In other words, people in positions of trust or authority such as teachers, counsellors, coaches, older family members, and doctors or other health professionals are committing a sexual offense if they engage in sexual activity with a person under the age of 18 who they have some level of authority over. In these cases, a person in a position of trust or authority is not able to claim that they have not committed a crime because the younger person consented to the sexual activity.

It should be noted that in some occupational contexts, sexual interaction is prohibited by professional codes of conduct. For example, physicians, other health care providers, and university faculty are typically subject to codes of conduct that prohibit them from having sex with their patients, clients, or students under any circumstances. In other words, the code of conduct has been breached even if the patient or student freely consents to the sexual activity.

In sum, while aspects of the *Criminal Code* provisions related to age and consent to sexual activity and unlawful sexual behaviour may appear convoluted to some and/or are seen as being in need of change by others (i.e., inconsistency in the legal treatment of anal sex versus other sexual activities), age factors are an important component of sexual health education programming that comprehensively addresses consent issues with young people.

Alcohol intoxication: Implications for consent to sexual activity

It is well known that sexual assault is common among college and university students and research has shown that alcohol consumption by the perpetrator and/or victim is often a factor in acquaintance sexual assault (also known as “date rape”; Abbey, 2002). The need to integrate consent issues into initiatives to reduce coercive sexual behaviour among university students has been central to discussions regarding the role that alcohol consumption plays in affecting a person’s ability to give consent to engage in sexual activity.

As noted above, the *Criminal Code* specifies that a person cannot consent to sexual activity if he/she is “incapable” of doing so. For example, a person who is unconscious due to drug or alcohol intoxication is clearly incapable of giving consent to engage in sexual activity. However, the law, and court decisions based upon it have not specified a clear threshold at which intoxication negates a person’s capacity to consent. In a review and discussion of the sexual assault of intoxicated women in Canada, University of British Columbia law professor Janine Benedet (2010) has noted that in cases where the complainant may be drunk or high, but not unconscious “...courts have struggled to articulate a threshold for incapacity short of total non-responsiveness” (p. 442). In general, Canadian courts have only specified, for example, that “...consent is not valid where the complainant is so intoxicated that she is unable to control her actions” (Benedet, p. 442).

While it is clear that alcohol plays a role in many cases of sexual assault and that alcohol consumption can negatively affect or cloud decision-making related to sexual behaviour, from a legal perspective, it is unclear precisely what level of intoxication is required to render a person incapable of giving consent to engage in sexual activity. For example, while a precise level of blood alcohol is used to designate a person as impaired for the purposes of driving a car, there is no equivalent standard for how drunk a person must be before they are incapable of giving consent to sexual activity. Sexual health education programming should, nevertheless, make clear that this ambiguity in no way detracts from the importance of partners ensuring clear consent from each other to engage in sex and that they be knowledgeable about the potential negative impact of alcohol consumption on decision making, including that a high-level of intoxication can render an individual incapable of legally giving consent to engage in sexual activity.

BDSM and consent

Recent discussions of consent in the media have also been applied to legal issues related to bondage, dominance, sadism, and masochism (BDSM) practices (Cossman, 2014). Two issues related to BDSM that have received attention within the legal and BDSM communities are: 1) providing consent for future activities in a BDSM scenario and 2) providing consent to activities that may include physical harm.

Consenting to future activities in a BDSM scenario

People who engage in BDSM often explicitly discuss, negotiate, and agree upon the activities that will take place within a particular scenario or “scene” before any activities commence (Taormino, 2013). This is to ensure that all parties have freely consented to the BDSM activities they will participate in. “Safe words” (i.e., a word/phrase or gesture) are used in order to provide each of the participants, particularly those who may be in a vulnerable position in a dominant-submissive or bondage scenario, with the ability to stop the interaction if they no longer wish to participate in it.

The concept that consent must be ongoing (e.g., with the help of safe words) is important with respect to BDSM scenarios, not only for ethical reasons but also potentially for legal ones as well. Canadian courts have ruled that consent can only be applied to sexual activities as they are occurring. For example, the Supreme Court of Canada has ruled in *R. v. J.A.* that a person cannot consent in advance to sexual activities while they are unconscious <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7942/index.do> This ruling was based, in-part, on the interpretation of the court that a person engaged in any sort of sexual activity must retain the ability to revoke consent at any point in the process, something an unconscious person cannot do (Craig, 2014). While the practice of BDSM among adults who willfully engage in such activities rarely comes to the attention of police or ends up before the courts, BDSM practices that in anyway hinder or prevent a person from revoking consent to participate in the activity may be in conflict with court rulings that consent must be ongoing.

