

Most states now have affirmative sexual consent laws, but not enough people know what they mean

March 26 2024, by Jonathan Crowe and Gianni Ribeiro



Credit: Maurício Mascaro from Pexels

Earlier this month, Queensland became the latest state to pass affirmative consent laws. This means consent is understood as ongoing

communication for the purposes of rape and sexual assault offenses.

Under affirmative [consent](#), agreement to each sexual act must be actively communicated. That is, each person must say or do something to indicate consent and check the other is willing to proceed.

It's common for victims of sexual assault to [freeze](#) or try to avoid further injury, rather than fighting back. The new laws make it clear these reactions are not consent.

But it's not just Queensland that has such laws. Where else are they in place, and how are they working in practice?

What do Queensland's laws do?

The [new Queensland laws](#) define consent as "free and voluntary agreement." They clarify that a person does not consent where they do not "say or do anything to communicate consent."

The laws also limit the mistake of fact excuse for rape and sexual assault. This excuse allows defendants to argue they honestly and reasonably—but mistakenly—believed the other person consented to sex.

The excuse has been [heavily criticized](#) for allowing defendants to rely on irrelevant factors, such as the other person's clothing or failure to fight back, as the basis for alleged mistakes about consent.

However, the [new laws](#) say a belief in sexual consent is not reasonable unless the person took active steps to check their partner was consenting. This is [consistent with](#) an affirmative consent model.

Where else has similar laws?

Four out of the six Australian states and one of the two territories have now enacted affirmative consent laws. [Tasmania](#) was the first state to adopt an affirmative consent model in 2004.

The Queensland laws follow on the heels of recent legal changes in NSW, the ACT and Victoria. NSW and the ACT legislated affirmative consent in 2021, while Victoria did the same in 2022.

[Western Australia](#) and [South Australia](#), meanwhile, are currently reviewing sexual consent laws and may well follow suit.

The national trend is clearly towards an affirmative consent standard. Some scholars have argued this could pave the way to aligning sexual consent laws across the nation—although significant challenges remain.

Critics of affirmative consent laws have suggested they could criminalize "[spontaneous marital sex](#)." However, this ignores the [social and legal context](#) within which the laws operate.

There is no evidence of the laws being applied in this way.

Vital for debunking rape myths

Affirmative consent laws can only be effective and fair if people understand what they mean in practice.

However, [public attitudes](#) are not always consistent with an affirmative consent model. A [NSW government study](#) found 14% of young men "didn't agree that you must seek consent every time you engage in sexual activity."

Societal attitudes are clouded by persistent myths about [consent](#) and [sexual violence](#). For example, people may think that someone who was drunk or did not fight back cannot be a victim of rape.

Rape myths are not limited to the general public. They influence judges, lawyers, police and jurors as well. Recent research has found rape myths in [supreme court judgments](#) and [jurors' perceptions of evidence](#) in rape trials.

It is easy to assume that once affirmative consent laws are passed, they will be fully effective in the courts. However, years after affirmative consent was adopted in Tasmania, courts were still [applying outdated legal principles](#).

Raising public awareness

For affirmative consent laws to serve their purpose, everyone—including judges, lawyers, jurors, police and the public—needs a clear understanding of what affirmative consent means.

Public awareness campaigns can help to clarify that consent is an active, ongoing process that cannot be inferred from silence or lack of resistance.

NSW's [Make No Doubt](#) campaign was launched the week prior to its new consent laws taking effect, but a similar campaign has yet to be announced in Queensland.

The Queensland [Women's Safety and Justice Taskforce](#) heard from victim-survivors, support services, lawyers, police and the broader community about the need for improved [public education](#) on consent.

Understanding consent in isolation is not enough. Comprehensive

education on respectful relationships is vital to fostering a culture where affirmative consent becomes the norm.

The effectiveness of affirmative consent laws also depends on how they are applied by police, lawyers and judges. If police don't give effect to the laws, then most sexual assaults [will never reach prosecutors](#)—let alone the courtroom.

[Comprehensive training](#) for these professionals is essential to ensure affirmative consent is implemented across the criminal justice system.

Since Australia's affirmative consent laws are so new, there is limited evidence (beyond Tasmania) of exactly how they will work in practice. It will be important to build this evidence base to ensure the laws are functioning as intended.

Government action is essential

Online resources, such as Rape and Sexual Assault Research and Advocacy's [sexual consent toolkit](#), can help people learn about affirmative consent. However, these resources only reach a small part of the community.

To raise wider awareness of affirmative consent and to overcome persistent [rape](#) myths, large-scale efforts are needed.

Governments across Australia should invest in the success of affirmative consent laws through further public awareness campaigns, as well as training and education for criminal justice professionals and the public.

Otherwise, affirmative consent laws could turn out to be just words on paper.

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