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

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

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
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

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

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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

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 .

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

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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