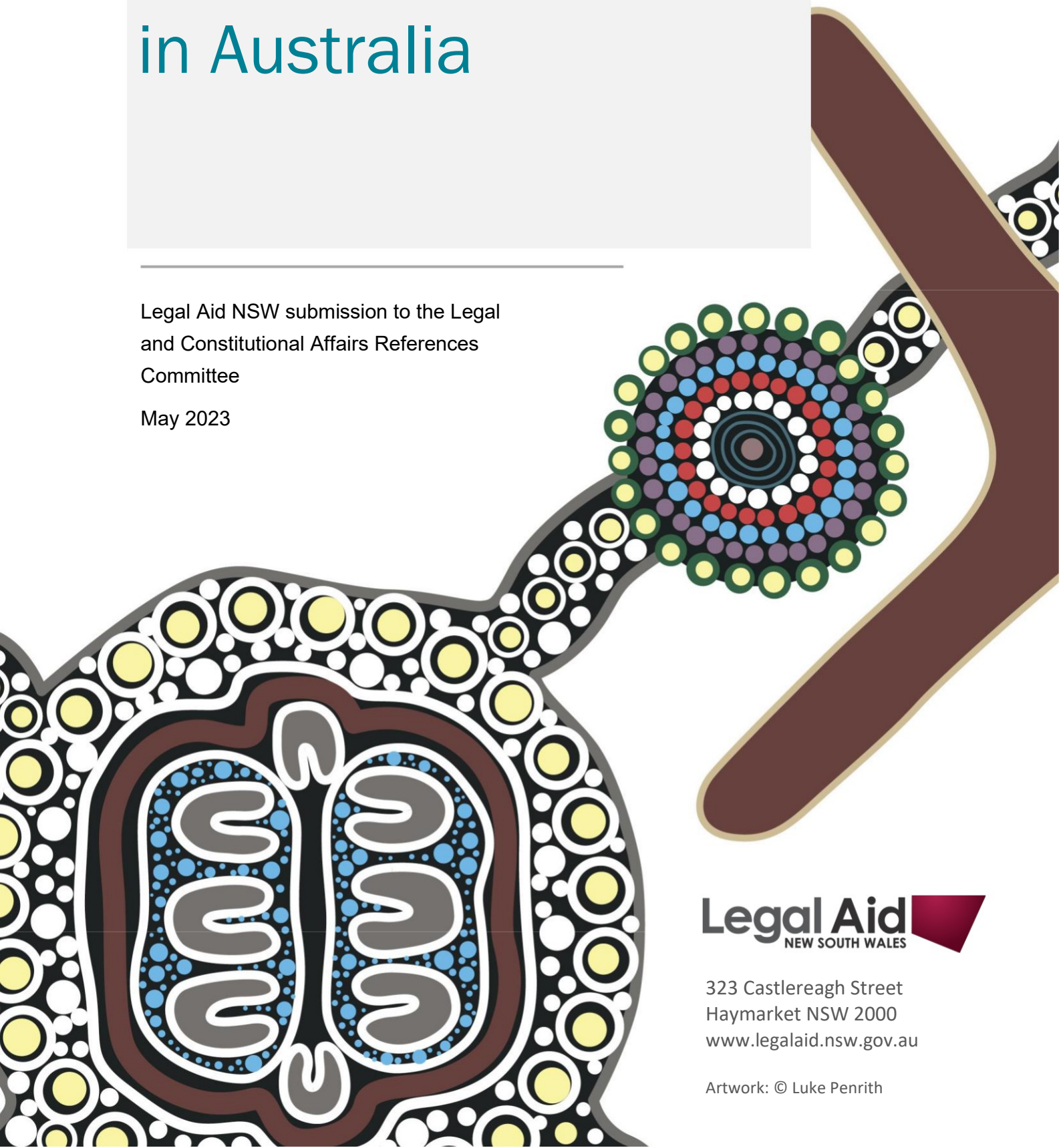


# Current and proposed sexual consent laws in Australia

Legal Aid NSW submission to the Legal and Constitutional Affairs References Committee

May 2023



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NEW SOUTH WALES

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## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community. We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

A range of Legal Aid NSW specialist services work on matters related to sexual assault and sexual consent.

Legal Aid NSW provides state-wide criminal law services through the in-

house Criminal Law Division and private practitioners. The Criminal Law Division's services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

The Legal Aid NSW Domestic Violence Unit (DVU) is a specialist unit helping clients who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point. The DVU provides legal advice and representation in a range of areas including: apprehended domestic violence orders, family law, care and protection, housing, social security, credit/ debt problems, victims' support, financial assistance matters and criminal law.

The Children's Legal Service (CLS) advises and represents children and young people involved in criminal cases in the Children's Court. CLS lawyers also visit juvenile detention centres and give free advice and assistance to young people in custody.

Should you require any further information, please contact:

[REDACTED]

## 1. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs References Committee's inquiry into current and proposed sexual consent laws in Australia, and support consideration of their effectiveness.

We acknowledge that sexual consent is a complex area of law. Our submission draws on our staff's experience assisting victims <sup>1</sup> through our specialist Sexual Assault Communication Privilege team and Domestic Violence Unit (DVU)<sup>2</sup>, and people accused of sexual offences through our Criminal Law Division. Our submission is also informed by the work of our Children's Legal Service Community Legal Education Unit which provides specialised crime prevention and education sessions to young people and youth workers across NSW, including on sexual consent. We hope that the breadth of our experience reflected in this submission will assist the Committee in examining the issues presented in the inquiry's Discussion Paper.

Consent laws in NSW were recently reformed to adopt an 'affirmative consent' model, commencing from 1 June 2022. In our view there is not yet enough decided matters to meaningfully assess the effectiveness of these reforms.

We consider that consent laws across Australia are now consistent in several important respects, despite not all jurisdictions having an affirmative consent model. However, inconsistency remains regarding the age of consent and we support a nationally consistent age of consent to avoid confusion for young people.

Legal Aid NSW supports public education campaigns and comprehensive education within schools, which we consider can play a significant role in achieving the objectives of affirmative consent reforms, including increasing community understanding of sexual consent, promoting respectful relationships and challenging harmful attitudes and beliefs regarding sexual consent and sexual assault. We acknowledge there have been recent Commonwealth Government educational initiatives however we see a need for further funded community education campaigns, more comprehensive sexual consent education in schools from a young age and further professional education for those working within the criminal justice system.

We also consider that efforts to improve the experience of sexual assault victims in the criminal justice system need to be carefully balanced with other important considerations, including the right of an accused to a fair trial.