Consenting to physical harm

One issue of interest in the discussions regarding BDSM and consent is whether or not an individual can give consent to be physically harmed (Cossman, 2014). There are a number of common activities where individuals freely consent to the infliction of pain and physical harm that are considered to be both legally and socially acceptable. For example, sports such as hockey, boxing, and football often involve the infliction of pain and harm. Courts in Canada have ruled that physical harm in the context of sport has inherent social value for society (Craig, 2014). In contrast to the violence within sports, courts have ruled that sadomasochistic sex does not have social value. For example, in a 1995 Ontario Court of Appeal ruling, a judge specifically addressed the social value of bodily harm within the context of sexual activity with the following:

Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour (cited in Craig, 2014, p. 115).

Although “BDSM sexuality still lives on the margins of legality in Canada” (Crossman, 2014) it is important to keep in mind that the courts are likely to address the issue only in situations where an individual makes a complaint to police that they were forced to engage in BDSM activities against their will.

Affirmative consent: Combining “no means no” and “yes means yes” approaches to sexual assault prevention

As noted above, Canadian law regarding consent to sexual activity has a combined focus on “voluntary agreement” (e.g., saying “yes”) and on a “lack of agreement” (e.g., saying “no”). Until recently, social marketing and educational programs aimed at sexual assault prevention, particularly for teens and university students, have been almost uniformly focused on encouraging young men to respect young women’s expression of a lack of agreement to engage in sexual activity through campaigns centered on a “no means no” message (i.e., nearly all “no means no” campaigns assume a heterosexual context in which a male is told “no” by a female partner).

Some researchers have been critical of “no means no” consent campaigns because they may fail to incorporate the nuanced communication that often occurs in sexual encounters. For example, Humphreys (2007) identified a number of complexities regarding the ways in which consent is typically communicated between men and women. That is, consent is often communicated between partners in nonverbal and indirect ways, such as not stopping a particular activity (e.g., not pulling away from a partner). “No means no” campaigns may also do little to disrupt the traditional heterosexual sexual script that is common among young adults, in which men play the role of assertive initiators of sexual activity and women are cast as resistant “gatekeepers” (Jozkowski & Petersen, 2013).

With respect to sexual assault prevention education programming on college campuses, Jozkowski and Humphreys (in press) offer a critique of current sexual consent promotion frameworks and provide suggestions for future programs to reduce sexual assault on campus. Many campus-based programs emphasize the need for women to be clear in their communication of affirmative consent (“yes means yes”) and refusal (“no means no”). The authors argue that while these types of programs can help to raise awareness, the extent to which they are effective in reducing sexual assault is unknown. Jozkowski and Humphreys endorse a “sociocultural approach” that focuses on the following factors:

- Focusing attention away from the idea that sex necessarily involves an initiator and a recipient of sexual behaviour and instead promotes a more collaborative effort of a couple to ensure positive, consensual sex (e.g., “consent is sexy” campaigns).
- College and university educational programs as well as elementary and secondary school programs should address gender inequality.
- Educational programs at all levels should teach critical awareness of media messages that objectify women and promote violence, discrimination, and sexism.
- Sexual assault prevention education should focus on deconstructing the sociocultural determinants of sexual violence, including institutions of male domination and entitlement.

A number of recent campus sexual assault prevention campaigns at Canadian universities have utilized “yes means yes” or “enthusiastic consent” themes and messages (e.g., “Consent is Sexy”, “Ask, Listen, Respect”) as a central focus. However, currently no Canadian universities or colleges in

Canada have formally adopted affirmative consent standards as part of student code of conduct regulations. The state of California is the first jurisdiction in North America to compel universities to implement an affirmative consent to sexual activity standard for student behaviour.

In September 2014, the state of California added a section to their *Education Code* (State of California, 2014) in regards to student safety and sexual assault. In order to continue to receive state education funding, the Bill requires all California postsecondary institutions to revise their policies and implement this affirmative consent standard. The Bill states that,

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent (State of California, 2014).

