

## Summary of the Status of JPP Subcommittee Deliberations on Issues 1-11

### 1. Is the current definition of “consent” unclear or ambiguous?

A. Presenters' recommendation: A majority of presenters recommended change.

B. Status: **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

WG #3 recommended Dean Anderson's proposed change, in the form of an explanation of the term "consent" which would be issued by Executive Order and become part of the Manual for Courts-Martial at paragraph 45c. This explanation would also be put into the judges' bench book. After significant argument at the 7/22 meeting, she revised it and resubmitted via email on 7/23:

Explanatory Note on resistance:

Neither verbal nor physical resistance is required to prove nonconsent. As section 120(g)(8)(A) indicates: “Lack of verbal or physical resistance... does not constitute consent.” This is the key phrase in the statute on the question of resistance. Resistance is not required. Its absence alone is insufficient to constitute consent.

Submission alone is also insufficient to constitute consent. As section 120(g)(8)(A) indicates: “submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent.” This clause means that when a person submits to the will of another due to force, a threat of force, or fear, they have not consented.

The totality of the circumstances to an alleged offense may be considered in determining consent or lack of consent. Section 120(g)(8)(C), which indicates, “All the surrounding circumstances are to be considered in determining whether ... a person did not resist or ceased to resist only because of another person’s actions,” does not mean that resistance is required or that its absence indicates consent. It means that circumstances surrounding the alleged offense may suggest why a person did not resist, felt they could not resist, or felt that resistance would be futile, and why submission to the conduct at issue may derive from the alleged offender’s or “another person’s actions.” Id.

**2. Should the statute define defenses relying on the victim's consent or the accused's mistake of fact as to consent in sexual assault cases?**

A. Presenters' recommendation: A majority of presenters recommended change, at least in clarifying that these two defenses are available and may be raised by the defense.

B. Status: RESOLVED BY CONSENSUS VOTE (at the June subcommittee meeting)

C. Subcommittee conclusion:

The subcommittee at the June meeting decided to recommend that "consent" be left the way it is now treated, as a defense attack on the government's proof on which the judge instructs the members, and that "mistake of fact as to consent" be added by to the statute or in the RCMs.

### 3. Should the statute define “incapable of consenting?”

A. Presenters' recommendation: A majority of presenters recommend change in that there needs to be a definition.

B. Status: **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status: (July TR at 164-210)

WG #2 recommended Friel fix at July meeting:

#### **Two alternative recommendations:**

1. Consent is so interwoven throughout the statute because lack of consent is raised with force, when victim is unconscious, incapable of consenting. To fully define it, the entire statute would need to be re-written, or

2. Define incapable of consenting in section (g) based on 18 USC section 2242, sexual abuse and provide discussion in an EO similar to Kepros' and Grammel's proposals

*For Option 2:*

#### **Draft language for Art. 120(g) Definitions**

(9) Incapable of consent – a person is incapable of consenting if he/she is:

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so.

#### **Draft language for EO, which would go into MCM or bench book for guidance**

For the purposes of Art. 120(b)(3), a person is incapable of consenting if he/she is:

A. incapable of appraising the nature of the conduct; or

B. physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so.

A totality of circumstances standard applies when assessing whether a person was incapable of consent. In deciding whether a person was incapable of consenting, many factors should be considered and balanced, to the extent they are known, include, but are not limited to his/her:

- Decision-making ability,
- Ability to foresee of consequences,

- Awareness of whom they are engaging in the act,
- Level of consciousness,
- Amount of alcohol or other intoxicants ingested,
- Tolerance to the ingestion of alcohol or other intoxicants, or
- Ability to walk, talk, and engage in other purposeful physical movements.

The accused must know or reasonably should have known that the person with whom they were engaging in the conduct was incapable of consenting.

4. Is the definition concerning the accused's "administration of a drug or intoxicant" overbroad?

A. Presenters' recommendation: A majority of presenters recommend no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

WG#2 recommended no change here, but did not have time to report at July meeting.