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<sup>1</sup> Victim is used in this submission to denote a person who is the victim or complainant or alleged victim of sexual violence. Some people who experience violence prefer the term 'victim' and others prefer the term 'survivor'. In this submission, the term 'victim' is intended to be inclusive of both victims and survivors. This submission acknowledges every person's experience is unique and individual to their circumstances.

<sup>2</sup> Legal Aid NSW's Domestic Violence Unit supports victims of domestic violence which may include sexual violence.

## Recommendations

**Recommendation 1:** *There should be a nationally consistent age of consent.*

**Recommendation 2:** *Jury directions in sexual assault trials should be available but not mandatory.*

**Recommendation 3:** *Police, prosecutors, legal practitioners and the judiciary should receive specialised sexual assault training.*

**Recommendation 4:** *Victims in sexual assault matters should be provided with more comprehensive information on the criminal justice system prior to any trial, including information on the purpose of evidence in chief and cross examination, the detail in which they are likely to be required to give their evidence and the obligation on the defence counsel to challenge their evidence.*

**Recommendation 5:** *Victims in sexual assault proceedings should be kept informed by police/prosecutors about the progress of their matters.*

**Recommendation 6:** *Sexual consent education in schools should commence in an age-appropriate way in early primary school with a focus on friendships, respectful relationships and body autonomy.*

**Recommendation 7:** *Sexual consent education in high school should include online literacy, education on healthy romantic relationships, gendered stereotypes, coercion, power imbalances, the legal definition of consent, offences associated with non-consensual sexual activity as well as ethical issues and negotiations around sex.*

**Recommendation 8:** *School teachers who are expected to teach the national consent curriculum should be given further professional development to assist them in understanding shifting community attitudes towards consent and provide guidance on teaching these sensitive issues.*

**Recommendation 9:** *The Commonwealth Government should fund community legal education for young people regarding sexual consent laws.*

**Recommendation 10:** *The Commonwealth Government should fund a national sexual consent public education campaign that aims to change community attitudes regarding sexual consent.*



## 2. What similarities or inconsistencies are there in sexual consent laws across Australian jurisdictions? Should these laws be harmonised? If so, or if not, why?

The legal landscape in Australia regarding consent laws is changing. Recent laws have been passed in many Australian jurisdictions with the objective of introducing an 'affirmative consent' model. Under an affirmative consent model, silence or lack of resistance cannot be interpreted as consent. This is intended to recognise that some people may respond to non-consensual sexual activity by freezing and may be unable to say or do anything to express non-consent due to fear or trauma. Affirmative consent laws mean that if a victim does not actively affirm their consent to sexual activity an accused cannot assume that their silence means "yes".

Legal Aid NSW practices in NSW. However, for the purpose of this submission we have conducted a review of the consent laws in all Australian states and territories. A summary of this is below. For a more detailed comparison please see **Annexure A**.

### 2.1 Australian jurisdictions with communicative/affirmative consent laws

The following Australian jurisdictions have adopted some form of communicative/affirmative consent laws:

- New South Wales: Affirmative consent laws commenced on 1 June 2022.<sup>3</sup> The reforms mean that an accused person can no longer argue that their belief that the other person was consenting was reasonable unless there is evidence that they took steps to ascertain whether the other person was consenting—either by words or conduct.<sup>4</sup>
- Australian Capital Territory (**ACT**): In May 2022 the ACT introduced similar reforms to those in NSW and adopted an affirmative model of consent.<sup>5</sup>
- Queensland: The *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2020* commenced on 7 April 2021 and introduced an affirmative consent model into Queensland law.
- Victoria: The Victorian government has passed affirmative consent reforms that will commence in July 2023 (unless proclaimed earlier).<sup>6</sup> Current Victorian legislation states that a person does not consent to sex if the person does not say or do anything to indicate consent to the act.<sup>7</sup> The proposed reforms expand on this and specify that for an accused's belief that a victim is consenting to be reasonable, an accused must have taken steps by saying or doing something to find out if the person consents.<sup>8</sup>

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<sup>3</sup>Affirmative consent laws in NSW were introduced by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW)

<sup>4</sup> *Crimes Act 1900* (NSW), 611

<sup>5</sup> *Crimes Act 1900* (ACT), 54(1)

<sup>6</sup> *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (VIC)

<sup>7</sup> *Crimes Act 1958* (VIC), s 37(2)(l)

<sup>8</sup> *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (VIC)

- Tasmania: Tasmania was previously considered to have the highest standard of consent laws in Australia<sup>9</sup> as, since 2004, their legislation has specified that proof that a victim did not communicate consent is sufficient to establish an absence of consent.<sup>10</sup> However, affirmative consent laws in other states and territories have since caught up and surpassed this threshold. While not as high of a standard as ‘affirmative consent’, Tasmanian laws do require an accused person to establish a positive indication of consent.

## 2.2 Australian jurisdictions without communicative/affirmative consent laws

The following states are yet to introduce communicative/affirmative consent laws:

1. Western Australia: The Law Reform Commission of Western Australia is currently examining whether to introduce an affirmative model of consent and are set to provide advice to the Western Australian government shortly.
2. South Australia: South Australia is yet to adopt affirmative consent laws. South Australian legislation does not comment on situations where a victim does not offer physical or verbal resistance. However, an accused can be guilty by reckless indifference if they are aware of the possibility that the victim might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the victim does in fact consent before deciding to proceed.<sup>11</sup> As far as we are aware, the South Australian government has not publicly announced an intention to review its consent laws.
3. Northern Territory: The Northern Territory has not adopted affirmative consent laws and we are not aware of any Northern Territory government reviews into the topic. The Northern Territory does have legislated directions where a judge in relation to sexual assault cases is required to direct a jury that a person is not to be regarded as having consented to an act of sexual intercourse only because they:
  - a. did not protest or physically resist
  - b. did not sustain physical injury
  - c. had, on that or an earlier occasion, consented to sexual intercourse (or other sexual act) with the accused.<sup>12</sup>

## 2.3 Consistencies across most Australian jurisdictions

In our view laws regarding consent are now consistent across most Australian jurisdictions in several important respects, despite not all jurisdictions adopting an affirmative consent model. The consistencies are:

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<sup>9</sup> See, for example, Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General) and Helen Cockburn, *The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials*, (Doctoral Thesis, University of Tasmania, June 2012)

<sup>10</sup> *Criminal Code Act 1924* (TAS), 2A(2)(a)

<sup>11</sup> *Criminal Law Consolidation Act 1935* (SA), s 47(b)

<sup>12</sup> *Criminal Code Act 1983* (NT), s 192A



1. All states define consent as a “free”<sup>13</sup> or “free and voluntary”<sup>14</sup> agreement.
2. All states (with the exception of Western Australia) have either adopted an affirmative/communicative model of consent, or:
  - a. Have legislation that allows an accused to be found guilty by reckless indifference if they are aware of the possibility that the victim might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain/give any thought to whether the victim does in fact consent before deciding to proceed (South Australia and Tasmania); and
  - b. Have legislated jury directions that explain to juries that a person is not to be regarded as having consented to an act of sexual intercourse only because they did not protest or physically resist (the Northern Territory).<sup>15</sup>

While Western Australian legislation only states that a victim’s failure to offer physical (rather than verbal) resistance does not of itself amount to consent, as discussed above, the Western Australian government is currently considering introducing an affirmative consent model.

