Issues paper 4.1 –Should consent in sexual offences be defined as an agreement?

The WA and Queensland Criminal Codes provide that **consent for sexual offences must be freely and voluntarily given** and set out some circumstances in which that is not the case.

By contrast, all other Australian jurisdictions define consent in their legislation in terms of an agreement between the participants. Victoria and Tasmania define consent as '**free agreement**'; NSW, NT, SA and the new Victorian Act define consent in terms of **free and voluntary agreement**; the ACT defines consent in terms of the '**informed agreement' of the participants that is freely and voluntarily given**; Canada defines consent as '**voluntary agreement**' and England, Wales and Northern Ireland define consent as when a person '**agrees by choice, and has the freedom and capacity to make that choice**'.

One option for reform would be to adopt a similar approach and replace the phrase 'freely and voluntarily given' in the *Code* with a phrase that refers to the agreement of the participants.

A definition based on agreement reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing both positive and communicative understandings of consent through use of the term agreement.

Other arguments in favour of using the terminology of agreement include:

- The current Code provision does not define consent: it simply describes circumstances in which consent will be valid.
- 'Giving' consent is a unilateral action, whereas 'agreeing' to sexual activity implies equality and mutuality. This better reflects a communicative model of consent.
- To reach an agreement, there needs to be clarity about the type of act to be engaged in, the participants, and timing of the act. These specifics may not be required in order to 'give' consent.
- An approach based on an agreement will help shift the focus of court proceedings from the complainant (and whether they gave consent) to the conduct of the participants to the agreement.
- It will further the harmonisation of consent laws across Australia.

The Supreme Court of WA has held that 'consent requires, in effect, an agreement as to what it is that is being consented to'. Consequently, changing the wording of the *Code* provision to refer to agreement may have little effect. Other arguments against changing the WA wording are:

- The current definition of consent already reflects a communicative model of consent, in that it requires consent to be 'given' (that is, communicated) to the other person.
- It is appropriate to focus on the complainant's state of mind, as that is the means by which their control over sexual autonomy is respected. Using the word agreement will not shift the focus from the complainant, as the jury must still decide whether the complainant agreed to the sexual activity.
- The concept of a 'free agreement' is no clearer that free and voluntary consent.
- Defining consent in this way does not clearly endorse a positive standard of consent.

Should the *Code* explanation of consent replace the phrase 'freely and voluntarily given' with a phrase that refers to the agreement of the participants?

A full discussion of this issue is in the Discussion Paper volume 1 paras 4.14-4.27.