Issues paper 4.2 - Should a participant's consent to sexual activity have to be communicated?

The *Code* does not specify the way in which consent must be given. Courts have held that while this will usually be done by words or actions, 'in some circumstances, a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour'.

By contrast, some jurisdictions' statutes, require the participants to a sexual activity to say or do something to indicate consent. This is seen by some people to be an essential component of a communicative model of consent. For example, in the ACT, consent is defined to mean **informed agreement to a sexual act that is freely and voluntarily given, and which is communicated by saying or doing something.** In NSW, Victoria and Tasmania, a failure to say or do something to communicate consent is **included in a list of circumstances in which a person is stated not to consent** (NSW and Victoria) or **not to freely agree** (Tasmania) to the sexual act.

The issue of whether the accused should be required to take steps to find out whether the complainant consented (the affirmative model of consent) is addressed in our discussion about the mistake of fact defence.

Arguments in favour of requiring a person's agreement to sexual activity to be communicated are:

- It reinforces the communicative model of consent, by making it clear that if a person does not communicate their consent through words or actions they are not consenting to the sexual activity.
- It will help to address the misconception that a person who does not consent will physically or verbally resist, and that a person who fails to resist is consenting. It makes it clear that passivity or silence does not constitute consent.
- It will offer protection to people who freeze, or who are unable to communicate their lack of consent for other reasons (such as fear of physical or financial consequences).
- It may help people who were silent or who did not actively resist to recognise their experience as non-consensual and empower them to report it to the police.
- It may assist with decisions to charge and prosecute cases in which the complainant did not say or do anything to indicate a lack of consent.
- It may help educate members of the community about the meaning of consent. This could promote 'a standard of behaviour for sexual activity based on mutual communication'.
- It reflects community expectations of the minimum standard of behaviour required of people who wish to engage in sexual activities.
- The focus of inquiry at trial will shift from whether the complainant resisted, or demonstrated an absence of consent, to whether the complainant did anything to communicate consent.
- It can help remove any ambiguity about whether a participant has consented where there is reliance on a 'subjective interpretation of non-verbal cues as consent'.
- It can help minimise the impact of victim-blaming views and other rape myths.
- It provides better guidance to jurors and may help them perform their role.
- It will bring WA in line with other Australian jurisdictions that have adopted this approach.

The NSWLRC disagreed with stakeholders who had argued that consent is an internal state of mind, which can exist without communication. It said consent was 'a communicated state of mind'.

While the NSWLRC was of the view that a positive act of communication should be mandated, it did not want to prescribe the form the communication must take. It intended the expression 'does not say or do anything to communicate consent' to be sufficiently broad to cover both verbal and non-verbal communication. It considered this to be important given there is no standard way in which people communicate consent, and that consent to sexual activity is frequently communicated in non-verbal ways. In addition, it acknowledged that communication can be contextual. Under its proposed approach, fact finders would be able to consider the specific factual circumstances to determine if there was a communication of consent.

Arguments against requiring a person's agreement to sexual activity to be communicated are:

- People engage in consensual sexual activities in various ways without expressly communicating their willingness to do so in words or actions. Imposing this requirement will unduly criminalise a lot of consensual sexual activities and could lead to injustice.
- It is 'confusing and ambiguous' and open to different interpretations by jurors. It would still require jurors to consider whether and in what way the complainant gave an unequivocal and express 'yes'.
- It will distract jurors from determining if the complainant freely and voluntarily consented.
- It may result in relevant circumstances, such as 'the nature and duration of the relationship between the parties involved in the sexual activity and how that relationship might impact on the ways in which those parties might communicate', being given less weight by the jury.
- It will not reduce the influence of rape myths. This is demonstrated by the continued influence of such myths in Victoria and Tasmania, where this approach has been adopted.
- It is unnecessary as jurors can already be told that a lack of resistance does not constitute consent.
- It could lead to extensive cross-examination of the complainant about their conduct, and whether it was done in order to communicate consent. This could include cross−examination about their prior sexual history, and how they have previously communicated consent.
- It will inappropriately shift the onus of proof to the accused to demonstrate that consent had been communicated. In practice, this is likely to require the accused to give evidence.
- The criminal law is an ineffective tool for changing societal attitudes. It would be better to instead focus on educational initiatives about consent.

Another consideration which may add weight to the case against introducing a communicative consent provision into the *Code* is that in WA, unlike in non-code jurisdictions and Tasmania, the prosecution does not have to prove that the accused had a subjective intention to do the act which constitutes the relevant sexual offence, knowing or being reckless as to whether the complainant consented. Thus, it may be reasoned that there is less emphasis in sexual offence trials held in WA on whether the complainant did or do not communicate their lack of consent. A mischief which the communicative model of consent aims to solve.

If a provision about the complainant's communication of consent is to be included in the *Code*, there are four issues that should be considered:

- **Should the provision require that the complainant 'indicate' consent, as is the case in Victoria, or should it require that they 'communicate' consent, as is the case in NSW and Tasmania?**

  The word 'communicate' was preferred by the NSWLRC, as it explicitly acknowledges the influence of the communicative model of consent.

- **Should the provision simply refer to the complainant not saying or doing anything to communicate consent, or should it be framed more broadly?**

  It has been suggested that the relevant provision should state:

  > The fact that a person froze, or was unable to respond to a sexual act, or did not say or do anything to indicate free agreement in response to a sexual act is enough to show that the act took place without that person's consent.

- **Should the provision be included as part of the definition of consent or should it be included in the list of circumstances in which there is no consent?** The former approach is taken in the ACT, where consent is defined to mean 'informed agreement to the sexual act that is … communicated by saying or doing something'. The latter approach is taken in Victoria, NSW and Tasmania, which have a separate provision which specifies that there is no consent where a person does not say or do anything to communicate or indicate consent.

- **Should the provision be accompanied by statutory jury directions which mirror the relevant principle?** Jury directions are addressed in Chapter 6 of the Discussion Paper volume 1.

Should the *Code* require the complainant's consent to sexual activity to have been communicated by words or actions? If so, how should this requirement be framed?

A full discussion of these issue is contained in Discussion Paper volume 1 paras 4.28−4.55.