

What is consent?

Consent is defined by section 74 Sexual Offences Act 2003.

Someone consents to vaginal, anal or oral penetration *only* if s/he **agrees by choice** to that penetration and has the **freedom** and **capacity** to make *that* choice. Consent to sexual activity may be given to one sort of sexual activity but not another, e.g. to vaginal but not anal sex or penetration with conditions, such as wearing a condom. Consent can be withdrawn at any time during sexual activity and each time activity occurs.

In investigating the suspect, it must be established what **steps, if any, the suspect took to obtain the complainant's consent** and the prosecution must **prove that the suspect did not have a reasonable belief that the complainant was consenting**.

There is a big difference between consensual sex and rape. This aide focuses on consent, as allegations of rape often involve the word of the complainant against that of the suspect. The aim is to challenge assumptions about consent and the associated victim-blaming myths/stereotypes and highlight the suspect's behaviour and motives to prove he did not reasonably believe the victim was consenting. We provide guidance to the police, prosecutors and advocates to identify and explain the differences, highlighting where evidence can be gathered and how the case can be presented in court.

Targeting

Victims of rape are often selected and targeted by offenders because of ease of access and opportunity - current partner, family, friend, someone who is vulnerable through mental health/ learning/physical difficulties, someone who sells sex, someone who is isolated or in an institution, has poor communication skills, is young, in a current or past relationship with the offender, or is compromised through drink/drugs. This list is not exhaustive. Victims may be chosen for grooming because of their vulnerabilities. The suspect/offender may hope that these vulnerabilities will limit belief in the complainant by authority and a court.

Context

Context is all important to the consideration of freedom and capacity to choose. It is necessary to focus on complainant's state of mind in the context of all the relevant circumstances.

These will include:

- their age, maturity and understanding;
- whether s/he knew or understood the position they were in and what they were being asked to do;
- the history of the relationship between the complainant and suspect;
- position of power over the complainant;

and, especially for younger and/or vulnerable victims:

- any earlier provision by the suspect of any gifts, alcohol or drugs;
- promises by the suspect of a more secure or exciting way of life;
- insincere compliments and/or kindness shown by the suspect;
- any other evidence of exploitation or grooming so that s/he may not understand the full significance of what they are doing.

Vulnerable victims

Vulnerable victims are targeted by offenders for a whole range of reasons, including the belief by offenders that:

- the complainants are more likely to succumb to pressure or intimidation on them to "comply" with the offender's sexual advances;
- in some cases they may be less likely to have "home support" where the suspected abuse will be noticed or acted on;
- they are less likely to report the abuse in the first place due to their vulnerabilities;
- if they do report, they are less likely to follow it through to giving evidence;
- they will not be believed by those to whom they report it, the CPS when deciding if to charge and, ultimately, the jury;
- overall, the likelihood of detection and prosecution is low.

Key issues for investigators and prosecutors

Investigators and prosecutors need to consider issues of consent in rape cases when applying the two stages of the Code for Crown Prosecutor's Full Code test: (i) the evidential stage; followed by (ii) the public interest stage. Charging decisions will be made in line with the Director of Public Prosecution's Guidance on Charging. Prosecutors must also take into account what becomes known of the defence case.

So what is... **Capacity to consent; Freedom to consent; Steps taken to obtain consent; Reasonable belief in consent?**

Capacity to consent:

Issues to consider include whether the complainant had the capacity to consent if:

- s/he was under the influence of drink or drugs;
- s/he suffers from a medical condition which limits their ability to consent or communicate consent;
- s/he has a mental health problem or learning difficulties;
- s/he was asleep or unconscious.

Freedom to consent:

Issues to consider include whether the complainant had the freedom to consent, for example, in situations such as:

- Domestic violence – where a partner or family member may use force or power to remove a complainant's freedom to consent;
- Where the suspect was in a position of power where they could abuse their trust, especially because of their position or status – e.g. a family member, teacher, religious leader, employer, gang member, carer, doctor;
- The complainant was dependant on the suspect, e.g. financially or for care.
- If the complainant was young, was s/he significantly younger than the suspect?
- Was the complainant old enough to consent?

Steps taken to obtain consent:

- Enquiring as to how the suspect knew or believed the complainant was consenting to sex and that s/he continued to consent;
- Investigating whether the suspect targeted or exploited the victim at a time when s/he was most vulnerable.

Reasonable belief in consent:

- Recognising or ignoring any signs from the complainant that they did not want sexual activity;
- Checking if consent was given for all the sex acts and not just some, e.g. consent for sexual intercourse but not oral sex.

Addressing myths and stereotypes:

- The form of dress a person wears does not mean they should expect to be raped.
- The majority of rape cases are where the offender and complainant know each other.
- Trauma can affect memory and create inconsistency.
- Being drunk makes the complainant vulnerable. It does not mean they were 'asking for it';
- Most victims do not fight; resistance and self-protection/defence can be through dissociation, freezing or trying to befriend the defendant – in fact any effort to prevent, stop or limit the event. It does not have to succeed to be an 'effort'.
- Late reporting may be due to inability to cope with the trauma of the incident, fear of repercussions, maturity with age recognising the abuse, control of the complainant, fear of going to court.
- In cases of adult survivors of child abuse the complainant may regress and behave or speak as a child.