While there are some inconsistencies between jurisdictions regarding consent laws, we consider these are relatively minor and do not cause any significant practical issues.

## 2.4 Inconsistency across Australian jurisdictions regarding the age of consent

Legal Aid NSW considers there should be a nationally consistent age of consent. The age of consent is the age that the law considers a person legally competent to agree to sexual activity with another person. The age of consent is 16 for all states and territories, except in Tasmania and South Australia where it is 17.

A national uniform age of consent would avoid confusion for young people. Whilst inconsistencies remain a young person might be committing a legal act in one state and an illegal act in another. This is problematic as in many jurisdictions the legal consequences for a young person engaging in sexual behaviour with a similar aged peer are the same as those for adults who engage in sexual behaviour with children. This can include lengthy custodial sentences, criminal convictions which can never be spent and being placed on a child protection register.

- **Recommendation 1:** There should be a nationally consistent age of consent.

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<sup>13</sup> *Criminal Code Act 1924* (TAS) and *Crimes Act 1958* (VIC)

<sup>14</sup> NSW, Queensland, Australian Capital Territory, South Australia, Northern Territory, Western Australia.

<sup>15</sup> *Criminal Code Act 1983* (NT), s 192A

### 3. Are there best practice models for sexual consent laws? If so, what are they and how could they be incorporated into Australian law, if not already there?

We are not aware of any jurisdiction that has ‘best practice’ consent laws.

We acknowledge the context in which recent reforms to consent laws have and are being implemented, that of continued and significant underreporting of sexual assault, dissatisfaction with the way the criminal justice system has responded to victims and harmful attitudes towards sexual consent and sexual assault among some segments of the community.

We note that the various ‘affirmative consent’ laws already implemented across the country (including those in NSW) require juries to consider multiple layers of prescriptive legal tests in sexual assault trials. There is a risk that the recent affirmative consent changes will create greater complexity and increase the risk of juror confusion.

As is the case in Australia, recommendations of law reform bodies internationally have led to significant changes to the content and structure of sexual offence legislation. However, research internationally and in Australia suggests that such legislative reforms may have a limited impact and may not substantially alter the way sexual offence legislation is enforced.<sup>16</sup>

We recommend that governments also consider other measures to seek to improve victims’ experience of the criminal justice system and challenge harmful attitudes and beliefs regarding sexual consent and sexual assault such as broader community education campaigns, more comprehensive consent and sex education in schools, and training for all criminal justice participants. This is discussed further in section 7 below.

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<sup>16</sup>A Victorian study found that although their 2007 reforms (which strengthened the definition of consent) saw some shift towards a focus on the accused’s state of mind, in addition to that of the complainant, this was only prominent in cases in which the accused gave evidence- Powell, A. et al. ‘Meanings of ‘Sex’ and ‘Consent’ The Persistence of Rape Myths in Victorian Rape Law, *Griffith Law Review* (2013) Vol 22 No 2 476-477. See also Rumney, P, The Review of Sex Offences and Rape Law Reform: Another False Dawn? *The Modern Law Review*. Vol 64 (November 2001) 904; and Willis, J and Barnes, J., Guiding Principles All At Sea, *Law Institute Journal*. 8\Vol 82/8 (August 2008), 904

## 4. Is there a disconnect between the law and its practical operation?

Legal Aid NSW's experience in sexual assault matters is limited to NSW, where affirmative consent laws commenced on 1 June 2022 and are still in their infancy. It is difficult to assess how the NSW legislation is working in practice as the first cases are only now starting to make their way through the NSW criminal courts.

However Legal Aid NSW acknowledges there can be a disconnect between the law and its practical operation. Interpretation of the law and application of community standards can be particularly problematic when considering the results of the most recently available National Community Attitudes Towards Violence Against Women Survey (**NCAS**), which estimated that, of Australians aged 16 years and over:

- One in five were unaware that non-consensual sex in marriage is against the law.
- One in ten believed that women were 'probably lying' about sexual assault if they did not report it straightaway.
- Two in five agreed that 'it was common for sexual assault accusations to be used as a way of getting back at men'.
- One in three believed that rape results from men being unable to control their need for sex; and more than one in four believed that, when sexually aroused, men may be unaware a woman does not want to have sex.
- One in eight believed that if a woman is raped while she is drunk or affected by drugs, she is at least partly responsible.<sup>17</sup>

Legal Aid NSW does not support mandatory, legislated jury directions in sexual assault trials, which are sometimes suggested to address this disconnect. We consider that mandatory, legislated jury directions are problematic and can unsettle and complicate law which has developed over many years. In addition, legislated jury directions may further complicate the process of explaining relevant law to a jury at the conclusion of a criminal trial, which is already a complex task. It may also make the process more open to error as weight may be given to one jury direction that is entirely irrelevant in the circumstances of the case. We consider that any jury directions in sexual assault trials should be available, but not mandatory.

- **Recommendation 2:** Jury directions in sexual assault trials should be available but not mandatory.

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<sup>17</sup> ANROWS, Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes Survey towards Violence against Women Survey by Webster, K., Diemer, K., Honey, N., Mannix, S., Mickle, J., Morgan, J., Parkes, A., Politoff, V., Powell, A., Stubbs, J. & Ward, A. This survey was due to be conducted again in 2021, and a report produced by the end of 2022, however it does not appear to be publicly available.

## 5. Should police officers, judicial officers and first responders receive specialised training in relation to responding to allegations of sexual assault?

Legal Aid NSW supports specialised sexual assault training for all criminal justice participants working in this area, including the police, prosecutors, legal practitioners and the judiciary. Legal Aid NSW recommends that state and territory governments support and encourage the police, the judiciary, public prosecutors, and law societies to develop and implement training in relation to understanding sexual offending, the changing legislation and societal attitudes to consent.