With respect to intoxication, the California Bill specifies that valid consent is not given if a person “...was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity” (State of California, 2014).

Integrating consent issues into effective sexual health education programs

Although somewhat more detailed, the state of California university affirmative consent standards are remarkably consistent with the *Criminal Code of Canada* provisions on consent to sexual activity in that they both use the language of “voluntary agreement” and specify that consent can be revoked at any time during a sexual encounter. Definitions of affirmative consent and the conditions necessary for consent to be valid similar to that laid out by the State of California will likely serve as models for how sexual health education programs for youth and young adults will conceptualize and teach about consent to sexual activity in Canada and the United States.

The importance of communication skills

With respect to teaching young people about the importance of ensuring affirmative or “enthusiastic” consent during sexual activity with their partners, it will be important to provide students with the communication skills to do so. The development of relevant communication skills is a necessary prerequisite for successfully enacting any form of health promoting behaviour that involves interpersonal interaction. Effective communication is a key behavioural skill necessary to support sexual and reproductive health (Fisher & Fisher, 1998). It has been shown, for example, that sexual health communication is associated with levels of condom use among adolescents (Widman, Noar, Choukas-Bradly, & Francis, 2014).

The development of relevant communication skills to ask for and give consent to participate in sexual activity may be especially important for young people who may feel embarrassed or awkward talking openly about sexual matters with their partners. Many will have little or no experience in navigating and negotiating sexual encounters. Open discussion about sexual desire may be in conflict with societal and cultural norms that encourage indirect and highly nuanced communication about sexual activities. Young women in particular may have not been socialized to assertively express their desire or agreement to engage in sexual activities (Tolman, 2005). In sum, effective sexual health education to promote affirmative consent will not just encourage young people to obtain consent, it will provide specific training focused on the development of the communication skills to ask for, negotiate, give, refuse, and revoke consent.

Verbal vs. Non-verbal consent

Both the *Criminal Code* of Canada and the state of California *Education Code* leave open the possibility that voluntary agreement to engage in sexual activity can be expressed non-verbally. However, there are a number of reasons why educators should focus on and encourage direct verbal consent. Non-verbal communication of consent intentions are typically established through highly nuanced body language that is either expressing sexual arousal or desire or expressing a resistance to sexual interaction. What a person is intending to express through their body language is much more easily misinterpreted than direct verbal communication, which leaves less room for ambiguity. The ability of an individual to understand the response to a simple and direct question such as “Is this OK with you?” used by the *Consent is Sexy* campaigns is far higher than his or her ability to decipher body language cues used to communicate sexual intentions. Similar to effective strategies to equip people with the communication skills to negotiate condom use, sexual health education programs should equip young people with the scripts and vocabulary to both express affirmative consent and to clearly indicate that they are not interested in sexual interaction or that they want sexual activity to stop.

Scripts/Vocabulary for Obtaining, Negotiating, and Refusing Consent

How do you know if the person you're with has given consent?

The only way to know for sure if someone has given consent is if they tell you. One of the best ways to determine if someone is uncomfortable with any situation, especially with a sexual one, is to simply ask. Here are some examples of the questions you might ask:

- *You're turning me on. Is that OK? Should we keep going? How far do you want to go?*
- *I really want to hug/kiss... you. Can I? What do you want to do with me?*
- *I want to make love (have sex) with you. Do you want to make love with me?*
- *Have you ever...? Would you like to try it with me?*
- *Are you comfortable?*
- *Do you want to stop?*
- *Do you want to go further?*

Are things moving too quickly?

If you are starting to feel uncomfortable, you always have the right to slow things down or stop altogether. Here are things you could say to let your partner know that you don't want to go any further:

- *I don't want to go any further than kissing, hugging, touching*
- *Can we stay like this for a while?*
- *Can we slow down?*

Here are some things you can say or do if you want to stop:

- *No*
- *I want to stop*
- *I'm not comfortable doing this anymore*
- *That's enough for now*
- *I need to go to the bathroom*

Adapted from University Health Center, University of Georgia. *Consent is Sexy*:
<https://www.uhs.uga.edu/consent/>

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