5. Does the definition of “bodily harm” require clarification?

A. A majority of presenters recommend no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status: (July TR at 5-93)

WG #1 recommended Kepros proposal at July meeting with two alternatives:

**Proposal 1:** Technical change to remove the term “bodily harm” from the statute.

- DELETE Art 120(g)(3) [definition of “bodily harm”]
- REPLACE “causing bodily harm to that other person” in Art 120(b)(1)(B) with “causing an offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact;”

**Proposal 1 Rationale:** This proposal is a minimal, technical change to the statute that simply removes “bodily harm” from statute and incorporates that term’s definition into the text of the statute itself. The term would eliminate confusion that results from the term

**Proposal 2:** Replace the “bodily harm” theory of liability for sexual assault with one based on “physical harm.” Add an additional theory of liability for sexual assault based on offensive touching or nonconsensual act.

- DELETE Art 120(g)(3) [definition of “bodily harm”]
- CHANGE Art 120(b)(1)(B) to “causing nonconsensual physical harm to that other person;”
- ADD Art 120(b)(4) “commits a nonconsensual sexual act upon another person.”

**Proposal 2 Rationale:** The Working Group's second proposal separates the two main elements presently contained in the bodily harm section of Article 120--any offensive touching and nonconsensual sex act--and puts them into two different sections. The first element of the proposal is to replace “bodily harm” with “physical harm” in (b)(1) in order to retain the concept of physical injury that is less than “grievous bodily harm” as a ground for criminal liability and to retain it as a subsection of (b)(1), which contains more "serious" kinds of sexual assault. The working group recommends the term “physical harm.” It is used elsewhere in the statute (Art 120(g)(5)(C)), and the JPP has not received any information about confusion regarding the term. Further, the continued use of the term of art “bodily harm” would inject prior interpretations of that language into this statute.

The act portion of the second element of the existing statute (g)(3)--any nonconsensual sexual act--is placed into a new section (b)(4). The reason for this is to make it crystal clear that nonconsensual sex standing alone is a crime under Article 120; that fact is obfuscated and obscured by the placement of the non-consensual sexual act language under the heading of bodily harm, which suggests that some kind of physical harm aside from the sex act is required. Nonconsensual sexual contact is captured under Art 120(d).

6. Is the definition of “threatening wrongful action” ambiguous or too narrow?

A. Presenters were split as to whether this should be changed.

B. **UNRESOLVED.**

C. Subcommittee deliberations status:

The subcommittee decided to address this issue in the context of coercive and abuse of authority sexual offenses.

On July 27, LtCol Hines sent email to subcommittee containing the old bench book instructions for "constructive force" that were used in the abuse of rank and parental compulsion scenarios and provided a suggested new instruction that is a hybrid of these for use under Art.

120(b)(1)(A) prosecutions where it is alleged the trainer/instructor or superior ranking accused places the victim in fear through use of rank, duress, or compulsion.

7. How should fear be defined to acknowledge both subjective and objective factors?

A. A majority of presenters recommend no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

Working Group #3 recommends no changes. A majority of presenters recommend no change, and the prevailing view of the members is that the government must prove the victim's fear was objectively reasonable.

8. Is the definition of “force” too narrow?

A. A majority of presenters recommend no change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status: (July TR at 93-95)

WG #1 recommended no change, but suggested this be looked at in light of the resolution of Issue # 1.

9. Are the definitions of “sexual act” and “sexual contact” too narrow, or are they overly broad?

A. A majority of presenters recommend change.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

WG #2 recommends revising the definitions with sex act mirroring the organization of the Federal statute and choose whether to refer to "genitalia" or to list out the "vulva, penis, scrotum, or anus."

10. Should the accused's knowledge of a victim's capacity to consent be a required element of sexual assault? (Presently, the government must prove both the victim's incapacity to consent and that the accused knew or reasonably should have known of that incapacity)

A. A majority of presenters recommend no change.

B. RESOLVED.

C. Subcommittee deliberations status:

Working Group #3 recommends no changes. Consensus at the June meeting was no change. The government must prove that the accused knew or reasonably should have known that the victim was incapable of consenting.

11. Should the offense of “indecent act” be added to the UCMJ as an enumerated offense?

A. A majority of presenter recommend this offense be added back into the UCMJ.

B. **UNRESOLVED**. Need final consensus vote.

C. Subcommittee deliberations status:

At June meeting, members requested material son the old version of indecent acts under Articles 134 and 120. Those materials were sent to them via email on July 2, 2015.