Such training could also involve education regarding:

- trauma responses
- the use of victim stereotypes in sexual assault trials and how this can be addressed
- the importance of keeping victims informed of the progress of their matter (if they so wish); and
- the importance of providing victims with information on the criminal justice process before the trial commences.

- **Recommendation 3:** Police, prosecutors, legal practitioners and the judiciary should receive specialised sexual assault training.

## 6. How could victim-survivors' experience of the criminal justice system be improved?

Legal Aid NSW acknowledges the importance of improving the experience of victims who participate in sexual assault trials. We support a measured approach to considering reforms and consider that efforts to improve the experience of sexual assault victims in the criminal justice system should be carefully balanced with other important considerations, particularly the right of an accused to a fair trial.

We note the adversarial nature of our justice system and the importance of an accused being able to test the evidence against them, which, in sexual assault cases, is often solely that of the victim. Although we acknowledge cross examination is difficult for victims, we consider the ability of an accused to test the evidence against them is a fundamental right and pillar of our criminal justice system.

Legal Aid NSW considers there are already multiple laws in place that have improved sexual assault victims' experiences of the criminal justice system in NSW (and in other Australian jurisdictions). These include:

1. The recent NSW affirmative consent laws (discussed in detail at section 2).
2. New jury directions set out in sections 292A–292E of the *Criminal Procedure Act 1986 (NSW)* which require the court to give the jury one or more of the below directions if there is a good reason to give the direction or if requested by a party (unless there is a good reason not to):
  - a) That non-consensual sexual activity can occur in many different circumstances and between different kinds of people including between people who are in a relationship or married.<sup>18</sup>
  - b) That there is no typical or normal response to non-consensual sexual activity and that people may respond differently, including by freezing or not saying or doing anything. The jury are told that they must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.<sup>19</sup>
  - c) That non-consensual sexual activity may not always involve violence, threats or physical injury and that the absence of violence, physical injury or threats does not necessarily mean that a person is not telling the truth about an alleged sexual offence.<sup>20</sup>
  - d) That trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.<sup>21</sup>
  - e) That it should not be assumed that a person consented to a sexual activity because they wore particular clothing or had a particular

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<sup>18</sup> *Criminal Procedure Act 1986 (NSW), s292A*

<sup>19</sup> *Criminal Procedure Act 1986 (NSW), s292B*

<sup>20</sup> *Criminal Procedure Act 1986 (NSW), s292C*

<sup>21</sup> *Criminal Procedure Act 1986 (NSW), s292D*

appearance, because they consumed alcohol or another drug, or because they were present at a particular location.<sup>22</sup>

3. Sexual assault communications privilege legislation which protects the privacy of counselling records by, to or about a person who has reported being a victim of sexual assault (this material is called protected confidences). Protected confidences are privileged and cannot be subpoenaed or used in evidence in criminal proceedings or apprehended violence order proceedings without leave of the court.<sup>23</sup>
4. An entitlement of victims to give their evidence by audio-visual link from a place other than the courtroom.<sup>24</sup>
5. An entitlement of victims to have a support person present when giving evidence.<sup>25</sup>
6. Legislation that makes any evidence relating to the sexual reputation/experience of the victim inadmissible.<sup>26</sup>
7. The ability for a court to order that an accused sit out of a victim's line of vision whilst they are giving evidence.<sup>27</sup>
8. A requirement for the court to be closed while a victim is giving evidence.<sup>28</sup>
9. Recent developments in the common law which have led to an increase in tendency evidence being admitted against accused persons in sexual assault trials.<sup>29</sup>
10. Legislation that requires a victim's evidence (including cross examination) to be recorded in sexual assault trials with a view to it being tendered in any subsequent trial or retrial to prevent the victim having to attend court on multiple occasions.<sup>30</sup>

We consider that victims' experience of the criminal justice system could be further improved through public awareness and education campaigns regarding sexual consent and stereotypes regarding sexual assault, as discussed in more detail at section 7 below.

As was highlighted in the Royal Commission into Institutional Responses to Child Sexual Abuse,<sup>31</sup> we consider that it may also benefit victims to receive more information about the court process, particularly giving evidence and cross-examination. This could include information on:

- The purpose of giving evidence in chief and the purpose of cross-examination.
- The detail in which they are likely to be required to give their evidence.

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<sup>22</sup> *Criminal Procedure Act 1986 (NSW)*, s292E

<sup>23</sup> *Criminal Procedure Act 1986 (NSW)*, s298

<sup>24</sup> *Criminal Procedure Act 1986 (NSW)*, s294B

<sup>25</sup> *Criminal Procedure Act 1986 (NSW)*, s294C

<sup>26</sup> *Criminal Procedure Act 1986 (NSW)*, s294CB

<sup>27</sup> *Criminal Procedure Act 1986 (NSW)*, s294B(3)(b)(ii)

<sup>28</sup> *Criminal Procedure Act 1986 (NSW)*, s291

<sup>29</sup> See, for example, *R v Bauer (a pseudonym)* (2018) 359 ALR 359, *McPhillamy v The Queen* (2018) 351 ALR, *Johnson v The Queen* [2018] HCA 48.

<sup>30</sup> *Criminal Procedure Act 1986 (NSW)*, s294CA

<sup>31</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report- Executive Summary and Parts I-II*, p 59



- The obligation on defence counsel to challenge their evidence on some or all grounds.

Continuity of police and prosecutors working with a victim is also an important aspect of improving a victim's experience with the criminal justice system, as is regularly being kept informed about the progress of the matter, if they so wish.

- **Recommendation 4:** Prior to a sexual assault trial commencing all victims should be given an explanation of how the criminal justice system operates, the purpose of giving evidence in chief, the purpose of cross examination, the detail in which they are likely to be required to give their evidence and the obligation on the defence counsel to challenge their evidence.

- **Recommendation 5:** Victims in sexual assault proceedings should be kept informed by police/prosecutors about the progress of their matters.

### 6.1 Should there be a specialist court or court list for sexual assault matters?

Legal Aid NSW generally favours specialist measures within current courts rather than a specialist court. We are concerned that specialist courts can lead to 'postcode justice', of different outcomes for defendants and victims depending on whether they fall within the catchment areas of the specialist courts. We would require further detail on how a specialist court or court list for sexual assault matters would operate to consider this issue more fully.

