

# AFFIRMATIVE CONSENT

## Policy position

- Consent - and how it is defined and defended - goes to the heart of upholding women's rights to bodily autonomy, agency and self-determination. Without control over their own bodies and selves, women are far less likely to be able to access broader legal, political and economic rights.
- Personal agency includes the right to decide freely when and with whom to have sex.
- While the definition of consent varies from state to state in Australia, the emphasis has historically been on when consent is not given or not obtainable, rather than when it is. Consent may be deemed to be absent, for example, if the victim-survivor was asleep or unconscious. Complex considerations can exist around the accused's 'honest belief', with this approach often reflecting existing power imbalances.
- In contrast, *affirmative* consent means that consent is *actively* sought and *actively* communicated. This switches the emphasis from the actions of the victim-survivor to the actions of the perpetrator, and from a "no means no" standard to "yes means yes".
- This is fairer and more balanced, in that an individual seeking to have sex with another person must obtain clear, expressed consent from them before (and while) engaging in a sexual act. It circumvents some of the complexities and subjectivities associated with contemplation of the perpetrator's beliefs and the victim's behaviour.
- Tasmania, New South Wales, Victoria and the ACT have affirmative sexual consent laws in place. Queensland and Western Australia are reviewing current provisions.

## Background

### State of play in Australia

Until very recently Tasmania was the only jurisdiction to put the onus on both participants to ensure the other is actively consenting.

In November 2021, New South Wales became the frontrunner on the mainland passing the affirmative consent bill, which requires people to expressly say or do something to confirm their partner consents to a sexual activity. The laws will also affirm a person's right to withdraw consent at any point. They make clear that if someone consents to one sexual act, it doesn't mean they've consented to other sexual acts. They will clarify that a defendant cannot rely on self-induced intoxication to show they were mistaken about consent. [The bill was passed and came into effect on 1 June 2022.](#)

One month earlier in May the ACT Legislative Assembly has [passed reforms of sexual consent laws in the ACT](#), ensuring that consent to sexual activity must be actively and affirmatively communicated.

Victoria followed suit shortly afterwards, with [the introduction of its own affirmative consent bill which passed in August 2022](#). Minister for Family Violence Ros Spence said, “This new standard of consent in Victoria shifts the focus away from the victim and towards the accused and what actions they took to confirm consent.”

Queensland has already modernised some aspects of consent - including enabling its withdrawal. The Queensland Women's Safety and Justice Taskforce released its second and final report—[Hear her voice: Report 2—Women and girls' experiences across the criminal justice system](#)—on 1 July 2022 recommending further reform in line with New South Wales, and which elicited the response: [‘The Queensland Government will progress amendments to move to an affirmative model of consent, which will better reflect community expectations of equality and mutual respect in sexual relationships and will drive changes in the way sexual offences are prosecuted and defended’](#).

In Western Australia, the Law Reform Commission has released [Volume 1 of a Discussion Paper \(Objectives, Consent and Mistake of Fact\)](#) which outlines options and poses questions about changing Western Australia's sexual offence laws in order to guide drafting of submissions.

## Internationally

Sweden, Portugal, Spain and Denmark are considered most aligned to the affirmative consent model.

Australia is largely on par with countries such as England, Wales, New Zealand and Canada.

According to an Amnesty report, only 12 of 31 European countries have a definition of rape that includes consent, with the others focussing on rape as by force or threat of force.

Worryingly, the report noted, some countries categorise sex without consent as a separate, lesser offence.

Amnesty notes that ‘consent-based definitions of rape and legal reforms are not the ultimate solutions to addressing and preventing this ever-present crime, rather they are significant starting points’.

## Recognising intersectionality

While all communities are affected by sexual violence, research shows that the impacts of violence fall more heavily on certain communities and individuals because of marginalisation experienced as a result of historic and current power imbalances between social groups.

Women who live at the intersections of multiple marginalised identities—like women living with disabilities (ABS, 2016), or Indigenous women (McCalman, 2014) —experience sexual violence at higher rates. For example, Indigenous women are particularly at risk of violence, being 12 times more likely to be the victims/survivors of assault than non-Indigenous women; in rural and remote Western Australia women are 45 times more likely to be assaulted by their spouse or partner than non-Indigenous women (Keel, 2004).

Aboriginal and Torres Strait Islander women are at significantly higher risk of sexual abuse because they are more likely to have multiple risk factors including being young, female, having a low income, and experiencing housing and job insecurity. Higher levels of disadvantage also increases the likelihood of exposure to stressful life events (McCalman, 2014). It is essential to note also that it is not people’s identities that cause vulnerability but is instead systems and practices that have a discriminatory and/or disproportionate impact on certain groups of people.

Factors such as race and ethnicity, socio-economic status, disability and age further complicate consent. These differences, which are indicative of social inequalities, can affect people’s ability to contest or request sexual encounters. While this is - as with experiencing sexual assault more generally - due largely to systemic power differentials, the ability to genuinely consent can also be impacted specifically by cultural, physical and language barriers.

## About WESNET

With almost 350 eligible members across Australia, WESNET represents a range of organisations and individuals including women’s refuges, shelters, safe houses and information/referral services.

Harnessing its large national network of members and associate members, WESNET plays an important role in identifying unmet needs, canvassing new and emerging issues, facilitating policy and sector debate and providing expert advice to government to provide improved responses to the problem of domestic and family violence. We do this within our communities - including the Australian Women’s Against Violence Alliance (AWAVA) - and in partnership with non-government stakeholders.

## References and further reading

Amnesty International (2018). [Right to be free from rape: overview of legislation and state of play in Europe and international human rights standards](#).

Australian Bureau of Statistics (2016). [Personal Safety, Australia](#).

Cassidy, C (2021). [‘What do the affirmative sexual consent law reforms passed in NSW and proposed in Victoria mean for each state?’](#), *the Guardian*.

Goldsworthy, T. (2018). [‘Yes means yes: moving to a different model of consent for sexual interactions’](#), *the Conversation*.

Keel, M. (2004). Family violence and sexual assault in Indigenous communities: Walking the talk (Briefing No 4., pp. 1-31). Melbourne, Victoria: Australian Centre for the Study of Sexual Assault.

McCalman J, Bridge F, Whiteside M, Bainbridge R, Tsey K, Jongen C. (201). '[Responding to Indigenous Australian sexual assault: a systematic review of the literature](#)'. *SAGE Open*.

McMaster University (2022), [Intersectionality](#).

O'Flaherty, A (2021). '[Queensland women's taskforce to consider whether further changes to consent laws are needed](#)', *ABC News*.

Pullar, J (2021). '[An affirmative YES. New South Wales just passed the Affirmative Consent Bill](#)', *Marie Claire*.

SBS (2021). '[Affirmative sexual consent laws are set to be introduced in Victoria](#)'.

Swinburne University (2021). [NSW adopts affirmative consent in sexual assault laws. What does this mean?](#)