### 6.2 Should there be restrictions on the reporting of criminal proceedings for alleged sexual assaults?

Legal Aid NSW supports automatic prohibitions on publishing the identities of victims in sexual offence proceedings. Automatic prohibitions are, in general, highly valued by victims. They remove the onus on a victim to make an application for a suppression or non-disclosure order, ensure that there is no unnecessary exposure to distress and humiliation, and encourage victims to report of offences and participate in the justice system.

However Legal Aid NSW supports sexual assault victims having autonomy over when, and if, their experiences and involvement in court proceedings are shared. The ability to share experiences of sexual assault on their own terms can promote the dignity and autonomy and may assist in recovery from trauma. From a public policy perspective, it is important that with the consent of the victim, these stories are reflected in the media to encourage other victims to come forward, reduce stigma, and promote a better understanding of sexual violence.

We consider that the current NSW legislation strikes the right balance, by prohibiting anything being published that identifies a victim in relation to a prescribed sexual offence, except where authorised by the court or with the consent of the victim.<sup>32</sup> The court cannot authorise a publication without first seeking and considering the views of the victim. This means that as a starting point, and until such a time as the court has ordered otherwise, anything that identifies the identity of a victim in sexual assault proceedings is prohibited from being published.

Courts in NSW also have the power to make a non-publication or suppression order pursuant to section 8(3) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) on the grounds that it is necessary to avoid causing undue distress or embarrassment to a defendant in criminal proceedings involving an offence of a sexual nature where there are exceptional circumstances. Legal Aid NSW suggest that consideration needs to be given to the impact this may have on a victim's ability to share their story, and how section 578A of the *Crimes Act 1900* and section 8(3) of the *Court Suppression and Non-Publication Orders Act 2010* (and similar provisions in other jurisdictions) interact with each other more broadly.

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<sup>32</sup> *Crimes Act 1900* (NSW), s578A

## 7. How can sexual consent culture be changed? What topics should be covered by consent education in schools? When and how should this education be delivered?

We consider that education within schools and wider community education, including community legal education, can be effective in changing sexual consent culture and promoting respectful relationships.

### 7.1 Mandatory sexual consent education within schools

Legal Aid NSW supports mandatory sexual consent education in all schools beginning at an early age, as is now required under the national curriculum since the start of 2023.<sup>33</sup> We understand that prior to this, there were variations in the way sexual consent was taught. We support children and young people receiving comprehensive relationships and sexuality education regardless of the type of school they attend or the location of their school.

Education on consent that starts in early primary school and continues into high school can significantly influence community attitudes and promote respectful relationships and sexual behaviour. Such education should be targeted and age appropriate. For example, in primary school consent can be taught with a focus on friendships, respectful relationships and body autonomy. By high school, consent education could shift to focus on romantic relationships, gendered stereotypes, coercion and power imbalances. High school sexual consent education should also cover the legal definition of sexual consent in NSW and the offences associated with non-consensual sexual activity, as well as ethical issues, interpreting verbal and non-verbal communication and negotiation around sex. We support teachers who are expected to teach the consent curriculum being provided with further professional development regarding shifting community attitudes, and guidance on teaching these sensitive issues.

- **Recommendation 6:** Sexual consent education in schools should commence in an age-appropriate way in early primary school with a focus on friendships, respectful relationships and body autonomy.
- **Recommendation 7:** Sexual consent education in high school should include online literacy, education on healthy romantic relationships, gendered stereotypes, coercion, power imbalances, the legal definition of consent, offences associated with non-consensual sexual activity as well as ethical issues and negotiations around sex.

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<sup>33</sup> G N Woodley, C Jacques, K Jaunzems, & L Green, 'Mandatory consent education is a huge win for Australia – but consent is just one small part of navigating relationships', *The Conversation*, (webpage. Published 21 February 2022, access 22 February 2023), < [https://theconversation.com/mandatory-consent-education-is-a-huge-win-for-australia-but-consent-is-just-one-small-part-of-navigating-relationships-177456?\\_sm\\_au\\_=iVVLFkr7LBHWDRW6TjtVJK77R67Fc](https://theconversation.com/mandatory-consent-education-is-a-huge-win-for-australia-but-consent-is-just-one-small-part-of-navigating-relationships-177456?_sm_au_=iVVLFkr7LBHWDRW6TjtVJK77R67Fc)>

- **Recommendation 8:** School teachers who are expected to teach the national consent curriculum should be given further professional development to assist them in understanding shifting community attitudes towards consent and give them guidance on teaching these sensitive issues.

## 7.2 Community legal education

There is also a need for community legal education. Legal Aid NSW lawyers representing young people and staff from our Community Legal Education Division have observed that many children and young people do not have a good understanding of sexual consent.

Sex education taught at high schools can be limited and many young people may not engage in such lessons due to truanting, suspension/expulsion or illness. In our experience knowledge of sexual consent and ethical practices among young people is often misinformed, inconsistent and/or lacking. This observation is highlighted by the below case study:

### *John's story* <sup>34</sup>

Legal Aid NSW represents John, a 16 year old boy.

John attends a local catholic school. One night while out at a party with friends, John meets Tiffany who is significantly intoxicated. John and Tiffany walk to a park where they share a kiss. John then grabs Tiffany, bends her over and inserts his penis into her vagina and sexually assaults her. At no time does John communicate with Tiffany or ask for her consent.

Tiffany immediately reports the sexual assault to police. John is charged with sexual intercourse without consent and pleads guilty.

John and his family are interviewed by a Youth Justice psychologist as part of the preparation of a report for sentencing. The Youth Justice psychologist comments that John does not appear to have any understanding of appropriate sexual relationships or consent. In the interview with John's mother, when asked if she has had any conversations with John regarding consent or appropriate sexual behaviour, his mother responds that she has not because he is not yet old enough to be married.

As part of the sentencing the Court orders that John receive psychological counselling and education around consent.

The Children's Legal Service Community Legal Education Unit at Legal Aid NSW provides specialised crime prevention and education sessions to young people and youth workers across NSW. In 2018, Children's Legal Service Community Legal Education Unit launched a workshop specifically about sexual consent, called 'Let's Talk About Consent'. The workshop was created in response to demand from schools and students for a workshop dedicated to the topic of sexual consent that arose during other workshops delivered at schools.

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<sup>34</sup> The client's name and some details have been changed to protect the client's confidentiality

The ‘Let’s Talk about Consent’ workshop is primarily delivered at schools but also at youth groups and targets both young people and their teachers and youth workers. It covers:

- The legal definition of consent in NSW;
- Offences associated with non-consensual sexual activity; and
- How to negotiate sex ethically and responsibly.

Discussions generated by the ‘Let’s Talk About Consent’ workshop, and feedback from teachers, young people and youth workers, indicate that the workshop is performing an important and effective role in the cultural shift away from ‘rape myths’ and building more positive and responsible attitudes to consent. Legal Aid NSW recommends similar workshops are rolled out nationally.

- **Recommendation 9:** The Commonwealth Government fund community legal education for young people around sexual consent laws

### 7.3 A National sexual consent education campaign

Harmful attitudes and beliefs regarding sexual consent and sexual assault amongst some members of the community also need to change in order to the achieve objectives of the affirmative consent reforms including addressing misconceptions about consent, and improving victim experiences of the justice system. The results of the National Survey of Community Attitudes Towards Violence Against Women (discussed above at part 4<sup>35</sup>) suggest there is much work to be done. We acknowledge the 2021 “Respect Matters” campaign by the Commonwealth Government (which included the milkshake consent video). However this campaign was confusing for many people and there is still considerable work required to change community attitudes.

Legal Aid NSW recommends a further government funded Australia-wide sexual consent community education campaign. We suggest that the campaign should encourage community engagement to ensure it is relatable to Australians. We consider the United Kingdom’s ‘Tea and Consent’ campaign to be an example of a campaign that clearly explains the issues in a way that resonated with the community.

- **Recommendation 10:** The Commonwealth Government should fund a national sexual consent education campaign that aims to change community attitudes around sexual consent.

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<sup>35</sup> ANROWS, Australians’ attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes Survey towards Violence against Women Survey by Webster, K., Diemer, K., Honey, N., Mannix, S., Mickle, J., Morgan, J., Parkes, A., Politoff, V., Powell, A., Stubbs, J. & Ward, A.

## 8. What is or should be the Commonwealth's role with respect to sexual consent laws?

In Australia the responsibility for criminal law is divided between the state and territory parliaments and the Commonwealth Parliament. The Commonwealth's jurisdiction in criminal matters is more limited than Australia's states and territories due to Australia's constitutional arrangements in which the Commonwealth has been granted only a limited and exhaustive list of subjects upon which it can validly enact legislation. Therefore the Commonwealth's role regarding legislative change to sexual consent laws is very limited.

However, as is discussed above, Legal Aid NSW considers that the Commonwealth Government plays an important role in changing community attitudes on consent. We recommend that the Commonwealth Government fund a national public education campaign and community legal education on sexual consent.



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## Annexure A- Comparison of the various Australian sexual consent laws

	NSW	Tasmania	Victoria	Queensland	Australian Capital Territory	South Australian	Northern Territory	Western Australia
Elements of sexual intercourse without consent/rape offence	<p>Sexual intercourse with another person without the consent of the other person, knowing that the other person does not consent to the sexual intercourse.<sup>36</sup></p> <p>NB: An accused is taken to know that the complainant did not consent if they are reckless as to whether the complainant consented, or their belief that the complainant</p>	<p>Sexual intercourse with another person without that person's consent.<sup>38</sup></p> <p>NB: honest and reasonable mistake of fact is available as a defence however , in sexual assault proceedings a mistaken belief as to the existence of consent is not honest or reasonable if the accused was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or</p>	<p>Intentional sexual penetration of another without their consent, without a reasonable belief that the other person was consenting.<sup>40</sup></p> <p>NB: Whether or not an accused reasonably believes that a complainant is consenting depends on the circumstances and the circumstances include any steps that an accused has taken to find out whether a complainant consents.<sup>41</sup></p>	<p>Carnal knowledge (i.e. sexual intercourse) with or of another without their consent; or Penetration the vulva, vagina or anus of another to any extent with a thing or a part of the body that is not a penis without the other person's consent; or Penetration the mouth of another with a penis without the other person's consent.<sup>42</sup></p> <p>NB: The defence of honest and reasonable mistake of fact is available<sup>43</sup> however in sexual</p>	<p>Sexual intercourse with another without consent, and being reckless as to whether the other person consented to the sexual intercourse.<sup>46</sup></p> <p>NB: Any belief by an accused that a complainant was consenting must be "reasonable in the circumstances"<sup>47</sup> and if an accused does not say or do anything to ascertain whether a complainant was consenting then any belief they had that the complainant was consenting may be unreasonable.<sup>48</sup></p>	<p>Sexual intercourse with another without consent (including where consent has been withdrawn) and knowing/reckless indifference to the fact that the other person did not consent.<sup>49</sup></p>	<p>Sexual intercourse with another person without their consent and knowing about or being reckless as to the lack of consent.<sup>50</sup></p>	<p>Sexual penetration of another without their consent.<sup>51</sup></p> <p>NB: Mistake of fact is available as a defence. This allows an accused to argue they had an honest and reasonable (but mistaken) belief that the complainant was consenting.</p>

<sup>36</sup> *Crimes Act 1900 (NSW)*, s 611

<sup>38</sup> *Criminal Code Act 1924 (TAS)*, s 185

<sup>40</sup> *Crimes Act 1958 (VIC)*, s 38

<sup>41</sup> *Crimes Act 1958 (VIC)*, s 36A

<sup>42</sup> *Criminal Code 1899 (QLD)*, s 349(2)

<sup>43</sup> *Criminal Code Act 1899 (QLD)*, s 24

<sup>46</sup> *Crimes Act 1900 (ACT)*, s 54(1)

<sup>47</sup> *Crimes Act 1900 (ACT)*, s 67(4)

<sup>48</sup> *Crimes Act 1900 (ACT)*, s 67(5)

<sup>49</sup> *Criminal Law Consolidation Act 1935 (SA)*, s 48

<sup>50</sup> *Criminal Code Act 1983 (NT)*, s 192(3)

<sup>51</sup> *Criminal Code Act Compilation Act 1913 (WA)* s 325.

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	consented is not a reasonable one. <sup>37</sup>	was reckless as to whether or not the complainant consented; or did not take reasonable steps to ascertain if the other person was consenting. <sup>39</sup>		assault matters, in deciding whether a belief of the person was honest and reasonable, regard may be had to anything an accused said or did to ascertain whether the complainant was consenting. <sup>44</sup> The self-induced intoxication of an accused cannot be taken into account when determining whether or not a belief was reasonable. <sup>45</sup>				
Consent definition	Consent is a free and voluntary agreement. <sup>52</sup>	Consent means a free agreement. <sup>53</sup>	Consent means a free agreement. <sup>54</sup>	Consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent. <sup>55</sup>	Consent is an informed agreement to the sexual act that is freely and voluntarily given and communicated by saying or doing something. <sup>56</sup>	A person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity. <sup>57</sup>	In the Northern Territory, consent means a free and voluntary agreement. <sup>58</sup>	Consent is freely and voluntarily given. <sup>59</sup>

<sup>37</sup> *Crimes Act 1900 (NSW)*, s 61HK(1)

<sup>39</sup> *Criminal Code Act 1924 (TAS)*, s 14A

<sup>44</sup> *Criminal Code Act 1899 (QLD)*, s 348A(2)

<sup>45</sup> *Criminal Code Act 1899 (QLD)*, s 348A(2)

<sup>52</sup> *Crimes Act 1900 (NSW)*, s 61HI.

<sup>53</sup> *Criminal Code Act 1924 (TAS)*, s 2A(1)

<sup>54</sup> *Crimes Act 1958 (VIC)*, s 36(1)

<sup>55</sup> *Criminal Code Act 1899 (QLD)*, s 348(1)

<sup>56</sup> *Crimes Act 1900 (ACT)*, s 50B

<sup>57</sup> *Criminal Law Consolidation Act 1935 (SA)*, s 46(2)

<sup>58</sup> *Criminal Code Act 1983 (NT)*, s 192(1)

<sup>59</sup> *Criminal Code Act Compilation Act 1913 (WA)*, 319(2)

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Affirmative consent?	<p>Yes. A person does not consent to a sexual activity if they do not say or do anything to communicate consent.<sup>60</sup></p> <p>AND</p> <p>Yes. A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.</p> <p>AND</p> <p>Any belief that the complainant consented is not reasonable if the accused person did not say or do anything to find</p>	<p>Yes. A person does not freely agree to an act if the person does not say or do anything to communicate consent.<sup>62</sup></p> <p>AND</p> <p>An accused cannot rely on mistake of fact defence if they did not take reasonable steps to ascertain if the other person was consenting.<sup>63</sup></p>	<p>Yes. A person does not consent if the person does not say or do anything to indicate consent.<sup>64</sup></p>	<p>Yes. A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.<sup>65</sup></p> <p>AND</p> <p>In deciding whether a belief of the person was honest and reasonable, regard may be had to anything the person said or did to ascertain whether the other person was giving consent to the act.<sup>66</sup></p>	<p>Yes. Consent is freely and voluntarily given and communicated by saying or doing something. AND</p> <p>A complainant is not taken to be consenting only because they do not say or do something to resist the act.<sup>67</sup></p>	<p>No. Although an accused is recklessly indifferent to whether the complainant consented if they are aware of the possibility that the complainant might not be consenting to the act, or has withdrawn consent to the act, but fails</p> <p>to take reasonable steps to ascertain whether the complainant does in fact consent before deciding to proceed.<sup>68</sup></p>	<p>No. however the legislation states being reckless as to a lack of consent to sexual intercourse includes not giving any thought to whether or not the other person is consenting to the sexual intercourse.<sup>69</sup></p> <p>Additionally, there are legislated jury directions that a person is not to be regarded as having consented to an act of sexual intercourse only because they did not protest or physically resist.<sup>70</sup></p>	<p>No. however the legislation states “a failure by [a complainant] to offer physical resistance does not of itself constitute consent to the act”.<sup>71</sup></p>
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<sup>60</sup> *Crimes Act 1900 (NSW)*, s 61HJ(1)(a)

<sup>62</sup> *Criminal Code Act 1924 (TAS)*, s 2A(2)(a)

<sup>63</sup> *Criminal Code Act 1924 (TAS)*, s 14A

<sup>64</sup> *Crimes Act 1958 (VIC)*, s 37(2)(l)

<sup>65</sup> *Criminal Code Act 1899 (QLD)*, s 348(3)

<sup>66</sup> *Criminal Code Act 1899 (QLD)*, s 348A(2)

<sup>67</sup> *Crimes Act 1900 (ACT)*, s 67(2)

<sup>68</sup> *Criminal Law Consolidation Act 1935 (SA)*, s 47(b)

<sup>69</sup> *Criminal Code Act 1983 (NT)*, s 192(4A)

<sup>70</sup> *Criminal Code Act 1983 (NT)*, s 192A

<sup>71</sup> *Criminal Code Act Compilation Act 1913 (WA)*, 319(2)

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	out whether the complainant consented. <sup>61</sup>							
Consent can be withdrawn	Consent can be withdrawn at any time by words or conduct. <sup>72</sup>	Not discussed in legislation	A person does not consent to sex if, having given consent to the act, the person later withdraws consent to the act taking place or continuing. <sup>73</sup>	If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent. <sup>74</sup>	A complainant does not consent to a sexual act when they say or do something to communicate withdrawing agreement to the act either before or during the act. <sup>75</sup>	Not discussed in legislation	Not discussed in legislation	Not discussed in legislation
Multiple occasions	A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with that person on another occasion, or another person on that or another occasion. <sup>76</sup> AND A person who consents to	Not discussed in legislation	Not discussed in legislation	Not discussed in legislation	A person is not taken to be consenting only because they consented to another act with the accused person; or the same act with the accused person at a different time or place or the same act with a person other than the accused person or a different act with a person other than the accused person. <sup>78</sup>	Not discussed in legislation	There are legislated jury directions that a person is not to be regarded as having consented to an act of sexual intercourse only because they consented to sexual intercourse (or another sexual act) with the accused on an earlier occasion. <sup>79</sup>	Not discussed in legislation

<sup>61</sup> *Crimes Act 1900 (NSW)*, s 61HK(2)

<sup>72</sup> *Crimes Act 1900 (NSW)*, s 61HI.

<sup>73</sup> *Crimes Act 1958 (VIC)*, s 37(2)(m)

<sup>74</sup> *Criminal Code Act 1899 (QLD)*, s 348(4)

<sup>75</sup> *Crimes Act 1900 (ACT)*, s 67(1)(a)

<sup>76</sup> *Crimes Act 1900 (NSW)*, s 61HI

<sup>78</sup> *Crimes Act 1900 (ACT)*, s 67(2)

<sup>79</sup> *Criminal Code Act 1983 (NT)*, s 192A

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	a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity. <sup>77</sup>							
Intoxication of complainant	A person does not consent to sex if they are so affected by alcohol or another drug as to be incapable of consenting <sup>80</sup>	A person does not consent if the person is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required <sup>81</sup>	A person does not consent to sex if they are so affected by alcohol or another drug as to be incapable of consenting to the act, or withdrawing consent to the act. <sup>82</sup>	Not discussed in legislation	A person does not consent to an act if they are incapable of agreeing to the act because of intoxication. <sup>83</sup>	A person is taken to not freely and voluntarily agree if the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity <sup>84</sup>	A person does not consent if they are "so affected by alcohol or another drug as to be incapable of freely agreeing" <sup>85</sup>	Not discussed in legislation
Non-exhaustive list of other circumstances in which	A person does not consent to sex if: -they don't have the capacity to consent	A complainant does not consent if they: - agree or submit because of force, or a reasonable fear of force to them or another	A person does not consent to sex if: - the person submits to the act because of force or the fear of force, whether to that	A person's consent is not freely and voluntarily given if it is obtained: -by force - by threat or intimidation	A person does not consent to a sexual act when they: -participate in the act because of the infliction of violence, force or threat on them, or	A person is taken not to freely and voluntarily agree if: -they agree because of the application of force or an	A person does not consent where: -the person submits because of force, fear of force, or fear of harm of any type,	Consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit,

<sup>77</sup> *Crimes Act 1900 (NSW)*, s 61HI

<sup>80</sup> *Crimes Act 1900 (NSW)*, s 61HJ(1)(c)

<sup>81</sup> *Criminal Code Act 1924 (TAS)*, s 2A(2)(h)

<sup>82</sup> *Crimes Act 1958 (VIC)*, s 36(2)(e) and (f)

<sup>83</sup> *Crimes Act 1900 (ACT)*, s 67(1)(g)

<sup>84</sup> *Criminal Law Consolidation Act 1935 (SA)*, s 46(3)(d)

<sup>85</sup> *Criminal Code Act 1983 (NT)*, s 192(2)(c)

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<p>there is no consent</p>	<p>- they are unconscious or asleep - they only participate because of force, fear of force or fear of serious harm to the person, another person, an animal or property, regardless of when the force or the conduct giving rise to the fear occurs, or whether it occurs as a single instance or</p> <p>as part of an ongoing pattern - they only participate because of coercion, blackmail or intimidation, regardless of when that occurred or whether it occurs as a single instance or as part of an ongoing pattern</p>	<p>- agree or submit because of a threat of any kind against him or her or against another person - agrees or submits because he or she or another person is unlawfully detained - agrees or submits because he or she is overcome by the nature or position of another person; or - agrees or submits because of the fraud of the accused is reasonably mistaken about the nature or purpose of the act or the identity of the accused is unable to understand the nature of the act.<sup>87</sup></p>	<p>person or someone else - the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal - the person submits to the act because the person is unlawfully detained - the person is asleep or unconscious - the person is incapable of understanding the sexual nature of the act -the person is mistaken about the sexual nature of the act -the person is mistaken about the identity of any other person involved in the act -the person mistakenly believes that the act is for medical or hygienic purposes</p>	<p>-by fear of bodily harm -by exercise of authority -by false and fraudulent representations about the nature or purpose of the act -by a mistaken belief induced by the accused that the complainant's sexual partner.<sup>89</sup></p>	<p>another person, an animal or property -participate in the act because of extortion, coercion, blackmail, intimidation or a fear of public humiliation or disgrace of them or another person -participate in the act because of a threat to mentally or physically harass them or another person -participate in the act because of force or fear -are mistaken about the identity of the other person -participate in the act because of fraudulent misrepresentation of any fact made by someone else -participate in the act because of an intentional misrepresentation by another person about the use of a condom -participate in the act as a result of an abuse of a relationship of authority, trust or dependence or</p>	<p>express or implied threat of the application of force or a fear of the application of force to them or to some other person -they agree because of an express or implied threat to degrade, humiliate, disgrace or harass them or some other person - they are unlawfully detained -they are asleep or unconscious -they are affected by a physical, mental or intellectual condition or impairment such that they are incapable of freely and voluntarily agreeing -they are unable to understand the</p>	<p>to himself or herself or another person -the person submits because he or she is unlawfully detained -the person is asleep, unconscious or so affected by alcohol or another drug as to be incapable of freely agreeing -the person is incapable of understanding the sexual nature of the act -the person is mistaken about the sexual nature of the act or the identity of the other person -the person mistakenly believes that the act is for medical or hygienic purposes; or</p>	<p>or any fraudulent means.<sup>92</sup></p>
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<sup>87</sup> Criminal Code Act 1924 (TAS), s 2A(2)

<sup>89</sup> Criminal Code Act 1899 (QLD), s 348(2)

<sup>92</sup> Criminal Code Act Compilation Act 1913 (WA), s 319(2)



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	<ul style="list-style-type: none"> <li>- they only participate because they are unlawfully detained</li> <li>- they only participate because they are overborne by the abuse of a relationship of authority, trust or dependence, or</li> <li>- they only participate because they are mistaken about the nature or purpose of the activity</li> <li>- They are mistaken about the identity of the accused</li> <li>- they only participate because of a fraudulent inducement.<sup>86</sup></li> </ul>		<ul style="list-style-type: none"> <li>-if the act involves an animal, the person mistakenly believes that the act is for veterinary or agricultural purposes or scientific research purposes.<sup>88</sup></li> </ul>		<ul style="list-style-type: none"> <li>a professional relationship do not have the capacity to agree to the act</li> <li>-are unconscious or asleep</li> <li>-are unlawfully detained or know that another person is unlawfully detained.</li> </ul>	<ul style="list-style-type: none"> <li>nature of the activity</li> <li>-they agree to engage in the activity with a person under a mistaken belief as to the identity of that person</li> <li>-they are mistaken about the nature of the activity (i.e. they believe it is for medical purposes)<sup>90</sup></li> </ul>	<ul style="list-style-type: none"> <li>-the person submits because of a false representation as to the nature or purpose of the act.</li> </ul> <p>Additionally, there are legislated jury directions that a person is not to be regarded as having consented to an act of sexual intercourse only because they:</p> <ul style="list-style-type: none"> <li>-did not protest or physically resist</li> <li>-did not sustain physical injury</li> <li>-had, on that or an earlier occasion, consented to sexual intercourse (or other sexual acts) with the accused.<sup>91</sup></li> </ul>	
Age of consent	16 years	17 years	16 years	16 years	16 years	17 years	16 years	16 years

<sup>86</sup> *Crimes Act 1900 (NSW)*, s 61HJ

<sup>88</sup> *Crimes Act 1958 (VIC)*, s 37

<sup>90</sup> *Criminal Law Consolidation Act 1935 (SA)*, s 46(3)

<sup>91</sup> *Criminal Code Act 1983 (NT)*, s 192A